Official Publication of the State Bar of New Mexico

Bar Bulletin

April 26, 2023 • Volume 62, No. 8

Monsoon Sunset, by Carla Forrest (see page 4) carlaforrest.com

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Center for Legal Education

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Register online at www.sbnm.org/CLE or call 505-797-6020

We are proud to welcome Associate Attorneys
Jensen Wallace & *Chelsey Pelzman*!

Jensen brings seven years of experience in family law to Terry & deGraauw, P.C. She is a skilled negotiator with a fierce dedication to her clients and the family law community. We are lucky to have her on our team!

Chelsey is a recent graduate of the UNM School of Law and has been an invaluable member of our team since day one! Her diligence and compassion have proven to be an asset to the clients she serves.

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www.sbnm.org

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About Cover Image and Artist: Award-winning contemporary artist Carla Forrest paints the New West in her spectral luminescent works, inspired by direct observation of nature and life. Honored as a Local Treasure by the Albuquerque Arts Business Association, Carla obtained her Bachelor of Arts in studio art from State University of New York, Master of Science in Teaching Visual Arts from Rochester Institute of Technology, and Doctorate in Organizational Learning and Instructional Technologies from the University of New Mexico. "I approach painting as an observer of the soul, enlightening the viewer about the presence, wonder, and dignity of nature and life. I want the viewer to value place and person in a space of spirit and heart and bring this illumination into their personal environments."

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m.(MT). Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. (MT). For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Notice Regarding Signing the Official Roll of Attorneys

All attorneys admitted to the State Bar of New Mexico under New Mexico Supreme Court Order No. 20-8500-011 between the dates of April 21, 2020, and June 17, 2022, must sign the Roll of Attorneys by June 16, 2023, pursuant to New Mexico Supreme Court Order No. 22-8500-029. The Roll is available for signing in the Supreme Court Clerk's Office. The Clerk's Office is located at 237 Don Gaspar Ave., Santa Fe, New Mexico, and is open from 8 a.m. to noon (MT) and 1 to 5 p.m. (MT), Monday through Friday, excluding legal holidays. The Roll will also be available for signing at the State Bar Center at 5121 Masthead St. NE, Albuquerque, NM 87109, from 9 a.m. to 3 p.m. (MT) on April 26. And on May 15, from 1 to 3:30 p.m., attorneys may sign the Roll at the UNM School of Law at 1117 Stanford Dr. NE, Albuquerque, NM 87106. No appointments are necessary.

Third Judicial District Court

Notice of Election of New Chief Judge

The Third Judicial District Court announces the election of Chief Judge Conrad F. Perea. The Third Judicial District Court would also like to thank Former Chief Judge Arrieta for serving as the chief judge from May 2019 until March 2023. Chief Judge Conrad F. Perea will begin serving as the new chief judge from April 2023 to May 2025 and is hopeful in continuing to add positive development to the Third Judicial District Court and the judiciary as a whole.

Notice of Case Reassignments

Third Judicial District Court Chief Judge Conrad F. Perea provides notice of the following case reassignments. All PQ cases currently assigned to Judge Richard Jacquez (RJ0) shall be reassigned to Judge Manuel Arrieta (MA0). All SI cases (lower court transfers) assigned to Judge James T. Martin (JM8) shall be reassigned to Judge Manuel Arrieta (MA0). All CV cases currently assigned to Judge Douglas Driggers (DD1) shall be reassigned to Judge Casey Fitch (CF2). All CV cases currently assigned to Judge Conrad Perea (CP1) shall be reassigned to Judge Casey Fitch (CF2). All DM cases currently assigned to Judge Grace Duran (GD1) shall be reassigned to Judge Robert Lara (RL2) @ 50% and to Judge Mark Standridge (MS9) @ 50%. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days from April 26 to excuse said Judges.

Twelfth Judicial District Court

Notice of Proposed Changes to Rules

The New Mexico Supreme Court's Equity and Justice Commission's Subcommittee on Judicial Nominations has proposed changes to the Rules Governing New Mexico Judicial Nominating Commissions. These proposed changes will be discussed and voted on during the upcoming meeting of the Twelfth Judicial District Court Judicial Nominating Commission. The Commission meeting is open to the public beginning at 9:30 a.m. (MT) on Friday, May 26, 2023, at the Otero County District Court located at 1000 New York Avenue, Alamogordo, N.M. Please email Beverly Akin (akin@law.unm.edu) if you would like to request a copy of the proposed changes.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will strive to set a high standard of professional conduct for others to follow.

Twelfth Judicial District Court Judicial Nominating Commission

Announcement of Vacancy

A vacancy on the Twelfth Judicial District Court in Alamogordo, N.M. will exist as of May 14, 2023 due to the retirement of the Honorable Judge Steven E. Blankinship, effective May 13. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Camille Carey, Chair of the Twelfth Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: https://lawschool.unm.edu/judsel/application.html, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for May 5 by 5 p.m. (MT). Applications received after that date and time will not be considered. The Twelfth Judicial District Court Judicial Nominating Commission will convene on May 26, beginning at 9:30 a.m. (MT) to interview applicants for the position at the Otero County District Court located at 1000 New York Avenue, Alamogordo, N.M. The Commission meeting is open to the public, and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

State Bar News

Annual Awards

Open for Nominations

Nominations are being accepted for the 2023 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2023 Annual Meeting on Thursday, July 27 at the Hyatt Regency Tamaya Resort & Spa. The

deadline is June 1. View previous recipients, instructions for submitting nominations, and descriptions of each award at www.sbnm.org/CLE-Events/State-Bar-of-New-Mexico-Annual-Awards.

Board of Bar Commissioners

Appointment to DNA - People's Legal Services, Inc. Board

The Board of Bar Commissioners will make one appointment to the DNA - People's Legal Services, Inc., Board for a four-year term. Attorneys licensed in New Mexico who wish to serve on the board should send a letter of interest and brief resume by May 1 to bbc@sbnm.org.

Appointment of Young Lawyer Delegate to American Bar Association House of Delegates

Pursuant to the American Bar Association Constitution and Bylaws (Rules of the Procedure House of Delegates) Article 6, Section 6.4, the Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association (ABA) House of Delegates for a two-year term, which will expire at the conclusion of the 2025 ABA Annual Meeting. Members wishing to serve as the young lawyer delegate to the ABA HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; they must also be a licensed New Mexico attorney and a current ABA member in good standing throughout the tenure as a delegate and be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meeting. Qualified candidates should send a letter of interest and brief resume by May 31 to bbc@sbnm.org.

Equity in Justice Program

Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in questions to Equity in Justice Program Manager Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the Bar Bulletin. Go to www. sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

Fee Arbitration Program

Be a Volunteer Arbitrator

The State Bar of New Mexico Fee Arbitration Program is an out-of-court method to resolve fee disputes that is expeditious, confidential, inexpensive and impartial. Attorneys who volunteer to be arbitrators review case materials, hold fee arbitration hearings and issue awards that are final and binding. The arbitrating attorney may decline a case for any reason. For more information, visit https://www.sbnm.org/For-Public/Client-Protection-and-Fee-Arbitration/Fee-Arbitration/Volunteer-to-Be-an-Arbitrator-in-the-Fee-Arbitration-Program.

Historical Committee

Tour of the Glorieta Battlefield

Join the Historical Committee of the State Bar on April 29 for a tour of the Glorieta Civil War Battlefield. The tour will begin at 9 a.m. and end between 3 and 4 p.m. (MT). The tour is limited to the first 30 persons to register. Registration will close on April 22 or when 30 people have registered. Register by emailing memberservices@sbnm.org. The tour leader is Henry M. Rivera who has led this tour many times; has led tours of many other Civil War Battlefields; is a member of the Civil War Roundtable of the District of Columbia and has previously addressed the Historical Committee on Civil War subjects. Tour details, maps and other material will be provided to registrants closer to the event date.

Legal Specialization Commission

Notice of Commissioner Vacancy

The State Bar of New Mexico is accepting applications for one available commissioner seat on the Legal Specialization Commission. Applicants must be lawyers who have passed the bar examination, are licensed and in good standing to practice law in New Mexico and have practiced law for a minimum of seven years. To apply, please send a letter of intent and resume to kate.kennedy@sbnm.org.

New Mexico Lawyer Assistance Program

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. (MT) on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pam.moore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on May 18, July 13, Oct. 5 and Jan. 11, 2023. The NM LAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NM LAP Committee has expanded their scope to include issues of depression, anxiety,

and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

The New Mexico Well-Being Committee

The next NM WBC meeting is on May 30 at 3 p.m. (MT). Please email Pam Moore, pam.moore@sbnm.org, for the Zoom link. All passionate about helping with well-being efforts are welcome to attend. The NM WBC is focused on creating a long term culture change towards greater health and well being for the NM legal community. In addition, the WBC plans and organizes well-being events, including educational presentations, and offers well being resources and services through its subcommittees.

Young Lawyers Division

Ask-A-Lawyer Call-In Day: Volunteers Needed for April 29

Once a year, New Mexico residents can get their legal questions answered free or receive brief legal advice through the Ask-a-Lawyer Call-in Program sponsored by the YLD. The YLD is recruiting volunteer attorneys virtually and in-person to answer questions from across the state on a variety of topics including: employment law, divorce, child support, landlord/tenant issues, personal injury, estate planning, real estate and more. This year's program will take place from 9 a.m.-noon (MT) on Saturday, April 29. Help us spread the word to you friends and family of this great event. For further questions, contact Member Services at memberservices@sbnm.org.

UNM School of Law

Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m.-8 p.m. (MT) Monday through Thursday and 8 a.m.-6 p.m. (MT) on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online resources. For more information, please see lawlibrary.unm.edu.

The New Mexico Law Review

Call for Abstracts Announcement

The UNM School of Law's *New Mexico Law Review* is calling for abstracts examining the impacts and implications of the New Mexico Civil Rights Act (NMCRA) passed in 2021. Topics may include communities protected by the NMCRA, how the NMCRA works with other New Mexico laws, its ramifications for rural areas and how it will pave the way for future legislative acts. The authors of selected papers will be featured in a special edition journal published in Spring 2024. Selected authors may also be invited to present their work at a potential symposium to be hosted by the *New Mexico Law Review* at the University of New Mexico School of Law. Further details about the event will be announced once confirmed. Please submit your abstract to Symposium Editor Shannel Daniels at nmlrarticles@gmail.com with "NCMCRA Abstract" in the email's subject line no later than April 30. You may also submit questions at the same email address.

Other Bars

Albuquerque Bar Association

2023 Law Day Luncheon

The Albuquerque Bar Association, in collaboration with the New Mexico Black Lawyers Association, will be celebrating Law Day 2023 by hosting a luncheon and CLE at the Clyde Hotel on April 28 from 11:30 a.m. to 1 p.m. (MT). American Bar Association President Enix-Ross will be present for the event as well. Members of the Albuquerque Bar Association and the New Mexico Black Lawyers Association have a reduced rate of $40 per person. Non-members may register at $50 per person. You may sign up at jotform.com/form/231034736064147.

Other News

New Mexico Christian Legal Aid

Virtual Training Seminar Announcement

New Mexico Christian Legal Aid will be hosting a Virtual Training Seminar on April 28 from 1-5 p.m. (MT) via Zoom on the topics of justice for the poor and assisting the needy. Attendants will receive free CLE credits and up-to-date training in providing legal aid. For more information and registration, contact Jim Roach at 505-243-4419 or Jen Meisner at christianlegalaid@hotmail.com.

Legal Education

April

27 **REPLAY: Cybersecurity: How to Protect Yourself and Keep the Hackers at Bay (2022)**
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www.sbnm.org

28 **Practical Tips & Strategies To Combat Implicit Biases In Law Firms and Society**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

28 **Professor Sonia Gipson Rankin - Gonzales v. Google (Tech Company Immunity)**
1.0 G
Virtual Program
Federal Bar Association, New Mexico Chapter
www.fedbar.org/new-mexico-chapter/

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1.0 G, 2.0 EP
Online On-Demand
The Ubuntuworks Project
www.ubuntuworksschool.org

1 **HR: Together Forward - 2023 SHRM NM State Conference**
8.0 G
Live Program
SHRM New Mexico
www.shrmnm.org

2 **The Rust Shooting: Should Alec Baldwin Be Charged with Manslaughter?**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

2 **Federal Capital Habeas Project**
12.0 G
Live Program
Administrative Office of the U.S. Courts
www.uscourts.gov

3 **Your Inbox Is Not a Task List: Real World Task Management for Busy Lawyers**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

5 **2023 Natural Resources, Energy and Environmental Law Legislative Update**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

5 **Hot Topics in Copyright Law: Artificial Intelligence, Computer Code, Fair Use (Google v. Oracle), and NFTs (Non-Fungible Tokens)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

5 **Wellness Wednesday: REPLAY: Mental Health and Well-Being in the Legal Profession (2021)**
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Center for Legal Education of NMSBF
www.sbnm.org

11 **Professor Vinay Harpalani - Harvard & UNC (Affirmative Action)**
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Virtual Program
Federal Bar Association, New Mexico Chapter
www.fedbar.org/new-mexico-chapter

12 **The Question Spectrum: From Cross-Examination to Voir Dire**
6.5 G
In-Person
Law Offices of Michael L. Stout
www.mlstoutlaw.com/home/the-question-spectrum
Contact: erporter@mlstoutlaw.com

22 **Dean Erwin Chemerinsky - "An Amazing Time at the Supreme Court"**
1.0 G
Virtual Program
Federal Bar Association, New Mexico Chapter
www.fedbar.org/new-mexico-chapter

31 **60 Years of Asking the Difficult Questions**
20.5 G
Live Program
Association of Family and Conciliation Courts
www.afccnet.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

Check your mail for your copy of the

2023-2024 Resource Deskbook & Membership Listing

Featuring helpful information for every State Bar of New Mexico member:

- State Bar programs, services and contact information
- A comprehensive list of courts and government entities in New Mexico
- A summary of license requirements and deadlines
- A membership directory of active, inactive, paralegal and law student members

Don't forget the extra copies for your staff!

www.sbnm.org/News-Publications/Resource-Deskbook-Membership-Listing-2023-24

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STATE BAR OF NEW MEXICO

2023 ANNUAL MEETING

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July 27-29

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www.sbnm.org/AnnualMeeting2023

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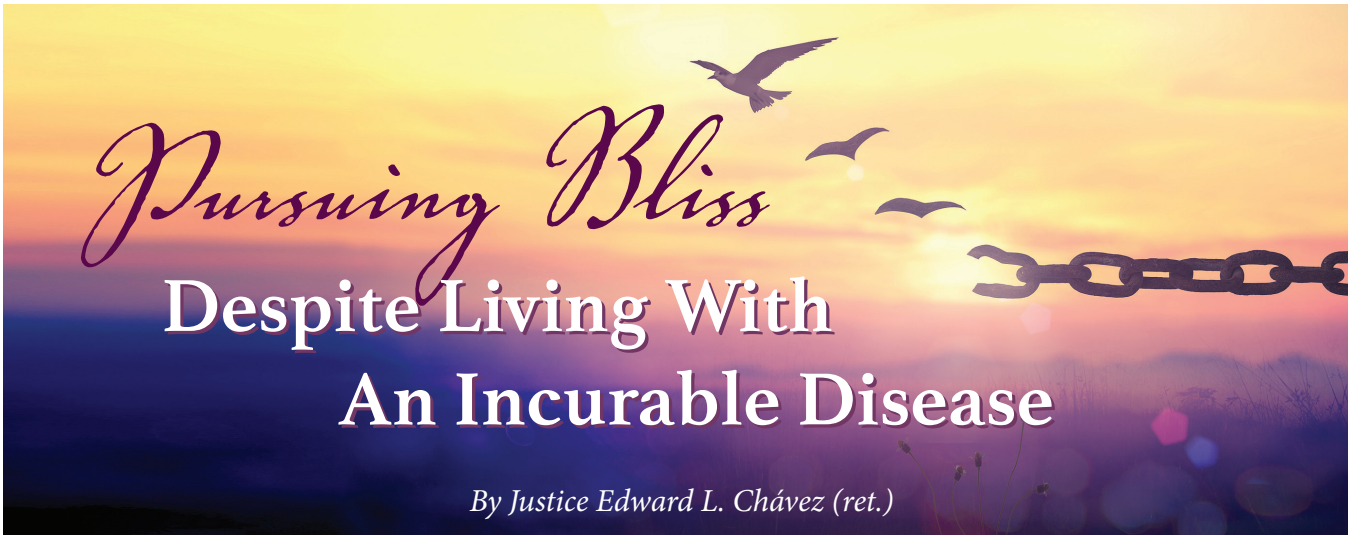

Pursuing Bliss Despite Living With An Incurable Disease

By Justice Edward L. Chávez (ret.)

About a year ago, the muscles of my left leg were not being innervated, so it atrophied and developed unusual twitching. Why wasn't the nerve innervating the muscles? Following two full days of nerve conduction studies, neurological exams, a full body MRI and lots of lab work, I was gently and compassionately told by a neurologist that I have an incurable motor neuron disease, amyotrophic lateral sclerosis (ALS), commonly referred to as Lou Gehrig's disease. ALS is a progressive, fatal neuromuscular disease that slowly robs the body of its ability to walk, speak, swallow and breathe. The life expectancy of a person with ALS averages two to five years from the time of diagnosis. I was familiar with ALS because a first cousin of mine had ALS, became a functional quadriplegic, lost his ability to speak and ultimately died from ALS.

My diagnosis was not welcomed news. I shed tears with my family, vowed to spend more time with them, especially my eight grandchildren, and seemed to have overcome the initial mental trauma of the diagnosis. I had not. I was so devastated that my mind began to signal me that I was already experiencing muscle weakness, I struggled to walk, thought I was losing my ability to swallow, etc. I was looking at life with a bad eye—focusing on the negative. The mind is that powerful if you let it be.

Faith—divine intervention—helped me overcome my mind's negative outlook on life. At least two Bible passages helped me gain control of my mind, including "The eye is the lamp of the body. So, if your eye is healthy, your whole body will be full of light" (Matthew 6:22) and "When troubles of any kind come your way, consider it an opportunity for great joy" (James 1:2). Rather than focus on ALS and its inevitable consequences, I began to focus on the simple things in life that I enjoy, such as the first sip of coffee in the morning, hearing the first bird chirp in the morning, the beauty of the mountains, sunrises and sunsets and frankly the joy of stepping onto the floor off my bed and realizing that for another day I am going to be able to be independent in my activities of daily living. You get the picture.

What I had also forgotten while my negative mind had completely overtaken me was practicing mindfulness. I downloaded "Practicing Mindfulness: An Introduction to Meditation" by Mark W. Muesse to help me return to the basics of mindfulness; an excellent resource for seeing the world as it is, expressing fundamental kindness, appreciating the joy of giving, embracing our flaws, embracing physical discomfort and even living in the face of death. I practice mindfulness daily no matter what I am doing, walking, consuming, driving, etc.

More importantly, I remembered that life through the eye reflects the attitudes we have toward others. A bad eye is to be self-centered, blind to the needs of others, unwilling to be generous because you are worried you do not have enough. A good eye allows you to focus on the beauty of life—God's creations—to follow your bliss, to look out for the needs of others and be generous with financial and/or emotional support. When you give much to others, you get much from others. "Give, and you will receive. Your gift will return to you in full pressed down, shaken together to make room for more, running over, and poured into your lap. The amount you give will determine the amount you get back" (Luke 6:38).

Since being diagnosed, I have researched lots about this progressive and incurable disease, and even watched documentaries about the disease, such as "Gleason." I have met other members of the New Mexico ALS community and learned about their challenges with this devastating disease and the enormous financial strain it puts on them and their loved ones. Yet, invariably they do their best to keep a positive outlook on life, appreciating the small things in life that many take for granted, like getting up under their own power, walking, talking, swallowing, breathing.

Faith and looking at life with a good eye caused me to form an ALS team I called "Follow Your Bliss" with the motto encouraging everyone to "smile often". I formed the team to raise money to provide resources and services to those in the New Mexico ALS community, support advocacy for

government funding of research, and raise awareness about the urgency to find treatments and a cure. I chose the team's name "Follow your Bliss" because even with the physical and mental challenges that come with ALS, we still can find things that make us happy and keep us at peace. The team's name is also a reminder to others to do what makes them happy now, and not to wait for another day, week, month, year...because tomorrow may never come.

The team, about two hundred strong, raised a record-breaking amount of money during the 2022 ALS walk. It was a blissful day for me surrounded by family and friends who were there looking out for the needs of others. We had turned a negative—ALS diagnosis—into a positive. As a result of the team's generosity, people in the ALS community will get resources not covered by insurance, which they need but otherwise cannot afford.

As much as I would like to talk my doctors out of the diagnosis, I obviously still have ALS. My diaphragm is the prime target of ALS, which is unusual but not unheard of. While I remain independent in my activities of daily living, I am losing my ability to breathe. I am not saying that it is easy, or that it will always be easy, but with God's grace, I do not have any fears or sorrows, and I am living a calm and peaceful life.

Keep the faith, follow your bliss, look at life with a good eye, and smile often. "A glad heart makes a happy face" (Proverb 15:13). ■

Justice Edward L. Chávez (ret.), who first began practicing law in 1981, was sworn into the New Mexico Supreme Court in 2003. From 2007 – 2010, he served as Chief Justice and later retired from his position in 2018, after which he began volunteer work for all three branches of government and private not-for-profit organizations. Prior to serving as a Justice, he held positions as Chairman of the UNM Health Center, President of the Legal Aid Society of Albuquerque and Chairman of the Disciplinary Board.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: October 1, 2022 – December 31, 2022

Final Decisions
Final Decisions of the NM Supreme Court 3

In the Matter of Matthew O'Neill, (No. S-1-SC-38193). The New Mexico Supreme Court entered an order permanently disbarring the Respondent pursuant to Rule 17-206(A)(1) NMRA, effective October 6, 2022.

In the Matter of Anthony R. Rascon, (No. S-1-SC-39012). The New Mexico Supreme Court entered an order permanently disbarring the Respondent pursuant to Rule 17-206(A)(1) NMRA, effective October 13, 2022.

In the Matter of Anthony J. Ayala, (No. S-1-SC-39074). The New Mexico Supreme Court entered an order permanently disbarring the Respondent pursuant to Rule 17-206(A)(1) NMRA, effective September 13, 2022.

Summary Suspensions
Total number of attorneys summarily suspended 0
Total number of attorneys
summarily suspended (reciprocal) 0

Administrative Suspensions
Total number of attorneys administratively suspended..... 0

Disability Inactive Status
Total number of attorneys removed from disability inactive states 0

Charges Filed
Charges were filed against an attorney for allegedly engaging in the unauthorized practice of law, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and/or engaging in conduct that is prejudicial to the administration of justice.

Injunctive Relief
Total number of injunctions prohibiting the unauthorized practice of law 1

In the Matter of Michelle Encinas, (No. S-1-SC-39126). The New Mexico Supreme Court entered an order permanently enjoining the Respondent from the unauthorized practice of law pursuant to Rule 17B-005(A) NMRA, effective October 6, 2022.

Reciprocal Discipline
Total number of reciprocal discipline filed……..…..……..1

Reinstatement from Probation
Petitions for reinstatement filed 0

Formal Reprimands
Total number of attorneys formally reprimanded 2

Informal Admonitions
Total number of attorneys admonished 2

Letters of Caution
Total number of attorneys cautioned 4

Attorneys were cautioned for the following conduct: (1) trust account violations. (1) prosecutorial misconduct; (1) failure to communicate; (2) lack of diligence, (2) lack of competence.

Complaints Received

Allegations	***No. of Complaints***
Trust Account Violations	4
Conflict of Interest	1
Neglect and/or Incompetence	47
Misrepresentation or Fraud	14
Improper Withdrawal	0
Fees	4
Improper Communications	8
Prosecutorial Misconduct	4
Advertising Violations	0
Improper Statements about Judge	0
Improper Means	3
UPL	0
Improper Trial Publicity	0
Lack of Fairness to Opposing Party/Counsel	1
Contact with Represented Party	0
Meritless Claims or Defenses	1
Lack of Diligence	4
Other	54
*Total number of complaints received	132*

*Denotes total number of complaints received through 12/31/2022. May differ from the total number reflected in allegations due to reporting timing.

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of STEPHEN D. AARONS, ESQ.

DISCIPLINARY NO. 2022-07-4527

An Attorney Licensed to Practice Law before the Courts of the State of New Mexico

FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a Conditional Agreement Admitting the Allegations and Consent to Discipline, which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

You have been licensed to practice law before the courts of the State of New Mexico since1985. You represented one of the defendants in a felony criminal case. Another attorney represented a co-defendant (Co-D).

On August 11, 2021, after oral argument, the Court issued an Order regarding your request for a subsequent interview of Co-D in which the Court set forth specific questions that you could ask of Co-D in another interview; the Court also set forth questions which you could not ask. You did not raise the issue of questions regarding a particular object (Object). The Court ordered you to not interview Co-D outside the presence of Co-D's attorney other than to prepare the witness with non-substantive questions.

During a hearing on December 8, 2021, you asked the Court for leave to file additional questions of Co-D beyond those set forth in the August 11, 2021 Order; those proposed additional questions did not concern the Object.

On December 29, 2021, you filed a Motion to Dismiss Due to Ineffective Assistance of Counsel, in which you argued, in part, that if you could not question Co-D about the Object, his client's constitutional right to challenge prosecution theories would be obstructed. The Court subsequently denied that Motion.

Subsequently, you directed your investigator to serve a trial subpoena on Co-D at the jail. You also instructed your investigator to ask Co-D about the Object. You did not seek authorization from Co-D's attorney for the investigator to question Co-D.

On or about January 25, 2022, your investigator went to the jail; obtained access to Co-D without Co-D's attorney's knowledge or consent; and questioned Co-D about the Object. Upon learning of the meeting, the prosecution filed a Motion for Order to Show Cause, which the Court subsequently granted by a Sealed Order. The case then proceeded.

You violated Rule 16-304(C), by knowingly disobeying obligations under the rules of a tribunal; Rule 16-402, by communicating with a represented person about the subject of the representation; and Rule 16-804(D), by engaging in conduct that is prejudicial to the administration of justice.

You have been cooperative in the disciplinary process and have acknowledged that your conduct was inappropriate: both mitigating factors. We are confident that you will not repeat the misconduct: a positive outcome of the disciplinary process.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D) and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin. You also must pay costs incurred in this disciplinary proceeding.

Dated January 12, 2023
The Disciplinary Board of the
New Mexico Supreme Court

By
Howard R. Thomas, Esq.
Acting Board Chair

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of ROSS PERKAL, ESQ.

DISCIPLINARY NO. 2022-03-4511

An Attorney Withdrawn from the Practice of Law before the Courts of the State of New Mexico

FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a Conditional Agreement Admitting the Allegations and Consent to Discipline, which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

You represented the tenants in a landlord-tenant dispute. You wrote numerous inappropriate emails to the landlord. You also drafted inappropriate emails for your clients to send to the landlord. Those emails contain highly offensive, threatening, and bombastic language which you emphasized by using all capital letters and highlighting.

A lawyer's correspondence should be measured and factually based. Zealousness in representing a client should not be displayed with inappropriately emotional expressions. Expressions of a lawyer's personal anger are counterproductive and not in the client's best interests.

As you have admitted, you violated Rules 16-101, by failing to represent a client competently; Rule 16-404(A), by emailing threats with no substantial purpose other than to embarrass . . . or burden a third person; and Rule 16-804(D), by engaging in conduct that is prejudicial to the administration of justice.

You have been cooperative in the disciplinary process and have expressed genuine remorse: mitigating factors. We are confident that you have learned from the experience: a positive outcome of the disciplinary process.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D) and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin. You also must pay costs incurred in this disciplinary proceeding.

Dated January 12, 2023
The Disciplinary Board of the
New Mexico Supreme Court

By
Howard R. Thomas, Esq.
Acting Board Chair

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of MELISSA REEVES-EVINS, ESQ.

DISCIPLINARY NO. 2022-06-4520

An Attorney Licensed to Practice Law before the Courts of the State of New Mexico

FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a Conditional Agreement Admitting the Allegations and Consent to Discipline, which was approved by a Disciplinary Board Hearing Committee and a Disciplinary Board Panel.

This matter arises from a disciplinary complaint against you by a financial adviser ("Advisor") who was employed by a broker-dealer firm which is registered with the Financial Industry Regulatory Authority ("FINRA").

The Advisor managed two IRA accounts for your husband ("Husband"). The accounts were not employment related and were payable on death. Husband designated his two adult children as beneficiaries to the IRA accounts.

Also, in 2012, you and Husband executed a Prenuptial Agreement which you drafted and under which the IRA accounts, inter alia, were specifically designated as Husband's separate property.

In 2016, Husband executed a Will, which you drafted and under which you were named the Personal Representative for Husband's Estate and a beneficiary along with Husband's two adult children ("2016 Will"). You are an experienced Estate-Planning lawyer.

In or about January 2017, Husband was diagnosed with brain cancer. That same month, you filed a Petition in the Third Judicial District Court to have Husband declared as incapacitated and you appointed as guardian and conservator for Husband.

After a full evidentiary hearing on March 9, 2017, the Court denied your Petition. On March 10, 2017, Husband, angry over your quest to have him declared incapacitated, executed a new Will ("2017 Will") which named his friend David Daniel as the Personal Representative and specifically disinherited you.

On August 1, 2018, Husband died. On August 6, 2018, you filed in the Third Judicial District Court, an Application for Informal Appointment as Personal Representative, thus opening In the Matter of the Estate of Michael B. Evins, No. D-307-PB-2018-00090; you were subsequently so appointed.

In your application, you did not offer or disclose the 2016 Will, and you represented that you were unaware of any unrevoked testamentary instrument. On August 8, 2018, you filed a Notice of Revocation of Will, in which you stated that the 2017 Will was revoked.

By letter dated August 9, 2018, you informed Husband's adult children of their father's death and of your application and appointment.

On August 27, 2018, David Daniel, through his attorney, filed in *In the Matter of Michael B. Evins, a Counter-Petition for Formal Probate and Appointing David Daniel as Personal Representative* ("Counter-Petition"). On December 18, 2018, the Counter-Petition came before the Court for hearing.

At that hearing, you presented a copy of the 2017 Will with the word "Revoked" handwritten across the first page, signed by two witnesses in January 2018 below a hand-written sentence: "I know this is what Mike wanted." You notarized the purported revocation.

However, as the District Court concluded, the purported revocation of the 2017 Will was ineffective under New Mexico law as it was done on a copy of the original 2017 Will, not the original. On March 25, 2019, the Court issued its Order Granting Counter-Petition for Formal Probate and Appointing David Daniel as Personal Representative ("Order"). You appealed the Order to the New Mexico Court of Appeals.

On or about August 21, 2018, the Advisor arranged distribution of the IRA's to Husband's designated beneficiaries, his two adult children.

On April 30, 2021, the Court of Appeals affirmed the district court's Order.

On or about August 31, 2018, you alleged the following in a complaint to the United States Securities and Exchange Commission ("SEC") ("Complaint"):

> [The Advisor] manages an IRA account for my late husband. He knows I am executor of my husband's estate and we live in a community property state, He knows that under federal ERISA laws, I am entitled to my husband's retirement accounts. He learned of my husband's death on August 8th and started liquidating the accounts in favor of my husband's adult children, without notice to me and without my permission and consent. He had knowledge I was in charge of the estate and I have not provided him a death certificate, yet he still liquidated on 8-21-18 and I received notice after the fact. His actions are both criminal and civil in nature and I will seek all available remedies against his [sic] and his dishonest company.

On or about October 3, 2018, you sent a letter on your law firm letterhead to Advisor's broker-dealer firm in which you stated that it could be "held liable for improper distribution, damages and attorney fees." Your Complaint was entered into FINRA's BrokerCheck website, accessible to the public and thus potential clients.

In fact, as any experienced Estate-Planning lawyer should know, the IRA accounts were not subject to ERISA, and as pay-on-death accounts, were not part of Husband's Estate. Nor was Advisor aware at the time of distribution of your later-revoked appointment as Personal Representative, but even if he had been because the accounts were not part of Husband's Estate, it would have made no difference. The Advisor's role in distributing the accounts was proper.

At financial and emotional cost to Advisor, he sought from FINRA expungement of your Complaint. On December 14, 2020, FINRA granted the request, quoting extensively from the district court's Order, and concluding:

> All of [your] allegations are both false and were made in a bad faith attempt to disinherit Mr. Evin's children. The complaint unduly damages [Advisor's] reputation and standing.

As you have admitted, you violated Rules 16-404(A), by, in representing herself, filing a complaint that had no substantial purpose other than to embarrass, delay or burden a third person; Rule 16-804(C), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 16-804(D), by engaging in conduct that is prejudicial to the administration of justice.

However, you have been cooperative in the disciplinary process and have expressed genuine remorse: mitigating factors. We are confident that you have learned from the experience: a positive outcome of the disciplinary process.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D) and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin. You also must pay costs incurred in this disciplinary proceeding.

Dated January 12, 2023
The Disciplinary Board of the
New Mexico Supreme Court

By
Howard R. Thomas, Esq.
Acting Board Chair

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of RUBEN L. REYES, ESQ.

DISCIPLINARY NO. 2022-02-4507

An Attorney Licensed to Practice Law before the Courts of the State of New Mexico

FORMAL REPRIMAND

You are being issued this Formal Reprimand pursuant to a Conditional Agreement Not to Contest the Allegations and Consent to Discipline which was approved by a Hearing Committee and a Disciplinary Board Panel.

You admit having violated the following Rules of Professional Conduct:

- 16-101 – by failing to provide competent representation to a client;
- 16-104(A)(1)(2) and (3)- by failing to properly communicate with a client;
- 16-116(D) – by failing to affect an orderly termination;
- 16-301 – by asserting an issue for which there was no basis of law which was not frivolous; and
- 16-804(D) – by engaging in conduct that is prejudicial to the administration of justice.

On or about October 6, 2021, your former client, Armando Leal Maciel filed a disciplinary complaint against you alleging misconduct associated with his immigration matter. Mr. Leal Maciel had retained you to represent him in an immigration appeal before the Ninth Circuit Court on or about December of 2019. You timely filed a Motion for Stay of Removal Order on or about January 10, 2020. The only basis for the Motion for Stay of Removal Order was "The Petitioner alleges that the BIA erred in finding the Petitioner committed a crime of domestic violence within the meaning [sic] section 237(a)(2)(E)(i) of the Act." You advised the Office of Disciplinary Counsel that, "The argument I was going to bring forth at the 9th Circuit Court of Appeals was that the court lacked jurisdiction and therefore his matter should be remanded for termination in accordance with the decision under Pereira v. Sessions." The Motion for Stay of Removal Order did not address any issue related to service of the Notice to Appear ("NTA") or jurisdiction of the court. No more than seven months later, you filed a Motion to Voluntarily Dismiss in the matter without consulting or notifying your client. Despite the Motion for Stay of Removal Order not addressing the NTA or jurisdiction issue, the Motion to Voluntarily Dismiss stated in pertinent part, "At the time of the filing of the petition

for review there was an outstanding issue in this circuit as to whether or not a Notice to Appeal lacking time, date and location of petitioner's initial removal proceeding deprived the agency of jurisdiction." The primary basis for the Motion to Voluntarily Dismiss inaccurately was "Petitioner's appeal was based on arguments soundly rejected by this Court's reasoning in Fermin v. Bar [No. 18-7855(9th Cir. 2020)] For the reasons stated above, the Petitioner submits this motion to voluntarily dismiss this appeal." The Motion to Voluntarily Dismiss only addressed the previously unaddressed issue related to service of the NTA and jurisdiction of the court – nowhere mentioning the actual rationale for the filing of the appeal. Your client only learned of the dismissal of his appeal when he consulted with another attorney approximately a full year later. Respondent had contacted the new attorney because he had only spoken to you one time the first month you were retained. Due to the withdrawal of the appeal your client was facing deportation. To make matters worse, when you were contacted by your former client's new attorney you simply failed to respond. It is only through the hard work of Mr. Leal Maciel's new attorney that he was not deported.

You have been practicing in the area of immigration for more than ten years and to have made such mistakes and neglected your client to such a degree is disturbing. The practice of immigration law may well be one of the most complicated and detail orientated areas of practice. It is, therefore, even more important to ensure that you are well-versed and up to date on the mandates of immigration practice. You deal with clients who are not familiar with the legal system and the stress and effects of being ignored are simply unacceptable and potentially catastrophic. It is hoped that this was an isolated instance of such misconduct brought on the circumstances in your life and it will not be repeated.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. This formal reprimand will be filed with the Supreme Court in accordance with 17-206(D) and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated January 12, 2023
The Disciplinary Board of the
New Mexico Supreme Court

By
Howard R. Thomas, Esq.
Acting Board Chair

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-019
No: S-1-SC-38570 (filed August 25, 2022)

TOBBY ANDERSON, BRYN ARNOLD, ANITA CARRILLO, AMANDA ELLER, SEAN GODKIN, PAMELA HOFFSCHNEIDER, HEIDI MACHACEK, EDUARDO TRISTE, NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION, and AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,
Plaintiffs-Appellants,
v.
STATE OF NEW MEXICO;
MICHELLE LUJAN GRISHAM,
Governor, State of New Mexico;
ALISHA TAFOYA LUCERO, Secretary,
New Mexico Corrections Department;
and MELANIE MARTINEZ, Director,
New Mexico Probation and Parole,
Defendants-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Matthew J. Wilson, District Judge

Law Office of Ryan J. Villa
Ryan J. Villa
Albuquerque, NM

Faegre Drinker Biddle & Reath LLP
John P. Mandler
Minneapolis, MN
Christopher J. Casolaro
Denver, CO

for Appellants

Holly Agajanian, Chief General Counsel
Maria S. Dudley, Associate General Counsel
Kyle P. Duffy, Associate General Counsel
Santa Fe, NM

for Appellee Governor Michelle Lujan Grisham

Hector H. Balderas, Attorney General
Neil R. Bell, Assistant Attorney General
Nicholas M. Sydow, Civil Appellate Chief
Santa Fe, NM

for Appellees State of New Mexico; Alisha Tafoya Lucero, Secretary, New Mexico Corrections Department; Melanie Martinez, Director, New Mexico Probation and Parole

OPINION

VIGIL, Justice.

{1} Eight named inmates (Named Plaintiffs) and two nonprofit organizations (the ten Plaintiffs, collectively) filed an amended complaint in district court seeking a mixture of a classwide writ of habeas corpus and classwide injunctive and declaratory relief. Plaintiffs allege that the State's management of COVID-19 in New Mexico prisons violates inmates' rights under the New Mexico Constitution. The district court dismissed the amended complaint, concluding that it lacked subject-matter jurisdiction because the Named Plaintiffs failed to exhaust the internal grievance procedures of the New Mexico Corrections Department (NMCD) before seeking relief, as required by, NMSA 1978, Section 33-2-11(B) (1990). Agreeing with the result, but not all of its reasoning, we affirm the district court.

{2} We hold that Section 33-2-11(B) imposes an exhaustion requirement for statutorily created rights such as declaratory relief, *see Am. Fed'n of State, Cnty. & Mun. Emps. v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.* (*AFSCME*), 2016-NMSC-017, ¶¶ 13-14, 373 P.3d 989, but that it is Rule 5-802(C), NMRA which imposes an independent duty to first exhaust the administrative remedies of the, NMCD before petitioning for writs of habeas corpus. We also hold that although habeas corpus actions are not governed by our Rules of Civil Procedure, *see Allen v. LeMaster*, 2012-NMSC-001, ¶¶ 15-17, 267 P.3d 806, procedures analogous to civil procedure Rule 1-023, NMRA are proper for classwide habeas relief. And to satisfy the habeas corpus exhaustion requirement under Rule 5-802(C) for an entire plaintiff class, one or more named class members must exhaust administrative remedies for each claim. Because no Named Plaintiff exhausted or sought to exhaust, NMCD's internal grievance procedures, we affirm.

I. BACKGROUND

{3} Plaintiffs filed a complaint and an amended complaint in district court claiming that the State of New Mexico, the Governor of the State of New Mexico, the Secretary of, NMCD, and the Director of New Mexico Probation and Parole Division of, NMCD (collectively, Defendants) in their handling of COVID-19 in New Mexico prisons violated inmates' rights to substantive and procedural due process, freedom of speech, and freedom from cruel and unusual punishment under the New Mexico Constitution. Plaintiffs alleged that Defendants allowed COVID-19 to run "rampant in New Mexico's prisons" by refusing to enforce their own mandates for social distancing, mask-wearing, heightened hygiene practices, and safe quarantine and treatment.

{4} As a result, Plaintiffs sought a classwide writ of habeas corpus and classwide relief under Rule 1-023(B)(2) consisting of the release of "all current and future persons held in any New Mexico prison facility during the course of the COVID-19 pandemic" as well as declaratory and injunctive relief. Currently, the, NMCD home page reports about 6,000 inmates in New Mexico prisons.[1] The injunctive

relief requested was for adequate testing of COVID-19, requiring prison staff to wear face coverings, providing inmates with face coverings and access to sanitation services, enforcement of social distancing within the prison, staggering of meal and recreation time, designating a room for evaluation of individuals with COVID-19 symptoms, and placing individuals with COVID-19 under medical isolation.

{5} Despite their claims being directly related to their conditions of confinement and treatment by, NMCD, Named Plaintiffs did not avail themselves of, NMCD's internal grievance procedures. Under, NMCD policy, emergency grievances "shall be forwarded without substantive review immediately to the Warden," "shall receive an expedited response at every level . . . [and] in no event will the time for response exceed three (3) working days from the time the grievance is received by the Grievance officer," and "may be immediately appealed to the State wide Grievance/Disciplinary Appeals Manager if the emergency grievance after investigation and Warden's review cannot resolve the issues presented at their facility level." *See* New Mexico Corrections Department, *Inmate Grievances* (June 14, 2018).[2]

{6} In the district court, Plaintiffs acknowledged that none of the Named Plaintiffs filed emergency grievances but argued that some class members—meaning any current New Mexico inmate—did file grievances and received no determination from, NMCD. Plaintiffs also argued that the Named Plaintiffs did not avail themselves of, NMCD's grievance procedures because "NMCD cannot grant release, the relief requested, on its own," thus making a futility argument. Defendants moved to dismiss, arguing that the district court lacked subject-matter jurisdiction because the Named Plaintiffs failed to exhaust administrative remedies under Section 33-2-11(B).

{7} Section 33-2-11(B) provides:

> No court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance or civil action filed by any inmate of the corrections department with regard to any cause of action pursuant to state law that is substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the corrections department's internal grievance procedure.

{8} The district court issued an order dismissing the amended complaint for lack of subject-matter jurisdiction. The district court ruled that accepting the allegations in the amended complaint as true, there was no allegation that the Named Plaintiffs exhausted or tried to exhaust the, NMCD's internal grievance procedures. The district court concluded that because all of Plaintiffs' claims are "directly related to [Named Plaintiffs'] confinement and treatment by, NMCD," they are subject to Section 33-2-11(B). The district court also ruled that a futility exception to exhaustion of administrative remedies does not apply because "[t]he clear legislative command of Section 33-2-11(B) requires exhaustion as a precondition to subject matter jurisdiction." And even if a futility exception does apply, the district court determined that "[e]xhaustion would not be futile in this case because the, NMCD has the authority to address the conditions in New Mexico's correctional facilities, a remedy that would address the majority of the allegations" made by the Named Plaintiffs. As to the nonprofit organizations, the district court held that to allow them to pursue a claim as plaintiffs when the Named Plaintiffs representing the purported class have not exhausted their administrative remedies would "frustrate the legislative purpose of Section 33-2-11(B) and would lead to an absurd result." The district court dismissed the amended complaint, and Plaintiffs appealed to the Court of Appeals.

{9} "Because the core relief sought in the [amended] complaint requires the issuance of the writ of habeas corpus and [because] all of the relief sought is inextricably connected to that request," the Court of Appeals certified all questions on appeal to this Court. *See* Rule 5-802(N)(2) (directing that the New Mexico Supreme Court has exclusive appellate jurisdiction over denials of habeas corpus petitions). We accepted certification.

II. DISCUSSION

{10} Plaintiffs make three arguments on appeal. First, the district court erred in concluding that the exhaustion requirement under Section 33-2-11(B) is jurisdictional because it implies an unconstitutional limitation by the Legislature on district courts' habeas corpus jurisdiction and on the writ of habeas corpus itself. Second, in holding that no futility exception applies, the district court erred because a material factual dispute exists as to whether exhaustion is futile. Finally, the district court erred in dismissing the nonprofit organizations on the basis that the grievance process applies only to inmates. We first consider the arguments related to exhaustion and futility and then turn to the argument concerning the nonprofit organizations.

A. Standard of Review

{11} All issues in Plaintiffs' arguments—the proper interpretation of Section 33-2-11(B), the district court's granting of a motion to dismiss for lack of jurisdiction, and the nonprofit organizations' standing to bring a claim—raise questions of law which we review de novo. *See U.S. Xpress, Inc. v. N.M. Tax'n & Revenue Dep't*, 2006-NMSC-017, ¶ 6, 139 N.M. 589, 136 P.3d 999 ("The meaning of language used in a statute is a question of law that we review de novo." (internal quotation marks and citation omitted)); *see also Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668 ("In reviewing an appeal from an order granting . . . a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews de novo."); *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 6, 144 N.M. 471, 188 P.3d 1222 (determining whether a party has standing to challenge a law is a question of law subject to de novo review).

B. Section 33-2-11(B) Is Jurisdictional for Rights Established by the Legislature

{12} Article VI, Section 13 of the New Mexico Constitution provides, "The district courts, or any judge thereof, shall have *power to issue writs of habeas corpus*, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise, in the exercise of their jurisdiction." (Emphasis added.) Plaintiffs argue that because district courts' habeas jurisdiction is constitutionally granted, it cannot be circumscribed or restrained by the Legislature. Plaintiffs contend that the district court's determination that Section 33-2-11(B)'s exhaustion requirement is "a precondition to state courts' jurisdiction over the Plaintiffs' request for a writ of habeas corpus" recognizes constitutional authority in the Legislature that it does not have. Plaintiffs assert that the right to seek habeas relief is "enshrined in the [New Mexico] Bill of Rights" and that Section 33-2-11(B) cannot limit this fundamental constitutional right. *See* N.M. Const. art. II, § 7 ("The privilege of the writ of habeas corpus shall never be suspended.").

{13} We conclude that the district court correctly determined that Section 33-2-11(B)'s exhaustion requirement applies to statutory duties. Nevertheless, the district court erred in concluding that Section 33-2-11(B)'s exhaustion requirement applies to all of Plaintiffs' claims, including the claims for writs of habeas corpus.

{14} We have held that the "Legislature

[1] Available at https://www.cd.nm.gov/ (last visited Aug. 9, 2022).
[2] Available at https://www.cd.nm.gov/wp-content/uploads/2019/06/CD-150500.pdf (last visited Aug. 9, 2022).

may establish a right and predicate a court's power of review on the fact that suit is brought by one of a particular class of plaintiffs or petitioners." *AFSCME*, 2016-NMSC-017, ¶ 14 (emphasis added). Or said another way, if a right is created by statute, the Legislature may limit the court's power of review for that right. *See id.* Such a limitation "is not a deprivation or ouster of jurisdiction of the courts, but a postponement until the [agency] has passed upon the complaint." *Smith v. S. Union Gas Co.*, 1954-NMSC-033, ¶ 10, 58 N.M. 197, 269 P.2d 745. Exhaustion of administrative remedies is one such limitation, which is not to say that imposing a duty to exhaust is always statutorily mandated.

{15} The requirement of exhaustion of administrative remedies "originates from two different sources: statutes and the common law." *In re Estate of McElveny*, 2017-NMSC-024, ¶ 22, 399 P.3d 919. The common-law duty is a "non-jurisdictional form of exhaustion," that is flexible, pragmatic, and "subject to several judge-made exceptions." *Id.* ¶ 23 (internal quotation marks and citation omitted). That said, when "a statute explicitly requires a party to exhaust particular remedies as a prerequisite to judicial review the statutorily mandated exhaustion requirements are jurisdictional. A court cannot excuse a petitioner from complying with an explicit and detailed statutory duty to exhaust administrative remedies." *Id.* (ellipsis, internal quotation marks, and citation omitted).

{16} To determine if there is a jurisdictional statutory duty to exhaust administrative remedies, there must be "sweeping and direct statutory language indicating that there is no jurisdiction prior to exhaustion," and a "mere reference to the duty to exhaust administrative remedies" is not enough. *Id.* ¶ 24 (ellipses, internal quotation marks, and citation omitted). *U.S. Xpress* offers one example of statutory language being enough to establish a jurisdictional statutory duty.

{17} In *U.S. Xpress*, this Court ruled that, NMSA 1978, Section 7-1-22 (1995, amended 2015) of the Tax Administration Act is jurisdictional and requires exhaustion of administrative remedies. 2006-NMSC-017, ¶ 7. Section 7-1-22 (1995) provides that "[n]o court of this state has jurisdiction" over certain taxpayer proceedings "except as a consequence of [an] appeal" from a denied protest remedy "or except as a consequence of a" denied claim for a refund. The *U.S. Xpress* Court held that the broad language of Section 7-1-22 (1995) "plainly insists that no court will have jurisdiction except as a consequence of an administrative appeal or a claim for a refund." 2006-NMSC-017, ¶ 11. The Court then declined to apply the futility doctrine because futility of exhaustion would be an inappropriate "excuse for bypassing a clear statutory directive." *Id.* ¶ 12.

{18} On the other hand, in *In re McElveny*, this Court held that exhaustion of administrative remedies under the Uniform Unclaimed Property Act (UPA), NMSA 1978, §§ 7-8A-1 to -31 (1997, as amended through 2007), is "non-jurisdictional" and subject to judicial discretion and exceptions. 2017-NMSC-024, ¶¶ 1, 28. This is because there is "no direct and unequivocal statement in the UPA requiring exhaustion of administrative remedies," whereas there are numerous justifications for imposing a common-law duty to exhaust. *Id.* ¶¶ 23-25. In deciding the question of exhaustion, the *McElveny* Court noted that if "the UPA contained an express and unequivocal exhaustion requirement, we would be required to remand this matter to the [d]epartment," but "because exhaustion is required in this case not for statutory, jurisdictional reasons but for prudential, non-jurisdictional reasons, we have discretion." *Id.* ¶ 28.

{19} The language of Section 33-2-11(B) is much like that of the statute at issue in *U.S. Xpress*. *Compare* § 33-2-11(B) ("No court of this state shall acquire subject-matter jurisdiction . . . with regard to any cause of action . . . substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the [NMCD's] internal grievance procedure."), *with* § 7-1-22 (1995) ("No court of this state has jurisdiction to entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer's liability for any tax . . . except as a consequence of the appeal by the taxpayer to the court of appeals from the action and order of the secretary . . . , or except as a consequence of a claim for refund."). In Section 33-2-11(B) the Legislature did not make a "mere reference" to a duty to exhaust but instead used "sweeping and direct statutory language indicating that there is no jurisdiction prior to exhaustion." *In re McElveny*, 2017-NMSC-024, ¶ 24 (ellipsis, internal quotation marks, and citation omitted). Because the Legislature used sweeping and direct language indicating that no court "shall acquire subject-matter jurisdiction" until administrative remedies are exhausted, Section 33-2-11(B) is jurisdictional. But it is jurisdictional only as to statutorily created rights. *See AFSCME*, 2016-NMSC-017, ¶ 14.

{20} Plaintiffs sought a writ of habeas corpus and brought claims for injunctive and declaratory relief. Relief under the Declaratory Judgment Act is statutorily created. *See AFSCME*, 2016-NMSC-017, ¶ 14; *see also*, NMSA 1978, § 44-6-2 (1975) (granting district courts the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed"). Further, the Declaratory Judgment Act "does not enlarge the jurisdiction of the courts over subject matter and parties, but provides an alternative means of presenting controversies to courts having jurisdiction thereof." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 13, 142 N.M. 786, 171 P.3d 300 (internal quotation marks and citation omitted). Because we conclude that Section 33-2-11(B)'s exhaustion requirement is jurisdictional, the district court was correct in dismissing Plaintiffs' Declaratory Judgment Act claims. The district court was also correct in concluding that the exhaustion requirement of Section 33-2-11(B) applies without exception. "A court cannot excuse a petitioner from complying with an explicit and detailed statutory duty to exhaust administrative remedies." *In re McElveny*, 2017-NMSC-024, ¶ 23 (internal quotation marks and citation omitted).

{21} Nevertheless, writs of habeas corpus and injunctions are common-law claims falling under district courts' original jurisdiction.[3] *See* N.M. Const. art. VI, § 13. Under the principle of comity, when a court has original jurisdiction because there is a common-law or legal remedy "apart from or in addition to an administrative remedy," the court may "defer to the administrative agency where the interests of justice are best served by permitting the agency to resolve factual issues within its peculiar expertise." *McDowell v. Napolitano*, 1995-NMSC-029, ¶ 11, 119 N.M. 696, 895 P.2d 218. Additionally, certain judge-made exceptions to exhaustion—such as futility—may be applied. *See*

[3] Plaintiffs do not contend that the claims for injunctive relief were improperly dismissed by the district court, but we note "that most any challenge to an administrative agency's decision may be articulated in terms of a request for injunctive relief. If one can circumvent administrative remedies simply by seeking the court's order enjoining the agency to reverse its decision, the exception will swallow the rule." Gzaskow v. Pub. Emps. Ret. Bd., 2017-NMCA-064, ¶ 37 n.2, 403 P.3d 694. We also note that Section 33-2-11(A) grants, NMCD with "the power and duty to examine and inquire into all matters connected with the government, discipline and police of the corrections facilities and the punishment and treatment of the prisoners." Thus, any injunctive relief pertaining to conditions of confinement should be dealt with at the administrative level, at least in the first instance, because, NMCD has the power and the duty to address such matters. See id.

In re McElveny, 2017-NMSC-024, ¶ 31; *U.S. Xpress*, 2006-NMSC-017, ¶ 12. We hold that district courts have authority to exercise their constitutional jurisdiction to issue writs of habeas corpus notwithstanding Section 33-2-11(B). *See* N.M. Const. art. VI, § 13; *see also* Max Minzner, *Habeas Corpus in New Mexico*, 46 N.M. L. Rev. 43, 54 n.56 (2016) (concluding that despite any limitation imposed by Rule 5-802(C) and Section 33-2-11(B), the Supreme Court retains "residual constitutional jurisdiction to issue writs of habeas corpus"). The Legislature has not circumscribed or restrained the writ of habeas corpus or district courts' habeas jurisdiction by enacting Section 33-2-11(B).

C. Named Plaintiffs Did Not Exhaust Administrative Remedies

{22} Although Section 33-2-11(B) is not jurisdictional as to Plaintiffs' habeas claims, Rule 5-802(C)(2) imposes an independent duty to exhaust administrative remedies for habeas claims challenging conditions of confinement. *See* Rule 5-802(C)(2) (tracking the language of Section 33-2-11(B) in allowing that an inmate may petition for a writ of habeas corpus challenging conditions of confinement "provided that no court of this state shall acquire subject-matter jurisdiction . . . with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the, NMCD until the inmate exhausts the, NMCD's internal grievance procedure"). Outlining the procedure that must be followed to petition for a writ of habeas corpus is within the Supreme Court of New Mexico's vested inherent power to prescribe rules and regulate pleadings, practice, and procedure in all courts of this state. *See* N.M. Const. art. III, § 1; N.M. Const. art. VI, § 3; *Martinez v. Chavez*, 2008-NMSC-021, ¶ 13, 144 N.M. 1, 183 P.3d 145. And although there is a substantive right to habeas corpus, N.M. Const. art. II, § 7, "restrictions on the time and place of exercising this right are procedural and within the Supreme Court's rule making power." *State v. Garcia*, 1984-NMCA-009, ¶ 11, 101 N.M. 232, 680 P.2d 613; *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 10, 89 N.M. 307, 551 P.2d 1354; *cf. Olguin v. State*, 1977-NMSC-034, ¶ 2, 90 N.M. 303, 563 P.2d 97 ("The right of appeal is provided for in the Constitution while the means for exercising that right are properly controlled by rules of procedure."). Thus, Named Plaintiffs must still show that they have exhausted administrative remedies for their habeas claims, but because of this Court's and district courts' original jurisdiction, N.M. Const. art. VI, §§ 3, 13, exceptions to exhaustion may be considered.

{23} "Th[e] exhaustion requirement is designed to ensure that habeas petitioners have tried to resolve their challenges to their conditions of confinement through the internal corrections procedure." *Minzner*, *supra* 54. Standard justifications for exhaustion support such a requirement for habeas claims. By requiring exhaustion for habeas claims related to conditions of confinement, NMCD is put on notice of any complaints and provided with an opportunity to remedy the situation. *See Resolution Tr. Corp. v. Binford*, 1992-NMSC-068, ¶ 18, 114 N.M. 560, 844 P.2d 810 ("[O]ne of the main purposes of requiring exhaustion of administrative remedies is to prevent the government from being surprised by claims it has not had time to consider administratively." (internal quotation marks and citation omitted)); *see also Cummings v. State*, 2007-NMSC-048, ¶ 26, 142 N.M. 656, 168 P.3d 1080 ("Requiring a prisoner to exhaust internal grievance procedures ensures that [NMCD] has been given a full opportunity to undertake such an inquiry."). Furthermore, exhaustion may help prevent unnecessary habeas claims in district court and ensure that the court will have the most complete record possible when such claims make their way to the district court. *See McGee v. United States*, 402 U.S. 479, 489-90 (1971) (explaining that exhaustion allows for a full opportunity to make a factual record and allows the agency to apply its expertise). But how do inmates, as a class, exhaust administrative remedies for Rule 5-802(C)(2) purposes?

{24} On this point, Plaintiffs argue that they put forth facts in support of their position that exhaustion would be futile and that the district court erred by dismissing the amended complaint when there was a disputed question of fact. Plaintiffs contend that they "referred to the existence of evidence that [c]lass [m]embers had filed grievances, including grievances under the emergency grievance procedure, seeking to remedy the government's constitutional violations in the midst of the COVID-19 pandemic, but had received no determination or remedy." Implicitly, therefore, Plaintiffs' position is that to establish that administrative remedies have been exhausted, or that exhaustion would be futile, it is enough to allege that unnamed class members have attempted to exhaust administrative remedies and have received no response.

{25} Defendants argue that the holding from *U.S. Xpress* requires each class member to individually exhaust administrative remedies before seeking judicial review. In *U.S. Xpress*, this Court declined to adopt the doctrine of "vicarious or virtual exhaustion" for the Tax Administration Act. 2006-NMSC-017, ¶ 1. The *U.S. Xpress* Court held that vicarious exhaustion did not apply because the Tax Administration Act "provid[ed] the exclusive remedies for tax refunds and require[ed] the taxpayer to individually seek the refund." *Id.* Additionally, this Court rejected the application of the futility exception, holding that it has no force "in the face of the clear legislative command" to exhaust. *Id.* ¶ 12. Defendants argue that the same should be true here because of the language used in Section 33-2-11(B).

{26} We conclude both positions are impractical. Plaintiffs' view of vicarious exhaustion is far too broad. We cannot say that the entire inmate population of New Mexico may be considered to have exhausted administrative remedies simply because some unnamed class member/inmate tried to file a grievance. Similarly, we cannot say that the nearly 6,000 inmates must each individually show they have exhausted administrative remedies. Such a requirement for all class members could unduly burden the prison's complaint system and delay resolution of grievances. *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (explaining that exhaustion "was intended to 'reduce the quantity and improve the quality of prisoner suits'" (citation omitted)). Thus, a balance must be struck, a balance that provides, NMCD with an opportunity to expeditiously address the merits of a claim while avoiding an undue burden on the internal grievance process.

{27} We conclude that the exhaustion requirement for habeas claims is satisfied as to an entire plaintiff class when one or more *named* class members have exhausted administrative remedies for each claim raised by the class. Defendants' argument that *U.S. Xpress* requires each class member to individually exhaust administrative remedies is unpersuasive for three reasons.

{28} First, as reflected above, *U.S. Xpress* concerned a statutorily created remedy, not a common-law or legal remedy apart from or in addition to the administrative remedy applied. 2006-NMSC-017, ¶ 8 (providing that the Tax Administration Act offers two exclusive remedies, a protest remedy and a refund remedy).

{29} Second, in determining that the doctrine of vicarious exhaustion did not apply, the *U.S. Xpress* Court not only looked to the specific language of the Tax Administration Act, but it also concluded that because the exhaustion requirement was jurisdictional and class actions are procedural, "the class action procedural rule does not effect any change on the subject matter jurisdiction limitations imposed by the Legislature." *Id.* ¶¶ 9, 13. Here, the same reasoning does not apply because Section 33-2-11(B) exhaustion cannot be jurisdictional as to the habeas claims.

{30} Finally, there are factual differences between *U.S. Xpress* and this case. This case involves the health and well-being of

individuals, not tax refunds. Moreover, in cases like this one, the composition of the class is subject to constant change beyond the class members' control. *See Jones v. Berge*, 172 F. Supp. 2d 1128, 1131 (W.D. Wis. 2001) (discussing class actions that challenge conditions of confinement and concluding that "the transfer of just one additional inmate to the institution intermittently would prevent a class action suit from ever being filed").

{31} Because Named Plaintiffs challenge their conditions of confinement rather than the fact or length of their confinement, looking to class actions under the Prison Litigation Reform Act (PLRA) is instructive. *See Preiser v. Rodriguez*, 411 U.S. 475, 476, 499-500 (1973) (holding that a 42 U.S.C. Section 1983 civil rights action "is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody"); *see also* PLRA, 42 U.S.C. § 1997e(a) (2013) ("No action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). Additionally, PLRA class actions are particularly relevant because Section 33-2-11(C) specifically mentions that when an inmate sues under 42 U.S.C. Section 1983, exhaustion of the administrative remedies is not required unless the remedies substantially comply with the minimum standards of the PLRA. *See* § 33-2-11(C).

{32} Circuit courts across the country have held that the PLRA's exhaustion requirement is satisfied through "'vicarious exhaustion'" when one or more *named* class members have exhausted administrative remedies for each claim raised by the class. *See Chandler v. Crosby*, 379 F.3d 1278, 1287-88 (11th Cir. 2004) (concluding that the named class member satisfied the PLRA's exhaustion requirement "as to the entire plaintiff class"); *see also Gates v.* Cook, 376 F.3d 323, 330 (5th Cir. 2004) (determining that one named class member's exhaustion was "enough to satisfy the requirement for the class"); *Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C. Cir. 2001) (analyzing whether any of the named plaintiffs exhausted administrative remedies).

{33} Although the Tenth Circuit has not expressly adopted the vicarious exhaustion rule for the PLRA, it has expressed approval of the rule. *See McGoldrick v. Werholtz*, 185 F. Appx. 741, 743-44 (10th Cir. 2006) ("Although we agree with plaintiffs that the vicarious exhaustion rule might save their claims if the district court had certified a class of prisoners . . . , the district court did not certify a class here."). And federal district courts in New Mexico and Colorado have applied the vicarious exhaustion rule to the PLRA. *See* Memorandum Op. and Ord. Denying Cnty. Defs. Motion for Partial Summary Judgment at 8, *Armendariz v. Santa Fe Cnty. Bd. of Comm'rs*, 1:17-cv-00339-WJ-LF (D.N.M. Feb. 20, 2019) (concluding that application of the rule was "legally supportable as well as feasible"); *see also Decoteau v. Raemisch*, 304 F.R.D. 683, 687-88 (D. Colo. 2014) (approving of vicarious exhaustion under the PLRA when "the named [p]laintiffs have exhausted their administrative remedies").

{34} We conclude that requiring one or more named plaintiffs to exhaust administrative remedies strikes the balance needed to carry out the purposes of exhaustion while also ensuring that inmate complaints are addressed. We note that this is a threshold requirement for determining whether Rule 5-802(C)'s exhaustion requirement has been met. The plaintiff class would still need to be certified under Rule 1-023. *See Crosby*, 379 F.3d at 1287 (holding that plaintiffs must still be certified under the federal equivalent of Rule 1-023 when applying vicarious exhaustion for the PLRA). Vicarious exhaustion would then apply to all plaintiffs if the class is certified, but it would not apply to nonexhausted plaintiffs if class certification is denied. We recognize that habeas corpus actions are not governed by our Rules of Civil Procedure, *see Allen v. LeMaster*, 2012-NMSC-001, ¶¶ 13-17, but "in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage," *Harris v. Nelson*, 394 U.S. 286, 299 (1969). Thus, we hold that Rule 1-023 class action procedures are appropriate for a class of inmate plaintiffs challenging conditions of confinement under Rule 5-802(C) governing habeas corpus procedures. Additionally, we request recommendations from the Rules of Criminal Procedure for the State Courts Committee for procedures analogous to Rule 1-023 for a class of inmate plaintiffs challenging conditions of confinement under Rule 5-802(C).

{35} Plaintiffs' amended complaint lists eight Named Plaintiffs to serve as representatives under Rule 1-023(A) for "all current and future persons held in any New Mexico prison facility during the course of the COVID-19 pandemic." The amended complaint does not allege that any of the Named Plaintiffs exhausted administrative remedies. In fact, during oral argument, Plaintiffs' attorney acknowledged that the amended complaint "was confined to the Named Plaintiffs" and that none of them filed a grievance. Nevertheless we conclude that simply alleging that unnamed class members have exhausted administrative remedies is not enough to satisfy the exhaustion requirement under Rule 5-802(C), even when applying vicarious exhaustion.

{36} Next, Plaintiffs argue that exhaustion is futile because, NMCD cannot grant the relief requested.

D. Plaintiffs Do Not Allege Facts Sufficient to Show Exhaustion Would Be Futile

{37} Plaintiffs contend that exhaustion of administrative remedies would be futile because their claims relate to Named Plaintiffs' release and, NMCD lacks any authority to grant release. Plaintiffs argue that *Cummings*, 2007-NMSC-048, ¶¶ 25-26, supports the proposition that if the relief requested cannot be granted by the administrative agency, exhaustion is futile.

{38} In *Cummings*, this Court held that a writ of habeas corpus "is not a one-stop shop for a prisoner's grievances" and that the petitioner's writ for habeas corpus, arguing that he was wrongly denied the right to vote, was correctly denied by the district court. *Id.* ¶ 25. The petitioner in *Cummings* sought a writ of habeas corpus, arguing that the district court made a clerical error wrongly denying him the right to vote. *Id.* ¶¶ 3, 25. The *Cummings* Court denied the writ because the right to vote is not part of a defendant's felony conviction and sentence but simply a collateral consequence of that conviction. *Id.* ¶ 25. The Court, in dicta, noted that it "question[ed] the district court's conclusion that [the petitioner] is first required to exhaust his administrative remedies . . . before requesting relief in district court" because the petitioner's "allegation has nothing to do with the correctional facilities where he is housed, nor does it have anything to do with his punishment and treatment." *Id.* ¶ 26. The Court reasoned that to force the petitioner "to pursue an administrative remedy would be futile simply because there is no administrative remedy for what he seeks." *Id.*

{39} Plaintiffs' argument that *Cummings* supports the proposition that exhaustion would be futile here fails for two reasons.

{40} First, *Cummings* stands for the proposition that if there is no administrative remedy to address the underlying issue necessitating the request for habeas relief, then exhaustion is futile. *Id.* In *Cummings*, the petitioner was requesting habeas relief because he was being denied the right to vote, a complaint, NMCD has no power to remedy. *Id.* In such a scenario, exhaustion is futile not only because, NMCD cannot remedy the situation, but also because Rule 5-802(C) would not apply where the cause of action is not "substantially related to the inmate's incarceration by the, NMCD." Rule 5-802(C); *see Cum-*

mings, 2007-NMSC-048, ¶ 26 (concluding that the right to vote "has nothing to do with the correctional facilities where [the petitioner] is housed, nor does it have anything to do with his punishment and treatment").

{41} Unlike the underlying issue necessitating the request for habeas relief in *Cummings*, Plaintiffs here are requesting habeas relief for something, NMCD has not only the power but the *duty* to address. *See* § 33-2-11(A) (providing that, NMCD has "the power and the duty to examine and inquire into all matters connected with . . . the punishment and treatment of the prisoners"). Further, Plaintiffs' claims are directly related to Named Plaintiffs' confinement and treatment by, NMCD, thus falling squarely under Rule 5-802(C). Plaintiffs sought a writ of habeas corpus alleging that Defendants refused to enforce their own mandates for social distancing, mask-wearing, heightened hygiene practices, and safe quarantine and treatment. As the district court correctly points out, NMCD has the authority to address these issues pertaining to conditions of confinement, and it "has procedures in place, including emergency procedures, to remedy conditions that pose a risk of harm to inmates." If Named Plaintiffs had utilized the, NMCD internal grievance procedure, perhaps their complaints over conditions of confinement would have been remedied.

{42} Second, Plaintiffs' reading of *Cummings* would render Rule 5-802(C) a nullity. Plaintiffs' argument—that because the requested relief (release) cannot be granted by, NMCD, exhaustion is futile—can be applied to every case requesting habeas relief based on conditions of confinement. Any inmate could bypass the exhaustion requirement of Rule 5-802(C) simply by requesting to be released. This is not futility.

{43} We have held that "[f]utility, as an exception to exhaustion requirements, applies where the agency has *deliberately placed an impediment in the path of a party*, making an attempt at exhaustion a useless endeavor." *In re McElveny*, 2017-NMSC-024, ¶ 31 (emphasis added) (internal quotation marks and citation omitted). This definition of futility is embodied in the PLRA's futility rule as well: "Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust." *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010).

{44} When looking to the facts alleged in the amended complaint and accepting the allegations therein as true, Plaintiffs do not state any facts to show that exhaustion of available, NMCD remedies would be futile. *See Gzaskow*, 2017-NMCA-064, ¶ 23; *see also* Rule 5-802(H)(2)(b) (providing that the court shall order a summary dismissal of a petition for a writ of habeas corpus if it plainly appears from the record that "the petitioner is not entitled to relief as a matter of law"). Plaintiffs never allege that, NMCD "deliberately placed an impediment in the path of [Named Plaintiffs], making an attempt at exhaustion a useless endeavor." *In re McElveny*, 2017-NMSC-024, ¶ 31 (internal quotation marks and citation omitted). Plaintiffs merely allege that "NMCD cannot grant release, the relief requested, on its own." We acknowledge that our standard of notice pleading allows a plaintiff to state only general allegations of conduct in a complaint, *see Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726, but we will not read into a complaint matters which it does not contain, *see Wells v. Arch Hurley Conservancy Dist.*, 1976-NMCA-082, ¶ 35, 89 N.M. 516, 554 P.2d 678 (Hernandez, J., specially concurring) ("[A] court under the guise of liberal construction of a pleading cannot supply matters which it does not contain.").

{45} Even allowing for a liberal construction of the amended complaint, Plaintiffs do not allege facts showing administrative remedies were made unavailable or futile. Take for example Plaintiffs' facts for their claim that Defendants' treatment of inmates amounts to cruel and unusual punishment in violation of Article II, Section 13 of the New Mexico Constitution. Plaintiffs allege that Defendants "have acted with deliberate indifference to the substantial risk [Named] Plaintiffs face of infection with COVID-19 due to the conditions of their confinement." More specifically, Plaintiffs allege that Defendants "know or should know that the conditions of [Named] Plaintiffs' confinement expose them to a substantial risk of infection with COVID-19." Absent from these allegations is anything about Defendants preventing, thwarting, or hindering Named Plaintiffs' efforts to avail themselves of an administrative remedy.

{46} Nor are we persuaded by Plaintiffs' argument that the district court should have held an evidentiary hearing to determine whether exhaustion was in fact futile. Plaintiffs argue that they provided facts to the district court in briefing and at argument to support their position that exhaustion was futile; however, the facts are all premised on the idea that exhaustion is futile when, NMCD cannot grant release or because unnamed class members have tried to exhaust and received no response. As stated above, neither the inability to grant release nor the filing of a grievance by an unnamed class member demonstrates futility.

{47} Although our reasoning rests on the exhaustion requirement of Rule 5-802(C) rather than Section 33-2-11(B), we conclude that the district court was correct in holding that "Plaintiffs do not allege that the [Named] Plaintiffs exhausted or attempted to exhaust the, NMCD's internal grievance procedures" and that "[e]xhaustion would not be futile in this case because the, NMCD has the authority to address the conditions in New Mexico's correctional facilities." This fact of, NMCD's authority coupled with the Named Plaintiffs' failure to exhaust, NMCD's emergency grievance procedures, with no factual allegation to support a finding that an attempt to exhaust those procedures would be futile, forecloses the Named Plaintiffs' right to judicial relief before exhaustion. Thus, we affirm the district court's dismissal of the amended complaint. *See State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the right for any reason doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)).

E. The District Court Properly Dismissed the Entire Action Despite the Presence of the Nonprofit Organizations

{48} The district court's order dismissing the amended complaint did not make any ruling as to standing. The district court held that to allow the nonprofit organizations "to pursue the claims in the [a]mended [c]omplaint when the [Named] Plaintiffs have not exhausted their administrative remedies would frustrate the legislative purpose of Section 33-2-11(B) and would lead to an absurd result." The district court determined that because the Named Plaintiffs had not exhausted administrative remedies, the court lacked "subject matter jurisdiction over the claims raised in the [a]mended [c]omplaint with respect to all Plaintiffs." As such, the district court concluded that the Governor's motion to dismiss the nonprofit organizations for lack of standing was rendered moot.

{49} Plaintiffs argue that the district court erred in dismissing the nonprofit organizations by conflating exhaustion and standing. Plaintiffs contend that because the exhaustion requirement only applies to inmates, it cannot apply to the nonprofit organizations, and a separate substantive analysis of their standing is necessary. We disagree.

{50} We conclude that the district court correctly dismissed the amended complaint with respect to all Plaintiffs. We also conclude that the district court's reasoning—to allow the nonprofit organizations to pursue the claims in the amended complaint when none of the Named

Plaintiffs have exhausted their administrative remedies would frustrate the purpose of Section 33-2-11(B)—equally applies to Rule 5-802(C). To allow the nonprofit organizations to pursue the claims in the amended complaint when none of the Named Plaintiffs have exhausted their administrative remedies would render meaningless the requirements for exhaustion in Section 33-2-11(B) and Rule 5-802(C). *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 36, 309 P.3d 1047 ("We will not construe a statute to defeat the intended purpose or achieve an absurd result." (internal quotation marks and citation omitted)).

{51} Plaintiffs argue that the district court's conclusion forces the nonprofit organizations "to exhaust remedies that they have no avenue to pursue." This argument misses the point. The nonprofit organizations "are nonprofit public advocacy organizations seeking to assert rights on behalf of their constituents." As such, their claims are brought purely in a representative capacity and depend here on the viability of the Named Plaintiffs' claims. It makes no sense to allow the nonprofit organizations to pursue claims on behalf of the Named Plaintiffs they represent who have not met their jurisdictional exhaustion prerequisites. *Cf. Parent/Pro. Advocacy League v. City of Springfield, Mass.*, 934 F.3d 13, 34 (1st Cir. 2019) (concluding that it would be illogical to allow the organizations to avoid the exhaustion requirement prerequisite to standing for the students they represent).

{52} We conclude that the district court properly dismissed the amended complaint as to all Plaintiffs. The exhaustion requirements of Section 33-2-11(B) and Rule 5-802(C) cannot be circumvented by bringing claims through a representative entity.

III. CONCLUSION

{53} We conclude that Section 33-2-11(B)'s exhaustion requirement is jurisdictional as to statutorily created rights. We also conclude that Rule 5-802(C) imposes an independent duty to exhaust administrative remedies for habeas claims. We hold that to satisfy the habeas corpus exhaustion requirement under Rule 5-802(C) for an entire plaintiff class, one or more named class members must exhaust administrative remedies for each claim. Because Plaintiffs do not allege that the Named Plaintiffs exhausted or sought to exhaust, NMCD's internal grievance procedures, nor do they allege facts sufficient to show exhaustion would be futile, the district court correctly dismissed the amended complaint. We affirm.

{54} IT IS SO ORDERED.

MICHAEL E. VIGIL, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

JULIE J. VARGAS, Justice

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-020
No: S-1-SC-38195 (filed September 1, 2022)

ADOBE WHITEWATER CLUB OF NEW MEXICO, a non-profit corporation, NEW MEXICO WILDLIFE FEDERATION, a non-profit corporation,
and NEW MEXICO CHAPTER OF BACKCOUNTRY HUNTERS & ANGLERS,
a non-profit organization,
Petitioners,
v.
NEW MEXICO STATE GAME COMMISSION,
Respondent,
and
CHAMA TROUTSTALKERS, LLC, RIO DULCE RANCH, Z&T CATTLE COMPANY, LLC,
RANCHO DEL OSO PARDO, INC., RIVER BEND RANCH,
CHAMA III, LLC, FENN FARM, THREE RIVERS CATTLE LTD., CO., FLYING H. RANCH INC., SPUR LAKE CATTLE CO., BALLARD RANCH, DWAYNE AND CRESSIE BROWN, COTHAM RANCH, WAPITI RIVER RANCH, MULCOCK RANCH, WILBANKS CATTLE CO., 130 RANCH, WCT RANCH, THE NEW MEXICO FARM AND LIVESTOCK BUREAU,
CHAMA PEAK LAND ALLIANCE, NEW MEXICO CATTLE GROWERS' ASSOCIATION,
NEW MEXICO COUNCIL OF OUTFITTERS AND GUIDES, AND UPPER PECOS WATERSHED ASSOCIATION,
Intervenors-Respondents.

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OPINION

VIGIL, Justice.

{1} This mandamus proceeding concerns the scope of the public's right to use public water flowing over private property. Article XVI, Section 2 of the New Mexico Constitution provides that "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, *is hereby declared to belong to the public*." (Emphasis added.) In *State ex rel. State Game Commission v. Red River Valley Co.* (*Red River*), this Court held that Article XVI, Section 2 conveys to the public the right to recreate and fish in public water. 1945-NMSC-034, ¶ 59, 51 N.M. 207, 182 P.2d 421. The question here is whether the right to recreate and fish in public water also allows the public the right to touch the privately owned beds below those waters. We conclude that it does.

{2} The New Mexico State Game Commission (Commission) promulgated a series of regulations, 19.31.22, NMAC (1/22/2018) (Regulations), outlining the process for landowners to obtain a certificate allowing them to close public access to segments of public water flowing over private property. *See* 19.31.22.6, NMAC (1/22/2018). In particular, access is closed to the "riverbed or streambed or lakebed" located on private property. *Id.* The reasoning is that because the landowner holds title to the bed below public water, the landowner may exclude the public from accessing the public water if it involves walking or wading on the privately owned bed. Petitioners, nonprofit organizations and corporations affected by the Regulations, sought a writ of prohibitory mandamus challenging the constitutionality of the Regulations.

{3} This Court assumed original jurisdiction over the petition under Article VI, Section 3 of the New Mexico Constitution. Concluding that the Regulations are an unconstitutional infringement on the public's right to use public water and that the Commission lacked the legislative authority to promulgate the Regulations, we issued the writ of mandamus and an order on March 2, 2022, directing the Commission to withdraw the Regulations as void and unconstitutional. In this opinion, we explain the reasoning and rationale underlying our issuance of the writ of mandamus.

I. BACKGROUND

{4} In 2015, the Legislature amended, NMSA 1978, Section 17-4-6 (2015), adding a one-sentence Subsection C:

> No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use *shall walk or wade onto private property through non-navigable public water* or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

(Emphasis added.) Purportedly acting under the above-emphasized language of Section 17-4-6(C), the Commission promulgated the Regulations. *See* 19.31.22, NMAC (1/22/2018).

{5} The Regulations' "Objective" is to implement

> the process for a landowner to be issued a certificate and signage by the director and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner.

19.31.22.6, NMAC (1/22/2018). Once a landowner is issued a certificate, the landowner is then issued signs from the Commission which are "prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass." 19.31.22.13(F), NMAC (1/22/2018). Members of the public may then be cited for criminal trespass if they touch the now-closed "riverbed or streambed or lakebed," 19.31.22.6, NMAC (1/22/2018), beneath the public water. 19.31.22.13(F), NMAC (1/22/2018).

{6} To obtain the certificate and signage necessary to close access to segments of public water, landowners must fill out an application providing "substantial evidence which is probative of the waters, watercourse or [rivers] being non-navigable at the time of statehood, on a segment-by-segment basis." 19.31.22.8(B)(4), NMAC (1/22/2018). The Regulations define "Non-navigable public water" as water that "was not used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel on water." 19.31.22.7(G), NMAC (1/22/2018).

{7} Following the promulgation of the Regulations, Petitioners filed a verified petition for prohibitory mandamus in this Court to nullify any certificates issued under the Regulations and to enjoin the Commission from enforcing the Regulations. Petitioners argue the Regulations violate Article XVI, Section 2 by impermissibly interfering with the public's constitutional right to use public water and that the Commission lacks the authority under Section 17-4-6(C) to promulgate the Regulations. In its answer brief, the Commission concedes the Regulations conflict with Article XVI, Section 2.

{8} This Court granted leave for Intervenor-Respondents ("Intervenors"), who are owners of private property over which nonnavigable waters flow, to intervene. Intervenors argue mandamus should be denied because the Regulations do not privatize or close public waters, but instead express the existing right to exclude trespassers on privately owned riverbeds.

II. DISCUSSION

A. Mandamus Is Appropriate

{9} Before addressing Petitioners' constitutional challenges to the Regulations, we explain the basis for our exercise of original mandamus jurisdiction. Article VI, Section 3 of the New Mexico Constitution gives this Court "original jurisdiction in . . . mandamus against all state officers, boards and commissions" and the "power to issue writs of mandamus . . . and all other writs necessary or proper for the complete exercise of its jurisdiction." "Although relief by mandamus is most often applied to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law, the writ may also be used in appropriate circumstances in a prohibitory manner to prohibit unconstitutional official action." *State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7, 456 P.3d 1065 (internal quotation marks and citation omitted). "In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official's act; we determine whether that act goes beyond the bounds established by the New Mexico Constitution." *Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132, 257 P.3d 952.

{10} Petitioners and Intervenors disagree about whether mandamus is the proper vehicle to address the fate of the Regulations. To resolve such disagreements, this Court applies a multifactor test to evaluate whether mandamus is appropriate. Mandamus is a discretionary writ that will lie when there is a purely legal issue "that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *see also*, NMSA 1978, § 44-2-5 (1884).

{11} In applying the *Sandel* factors, we conclude that mandamus is appropriate. First, the scope of the public's ownership rights in the natural waters of New Mexico and the competing real property

interests of private landowners implicates a question of great public importance. Second, whether it is unconstitutional for the Regulations to restrict the recreating public from accessing public waters flowing over private property and whether the Commission may promulgate the Regulations in the first place are both legal questions that can be decided on undisputed facts. Third, the importance of the constitutional issue and the need for clarification on public water access and private property ownership merits an expeditious resolution that this Court is uniquely positioned to provide. Therefore, we determine all three *Sandel* factors are met and that mandamus is appropriate in this case.

B. Natural Water Within the State Belongs to the Public But the Beds May Be Privately Owned

{12} Having determined that prohibitory mandamus is an appropriate vehicle to address Petitioners' claims, we begin by reviewing the relevant law on public ownership rights in state waters and private ownership rights in the beds that lie beneath those waters. Such a review is necessary for understanding why the Regulations' threshold for closing public access, which is based on navigability, is irrelevant to the scope of the right of the public to use public waters under Article XVI, Section 2.

{13} In 1907, the Territorial Legislature enacted the Water Code that declared, "All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.", NMSA 1978, § 72-1-1 (1907). This was a declaration of "prior existing law, always the rule and practice under Spanish and Mexican dominion." *Red River*, 1945-NMSC-034, ¶ 21 (internal quotation marks and citation omitted). The prior-appropriation doctrine was then incorporated into the New Mexico Constitution:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, *is hereby declared to belong to the public* and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

N.M. Const. art. XVI, § 2 (emphasis added).

{14} In 1945, this Court determined that Article XVI, Section 2, combined with prestatehood law, established a public right to recreate in the waters of New Mexico and that this right is equal to the right of the owners of the land near the water. *Red River*, 1945-NMSC-034, ¶ 59 (holding that a landowner with private property bordering and below public water had "no right of recreation or fishery distinct from the right of the general public"). In *Red River*, we addressed whether a landowner who owned land on both sides of Conchas Lake, deemed nonnavigable water, could exclude others from fishing in boats on the lake. *Id.* ¶¶ 1-13. We acknowledged ownership in the banks and beds of a body of water may be private but emphasized that such ownership does not change the fact that the water, next to the banks and above the beds, is public. *Id.* ¶ 37.

{15} In analyzing the permissible uses of public water, this Court rejected limiting the public's right to those of traditional navigation. *See id.* ¶ *36 ("[U]*ses of public water are not to be confined to the conventional ones first known and enjoyed."). In support of the rejection, we noted the historical expansion of the public's use of public water:

> At one time, public waters were thought of only as they afforded rights of navigation to the height of tide water; later they were extended to include all clearly navigable streams, and later still, to streams which would be used, not for boats of commerce, but only for the floating of logs and other items of commerce; and, later has come the recreational use where the strict test of navigability earlier applied is less rigidly adhered to.

Id. ¶ 35. With this historical backdrop, we concluded that the scope of the public's right to use public waters is a matter of New Mexico law and that such right includes fishing and recreation. *Id.* ¶¶ 35-37, 59. The conclusion that state law governs the scope of the right of the public to use public waters over private beds tracks with federal law. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012) ("[T]he [s]tates retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title.").

{16} Under federal law, title to land under nonnavigable waters remains with the United States, *United States v. State of Utah*, 283 U.S. 64, 75 (1931), and title to land under navigable waters rests with the states. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). This rule that the states "hold title to the beds under navigable waters has [its] origins in English common law." *PPL Mont., LLC*, 565 U.S. at 589. In England, there was a distinction "between waters subject to the ebb and flow of the tide (royal rivers) and nontidal waters (public highways)." *Id.* "With respect to royal rivers, the Crown was presumed to hold title to the riverbed and soil, but the public retained the right of passage and the right to fish in the stream." *Id.* For public highways, "the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership." *Id.*

{17} The tide-based distinction was ill-suited for the United States, and by the late nineteenth century, the prevailing doctrine for determining title to riverbeds was "navigability in fact." *Id.* at 590. The question of navigability for determining riverbed title is governed by federal law, which provides that public rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 591-92 (internal quotation marks and citation omitted). That said, the beds to both navigable waters and nonnavigable waters—whether title is vested in the state or the United States—are still subject to state law under the "public trust doctrine." *Id.* at 603-04; *see also Red River*, 1945-NMSC-034, ¶ 259 (opinion on second motion for rehearing) ("These waters are publici juris and the state's control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States.").

{18} The public trust doctrine "concerns public access to the waters above . . . beds for purposes of navigation, fishing, and other recreational uses." *PPL Mont., LLC*, 565 U.S. at 603. The public trust doctrine is a matter of state law subject only to governmental regulation by the United States under the Commerce Clause and admiralty power. *Id.* at 604. "Under accepted principles of federalism, the [s]tates retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title." *Id.*; *see also State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P.2d 983 ("The state as owner of water has the right to prescribe how it may be used.").

{19} Thus, while the federal "navigability" test is used to determine title to the beds beneath water, such a test is irrelevant when determining the scope of public use of public waters. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984) ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."). Moreover, "[p]rivate ownership of the land underlying natural lakes and streams does not defeat the [s]tate's power to regulate the use of the water or defeat whatever right the public has to be on the water." *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1137 (Utah 1982). This is why, in *Red River*, we could reject the traditional navigability test—the test applied by the Regulations—

for determining public use and instead conclude that the scope of public trust to waters in New Mexico includes fishing and recreation. 1945-NMSC-034, ¶¶ 35, 43, 48. New Mexico is not alone in concluding title to the beds beneath water is immaterial in determining the scope of public use. Montana, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming, and South Dakota have all recognized public ownership and use of water is distinct from bed ownership. *See Parks v. Cooper*, 2004 SD 27, ¶ 46, 676 N.W. 2d 823 (describing the states—including New Mexico—where the public trust doctrine applies to water independent of ownership of the underlying land).

{20} With the understanding that state law governs the scope of the public's right to use waters and that public use within New Mexico includes fishing and recreation, we now turn to the merits of Petitioners' claims. First, we address the constitutionality of the Regulations and Section 17-4-6(C). We then consider Intervenors' argument on judicial taking.

C. The Regulations Are Unconstitutional

{21} Petitioners challenge the constitutionality of the Regulations and the Commission's authority under Section 17-4-6(C) to promulgate the Regulations. "We review questions of statutory and constitutional interpretation de novo." *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232.

{22} Petitioners argue the Regulations are unconstitutional because Article XVI, Section 2 and this Court's decision in *Red River* implicitly recognize the public's right to use streambeds and banks. Petitioners contend that if the public cannot use streambeds and banks in the exercise of its right to public waters, as a practical matter, the public "could enjoy no fishing or recreational rights upon much of the public water of this state." *Red River*, 1945-NMSC-034, ¶ 43. On the other hand, Intervenors argue that when a member of the public walks or wades in a river where the bed is privately owned, that person is a trespasser, and only when a landowner bars a person from floating upon public water that can be used without walking and wading does the landowner interfere with the person's right to use the water. Intervenors contend because the Regulations merely reiterate the existing right to exclude trespassers on privately owned riverbeds, they are constitutional. We are not persuaded by Intervenors' arguments.

{23} We conclude under Article XVI, Section 2 and our holding in *Red River* that the public has the right to recreate and fish in public waters and that this right includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right. *See Hartman v. Tresise*, 84 P. 685, 692 (Colo. 1905) (Bailey, J., dissenting) ("[T]he people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant."); *see also Galt v. State*, 731 P.2d 912, 915 (Mont. 1987) ("The public has a right of use up to the high water mark, but only such use as is [reasonably] necessary to utilization of the water itself."); *Conatser v. Johnson*, 2008 UT 48, ¶ 26, 194 P.3d 897 (holding that the public's easement includes touching riverbeds because "touching the water's bed is reasonably necessary for the effective enjoyment of" the easement). Walking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing and recreation. Having said that, we stress that the public may neither trespass on privately owned land to access public water, nor trespass on privately owned land from public water. *See Red River*, 1945-NMSC-034, ¶ 32 ("Access to this public water can be, and must be, reached without such trespass.").

{24} Article XVI, Section 2 declares that the natural waters of New Mexico "belong to the public and [are] subject to appropriation for beneficial use, in accordance with the laws of the state." Thus, individuals have no ownership interest in those natural waters, only the right to put the water to certain uses. *See* N.M. Const. art. XVI, § 3; *see also Snow v. Abalos*, 1914-NMSC-022, ¶ 11, 18 N.M. 681, 140 P. 1044 ("The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose."). As reflected above, this is true whether the public water is navigable or nonnavigable. A determination on navigability only goes to who has title to the bed below the public water, *Red River*, 1945-NMSC-034, ¶¶ 18, 37, not to the scope of public use.

{25} The state, as a trustee, regulates the water for the benefit of the people. *See State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶ 11, 55 N.M. 12, 225 P.2d 1007.

> Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the [s]tate must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the [s]tate as a whole.

J.J.N.P., 655 P.2d at 1136. "A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water." *Id.* In New Mexico, we have recognized that the scope of the public's easement in state waters includes fishing and recreational activities. *Red River*, 1945-NMSC-034, ¶¶ 26, 59. The question now is should the scope of the public's easement be interpreted narrowly and limited to those activities which may be performed *upon the water*, as argued by Intervenors, *see Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), or should the scope of the public's easement be interpreted broadly to include lawful activities that *utilize* the water, as argued by Petitioners, *see Conatser*, 2008 UT 48, ¶ 15.

{26} In *Day*, the Wyoming Supreme Court limited the scope of the public's easement to a "right of flotation" upon the water and such activities "as a necessary incident to" flotation. 362 P.2d at 146, 151. There, a member of the public sought a declaration that he had a right to fish "either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of" the North Platte River where it crossed privately owned land. *Id.* at 140. The *Day* Court declined to interpret the scope of the public's easement to include walking and wading on the bed of a river for fishing, but held that the public could fish while floating. *Id.* at 146. The *Day* Court reasoned that because the right of flotation had long since been enjoyed by the public through floating logs and timber, it "was but a right of passage" for floating in a craft. *Id.* at 146-47. The right to hunt, fish, and engage in other lawful activities were all modified by the right to float, *id.*, meaning they could be done as long as the person was floating and only with "minor and incidental use of the lands beneath" water. *Id.* This narrow servitude interpretation was rejected in *Conatser*, 2008 UT 48, ¶ 15.

{27} In *Conatser*, the Utah Supreme Court held that the scope of the public's easement included the right of the public to engage in all recreational activities that utilize the water. *Id.* ¶¶ 11-28.[1] The plaintiffs in *Conatser* sought a declaration that the public's easement allows the public to walk and wade on the beds of public waters. *Id.* ¶¶ 1, 2. The district court held that the public's easement was like that in *Day* and that the public only had a right to be "upon the water." *Id.* ¶ 2 (internal quotation marks omitted). The Utah Supreme Court reversed the district court, reasoning that where *Day* limits the easement's scope, Utah had expanded the scope to recreational activities. *Id.* ¶¶ 2,

[1] The Utah legislature subsequently limited the scope of the public's easement. See Utah Code Ann. § 73-29-102 (2010).

13-16. "Thus, the rights of hunting, fishing, and participating in any lawful activity are coequal with the right of floating and are not modified or limited by floating, as they are in *Day*." *Id.* ¶ 14. The *Conatser* Court then concluded, "In addition to the enumerated rights of floating, hunting, and fishing, the public may engage in any lawful activity that utilizes the water . . . [and] touching the water's bed is reasonably necessary for the effective enjoyment of those activities." *Id.* ¶ 25.

{28} Red River did not require this Court to address whether the scope of the public's easement includes the touching of privately owned beds beneath public water. 1945-NMSC-034, ¶ 4. Instead the question was whether the public's easement included the right of the public "to participate in fishing and other recreational activities in" public waters. *Id.* Similar to the easement in *Conatser*, this Court held that the public's easement is not limited to flotation or traditional navigability, but is broad and includes the right to "general outside recreation, sports, and fishing." *Id.* ¶¶ 35, 48, 59. We conclude that implicit in our holding is the privilege to do such acts as are reasonably necessary to effect the enjoyment of such enumerated rights. The majority's opinion in *Red River* facilitates such a conclusion for the reasons below.

{29} First, *Red River* rejected the common-law rule that the owner of the land beneath water held title to the water as well as possessed an exclusive right to fish in the portion of the waters that flow through the land. *Id.* ¶¶ 13, 36. To prohibit those acts reasonably necessary to enjoy the right to recreation and fishing, such as the touching of beds and banks, effectively reinstates the common-law rule granting landowners the exclusive right of fishery—even if only for waters the Regulations deem nonnavigable. *See* 19.31.22.6, NMAC (1/22/2018) (allowing landowners to receive a certificate recognizing that there are segments of "non-navigable public water" within the landowner's property whose riverbed or streambed or lakebed is closed to public access).

{30} Second, *Red River* rejected the majority holding in *Hartman*, 84 P. 685, because it was contrary to "the better reason and the great weight of authority." *Red River*, 1945-NMSC-034, ¶¶ 38-40. In *Hartman*, the majority concluded that the common-law rule—the owner of a streambed has the exclusive right of fishing in the stream that flows through their land—applied and that there was no "public right of fishery." 84 P. at 687. On the other hand, the dissent, the views with which *Red River* agreed, 1945-NMSC-034, ¶ 38, stated that "a public river is a public highway, and this is its distinguishing characteristic; that the right to common of fishery was vested in the people in all public rivers." *Hartman*, 84 P. at 689 (Bailey, J., dissenting). The *Hartman* dissent elaborated, "where the land belongs to one party and the water to another, the right of fishery follows the ownership of the water; and where the public has an easement in the water . . . fishing goes with the easement as an incident thereto, for the reason that the waters are public." *Id.* at 690 (Bailey, J., dissenting). In discussing the portion of the Colorado constitution similar to our Article XVI, Section 2, the *Hartman* dissent stated, "if the streams themselves are public, and the water belongs to the people, the people have the right of way in the bed of the stream for all purposes not inconsistent with the constitutional grant." *Hartman*, 84 P. at 692 (Bailey, J., dissenting). *Compare* Colo. Const. art. XVI, § 5 (declaring waters of natural streams as property of the public, "dedicated to the use of the people of the state"), *with* N.M. Const. art. XVI, § 2 (declaring unappropriated water of natural streams as "belong[ing] to the public . . . for beneficial use"). Thus, in favoring the view of the dissent in *Hartman*, we implicitly condoned the public's use of beds under public water as that use is reasonably necessary to effect the enjoyment of the public's easement.

{31} Finally, both the holding of the majority and the criticism from the dissent in *Red River* suggest that the public's right to use public waters includes such acts as are reasonably necessary to effect enjoyment of the right to recreation and fishing. *Red River* held that "[b]roadly speaking, the rule in this country has been that the right of fishing in all waters, the title to which is in the public, belongs to all the people in common." 1945-NMSC-034, ¶ 48 (internal quotation marks and citation omitted). With this holding, echoing the dissent in *Hartman*, *Red River* again implicitly condones the use of beds beneath public water. Justice Bickley's dissent in *Red River* criticized the majority's holding that the public's easement included use of the beds beneath public water:

> [T]he majority feel that it is appropriate to declare that each individual member of the public has . . . [a] right to fish in the unappropriated waters from every natural stream . . . within the state of New Mexico without the consent of the owners of the lands through which such streams flow and of the banks and beds of such streams because they say that the fact that such waters belong to the public is sufficient answer to the protests of such property owners.

Id. ¶ 70 (Bickley, J., dissenting) (fourth alteration in original) (internal quotation marks omitted); *see also id.* ¶ 177 (Sadler, J., dissenting) (criticizing the majority for stating that access to public water must be done without trespass but then establishing a rule that allows trespass onto banks and beds). This criticism of the majority's holding also suggests the dissent's recognition of the implicit right to do such acts as are reasonably necessary for the enjoyment of the public's easement.

{32} Based on the aforementioned, and because we did not limit the scope of the public's easement to floating as in *Day*, we conclude that the public may engage in such acts as are reasonably necessary for the enjoyment of fishing and recreation. Because the Regulations close access to public water based on a finding of nonnavigability, something *Red River*, 1945-NMSC-034, ¶¶ 18, 37, expressly rejected, the Regulations are unconstitutional. To the extent that the Regulations could be interpreted as closing access only to public water where walking and wading is involved, as argued by Intervenors, the Regulations would still be an unconstitutional limitation on the public's right to recreate and fish in public waters.

{33} We emphasize that the scope of the public's easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of minimal impact. "The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible." *Galt*, 731 P.2d at 916. That is, the right of the public and the right of the landowner "are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, [so] that there may be a due and reasonable enjoyment of both." *Conatser*, 2008 UT 48, ¶ 20 (internal quotation marks and citation omitted).

{34} Since we conclude that the Regulations are an unconstitutional limitation on the public's right to recreate and fish in public waters, we must determine whether Section 17-4-6(C), the statute purportedly giving the Commission authority to promulgate the Regulations, can be read to avoid constitutional concerns. If so, we must read it as such and conclude that the Commission lacked statutory authority to promulgate the Regulations.

D. Section 17-4-6(C) Can Be Read to Avoid Constitutional Concerns

{35} Petitioners argue that Section 17-4-6(C) must be read to avoid constitutional concerns and in doing so, the statute provides no support for the Regulations. Petitioners contend that because the Commission is created and authorized by statute it is limited to the authority expressly granted or necessarily implied by those statutes, and it cannot promulgate regulations that conflict with the only constitutional reading of Section 17-4-6(C). We agree.

{36} "It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 12, 111 N.M. 336, 805 P.2d 603; *see also Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("[C]ourts will avoid deciding constitutional questions unless required to do so."). Put another way, we should "avoid an interpretation of a . . . statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

{37} Section 17-4-6(C) provides that no person "shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing." Section 17-4-6(C) can be interpreted one of two ways: (1) the public cannot walk or wade onto private property (*excluding* the beds of public water) from public water, and the public cannot gain access to public water by crossing over private property, or (2) the public cannot walk or wade onto private property (*including* the beds of public water) from public water, and the public cannot gain access to public water by crossing over private property. The former raises no constitutional question. *Red River* reiterated several times that trespass onto privately owned lands is not permitted. 1945-NMSC-034, ¶¶ 32, 43, 48, 56. The latter would, like the Regulations, be an unconstitutional limitation on the public's right to recreate and fish in public waters.

{38} Because Section 17-4-6(C) can be construed to avoid a constitutional question and the Regulations conflict with that constitutional reading, we conclude not only that the Regulations are unconstitutional, but also that the Commission lacked the authority to promulgate the Regulations. *See Qwest Corp. v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 143 P.3d 478 ("Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.").

E. Because Article XVI, Section 2 Is Declaratory of Prior Existing Law, Our Holding in This Case Is Not a Judicial Taking

{39} As a final matter, we address Intervenors' argument that our conclusion—that the public has a right to engage in such acts that utilize public water and are reasonably necessary for the enjoyment of fishing and recreation—amounts to a judicial taking. Intervenors contend that because they can trace title to the riverbeds back to the United States the riverbeds cannot be subject to the public's easement. We are not persuaded.

{40} As reflected above, Article XVI, Section 2 and the public's easement in public water stem from prior existing law recognized by the United States government. In *Red River*, we began by analyzing whether Article XVI, Section 2's declaration that the waters of New Mexico "belong to the public" applied to the waters above nonnavigable streams. 1945-NMSC-034, ¶¶ 16-19. This Court determined that even though the landowner in *Red River* could trace his title to the land under the nonnavigable water to an early Mexican grant and Article XVI, Section 2 could not deprive the title of any right which may have vested prior to 1911, the constitutional declaration still applied because it was "only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion." *Red River*, 1945-NMSC-034, ¶ 21 (internal quotation marks and citation omitted). "The doctrine of prior appropriation, based upon the theory that all waters subject to appropriation are *public*," applied "before New Mexico came under American sovereignty and continu[ed] thereafter." *Id.* ¶¶ 22, 26.

{41} Thus, the waters at issue are public waters and always have been. *Id.*; *see also* § 17-4-6(C) (referring to nonnavigable waters as "public water"). Intervenors' argument that the landowners can trace their title to the riverbeds back to the United States is immaterial. Even if Intervenors can trace their title back to the United States—as is the case with nonnavigable waters under the federal navigable-in-fact test—this does not change that the owner of the land must "yield its claim of right to so reserve as against use by the public." *Red River*, 1945-NMSC-034, ¶ 23; *see also id.* ¶ 24 ("[T]he United States government . . . has always recognized the validity of local customs and decisions in respect to the appropriation of public waters."); *id.* ¶ 259 (opinion on second motion for rehearing) ("These waters are publici juris and the state's control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States."). As succinctly stated by the Attorney General,

> Based on *Red River* and subsequent cases construing New Mexico law, it is clear that even if a landowner claims an ownership interest in a stream bed, that ownership is subject to a preexisting servitude (a superior right) held by the public to beneficially use the water flowing in the stream.

N.M. Att'y Gen. Op. 14-04 (April 1, 2014). Thus, any title held by Intervenors was already subject to the public's easement in public waters. *See Red River*, 1945-NMSC-034, ¶ 45 (providing that when the United States confirmed title to the lands in question, it did not "destroy, or in any manner limit, the right of the general public to enjoy the uses of public waters"); *see also Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs*, 2014 MT 10, ¶ 70, 373 Mont. 277, 321 P.3d 38 (concluding that under the Montana Constitution and the public trust doctrine, nothing had been taken from the riparian owner because he "never owned a property right that allowed him to exclude the public from using its water resource"); *cf. State v. Wilson*, 2021-NMSC-022, ¶¶ 52-56, 489 P.3d 925 (describing how there is no taking when the owner's title was already barred under existing law from using the land a certain way). Today we merely clarify the scope of that easement by making explicit what was already implicit in *Red River*.

III. CONCLUSION

{42} We conclude that the Regulations are an unconstitutional infringement on the public's right to use public water and that the Commission lacked the legislative authority to promulgate the Regulations. We hold that the public has the right to recreate and fish in public waters and that this right includes the privilege to do such acts as are reasonably necessary to effect the enjoyment of such right.

{43} IT IS SO ORDERED.
MICHAEL E. VIGIL, Justice
WE CONCUR:
C. SHANNON BACON, Chief Justice
DAVID K. THOMSON, Justice
JULIE J. VARGAS, Justice
BRIANA H. ZAMORA, Justice

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-021
No: S-1-SC-37389 (filed September 19, 2022)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
CHRISTINA M. BANGHART-PORTILLO,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Daniel A. Bryant, District Judge

Bennett J. Baur, Chief Public Defender
David Henderson, Appellate Defender
Kimberly M. Chavez Cook, Appellate Defender
Santa Fe, NM

for Defendant-Petitioner

Hector H. Balderas, Attorney General
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Santa Fe, NM

for Plaintiff-Respondent

OPINION

BACON, Chief Justice.

{1} Defendant Christina Banghart-Portillo pleaded guilty to tampering with evidence, contrary to, NMSA 1978, Section 30-22-5 (2003), and conspiracy to commit tampering with evidence, contrary to, NMSA 1978, Section 30-28-2 (1979) (Count 1 and Count 2, respectively), each of which was a fourth-degree felony offense, under a written plea agreement. Because Defendant had a prior felony conviction, each sentence was enhanced at her initial sentencing by one year under New Mexico's habitual offender statute, NMSA 1978, Section 31-18-17(A) (2003). Defendant also admitted her identity in a second prior felony at the time of her sentencing, yet the district court imposed no additional enhancement at that time. The district court imposed consecutive sentences on Defendant for a total of five years of incarceration with three years suspended, leaving her with an initial sentence of two years of incarceration followed by three years of probation. Defendant violated the terms of her probation over halfway through her three-year probationary period, prompting the district court to apply a second habitual offender enhancement, which added a total of three years to the sentence for each count pursuant to Section 31-18-17(B).

{2} The central issue before this Court is whether Defendant had a reasonable expectation of finality for Count 1 such that the district court no longer had jurisdiction when it applied the habitual offender enhancement to that Count. Defendant argues on appeal that the district court's enhancement of the Count 1 sentence resulted in a double jeopardy violation because the court had lost jurisdiction by the time of the enhancement. The Court of Appeals held that the district court retained jurisdiction to apply a habitual offender enhancement to Count 1. *State v. Banghart-Portillo*, A-1-CA-36917, mem. op. ¶ 3 (N.M. Ct. App. Oct. 24, 2018) (nonprecedential). We originally granted, then quashed, Defendant's petition for writ of certiorari. We later granted Defendant's motion for rehearing on two narrow issues:

> (1) Should this Court adopt *State v. Yazzie*, 2018-NMCA-001, 410 P.3d 220? If so, does *Yazzie* answer the question of whether Defendant had an objectively reasonable expectation of finality in her sentence, especially given the type of plea agreement?
> (2) How does the holding of *State v. Mares*, 1994-NMSC-123, 119 N.M. 48, 888 P.2d 930, inform the inquiry whether Defendant had an objectively reasonable expectation of finality in her sentence?

{3} We agree that the district court retained jurisdiction to enhance Defendant's sentence for Count 1, but we reach that conclusion guided by the issues on which we granted rehearing. We further clarify that a defendant must be reasonably informed when a sentence of probation is imposed on multiple counts in the aggregate such that a habitual offender enhancement will apply to all counts throughout the entire probationary period.

I. BACKGROUND

A. Factual Background

{4} According to the charging documents in Defendant's case, Officer Steven Minner pulled over Defendant and Anthony Banghart because their vehicle had a broken taillight. Officer Minner arrested Defendant, and a fellow officer arrested Mr. Banghart because both had outstanding warrants. After the two were booked, another officer observed Mr. Banghart remove an object from his clothing near his abdomen area and pass it to Defendant. Defendant then attempted to swallow the object but was unable to and "coughed it up." Defendant gave the object back to Mr. Banghart, and he put it back in his clothing. The observing officer relayed this information to Officer Minner. The two officers then searched Mr. Banghart and discovered two pieces of plastic that contained heroin.

1. Defendant's plea and sentencing

{5} Defendant pleaded guilty to one count of tampering with evidence, contrary to Section 30-22-5, and one count of conspiracy to commit tampering with evidence, contrary to Section 30-28-2. The plea agreement provided that "[t]he State may bring habitual offender proceedings, as provided by law, based on any convictions not admitted in this plea. The State may also choose to withdraw this plea agreement if it discovers any such convictions." At the plea hearing, the State informed the district court that it had reason to believe Defendant may have prior convictions under a different name and needed time to investigate. The district court then instructed Defendant that if she had

> two prior felony convictions, then [the court] could add four years to each of [her underlying offenses], and if that is the case, none of that time is able to be deferred by [the court] or suspended, you understand? So [Defendant] would have to serve a minimum of four years [per offense] in the state penitentiary.

Defendant indicated that she understood.

{6} Approximately one month later, the State filed a supplemental criminal

information, alleging that Defendant had committed two prior felonies. At the sentencing hearing, defense counsel informed the court that Defendant would admit her identity in both prior felonies. Defense counsel further explained that the State had agreed to seek enhancement for only one prior felony and to hold the other in abeyance. The district court reminded Defendant that she did not need to admit to the two prior felony convictions and that the State had the burden of proving its allegations in the supplemental information. Defendant and the district court then had the following exchange:

> Judge: If you make that admission [to the two prior felony offenses] today, you are making it very easy for the court in the future to give you four additional years and that would be per count, so that could be eight years, because I'm running these consecutive to each other. You understand that it could be an eight-year sentence for you if you violate probation.
> Defendant: Yes Ma'am.

{7} The district court sentenced Defendant to eighteen months in prison for Count 1 and eighteen months in prison for Count 2 and added a one-year habitual offender enhancement to each, for a total of five years of incarceration. The district court suspended three years of Defendant's incarceration relating to Counts 1 and 2 and instead imposed three years of probation to begin after her release from her two-year prison sentence relating to her habitual offender enhancements.[1] Finally, the district court provided that Defendant would serve a mandatory parole term of one year following her incarceration to run concurrent with her term of probation.

2. Defendant's release from prison and probation violations

{8} Defendant began her probationary period after being released from prison. Defendant violated probation multiple times, prompting the State to file a petition to revoke Defendant's probation on three occasions. The district court revoked then reinstated Defendant's probation on the first two occasions. The district court then revoked Defendant's probation following the State's third petition, just over halfway into Defendant's probation term, and enhanced her sentences for Counts 1 and 2 by three years each, pursuant to Section 31-18-17(B).

B. Procedural Background

{9} Defendant filed pleadings opposing the district court's habitual offender enhancements for both counts. Defendant argued, among other things, that the written plea agreement imposed a maximum term of three years of incarceration and that she completed her sentence as to Count 1 after serving over half of her three-year probationary period, such that the district court lost jurisdiction to enhance it. This argument was based on Defendant's assertion that the first eighteen months of her probation corresponded to Count 1, and the second eighteen months of her probation corresponded to Count 2. The district court rejected Defendant's arguments, finding that her three-year probationary period was unitary and, as a result, that she was still on probation for and subject to enhancement on both Count 1 and Count 2 throughout the entire three-year term.

{10} Defendant appealed to our Court of Appeals, which held that the district court retained jurisdiction to enhance Defendant's sentence on both counts. *Banghart-Portillo*, A-1-CA-36917, mem. op. ¶¶ 1, 3. It reasoned that "it did not appear that Defendant's judgment and sentence was structured for time served on probation to correspond with any particular conviction." *Id.* ¶ 3. As such, Defendant "had no reasonable expectation of finality as to [C]ount [1] or any limitation on the enhancement prior to the completion of her entire probationary period." *Id.* (citing *Yazzie*, 2018-NMCA-001, ¶ 14). Defendant then timely petitioned this Court for a writ of certiorari under Rule 12-502, NMRA. We granted, then quashed certiorari. We subsequently granted Defendant's motion for rehearing to determine whether *Yazzie* is controlling in this matter and to consider the impact *Mares* has on our analysis.

II. DISCUSSION

{11} "[W]hether a trial court has jurisdiction in a particular case is a question of law that we review de novo." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. "We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation." *State v. Cummings*, 2018-NMCA-055, ¶ 6, 425 P.3d 745. Additionally, to the extent that this Court is required to interpret a plea agreement, the terms of the plea agreement are also reviewed de novo. *State v. Gomez*, 2011-NMCA-120, ¶ 9, 267 P.3d 831.

{12} "In New Mexico, the jurisdiction of a trial court to enhance a felony sentence under the habitual offender statute expires once a defendant has completed service of that sentence." *State v. Lovato*, 2007-NMCA-049, ¶ 6, 141 N.M. 508, 157 P.3d 73. "This jurisdictional limitation is founded upon principles of double jeopardy: once a sentence has been served, a defendant's punishment for the crime has come to an end." *Id.* (internal quotation marks and citation omitted). "Such double jeopardy concerns are only implicated if the defendant has an objectively reasonable expectation of finality in the sentence." *Yazzie*, 2018-NMCA-001, ¶ 11. "[A d]efendant must establish that the district court did not have jurisdiction to impose the additional enhancement by proving two things: (1) that [the d]efendant had an expectation of finality in [the defendant's] original sentence, and (2) that the expectation was reasonable." *Id.*

{13} We use the two questions on which we granted rehearing to guide our analysis. First, we determine whether *Yazzie* is controlling in this matter. Second, we determine what the holding in *Mares* adds to our analysis.

A. *Yazzie* Does Not Answer Whether Defendant Had an Objectively Reasonable Expectation of Finality for Count 1

{14} To determine whether Defendant had a reasonable expectation of finality in her sentence relating to Count 1, we analyze the written terms of the plea agreement and the circumstances surrounding the plea agreement. "A plea agreement is a unique form of contract whose terms must be interpreted, understood, and approved by the district court." *Yazzie*, 2018-NMCA-001, ¶ 9 (internal quotation marks and citation omitted). When interpreting a plea agreement, appellate courts construe the agreement's terms according to "what [the d]efendant reasonably understood when [the defendant] entered the plea." *Id.* (first alteration in original) (internal quotation marks and citation omitted). "If the language in the written agreement is ambiguous, it is the district court's task to resolve that ambiguity with the parties." *Id.* In this case, the Court of Appeals relied on *Yazzie* to hold that Defendant had no reasonable expectation of finality in her sentence. *Banghart-Portillo*, A-1-CA-36917, mem. op. ¶ 3. The State similarly argues that *Yazzie* is analogous to this case and that we should affirm the Court of Appeals' analysis. For the reasons that follow, we disagree that *Yazzie* is dispositive in this case.

{15} In *Yazzie*, the terms of the written plea agreement provided that the defendant "would receive a three-year sentence on Count 1 and a one-and-one-half-year sentence on Count 2." *Yazzie*, 2018-NMCA-001, ¶ 3. Under the terms of the plea agreement, the State filed a supplemental information charging the defendant as the same person convicted of three other felony offenses. *Id.* The defendant admitted his identity in the

[1] Section 31-18-17(A) provides that a sentence under the habitual offender statute "shall not be suspended or deferred" absent circumstances not present in the instant matter.

three additional charges and received a habitual offender enhancement of eight additional years on Count 2. *Id.* Similar to this case, three years of the defendant's sentence in *Yazzie* were suspended, and the district court ordered his placement on supervised probation for three years following his incarceration. *Id.* ¶¶ 13-14. The defendant also agreed that if he "later violate[d] that probation, he may be incarcerated for the balance of the sentence and have an eight[-]year habitual enhancement apply to *Count 1*." *Id.* ¶ 14 (first alteration in original) (emphasis added) (internal quotation marks omitted).

{16} The district court in *Yazzie* later concluded that the defendant had violated his probation, and the court imposed a habitual offender enhancement on Count 1. *Id.* ¶ 7. The defendant argued on appeal that he had completed his sentence for Count 1 at the time the district court enhanced his sentence. *Id.* ¶ 8. The Court of Appeals held that, under the express terms of the plea agreement, "[the d]efendant would have expected to serve a three-year period of probation and be subject to additional enhancement of the sentence imposed for Count 1 during the entire period of his probation." *Id.* ¶ 14. Accordingly,

> [b]ecause neither the plea agreement nor the judgment and sentence structured [the d]efendant's sentence such that the time served on probation corresponded with a particular conviction, [the d]efendant had no reasonable expectation of finality as to Count 1 or any limitation on the enhancement of Count 1 prior to the completion of his entire three-year period of probation.

Id.

{17} The Court of Appeals here relied on *Yazzie* in large part for its conclusion that Defendant's "probation term was not assigned to run in accordance with either of the counts, but rather in total time." *Banghart-Portillo*, A-1-CA-36917, mem. op. ¶ 3. Thus, Defendant "was . . . still subject to the district court's jurisdiction for enhancement of both counts." *Id.* Defendant argues that the factual distinctions in *Yazzie* render it inapplicable to this case. While we acknowledge that the facts of *Yazzie* are distinct from this case, we agree with *Yazzie*'s holding that a unitary probationary term encompassing more than one count is permissible, so long as the defendant is reasonably informed of what to expect under the terms of the plea agreement and sentence. *Yazzie*, 2018-NMCA-001, ¶ 14. However, for the reasons that follow, we look beyond *Yazzie* to decide whether the district court in this case retained jurisdiction to enhance Defendant's sentence for Count 1.

{18} First, the express terms of the plea agreement in *Yazzie* were clear that the defendant would receive a habitual offender enhancement of up to eight years on Count 1 if he violated probation. *Yazzie*, 2018-NMCA-001, ¶ 4. Here, no such language existed in Defendant's written plea agreement. In fact, Defendant's written plea agreement only specifies that she faced zero to three years of incarceration. Second, the plea agreement in *Yazzie* further specified that an enhancement of eight years already attached to Count 2 at the time of the defendant's sentencing. *Id.* ¶ 3. As such, when the defendant in *Yazzie* violated the terms of his probation, the only count that the district court had not yet enhanced was Count 1. In this case, Defendant's written plea agreement was silent about the possibility of enhancement of either count if she violated probation. Based on these distinctions, it follows that the defendant in *Yazzie* could have reasonably expected to receive an eight-year enhancement on Count 1 according to the express terms of his plea agreement and the structure of his sentence. Here, in contrast, the express terms of the plea agreement and structure of the sentence did not create such a clear and reasonable expectation for Defendant. Thus, Defendant's written plea agreement was ambiguous in the sense that it did not specify the consequences she faced if she violated probation following her admission of the two prior felonies.

{19} Accordingly, we must look beyond Defendant's written plea agreement and determine whether the district court resolved the ambiguities about the consequences of a probation violation. *See Yazzie*, 2018-NMCA-001, ¶ 9.

B. Any Ambiguities in the Plea Agreement Were Cured Pursuant to Mares

{20} Following our determination that Defendant's written plea agreement was ambiguous, we now must analyze whether the district court resolved the ambiguity and thus reasonably informed Defendant of what she could expect if she violated probation. *Id.* This Court held in *Mares* that "[i]f the [district] court resolves alleged ambiguities [in the plea agreement] and no further objection is made, the agreement is no longer ambiguous on those points addressed by the court." 1994-NMSC-123, ¶ 12. In *Mares*, the defendant "entered into a plea agreement under which he . . . plead[ed] nolo contendere to one count of trafficking cocaine." *Id.* ¶ 2. The plea agreement provided that the defendant would be sentenced to nine years of imprisonment. *Id.* ¶ 3. The district court suspended all but seventy days of the defendant's sentence and imposed forty-eight months of probation. *Id.* During the sentencing hearing, defense counsel inquired about the period of incarceration the defendant faced if he violated probation. *Id.* ¶ 4. The district court responded that the defendant faced a potential of nine years of incarceration if he violated probation. *Id.* Consequently, this Court held that "the [district] court resolved any ambiguity regarding the period of incarceration facing [the defendant] in the event he violated the conditions of his probation." *Id.* ¶ 13.

{21} Mares, unaddressed by the dissent, informs the outcome of this case. The district court here resolved any ambiguities present in the plea agreement by informing Defendant of the potential consequences if she violated probation. The dissent maintains that "defendants have the right to be clearly informed by the words of a plea agreement and by the district court regarding the consequences of these types of pleas, particularly when they stipulate to prior felonies." *Dissent*, ¶ 37. However, *Mares* instructs that when a plea agreement is ambiguous, the district court may clarify the terms of the agreement and cure the ambiguities. *Mares*, 1994-NMSC-123, ¶ 12. That is what occurred in this case. The district court specifically informed Defendant that if she admitted to both prior felonies, a probation violation would result in a four-year habitual offender enhancement on each of her counts, totaling eight additional years of incarceration. This clarification occurred on more than one occasion. First, the district court informed Defendant of the consequences of having two prior felonies at her plea hearing, before the State filed the supplemental information. Second, the district court ensured that Defendant understood the consequences of admitting to the two prior felonies at her sentencing hearing after the State filed the supplemental information. Defendant had the opportunity to object or withdraw the plea at this time, but she did not.

{22} Thus, like in *Mares*, the district court here cured any ambiguities present in the plea agreement about the potential consequences of a probation violation. Based on that clarification, Defendant should have reasonably expected that she faced an additional eight years of incarceration if she violated probation and that each Count was subject to a habitual offender enhancement throughout her entire probationary period. As a result, Defendant has failed to prove that she had a reasonable expectation of finality as to Count 1. *See Yazzie*, 2018-NMCA-001, ¶¶ 10-11 (holding that a defendant must prove that his or her expectation of finality was reasonable in order to establish that the district court did not have jurisdiction to impose an additional enhancement).

C. Defendant's Remaining Arguments Do Not Alter Our Analysis

{23} Defendant and the dissent rely on *Lovato*, 2007-NMCA-049, to argue that because Defendant had served over half of her probation, the district court lost jurisdiction to enhance Count 1. *Lovato* is inapplicable here. In *Lovato*, similar to this case, the defendant was convicted of multiple felony counts. *Id.* ¶ 2. The defendant argued that because he already served his incarceration period and parole for the first count, the district court lost jurisdiction to enhance that sentence. *Id.* ¶ 4. However, crucially, the defendant in *Lovato* had not been adjudicated as a habitual offender prior to the completion of his sentence for the first count. *Id.* ¶ 3. Accordingly, the Court of Appeals held that the defendant could not have reasonably expected that count to be enhanced. *Id.* ¶ 10; *see also State v. Gaddy*, 1990-NMCA-055, ¶ 8, 110 N.M. 120, 792 P.2d 1163 ("An unenhanced sentence remains a valid sentence until it is *determined* that [a] defendant is a habitual offender and that the underlying sentence is subject to enhancement."). Here, when Defendant entered her plea, she admitted her identity for two prior felonies and acknowledged that her sentence could be enhanced up to eight additional years if she violated probation. *Lovato* therefore is inapposite.

{24} Defendant further contends that structuring her probation as one unitary block for both Counts is impermissible under *Brock v. Sullivan*, 1987-NMSC-013, 105 N.M. 412, 733 P.2d 860. In *Brock*, we examined an instance where the defendant was convicted of four fourth-degree felony offenses and was sentenced to eighteen months of incarceration for each offense. *Id.* ¶ 1. Each of the defendant's sentences also included a term of parole. *Id*. ¶ 3. An unusual issue arose in *Brock* when the Parole Board "separated each parole period from the underlying sentence and period of imprisonment imposed thereon and, in effect, tolled commencement of the parole periods until the sentence on the last consecutive offense was served." *Id.* ¶ 4. We held that this instance of "stacking of multiple parole periods" is impermissible under New Mexico law. *Id.* ¶ 6 (footnote, internal quotation marks, and citation omitted). Accordingly, we held that the defendant must serve each of his parole sentences immediately after completing the period of incarceration for the corresponding sentence and concurrently with any consecutive sentence of incarceration. *Id.* ¶ 13.

{25} Defendant's arguments under *Brock* must fail. Nothing in *Brock* suggests that its holding or principles apply in parallel to both parole and probation. In fact, our analysis in *Brock* centered explicitly around statutes relating to parole only. *See generally Brock*, 1987-NMSC-013. Defendant makes no argument as to why our holding prohibiting fragmenting of parole periods similarly applies to probation. Moreover, a unitary block of probation would not result in the type of "stacking" prohibited by *Brock*. *See id.* ¶¶ 6-7. *Brock* recognized an exception where parole may be served in prison to prevent fragmenting. *Id.* ¶ 13. Probation, by its nature, cannot be served in prison.[2] As a result, a term of probation is necessarily separate from the corresponding sentence of incarceration when, as in this case, a defendant is sentenced to periods of incarceration and probation on multiple counts. Therefore, *Brock* does not change our rejection of Defendant's challenge to probation imposed as a unitary block in this case.

D. Plea Agreements Should Specify When a Probationary Period Is to Be Served in the Aggregate

{26} While holding that the district court cured any apparent ambiguities in Defendant's plea agreement pursuant to *Mares*, we also emphasize the importance of clarity in plea agreements. We note that the result in this case may very well have been different if the district court had not made it clear that Defendant faced up to eight additional years of incarceration if she violated probation. We caution the sentencing court and counsel for the parties to ensure that it is clear to a defendant accepting a plea whether probation is to be served in a unitary block. This will provide the defendant notice that a habitual offender enhancement may apply to all counts for the duration of the probationary period if a violation occurs. We further clarify that there can be no presumption that a probationary term will be served in the aggregate absent explicit language in the plea agreement or clarification by the district court. Failing to make this specification would create an ambiguity in the plea and undermine a defendant's reasonable expectation of finality.

III. CONCLUSION

{27} We conclude that Defendant did not have a reasonable expectation of finality in Count 1 at the time that the district court enhanced Defendant's sentence because the district court had previously informed her of the consequences she faced if she violated probation. Therefore, we affirm the Court of Appeals and hold that the district court properly retained jurisdiction to apply a habitual offender enhancement to Count 1.

{28} IT IS SO ORDERED.

C. SHANNON BACON, Chief Justice

WE CONCUR:

JULIE J. VARGAS, Justice

CINDY LEOS, Judge, sitting by designation

DAVID K. THOMSON, Justice, dissenting

BRIANA H. ZAMORA, Justice, concurring in dissent

THOMSON, Justice (dissenting).

{29} The majority, *maj. op.* ¶ 12, rightly acknowledges that "[i]n New Mexico, the jurisdiction of a trial court to enhance a felony sentence under the habitual offender statute expires once a defendant has completed service of that sentence." *Lovato*, 2007-NMCA-049, ¶ 6 (citing *Gaddy*, 1990-NMCA-055, ¶ 8) ("[T]he trial court was deprived of jurisdiction to impose a habitual offender enhancement after the defendant had completely served the underlying sentence."); *March v. State*, 1989-NMSC-065, ¶¶ 5, 7, 13, 109 N.M. 110, 782 P.2d 82 (holding that the trial court had no jurisdiction to enhance the defendant's sentence because the earning of meritorious deductions had brought the defendant's service of his sentence to an end). After quashing its writ of certiorari in this case, this Court granted Defendant's motion to reconsider the appeal, accepting Defendant's request to "rehear its quash order as to Count 1 only." I appreciate the Court's willingness to rehear its order to quash, but I disagree with the majority's conclusions. I am not convinced that it is lawful to extend a district court's jurisdiction by applying the aggregate three-year term of probation to each count in this case when the sentence provides that each count shall run consecutively and that each count be enhanced separately. Put simply, whereas here there is no part of the sentence for count one to be served, there is no part of a defendant's sentence to be enhanced. "Once a defendant has completely served his or her underlying sentence, the district court loses jurisdiction to enhance that sentence, even if the state filed the supplemental information before the defendant finished serving the underlying sentence." *State v. Godkin*, 2015-NMCA-114, ¶ 20, 362 P.3d 161, 167 (text only) (quoting *State v. Roybal*, 1995-NMCA-097, ¶ 4, 120 N.M. 507, 903 P.2d 249).[3] Here it is indisputable that Defendant completely served her underly-

[2] NMSA 1978, Section 31-21-5(B) (1978), the definitions section of the Probation and Parole Act, defines probation as "the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions." (Emphasis added.)

[3] The "text only" parenthetical used herein indicates the omission of any of the following-internal quotation marks, ellipses, and brackets that are present in the text of the quoted source, leaving the quoted text itself otherwise unchanged.

ing sentence with regard to Count 1 before the district court's exercise of jurisdiction to enhance that sentence.

{30} I appreciate the considered guidance the majority provides regarding how a defendant could be better informed about the structure, term, and finality of a sentence when faced with the facts of this case. *See maj. op.* ¶ 26. I also agree with the majority's conclusion that reliance on *Yazzie*, 2018-NMCA-001, ¶ 9, to quash certiorari in this case was misguided. *Maj op.* ¶ 14. Respectfully, however, I believe that the majority's opinion does little to resolve the issue in this case, which is the propriety of an enhancement of the underlying sentence on a count where that sentence is completed. Despite the needed guidance it provides, the majority opinion's ultimate holding essentially reaffirms the original decision to quash certiorari. Because I conclude, guided by *Lovato*, that the trial court has no authority to enhance Defendant's sentence for Count 1 as that sentence has been completely served, I respectfully dissent.[4]

{31} Defendant like all defendants "should be able to negotiate the terms of a plea agreement to the full extent allowed by law[, including] . . . a maximum potential incarceration provision in exchange for a guilty plea . . . that governs both sentencing and post-sentencing procedures." *Mares*, 1994-NMSC-123, ¶ 11. The instant felony charges Defendant was resolving at the plea hearing were tampering with evidence and conspiracy to tamper with evidence. At Defendant's sentencing hearing, the State presented two prior felony convictions, one for forgery and one for worthless checks. The State agreed to pursue only one of the prior felonies and hold the others in abeyance. This resulted in a one-year enhancement on the instant felony charge.

{32} Concerning the State's ability to seek sentencing enhancements based on prior convictions, the written plea agreement in this case simply provided, "The State may bring habitual offender proceedings, as provided by law, based on any convictions not admitted in this plea." At the plea hearing, the State advised the district court that it needed an opportunity to investigate possible prior convictions to determine whether it would bring habitual offender proceedings. The district court then informed Defendant that, under the agreement, if she had one prior felony conviction her sentence could be enhanced by one year for Count 1 and one year for Count 2, and Defendant indicated that she understood.

{33} Defendant's written plea agreement acknowledged that "[s]entencing remains in the discretion of the court" and that "Defendant may be ordered to serve a term of incarceration of between zero (0) and three (3) years" based on running the "maximum basic sentence of eighteen (18) months" for tampering with evidence (Count 1) and the "maximum basic sentence of eighteen (18) month for conspiracy" (Count 2) *consecutively*. Defendant received the maximum sentence for the two instant felonies. The Judgment, Sentence, and Order Partially Suspending Sentence imposed an eighteen (18) month sentence on Count 1 and an eighteen (18) month sentence on Count 2, noting that the sentence for Count 2 was to run *consecutively*, after Count 1. *Consecutive sentences* is defined as "two or more sentences of jail time to be served in sequence." Black's Law Dictionary (11th ed. 2019) at 1636. The sentence for each count was enhanced by one year, based on a finding that Defendant was a habitual offender, and on her admission to one previous offense, with an oral acknowledgement that a second admission was held in abeyance. Running the sentences consecutively—and attaching a one-year enhancement to the basic sentence of each—the district court reached a five-year total sentence. The district court also suspended three years of the five-year sentence, leaving two years as the actual term of imprisonment. Thus the actual sequence of the sentence is as follows: Defendant is sentenced for two-and-one-half years on Count 1 (18 months for the crime and one year for being a habitual offender), Defendant serves that sentence for Count 1, and then Defendant starts to serve the same amount of time for Count 2. This applies the credit for time served to Count 1 first as that is its sequence in Defendant's sentence. As discussed below, regardless of how the majority wants to interpret the probationary terms or whether the plea was amended after the fact, under a consecutive sentence the sentence for Count 1 must be served before the sentence for Count 2 can begin. In this case the sentence for Count 1 was served, and when that happened the trial court lost jurisdiction to enhance the sentence for Count 1.

{34} This conclusion is not only what a plain reading of "consecutive" requires but is also what the statute governing the use of prior felonies requires. Each "prior felony conviction" must apply to the "basic sentence" of the "instant felony." Section 31-18-17(A) (providing that the basic sentence for the instant felony "shall be increased by one year" for "one prior felony conviction"); § 31-18-17(B) (providing that the basic sentence for the instant felony "shall be increased by four years" for "two prior felony convictions"); § 31-18-17(C) (providing that the basic sentence for the instant felony "shall be increased by eight years" for "three or more prior felony convictions"). State law also requires that Defendant receive credit on her suspended sentence for time served on probation., NMSA 1978, § 31-21-15(A)-(B) (2016) (stating that if imposition of sentence was deferred and a probationer has violated any condition of release, "the court may impose any sentence that might originally have been imposed, but credit shall be given for time served on probation").

{35} In February 2016 Defendant was released from a two-year term of incarceration and began probation. Following Defendant's arrest in October 2017 for a probation violation, the district court revoked probation and enhanced the sentence for Count 1 by three years. Between the time when her probationary period began and when it was revoked Defendant had completed 612 days of probation. Combined with presentence credit of 164 days—for a total of 2.1 years—and with one year of the period of incarceration applicable to Count 1, Defendant's total sentence served was well over the two-and-one-half years she was obligated to serve on Count 1. Thus, based on its own explanation, the district court could not effectively sentence Defendant to serve any period of incarceration on Count 1 as of when she had successfully served 1.5 years on probation.

{36} "Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime.", NMSA 1978, § 31-20-8 (1977). If the district court could not revoke Defendant's probation and incarcerate Defendant for any portion of the suspended sentence on Count 1, the district court lacked jurisdiction to enhance Defendant's sentence on Count 1. *See Lovato*, 2007-NMCA-049, ¶ 6 ("In New Mexico, the jurisdiction of a trial court to enhance a felony sentence under the habitual offender statute expires once a defendant has completed service of that sentence."). The district court's minimal explanation to Defendant at a subsequent sentencing hearing—that admitting a second prior at that time would make it "very easy for a court in the future to give

[4] The majority focuses most of its analysis on ambiguity created in the plea agreement and maintains that, because the district court resolved those ambiguities post plea, Defendant's argument fails. Because Defendant asks us to review only the enhancement of the Count 1 sentence, and because I would decide that the district court lacks jurisdiction to enhance Count 1, I do not address the plea-agreement-ambiguity portion of the majority opinion. See maj. op. ¶ 20.

[Defendant] four additional years, and that would be per count and could be for eight years"—cannot persuade this Court to determine that Defendant agreed to amend her initial plea agreement by an illegal extension of the sentence in Count 1 beyond two and one half years.

{37} Finally, the holding of the majority along with, in my view, the misguided holding of *Yazzie* should serve a note of caution for defendants who agree to consolidate charges into one plea agreement, especially when it is likely they will be sentenced consecutively. In my view, defendants have the right to be clearly informed by the words of a plea agreement and by the district court regarding the consequences of these types of pleas, particularly when they stipulate to prior felonies.

{38} Therefore, I would reverse the Court of Appeals in part and hold that allowing the district court to enhance Defendant's sentence on Count 1 violates concepts of double jeopardy. At the time Defendant entered into the plea agreement, she had an *objectively reasonable expectation of finality* in her sentence as to Count 1, and she had served in excess of her basic sentence and enhancement before her arrest for probation violation. The district court lacked jurisdiction to impose further periods of incarceration on Count 1 at that point. *See March*, 1989-NMSC-065, ¶ 5 ("A defendant's objectively reasonable expectation of finality in sentencing for double jeopardy purposes turns upon, NMSA 1978, Section 31-18-19 ([1977]), which declares it is the duty of the district attorney to bring the habitual offender charge 'at any time, either after sentence or conviction,' [but] the statute does not say 'after *serving* of sentence.'"); *see also* § 31-20-8 (relieving a defendant "of any obligations imposed on him by the order of the court" when the defendant "has satisfied his criminal liability for the crime" and "the period of suspension expires without revocation of the order" of suspension).

DAVID K. THOMSON, Justice

I CONCUR:

BRIANA H. ZAMORA, Justice

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-044
No: A-1-CA-38429 (filed May 2, 2022)

ADAM TRUBOW and PATRICK MCBRIDE,
Appellants-Petitioners,
v.
NEW MEXICO REAL ESTATE COMMISSION,
Appellee-Respondent.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Valerie A. Huling, District Judge

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for Respondent

OPINION

BACA, Judge.

{1} A licensing board, subject to the Uniform Licensing Act (ULA), cannot take disciplinary action against a party later than two years after the improper conduct is discovered by the board. *See* NMSA 1978, § 61-1-3.1(A) (2003). On appeal, Adam Trubow and Patrick McBride (Petitioners) argue (1) the statute of limitations under the ULA barred the New Mexico Real Estate Commission (NMREC) from bringing disciplinary action against them, and (2) substantial evidence did not support NMREC's disciplinary action. Agreeing with Petitioners, we conclude that the disciplinary action brought by NMREC was barred by the statute of limitations. Consequently, we do not address Petitioner's substantial evidence claim.

BACKGROUND

{2} On December 6, 2017, NMREC revoked Petitioners' real estate broker licenses and issued a fine after determining that Petitioners made false statements regarding their business relationship with Ms. Lisa Donham and acted in bad faith regarding negotiations for the short sale of her home. It is undisputed that the disciplinary action was based on allegations made in a letter from Ms. Donham dated April 6, 2011 (2011 Letter).[1]

{3} On January 15, 2014, Ms. Donham submitted a complaint against Petitioners, along with the 2011 Letter, to the Consumer Protection Division of the New Mexico Attorney General's Office (NMAG). On July 2, 2014, NMREC received an email setting forth Ms. Donham's complaints against Petitioners from the NMAG. Eight days later, on July 10, 2014, NMREC opened the email from the NMAG and opened a case for investigation.

{4} On July 8, 2016, two years and six days after it received the email from the NMAG alerting it to Ms. Donham's complaints, NMREC issued a notice of contemplated action (NCA) indicating formal action against Petitioners for the denial, suspension, restriction, or revocation of Petitioners' real estate licenses. Petitioners argue that the statute of limitations, Section 61-1-3.1(A), barred NMREC from bringing disciplinary action against them.

DISCUSSION

{5} Before we discuss the merits of this appeal, we briefly address NMREC's challenge that Petitioners failed to preserve their time-barred argument on appeal. NMREC argues that Petitioners neglected to raise the issue of whether NMREC, with reasonable diligence, should have discovered the claim against them before July 10, 2014. We disagree.

{6} "To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation marks and citation omitted). "The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

{7} Here, the record reveals that Petitioners filed a motion seeking dismissal with NMREC and argued that the action was time-barred due to the statute of limitations. The motion laid out its objections to NMREC and created an adequate record for purposes of appeal. NMREC addressed Petitioners' argument that the NCA was issued past the statute of limitations, denied Petitioners' motion to dismiss, and found no evidence to confirm whether NMREC opened the email prior to July 10, 2014, the stamped date on which the email was opened. Additionally, Petitioners renewed the statute of limitations argument to the district court in a statement of appellate issues. The district court also rejected Petitioners' argument and agreed with NMREC that, despite receiving the email on July 2, 2014, the contents therein were not discovered until July 10, 2014, when the email was opened.

{8} The record thus plainly establishes that Petitioners alerted both NMREC and the district court to its argument against the timeliness of NMREC's NCA in the form of written pleadings, allowing both

[1] In addition to the time-barred arguments, Petitioners also argue that the 2011 Letter was unverified. We do not address the merits of these arguments because we dispose of this claim as being time-barred.

adjudicative bodies to make an informed decision as to the issue raised. Considering the preservation requirements and their purposes, we conclude Petitioners properly preserved their statute of limitations argument and turn now to the issues raised on appeal.

I. The Discovery Rule Applies to the ULA

{9} The ULA provides professional licensing boards with a means for "protecting the public by enforcing professional standards with respect to the conduct of its licensees." *N.M. Bd. of Psych. Exam'rs v. Land*, 2003-NMCA-034, ¶ 26, 133 N.M. 362, 62 P.3d 1244. In addition, the ULA "reflect[s] a legislative decision regarding the balance to be struck between the public's need to be protected and the licensee's individual property right to earn a livelihood under a state-conferred license." *Varoz v. N.M. Bd. of Podiatry*, 1986-NMSC-051, ¶ 12, 104 N.M. 454, 722 P.2d 1176. Within the ULA, Section 61-1-3.1(A) states:

> An action that would have any of the effects specified in Subsections D through N of [NMSA 1978,] Section 61-1-3 [(1993, amended 2020)] or an action related to unlicensed activity shall not be initiated by a board later than two years after the *discovery by the board* of the conduct that would be the basis for the action, except as provided in Subsection C[2] of this section.

(Emphasis added.) Here, the parties agree that under Section 61-1-3.1(A), the applicable statute of limitations is two years. Therefore, because NMREC issued the NCA on July 8, 2016, the issue before this Court is whether NMREC "discovered"—within the meaning of the ULA—the conduct on which the discipline was based before or after July 8, 2014. The answer depends on the meaning of the phrase "discovery by the board" in Section 61-1-3.1(A). Consequently, we must interpret Section 61-1-3.1(A).

{10} Generally, there are two basic standards that trigger the beginning of the statute of limitations period: the discovery rule and the occurrence rule. *See Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 47, 121 N.M. 821, 918 P.2d 1321 (describing the two standards in the context of medical malpractice claims, "[o]ne is sometimes called the 'discovery rule,' . . . [and t]he other standard is sometimes called the 'occurrence rule'"). While the discovery rule focuses on the date the injury was discovered, or, importantly, reasonably should have been discovered, the occurrence rule fixes the accrual date on the occurrence of a given act. *Id.* Accordingly, in order to resolve this appeal, we first determine which rule governs the application of Section 61-1-3.1(A) to these circumstances.

{11} "The meaning of language used in a statute is a question of law that we review de novo." *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. "[W]hen presented with a question of statutory construction, we begin our analysis by examining the language utilized by the Legislature, as the text of the statute is the primary indicator of legislative intent." *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361. "In furtherance of this goal, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Leger v. Gerety*, 2022-NMSC-007, ¶ 26, 503 P.3d 349 (internal quotation marks and citation omitted). The plain meaning rule requires a court to give effect to the statute's language and refrain from further interpretation when the language is clear and unambiguous. *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 ("The plain meaning rule of statutory construction states that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)). "However, if 'adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will reject the plain meaning in favor of an interpretation driven by the statute's obvious spirit or reason.'" *Cordova v. Cline*, 2021-NMCA-022, ¶ 7, 489 P.3d 957 (quoting *State v. Trujillo*, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125). "We also consider the statutory subsection in reference to the statute as a whole and read the several sections together so that all parts are given effect." *Bishop*, 2009-NMSC-036, ¶ 11. In addition to the statutory language, we examine "the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934; *see State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 ("In other words, a statutory subsection may not be considered in a vacuum." (internal quotation marks and citation omitted)). "The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69. We now apply these principles of statutory construction to the issue before us.

{12} As stated above, in this case, our inquiry begins with ascertaining the meaning of the phrase "discovery by the board" contained within Section 61-1-3.1(A). We hold it to mean that the statute of limitations begins when a licensing board—subject to the ULA—discovered or with reasonable diligence should have discovered that a disciplinary action exists. *See Williams v. Stewart*, 2005-NMCA-061, ¶ 12, 137 N.M. 420, 112 P.3d 281.

{13} In its original form, Section 61-1-3.1(A) (1981)[3] was an occurrence statute without a provision "tying the running of the limitations period to discovery of the underlying conduct." *N.M. Real Est. Comm'n v. Barger*, 2012-NMCA-081, ¶ 11, 284 P.3d 1112. That changed, however, when "[i]n 1993, the Legislature amended the statute to bar board action initiated later than two years *after the discovery* of the conduct." *Id.* ¶ 11 (internal quotation marks and citation omitted). While the most current version of Section 61-1-3.1(A)—applicable in this case—was last amended in 2003 to bar any action "initiated by a board later than two years after the discovery *by the board* of the conduct," § 61-1-3.1(A) (emphasis added), our focus remains on the 1993 addition of the term "discovery" as relevant to the Legislature's intention to extend the discovery rule to the ULA. *See Barger*, 2012-NMCA-081, ¶ 22 ("The 2003 amendment clarifies that the Legislature intended the triggering event in Section 61-1-3.1(A) to be a licensing board's discovery of the conduct underlying an NCA.").[4] Unquestionably, *Barger* clarified that the 1993 amendment added a discovery element which made Section 61-1-3.1(A) "[a] discovery statute of limitations." *Barger*, 2012-NMCA-081, ¶ 14.

{14} In *Barger* we recognized that NMREC brings actions against licensees similar to the way plaintiffs bring actions against other parties. *See id.* ¶ 10 ("[I]t is a board's discovery that triggers the limitations period because, generally speaking, statutes of limitations encourage plaintiffs to bring their actions while the evidence is still available and fresh." (alteration, internal quotation marks, and citation omitted)). Given the discovery

[2] Subsection (C) applies to the New Mexico state board of psychologist examiners and is inapplicable here. See § 61-1-3.1(C).

[3] Under the 1981 version, Section 61-1-3.1 barred any action initiated by a licensing board "later than two years after the conduct that would be the basis for the action." Section 61-1-3.1(A) (1981) (internal quotation marks omitted).

[4] We note that neither party argues that Section 61-1-3.1 remained an occurrence statute after the amendment of 1993.

rule's frequent application in other areas of law in which prescriptive periods exist, the Legislature's addition of a discovery element regarding a statute of limitations supports the proposition that the standard discovery rule applies.

{15} Just prior to the 1993 amendment of Section 61-1-3.1(A), our New Mexico Supreme Court held in *Roberts v. Southwest Community Health Services*, 1992-NMSC-042, ¶¶ 25-27, 114 N.M. 248, 837 P.2d 442, that in medical malpractice cases, the discovery rule controls, and "the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause." Central to our Supreme Court's holding was its appreciation of the development and expansion of the application of the discovery rule with respect to statutes of limitations. As to this issue, the Court stated that "[t]he great weight of authority, both in decisions and commentary, today recognizes some form of the 'discovery rule,' i.e., that the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists." *Id.* ¶ **24. Thus, t**he Legislature's use of the term "discovery" in Section 61-1-3.1(A), coupled with the meaning of that term at the time, supports our conclusion that the discovery rule applies to Section 61-1-3.1(A). "We presume that the Legislature [i]s aware of existing law . . . at the time it enact[s new law]." *PNM Gas Servs. v. N.M. Pub. Util. Comm'n*, 2000-NMSC-012, ¶ 73, 129 N.M. 1, 1 P.3d 383.

{16} Therefore, consistent with the discovery rule, the statute of limitations under Section 61-1-3.1(A) begins when a licensing board discovers or with reasonable diligence should have discovered the conduct upon which the disciplinary action is based. *See Williams*, 2005-NMCA-061, ¶ 12. We now turn to the application of this rule to the facts of the case before us.

II. The NMREC's Claim Against Petitioners Was Untimely

{17} Where there are undisputed facts that show that the plaintiff knew or should have become aware of the facts underlying his or her claim by a specific date, the reviewing court may decide the issue as a matter of law. *See, e.g.*, *Brunacini v. Kavanagh*, 1993-NMCA-157, ¶ 29, 117 N.M. 122, 869 P.2d 821 ("Although the time when a party is deemed to have discovered, or reasonably should be held to have discovered the malpractice of an attorney, is generally a question of fact[;] nevertheless, where the undisputed facts show that [the p]laintiffs knew, or should have been aware of the negligent conduct on or before a specific date, the issue may be decided as a matter of law.").

{18} Having held that the discovery rule applies in this case, the limitation period began when NMREC "discover[ed], or should have discovered in the exercise of reasonable diligence, the facts that underlie [the] claim." *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 26, 140 N.M. 111, 140 P.3d 532. Thus, Petitioners contend that NMREC "should have discovered" Ms. Donham's complaints against Petitioners on July 2, 2014, when the email was received. NMREC does not dispute that the email from the NMAG was received by it on July 2, 2014. However, NMREC contends that discovery occurred, in this instance, when the email was opened and processed. In support of their argument that the limitation period begins upon opening and processing of the email, NMREC, citing *Barger*, 2012-NMCA-081, **¶ 10, states discovery is "knowledge of the conduct that triggers the statute of limitations." Thus,** NMREC contends that in this case, because the opening and processing of the email gave it knowledge of the claim, the limitations period began at that moment. We disagree. If we were to adopt NMREC's argument, NMREC would then define the parameters by which something is discovered for purposes of triggering the statute of limitations period. This would be contrary to the purpose of a statute of limitations. "[A] statute of limitations seeks to further basic fairness to the defendant by encouraging promptness in instituting a claim, suppressing stale or fraudulent claims, and avoiding inconvenience." *Id.* ¶ 16 (omission, internal quotation marks, and citation omitted). The statute "should reflect a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue his claim." *Id.* (internal quotation marks and citation omitted). If NMREC can control the triggering event for the statute of limitations by deciding when to open an email and initially review a complaint, then the board's opportunity to pursue the claim, and the licensee's ability to defend the claim, are substantially impaired. Thus, NMREC's proposition is untenable.

{19} Instead, we hold that in cases subject to the ULA, when a party facing disciplinary action proves that an email was delivered on a specific date, *see Little v. Baigas*, 2017-NMCA-027, ¶ 32, 390 P.3d 201 (recognizing that "[t]he statute of limitations is an affirmative defense"), we presume that the board became aware or should have become aware of its contents on the date of delivery. *See Ball v. Kotter*, 723 F.3d 813, 830 (7th Cir. 2013) (presuming that letters and emails were properly received and read). However, the board may rebut that presumption by showing that the delay in opening the email was reasonable under the circumstances. Applying our holding to these facts, we conclude that NMREC, in the exercise of reasonable diligence and without any evidence to the contrary, should have discovered the complaint on July 2, 2014, when the email was sent. Thus, NMREC was time-barred from bringing the action against Petitioners. We explain.

{20} The transcripts of NMREC's hearing, exhibits submitted to NMREC and the district court, together with general stipulations by the parties, establish four undisputed facts: (1) on July 2, 2014, an NMREC investigator received an email setting forth Ms. Donham's complaints against Petitioners from the NMAG; (2) on July 10, 2014, the NMREC investigator opened the email and read its contents; (3) NMREC did not provide any reason or justification for not opening the email until July 10, 2014; and (4) on July 8, 2016, NMREC issued an NCA against Petitioners.

{21} Importantly, NMREC gave no reasons to justify why the email was not opened until July 10, 2014. In fact, NMREC conceded that it did not offer any reason to justify this delay. The only testimony offered by NMREC on this point is that of the investigator who received the email and subsequently opened it. She stated, "I opened it up, printed it, reviewed it, made my handwritten notations, and then I carried it to the front desk and stamped it in." While this testimony establishes what was done with the information in the email once it was opened, it does not provide any explanation or justification for the delay in opening the email. Consequently, without any evidence showing that the delay was reasonable under the circumstances, we presume that NMREC should have known of the email's contents once the email was received on July 2, 2014.

{22} NMREC's remaining arguments are unpersuasive. First, NMREC blames the NMAG for the delay in issuing the NCA. NMREC argues that because the NMAG prepared the NCA and sent it to NMREC for issuance, it has no control over when the NCA is issued. It states that this is because it does not control how long the NMAG will take to prepare and send an NCA to it for issuance. We disagree. NMREC has two years to bring a disciplinary action under the ULA. It is undoubtedly aware of this limitation. If the NMAG is taking an extraordinarily long time to prepare the NCA, NMREC can take whatever action it deems necessary to have the NCA issued within the time limits of the ULA.

{23} Second, NMREC argues that it exercised ordinary diligence to comply with Section 61-1-3.1(A) when it established internal policies and procedures for submitting complaints to the NMREC. However, the only evidence in the record was that the

NMREC investigator received complaints directly from the NMAG on occasion, and had the complaint been received by mail, she would not have been the one initially to receive the complaint. These facts do not address whether the delay in opening the email was reasonable under the circumstances. NMREC's remaining contentions regarding the NMREC's internal procedures are merely arguments of counsel, not evidence,[5] and we therefore decline to rely on them. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence.").

{24} All told, NMREC tendered no evidence explaining why NMREC, exercising reasonable diligence, took so long to discover the contents of the email of July 2, 2014. Consequently, we presume that had NMREC exercised reasonable diligence in this instance, as it is obligated to do under the discovery rule, it would have discovered the complaint against Petitioners in the email sent on July 2, 2014, before July 8, 2014, and would have issued the NCA within the time limits of the ULA. Accordingly, NMREC's action against Petitioners was outside the applicable statute of limitations and is, therefore, barred. As a result, we reverse the district court's judgment in favor of NMREC and vacate the actions against Petitioners as barred by the statute of limitations.

CONCLUSION

{25} For the reasons stated above, we reverse and vacate.

{26} IT IS SO ORDERED.

GERALD E. BACA, Judge

WE CONCUR:

J. MILES HANISEE, Chief Judge

ZACHARY A. IVES, Judge

[5] In its answer brief, NMREC explains its internal procedures for receiving complaints and equates it to similar procedures, pursuant to the Inspection of Public Records Act (IPRA). NMREC, however, provides no citations to the record where this evidence was established.

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-045
Nos: A-1-CA-38474 and A-1-CA-38478 (consolidated for purpose of opinion
(filed May 16, 2022)

ELEPHANT BUTTE IRRIGATION DISTRICT,
Petitioner-Appellant,
and
TURNER RANCH PROPERTIES, L.P.; HILLSBORO PITCHFORK RANCH, LLC; and GILA RESOURCES INFORMATION PROJECT,
Petitioners-Appellants,
v.
NEW MEXICO WATER QUALITY CONTROL COMMISSION,
Respondent-Appellee,
and
NEW MEXICO COPPER CORPORATION and NEW MEXICO ENVIRONMENT DEPARTMENT,
Intervenors-Appellees,
IN THE MATTER OF THE APPLICATION FOR NEW MEXICO COPPER CORPORATION FOR A GROUND WATER DISCHARGE PERMIT FOR THE COPPER FLAT MINE, DP-1840, DOCKETED AS GWB 18-06(P).

APPEAL FROM THE WATER QUALITY CONTROL COMMISSION
Jennifer J. Pruett, Chair

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OPINION

HANISEE, Chief Judge.

{1} These appeals arise from an order of the New Mexico Water Quality Control Commission (the Commission) upholding the grant of New Mexico Copper Corporation's (N.M. Copper) application for a discharge permit for the Copper Flat Mine (the Mine) in Sierra County, New Mexico issued by the New Mexico Environment Department (the Department) under the New Mexico Water Quality Act (the Act), NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2019), and its implementing regulations, 20.6.2 NMAC and 20.6.7 NMAC.[1] Determining that, in upholding the grant of the discharge permit (DP-1840), the Commission did not act arbitrarily, capriciously, or otherwise not in accordance with the law, we affirm.

BACKGROUND

A. The New Mexico Water Quality Act

{2} Before turning to the facts at hand, we first provide a brief overview of the statutory framework governing the issues before us. The Act was enacted by the New Mexico Legislature who sought "to abate and prevent water pollution." *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546, 603 P.2d 285. The Act authorizes the Commission to "adopt water quality standards for surface and ground waters of the state," which must "protect the public health or welfare, enhance the quality of water and serve the purposes of the . . . Act." Section 74-6-4(C). The Act provides that, "the [C]ommission may require persons to obtain from a constituent agency designated by the [C]ommission a permit for the discharge of any water contaminant or for the disposal or reuse of septage or sludge." Section 74-6-5(A). The Act further mandates that the constituent agency shall deny any application for a permit if:

> (1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations;
> (2) any provision of the . . . Act would be violated;
> (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard.

Section 74-6-5(E).

[1] This opinion resolves the parties' challenges to the Commission's Order in case numbers A-1-CA-38474 and A-1-CA-38478. Because these cases raise related issues arising from the same application for a discharge permit, we consolidate both for decision. See Rule 12-317(B) NMRA.

{3} In 2009, the Act was amended to direct the Commission to adopt regulations particular to specific industries, including the copper mining industry, specifying "the measures to be taken to prevent water pollution and to monitor water quality." Section 74-6-4(K); *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, ¶ 3, 417 P.3d 369. The regulations were to be developed by the Department and proposed for adoption by the Commission. Section 74-6-4(K). Pursuant to these regulations, the Department proposed and the Commission adopted the Copper Rule. *See Gila Res. Info. Project*, 2018-NMSC-025, ¶ 1 (affirming the Commission's adoption of the Copper Rule). The Copper Rule is a "supplement [to] the general permitting requirements . . . to control discharges of water contaminants specific to copper mine facilities." 20.6.7.6 NMAC. The Copper Rule acknowledges that "open pit copper mining leads inevitably to some degree of contaminant discharge" and "operates from the premise that the most effective way to mitigate these inevitable discharges is through containment." *Gila Res. Info. Project*, 2018-NMSC-025, ¶ 43. Considering the inevitable discharges associated with open pit copper mining, the Copper Rule specifies that "[d]uring operation of an open pit," the groundwater quality standards set forth by 20.6.2.3103 NMAC "do not apply within the area of open pit hydrologic containment." 20.6.7.24(D) NMAC.

B. DP-1840 and the Relevant Proceedings

{4} We now describe the factual background leading to this appeal. N.M. Copper intends to reopen and operate the Mine, a historic open pit copper mine located approximately five miles northeast of Hillsboro in Sierra County, New Mexico. The Mine sits adjacent to and shares a border with both Hillsboro Ranch Properties and the Ladder Ranch (collectively, the Ranches). Several mining companies have attempted to operate the Mine over the past fifty years. *See State ex. rel. Off. of State Eng'r v. Elephant Butte Irrigation Dist.*, 2021-NMCA-066, ¶¶ 631, 499 P.3d 690 (explaining the complex history of the ownership and operation of the mine). In 2009, N.M. Copper entered into an agreement to purchase the Mine and associated mineral claims, and did so in 2011.

{5} In March 2011, N.M. Copper submitted an application to the Department for a modification of the existing groundwater discharge permit for the Mine. In February 2018, the Department's Groundwater Quality Bureau published a public notice of the Department's proposal to issue DP-1840, stating that the Department would accept public comment on the proposed permit for thirty days, which was extended for an additional sixty days at the request of several parties. The Department held a public hearing on the proposed permit from September 24-28, 2018, at which N.M. Copper, the Department, as well as the Ranches and the Elephant Butte Irrigation District (EBID) (collectively, Appellants) presented the testimony of technical witnesses. As well, forty-eight members of the general public made oral statements. In December 2018, the Administrative Hearing Officer (AHO) issued a report (the AHO Report) alongside proposed findings of fact and conclusions of law, determining that the discharge did not pose an "undue risk to property" and that the open pit water body will not be a water of the state, and therefore is not subject to surface water quality standards. That same month, the Secretary of the Department (the Secretary) issued its order (the NMED Order), in which the Secretary adopted the AHO's Report of proposed findings of fact and conclusions of law and added thirteen additional findings and conclusions. Finally, in September 2019, the Commission adopted its final order (the Final Order), adopting the NMED Order with additional revisions, and granting N.M. Copper's application for DP-1840. DP-1840 authorizes N.M. Copper to discharge a maximum 25,264,000 gallons per day of tailings slurry, including "mine tailings, process water, impacted storm[]water, and domestic wastewater to a lined tailing impoundment," known as the Tailings Storage Facility. Additionally, DP-1840 regulates "discharges from other mine units, including waste rock stockpiles, ore stockpiles, mineral processing units, process water impoundments, an open pit, sumps, tanks, pipelines, and other areas within the permit boundary of approximately 2,190 acres."

C. The Final Order

{6} In the Final Order, the Commission concluded that the opposing parties, including EBID and the Ranches, "did not prove that the discharges from DP-1840's permitted mine operations will cause undue risk to [the Ranches'] property." Although the Commission provided only limited insight into its reasoning, through the NMED Order the Secretary explained that "[t]he phrase 'undue risk to property' as used in the Copper Rule pertains to potential impacts to water quality from the permitted discharges, not to the depletion of groundwater." Similarly, the Secretary explained that its conclusion that "the discharges from permitted mine operations will not cause undue risk to the property of the Ranches, or [EBID], or anyone else" was based on a totality of expert witness testimony, specifically expert testimony based on "site-specific modeling and analysis, and addressed scientific likelihoods rather than speculation." And while the Final Order issued by the Commission did not articulate specific reasoning as it relates to the proposed pit lake, the Secretary explained, "The future pit lake at Copper Flat will not be a surface water of the state subject to the water quality standards in 20.6.4 NMAC."

DISCUSSION

{7} EBID asserts that in granting N.M. Copper's discharge permit the Commission "ignored its determination that the phrase 'undue risk to property' as used in the Copper Rule, 20.6.7 NMAC, may be broader than potential impacts to water quality from the permitted discharges."[2] The Ranches similarly contend that the Commission failed to adequately explain its conclusion that DP-1840 will not pose an "undue risk to property." Additionally, the Ranches assert that DP-1840 violates the Act, and the Commission did not adequately explain its conclusion that surface water standards will not apply to

[2] EBID additionally contends that that the Commission "failed to consider that the Department had failed to engage in appropriate interagency coordination related to the [Mine], which itself, poses an undue risk to the Elephant Butte Irrigation District." Specifically, EBID argues that "it would have assisted the [AHO] and the Secretary" when evaluating the risk to property presented by the Mine to "have access to items that are part of the [State Engineer's] Dam Safety Bureau application process," such as a design report, operation and maintenance manual, and emergency action plan. Similarly, EBID asserts that an emergency action plan developed in collaboration with EBID, the U.S. Bureau of Reclamation and all affected state agencies that addresses catastrophic events "should have been required as a permit condition" to ensure that the Mine does not pose an "undue risk to property." While EBID emphasizes the importance of such coordinated efforts, it is not supported by statutory authority requiring such efforts. See In re Adoption of Doe, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. . . . Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal." (citation omitted)). Our own research has revealed no such requirements, much less authority suggesting such an omission would be structurally fatal to a discharge permit. Because we have no authority to apply conditions not within the Act, nor employ regulations not promulgated by the Commission, we reject these arguments.

the pit lake. We first set forth the standard of review, then analyze Appellants' arguments as they relate to the Commission's interpretation of "undue risk to property," and then turn to the Ranches' remaining arguments.

I. Standard of Review

{8} The Act provides that we "shall set aside the [C]ommission's action only if it is found to be: (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Section 74-6-7(B). "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Colonias Dev. Council v. Rhino Env't Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 117 P.3d 939 (internal quotation marks and citation omitted). Additionally, "[a]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Albuquerque Cab Co. v. N.M. Pub. Regul. Comm'n*, 2017-NMSC-028, ¶ 8, 404 P.3d 1 (internal quotation marks and citation omitted). An agency decision is not in accordance with the law "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *Princeton Place v. N.M. Hum. Servs. Dep't*, 2018-NMCA-036, ¶ 27, 419 P.3d 194 (internal quotation marks and citation omitted), *rev'd on other grounds*, 2022-NMSC-005, ¶ 3.

{9} Although not bound by the agency's interpretation, we "confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28 (internal quotation marks and citation omitted). However, "statutory construction itself is not a matter within the purview of the [agency]'s expertise," so we "afford little, if any, deference to the [agency]" on questions of law not involving this expertise or policy determination. *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted).

II. The Commission's Order Determining That the Mine Did Not Pose an Undue Risk to Property Was Not Arbitrary, Capricious, or Otherwise Not in Accordance With the Law

{10} The parties dispute the meaning and factors that must be considered in determining whether a discharge permit creates an "undue risk to property." EBID and the Ranches contend that "undue risk" should encompass the Mine's impact on both water quality and quantity. They also argue that they presented compelling evidence of an "undue risk" to their respective properties from both contamination and depletion.

A. The Scope of "Undue Risk"

{11} Appellants contend that the Commission erred in determining that the Mine did not present "an undue risk to property" because the Commission failed to consider the Mine's inevitable depletion of surface water. EBID asserts that because the Commission did not provide a definition of the phrase, but instead explained that the consideration of undue risk "may be broader than potential impacts to water quality from the permitted discharges and shall be reviewed on a case[-]by[-]case basis," the Commission rendered the phrase "superfluous in violation of the law."[3] Similarly, the Ranches argue that because the Commission failed to consider the relevant factor of water depletion, its order is arbitrary, capricious, or an abuse of discretion.

{12} We disagree with Appellants' contention that a determination of whether a mine presents "an undue risk to property" requires consideration of potential depletion. This appeal arises from an order granting an application for a discharge permit, and the scope of the issues available for our review are neither broader nor narrower than that. Granting a discharge permit requires compliance with the Copper Rule and a determination that any discharge authorized under a permit creates no hazard to public health nor undue risk to property owners. 20.6.7.10(J) NMAC. Thus, any challenge asserting that the permit should not be granted must relate to "undue risk" attributed to the discharge authorized under DP-1840. As the NMED Order provides, DP-1840 "only regulates discharges of water at the [M]ine site," and "does not allocate water for use . . . or permit the pumping of groundwater." Stated differently, DP-1840 has nothing to with and does not authorize or permit water from any source to be used at the Mine. Indeed, neither the Department nor the Commission has the authority to regulate the source from which a discharger receives the water that is utilized in the processes resulting in the discharge. Rather, our Legislature has delegated such authority solely to the Office of the State Engineer. *See* NMSA 1978, § 72-2-9 (1907) ("The state engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts."); *see also* NMSA 1978, § 72-2-9.1(B)(2-3) (2003) ("The state engineer shall adopt rules for priority administration . . . so as to create no impairment of water rights . . . and . . . so as to create no increased depletions.").

{13} At oral argument for this appeal, when asked to define the phrase, the Department described "undue risk to property" to be "a larger than acceptable chance that these discharges permitted by this permit [would] cause harm to surrounding properties." While we accept for purposes of this appeal—and given that there is no statutory, regulatory or jurisdictional direction pointing this Court to a broader or more inclusive inquiry in the context of a discharge permit—the Commission's interpretation of the phrase "undue risk to property," we decline to formally adopt the definition provided by the Department. The formal adoption of such an interpretation, or a different one altogether, requires agency rulemaking in our view. *See New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (explaining that the

[3] EBID similarly contends that the meaning of "undue risk" requires a consideration of depletion because the Commission rejected the Secretary's finding No. 4 which provided, "the phrase undue risk to property pertains to potential impacts to water quality from the permitted discharges, not to the depletion of groundwater" and instead explained that "the phrase . . . as used in the Copper Rule 20.6.7 NMAC, may be broader than potential impacts to water quality from the proposed discharges and shall be reviewed on a case[-]by[-]case basis." We disagree. Such modified language employed by the Commission does not mean that it considered, or must consider, potential depletion of groundwater in its discharge determination. Rather, in replacing the limiting language set forth by the Secretary, the Commission explained that in making a determination that a discharge permit poses an "undue risk," it may broadly consider "potential impacts to water quality." We simply do not view the Commission as having—by rejecting the Secretary's wording in its order applicable only to this case—expanded the permit application process beyond the context of the discharge at issue on a case-by-case basis. Indeed, to do so would require more than a vague declaration lacking regulatory specificity. In any event, the Commission did not expressly provide that depletion is a factor to be considered in making a determination that a discharge permit would create an "undue risk to property."

Legislature "delegate[s] both adjudicative and rule-making power to administrative agencies"); *see also Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 8, 347 P.3d 710 ("A court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation." (alteration, internal quotation marks, and citation omitted)). Although the phrase "undue risk to property" does not include technical language such that it would be beyond the understanding of those without expertise, the question of what constitutes an "undue risk" requires agency knowledge within the scope of the Commission's statutory function. *See Morningstar*, 1995-NMSC-062, ¶ 11 (explaining that although not bound by the agency's interpretation, "[t]he [C]ourt will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." (internal quotation marks and citation omitted)); *see also Gila Res. Info. Project*, 2018-NMSC-025, ¶ 35 ("We will overturn the administrative construction of statutes by appropriate agencies *only if they are clearly incorrect*." (internal quotation marks and citation omitted)).

{14} We therefore conclude that the Commission's Final Order, as it relates to the scope of "undue risk to property" and its related decision not to consider potential depletion, was not arbitrary, capricious, or otherwise not in accordance with the law. Nothing the Commission said within the Final Order or adopted or modified from the wording employed by the Secretary convinces us otherwise. We now turn to Appellants' contentions that the Commission failed to adequately address compelling evidence of "undue risk" to their respective properties.

B. The Sufficiency of the Commission's Final Order

{15} We review the Commission's Final Order to determine if it is supported by substantial evidence. "For questions of fact, [the appellate court] looks to the whole record to determine whether substantial evidence supports the [agency]'s decision." *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-012, ¶ 14, 444 P.3d 460 (alteration, internal quotation marks, and citation omitted). "Substantial evidence requires that there is evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Id.* (internal quotation marks and citation omitted). "Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact[-]finder's conclusions with our own." *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶ 18, 148 N.M. 21, 229 P.3d 494 (internal quotation marks and citation omitted).

{16} In applying whole record review, we consider the AHO's Report, as well as the NMED Order and the Commission's Final Order. Over the course of a five-day hearing in September 2018, the AHO considered an assortment of evidence, including expert testimony from N.M. Copper, EBID, and the Ranches, as well as public comment and nearly 18,000 pages of administrative record. Although the AHO recognized that "[t]he fears expressed by the Ranches, EBID, and many of the public commenters are understandable," the AHO declared, "Migration of significant water contaminants over very long distances, or in directions contrary to typical groundwater flow" to be unlikely. To best understand the AHO's conclusion that such contamination is unlikely, we highlight selected findings of fact provided in the AHO's Report, and emphasize that neither EBID nor the Ranches challenges the AHO's findings of fact.

{17} The AHO Report notes that N.M. Copper used "[forty] years of data from exploration drilling programs, monitoring wells, aquifer testing, including groundwater samples from the previous mining operations . . . to characterize the hydrologic settling of the [M]ine site." The AHO Report also explains that the East Animas Fault—which sits adjacent to the Mine—"could not serve as a conduit for the migration of contaminants through groundwater flow" as the "general direction of the groundwater flow at the [M]ine site is west to east." Regarding the waste rock stockpiles, the AHO concluded that "[n]o impacts to groundwater will occur should there be any seepage," and if seepage did occur, "all parameters of predicted groundwater chemistry are below New Mexico's groundwater standards." Similarly, addressing the Tailings Storage Facility, the AHO determined that "[t]here will be no water quality impacts to groundwater or surface water from the [facility]." Because these uncontested findings of fact require the application and understanding of technical expertise, we accord them proper deference. *See Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 49, 140 N.M. 49, 139 P.3d 209 ("Particularly where specialized technical or scientific knowledge is involved, we will give great deference to an agency's factual findings.").

{18} The AHO Report underscored that "what constitutes 'undue risk' in connection with the issuance of a groundwater discharge permit has not been set out in a regulation or guidance document, statute or New Mexico case law," and expressly declined to make a recommendation regarding undue risk. However, the AHO noted that "[a]part from this issue of undue risk, the recommended findings and conclusions support the issuance of . . . [DP-1840] as based on substantial evidence." Although the AHO declined to make a conclusion regarding undue risk, we conclude that substantial evidence, including the evidence highlighted above, supports the Commission's Final Order determining that the Mine does not present an "undue risk to property."

{19} In the Final Order, the Commission also noted that its "decision [to grant DP-1840] is based on the totality of expert witness testimony . . . with more weight given to that from experts who based their conclusions on site-specific modeling and analysis and who addressed scientific likelihoods rather than speculation." The Ranches contend that this "is hardly a sufficient explanation of the Commission's decision," and argues that the Commission should have identified which evidence it found to be speculative. In asking us to consider the evidence and expert testimony it presented, the Ranches effectively ask us to reweigh the evidence, which we cannot do. *See Albuquerque Bernalillo Cnty. Water Util. Auth.*, 2010-NMSC-013, ¶ 18. Moreover, at oral argument, the Ranches described the nature of the expert testimony of its hydrologists, explaining generally that one or more of them told the AHO that the East Animas Fault "could actually serve as a conduit and move the contamination in unpredictable ways." We need not conclude that such evidence is or is not speculative, or whether it is persuasive or unpersuasive. Instead, we emphasize only that it appears to be reasonable for the AHO, and later the Commission, to give less weight to this evidence and hold that the factual findings of the AHO are supported by substantial evidence. *See Montano v. N.M. Real Est. Appraiser's Bd.*, 2009-NMCA-009, ¶ 8, 145 N.M. 494, 200 P.3d 544 ("We will not disturb the agency's factual findings [that are] supported by substantial evidence.").

{20} Because we decline to disturb the uncontested factual findings within the AHO Report, and determine that the Commission's Final Order as it relies on such factual findings is supported by substantial evidence, we hold that the Commission's determination that the Mine does not pose undue risk to property is not arbitrary, capricious, or otherwise not in accordance with the law.

III. DP-1840 Does Not Violate the

Act and the Commission's Order Determining That the Pit Lake Is Not a Surface Water of the State Is Not Arbitrary, Capricious, or Otherwise Not in Accordance With the Law

{21} In addition to the arguments raised by both Appellants related to the Commission's interpretation of "undue risk to property," the Ranches additionally assert that DP-1840 violates the Act because (1) the future pit lake will be a surface water of the state, and (2) DP-1840 will cause water contaminant levels in excess of state standards. In making these arguments, the Ranches contend that the Commission failed to adequately explain its conclusion that the pit lake is not a surface water of the state. The Department answers that the Commission correctly concluded that the water in the future open pit is eligible for the private waters exemption under the Act because there is no potential for outward migration from the pit such that water will contaminate other surface or groundwater. Agreeing with the Department that the pit lake is eligible for the private waters exemption of the Act, the Commission explains that the pit lake does not fall within the definition of "surface waters" of the State as it is not "naturally occurring," a tributary, a "manmade bod[y] of water that [was] originally created in surface waters," or a water of the United States. *See* 20.6.4.7(S)(5) NMAC. To address the Ranches' arguments, we briefly discuss New Mexico's surface waters of the state rule, then address the Commission's Final Order as it relates to the pit lake.

A. "Surface Waters of the State"

{22} All surface waters of the state of New Mexico are subject to the water standards set forth by the Act. Pursuant to 20.6.4.7(S)(5)(a) NMAC, "surface waters of the state" are defined broadly as "all surface waters situated wholly or partly within or bordering upon the state," including lakes, rivers, streams, wetlands, wet meadows, reservoirs and natural ponds and all tributaries of such waters, including "any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, and any 'waters of the United States' as defined under the Clean Water Act that are not included in the preceding description." 20.6.4.7(S)(5)(b) NMAC. However, this expansive definition "does not include private waters that do not combine with other surface or subsurface water." 20.6.4.7.S(5)(c) NMAC. The private waters exemption, which the Commission determined is applicable to the pit lake, derives from the statutory definition of "water" in the Act. Under the Act, "water" means "all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, *except private waters that do not combine with other surface or subsurface water*." Section 74-6-2(H) (emphasis added). In other words, as the AHO correctly explained, "[t]o be exempt from the definition of a "[s]urface waters of the state" and therefore not subject to the requirements of the Act, "a water body[] (1) must not combine with other surface or subsurface waters, (2) must not be a water of the United States, and (3) must be located entirely on private lands."

B. The Commission's Order

{23} The Ranches contend that the "Commission did not adequately explain its conclusion that surface water standards will not apply to the pit lake," and argues that the pit lake is encompassed within the expansive definition of surface waters of the state because it will combine with surface waters—"act[ing] as a hydraulic sink, drawing in groundwater from the surrounding areas, and that water will combine with the water in the lake." The Department, the Commission, and N.M. Copper respond that the Commission correctly upheld the Department's conclusion because the pit lake does not meet the regulatory definition of surface waters of the state as it will be located entirely on private land, and will not combine with other surface water or ground water.

{24} In determining that the pit lake qualifies for the private waters exemption, the Commission adopted the AHO and Department's reasoning that the pit lake will not combine with other surface waters, such to render it a surface water of the state. The AHO explained that the Department's understanding of the phrase "combine with other surface or subsurface waters" as contemplated by the private waters exemption "refers only to water flowing out of a polluted water body into surrounding water, and not to surrounding water flowing into a polluted water body." The Ranches are correct that 20.6.4.7.S(5)(c) NMAC, supplying the private waters exemption, does not include such a distinction. However, the application of the private waters exemption requires the application of highly technical agency expertise. *See N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 19 (stating that we "will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function" (internal quotation marks and citation omitted)); *see also Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806 (providing that when resolving ambiguities in regulations, "which an agency is charged with administering, [we] generally will defer to the agency's interpretation if it implicates agency expertise." (internal quotation marks and citation omitted)). We are further persuaded by the evidence relied upon by the Commission in making its determination and adopted in the findings of fact in the AHO's Report, including that the "pit lake will be a hydrologic sink," and that "[t]here will be no outflow to groundwater or surface water,"—meaning that only evaporation will cause water loss in the pit lake—and that "[t]here is no potential that the open pit water body could contaminate any other groundwater or surface water of the [s]tate." Although we decline to formally adopt the distinction set forth in the AHO's Report—because it is not for the Court to establish definitions that are within the purview of our Legislature or appropriate regulatory entity—we conclude that its interpretation of the definition of surface waters of the state and the related private waters exemption is not arbitrary, capricious, or otherwise not in accordance with the law. *See New Energy Econ.*, 2010-NMSC-049, ¶ 14; *Albuquerque Cab Co.*, 2017-NMSC-028, ¶ 8.

C. Contaminant Levels in Excess of State Standards

{25} The Ranches assert that DP-1840 violates Section 74-6-5(E)(3) of the Act, which provides that "[t]he constituent agency shall deny any application for a permit . . . if . . . the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard." The Ranches argue that "[d]ischarges from the disturbed mine areas into the future pit lake will cause [s]tate surface water standards to be exceeded," and contends that N.M. Copper's "own modeling shows that the future pit lake will exceed the applicable surface water standards" of mercury, selenium, and vanadium. Section 74-6-5(E)(3) generally requires the denial of a discharge permit if the anticipated discharge "would cause or contribute to water contaminant levels in excess of [20.6.2.3103 NMAC] standards." *Gila Res. Info. Project*, 2018-NMSC-025, ¶ 22 (internal quotation marks and citation omitted). However, under the Copper Rule, the 20.6.2.3103 NMAC standards are inapplicable to an "area of open pit hydrologic containment." 20.6.7.24(D) NMAC; *see Gila Res. Info. Project*, 2018-NMSC-025, ¶ 43 (acknowledging that under the Copper Rule the standards set forth by 20.6.2.3103 NMAC may be exceeded because the Rule "accepts that some discharge contamination is inevitable, seeks to contain that contamination, and relies on the hydrologic phenomenon produced by the open pit to contain it"). Because we uphold the Commission's determination that the pit lake is not a surface water of the state, we necessarily conclude that the pit lake is

not required to meet the contamination standards in 20.6.2.3103 NMAC.

CONCLUSION

{26} For the reasons articulated above, we conclude that Appellants have not established that the Commission's Final Order upholding the grant of DP-1840—including its interpretation of the phrase "undue risk to property" and its related determination that the Mine does not present an undue risk to their respective properties, as well its conclusion that the pit lake does not constitute a surface water of the state—was arbitrary, capricious, or unsupported by substantial evidence. We, therefore, affirm.

{27} IT IS SO ORDERED.

J. MILES HANISEE, Chief Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge

JACQUELINE R. MEDINA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-046
No: A-1-CA-38870 (June 8, 2022)

CITY OF LAS CRUCES,
Plaintiff-Appellant,
v.
RENEE APODACA,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Conrad F. Perea, District Judge

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OPINION

YOHALEM, Judge.

{1} The opinion filed May 17, 2022, is hereby withdrawn, and this opinion is substituted in its place. This is an appeal by the City of Las Cruces (the City), from the district court's decision granting Defendant's motion to dismiss and to bar retrial under the double jeopardy clause of Article II, Section 15, of the New Mexico Constitution, based on judicial and prosecutorial misconduct in municipal court.

{2} The City raises two issues on appeal:[1] (1) whether the district court had authority to hear and decide Defendant's motion to dismiss and to bar retrial based on alleged official misconduct in the municipal court; and (2) whether the district court erred in relying on the limited record in the municipal court and the arguments of counsel to reconstruct the events at trial in a court not of record. Finding no error by the district court, we affirm.

BACKGROUND

{3} We describe the municipal court proceedings based on the municipal court record and the arguments of counsel, which were accepted by the district court as the facts on which it based its decision.

{4} Defendant was charged with five misdemeanors in the City of Las Cruces Municipal Court arising from a single incident, (1) aggravated driving while intoxicated, (2) driving on the wrong side of the street, (3) improper turn, (4) open container, and (5) driving without a license. The municipal court dismissed the driving without a license charge before trial. The City produced four DVD's (video recordings) to Defendant without identifying what it intended to introduce at trial. All four contained multiple video clips. The City's pretrial list of exhibits indicated that the City intended to introduce "[a]ny and all videos and photos produced by Plaintiff or Defendant," without further specification.

{5} At trial, the City called Officer Albert Garcia as a witness, and moved to admit one of the video recordings into evidence through his identification. The City did not clarify to Defendant or to the municipal court which of the four video recordings the City was attempting to admit at trial, but indicated only that it was one of the four that had been disclosed to the defense.

{6} Defendant objected to the admission of the video recording, stating that counsel had no way of knowing which of the previously disclosed four recordings the City was moving to admit, or whether the video recording at issue was in fact a true and accurate copy of one of the recordings that had been previously disclosed. Defendant further objected to the admission of the video recording without it being played in open court on hearsay and confrontation grounds. Defendant argued she would have no opportunity to object to the admission of hearsay and violation of Defendant's right to confrontation without the video being played in open court. The City agreed that the video recording contained both admissible evidence and inadmissible hearsay "that was probably probative" on the recording and did not deny that there were statements on the video made by individuals who testified at trial, as well as by individuals not called by the City as witnesses.

{7} The City claimed that it sought to admit only the nonhearsay portions of the video recording but failed to identify with time stamps or otherwise the admissible and inadmissible portions of the video.

{8} The municipal court admitted the video recording over Defendant's objection.[2] The City did not play the recording

[1] We note that the briefs on appeal raised a jurisdictional issue. We agreed with the City that the municipal court's order of conviction was not a final, appealable order. We remanded for entry of final orders by the municipal and district courts, with leave for the City to reinstate its appeal upon the entry of those orders. Final orders having been entered, the jurisdictional issue resolved, and the City's appeal reinstated, we now address the City's remaining arguments.

[2] The City claims, for the first time in its brief on appeal to this Court, that defense counsel stipulated to the admission of the video recording. The record in the district court shows that the City agreed with defense counsel that the video recording was admitted over her objection. Because the district court was not alerted—by objection, by the admission of conflicting evidence, or by a proposed finding—to the City's claim, we will not review it on appeal. See Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."). We accept and rely on the facts found by the district court in determining what happened in the municipal court for purposes of this appeal. See State v. Baca, 2015-NMSC-021, ¶ 25, 352 P.3d 1151 (holding that the appellate court defers to the facts found by the district court concerning the inferior court proceedings in reviewing a dismissal for double jeopardy).

in whole or in part during trial. The police officers called by the City as witnesses testified briefly, and then relied on the recording to flesh out their testimony. Defendant repeatedly objected, arguing that she was unable to cross-examine the police officers about the recorded statements because her counsel had no information identifying what was on the recording.

{9} During closing argument the City relied on the unplayed video recording as evidence of Defendant's guilt. Defendant once again objected, noting that the defense did not have an opportunity to object to the inadmissible evidence on the recording or cross-examine the officers who testified in court with reference to the video evidence. Defense counsel asked the municipal court to grant a directed verdict on the aggravated DWI charge, pointing out that the City failed to elicit testimony from the witnesses at trial on a required element of the charge: that Defendant had been advised, at the time of her traffic stop, that refusal to submit to alcohol breath testing "could result in the revocation of [D]efendant's privilege to drive." UJI 14-4510 NMRA. In response to that motion, the City claimed, without reference to a time-stamp, that the advisement could be heard on one of the four video tracks admitted into evidence, but not played at trial. The municipal court denied Defendant's motion for directed verdict on the basis that the video provided the missing evidence.

{10} At the conclusion of the closing arguments, the municipal court judge stated that he would review the video recording in chambers, without either party present. Defendant's counsel objected, citing confrontation clause violations, the improper admission of hearsay, and Defendant's due process right to be present and have the assistance of counsel at all critical stages of the proceedings. The municipal court again overruled Defendant's objection, took the video recording into chambers and reviewed it privately after the conclusion of the trial. Defendant's counsel was not given a copy of the video or otherwise permitted to review it. Six days after trial, the municipal court entered a verdict of guilty on the four remaining counts.

{11} Defendant filed a post-trial motion to dismiss with prejudice and to bar retrial alleging prosecutorial and judicial misconduct. Defendant argued that the municipal court's admission into evidence of and reliance on the video recording to convict Defendant of the charges against her violated her right to confront the witnesses against her, denied her due process, and denied her the right to assistance of counsel.

{12} Without waiting for a ruling on her post-trial motion, Defendant appealed to the district court. Relying on the limited record of the municipal court proceedings filed in the district court, including the video recording introduced at trial and the statement of facts in defense counsel's post-trial motion, Defendant filed a pretrial motion in the district court to dismiss and to bar retrial. Defendant relied on the holding of our Supreme Court in *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792, to argue that misconduct by the prosecutor and the municipal court judge violated the double jeopardy clause of the New Mexico Constitution, and, therefore, precluded retrial in the district court.

{13} After the hearing on Defendant's pretrial motion and a thorough review of the entire record on appeal from the municipal court, including the video recording admitted into evidence in the municipal court, the district court agreed with Defendant that misconduct barred retrial. The City appealed to this Court.

DISCUSSION

I. The District Court Was Authorized to Hear and Decide Defendant's Dispositive Pretrial Motion to Dismiss and Bar Retrial

{14} The City contends that, in an appeal from Defendant's conviction in municipal court, the district court lacked authority to hear and decide Defendant's pretrial motion. The City claims that the district court erroneously applied the limited exception identified by our Supreme Court in *City of Farmington v. Piñon-Garcia*, 2013-NMSC-046, ¶ 11, 311 P.3d 446, by conducting a hearing de novo and deciding Defendant's motion, when instead it should have proceeded to conduct a trial de novo. The City supports its claim by characterizing Defendant's motion as a request to the district court to review an evidentiary decision by the municipal court for reversible error.

{15} Although the City is correct that the district court does not act as a typical appellate court in an appeal from a municipal court conviction and generally conducts the appeal by trial de novo, the authority of the district court on appeal from a court not of record extends to hearing and deciding certain pretrial motions that require review of the proceedings in the municipal court. *See id.* ***¶¶ 11-12.*** We look to the nature of the motion filed in the district court to determine whether the motion is subject to a de novo hearing in the district court under our Supreme Court's decision in *Piñon-Garcia*. *See id.* ¶ 12.

{16} We are not persuaded by the City's contention that Defendant's motion seeks reversal based on a claim of evidentiary error in the municipal court. Although the municipal court's decision to admit the video recording into evidence over Defendant's objection played a role in the events which underpin Defendant's motion, the motion does not seek reversal and remand for retrial on the basis of the municipal court's abuse of discretion in admitting that evidence. Defendant's motion focused instead on the prejudicial impact on the defense of the prosecution's conduct in failing to identify the recording and to identify the portions of the recording it sought to introduce into evidence; the erroneous admission into evidence of the entire video recording without allowing the defense to object to hearsay; the judge's repeated refusal to allow the video recording to be played in open court; the inability of the defense to cross-examine witnesses concerning the video evidence; and the judge's reliance on a private review of the video recording in chambers as evidence supporting conviction. The basis for Defendant's double jeopardy motion was not simply (or even primarily) the evidentiary error that occurred below, but the repeated refusal of the prosecution and the municipal court judge to consider the prejudicial impact of improper judicial decisions and prosecutorial failures on Defendant's right to defend herself, to confront the witnesses against her, and to appear and be defended by counsel at all critical stages of the proceedings.

{17} Alleging misconduct in the municipal court by both prosecutor and judge, Defendant sought in the district court to bar retrial, pursuant to her right not to be tried twice under the double jeopardy clause of the New Mexico Constitution. Misconduct by the prosecution and judge that prejudice a defendant's right to a fair trial has been held by our Supreme Court in *Breit*, and most recently in *State v. Hildreth*, 2022-NMSC-012, 506 P.3d 354 (which expressly extends *Breit* to judicial misconduct) to bar retrial under Article II, Section 15 of the New Mexico Constitution, the double jeopardy clause. The Court in *Breit* found that retrial is barred

> when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

1996-NMSC-067, ¶ 32.

{18} The nature of Defendant's motion fits squarely within the *Piñon-Garcia* exception to proceeding with a trial de novo on appeal in the district court from an inferior court not of record. *See* 2013-NMSC-046, ¶ 13. It is exactly this sort of potentially dispositive pretrial motion that

Piñon-Garcia holds demands review by a hearing de novo in the district court. Defendant's motion stated a claim for official misconduct at trial, which, if established at a hearing de novo in the district court, would fully dispose of the charges against Defendant and bar retrial in the district court. Indeed, our Supreme Court specifically includes double jeopardy violations along with speedy trial and discovery rule violations as examples of the violations of "constitutional safeguards and procedural rules" in an inferior court not of record that must be reviewed by the district court by hearing de novo upon the request of counsel in a pretrial motion. *Id.* ¶ 2. We conclude, therefore, that the district court acted well within its authority in considering and deciding Defendant's motion to dismiss and to bar retrial on its merits.[3]

II. The District Court Properly Reconstructed the Record in the Municipal Court

{19} The City's remaining claim on appeal is that the district court erred in relying on the limited record on appeal and the proffers of counsel to reconstruct the challenged events in the municipal court, a court not of record.

{20} In *Piñon-Garcia*, our Supreme Court emphasized that the district court cannot disregard the history of the case in municipal court when called upon to decide a dispositive pretrial motion involving the compliance of municipal court proceedings with the constitution or court rules. *See* 2013-NMSC-046, ¶ 12. Acknowledging that the record on appeal from a municipal court is limited and generally does not include a trial transcript, our Supreme Court directed the district court to rely on the pleadings, other written documents prepared in the municipal court, and exhibits that constitute the municipal court record on appeal, together with the stipulations of counsel. *See id.*; *see also State v. Vanderdussen*, 2018-NMCA-041, ¶ 2, 420 P.3d 609 (explaining that the district court "was bound by events that transpired in [the] magistrate court and therefore was required to base its independent judgment on the limited record brought before it and the arguments made by counsel in district court").

{21} At the hearing on Defendant's motion to dismiss and bar retrial, the district court noted that it had reviewed the entire municipal court record, including the video recording, and indicated that it would review the entire municipal court record again before making a decision. Although claiming the record was inadequate, the City agreed with the defense that (1) the defense had objected to the admission of the unidentified video recording repeatedly at trial; (2) the defense had repeatedly requested that the recording be played in open court, and the court refused the request; (3) the video recording mixed probative hearsay statements with admissible evidence; and (4) the municipal court overruled Defendant's objection to the court reviewing the video recording privately outside the presence of counsel. The City offered no affidavits or evidence that conflicted with this description of the events at trial, or the description found in Defendant's post-trial motion, and repeated in her motion in the district court. Although Defendant's post-trial motion was withdrawn and was not decided by the municipal court, it was prepared contemporaneously with the events in the municipal court by the municipal court defense counsel (who also argued the double jeopardy motion before the district court), it was served on the City and was included in the municipal court record on appeal. We see no error in the district court's reliance on the limited municipal court record and the facts agreed upon by counsel at the hearing in district court to reconstruct the record and then to render a de novo decision on Defendant's motion.

CONCLUSION

{22} Finding no error by the district court, we affirm the district court's dismissal of the charges against Defendant for violation of the double jeopardy clause of Article II, Section 15 of the New Mexico Constitution.

{23} IT IS SO ORDERED.

JANE B. YOHALEM, Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge

MEGAN P. DUFFY, Judge

[3] We note that the City does not claim error in the district court's ruling on the merits of the court's application of the Breit factors. We, therefore, do not review this issue on appeal.

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-047
No: A-1-CA-38232 (November 9, 2021)

NEW MEXICO BOYS AND GIRLS RANCH and EL RANCHITO DE LOS NINOS,
Plaintiffs-Appellees.
v.
NEW MEXICO BOARD OF PHARMACY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
James Lawrence Sanchez, District Judge

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OPINION

MEDINA, Judge.

{1} The New Mexico Board of Pharmacy (the Board) appeals the district court's permanent injunction prohibiting it from enforcing the Pharmacy Act (the Act), NMSA 1978, §§ 61-11-1 to -29 (1969, as amended through 2021[1] and 16.19.17 NMAC against New Mexico Boys and Girls Ranch and El Ranchito de Los Ninos (collectively, the Ranches). The Board makes three arguments: (1) the district court lacked subject matter jurisdiction to issue a decision on the Ranches' complaint and abused its discretion when it issued a permanent injunction against the Board; (2) the Act requires the Ranches to hold a pharmacy license; and (3) the Board acted within the scope of its authority when promulgating the definition of "custodial care facility" at 16.19.11.7(B) NMAC. We affirm, holding that the Act does not apply to community care homes licensed under 8.26.6 NMAC.

BACKGROUND

{2} The parties do not dispute the material facts. The Ranches are facilities that provide full-time care to New Mexico children in need. Both facilities are licensed by the Children, Youth and Families Department (CYFD) as community homes. Prior to 2014, 7.8.3 NMAC governed the Ranches' CYFD licensure and required them to obtain a pharmacy license from the Board. *See* 7.8.3.82 NMAC (Regulations Governing Community Homes); 7.8.3.95(B) NMAC ("Facilities providing services which require regular use of controlled and/or prescription medication for the children under care must hold and display an appropriate drug permit as determined by the State Board of Pharmacy."). In 2014, CYFD issued new regulations for "Community Home Licensing Standards" at 8.26.6 NMAC. *See* 8.26.6.5 NMAC (providing an effective date of August 29, 2014 for the Community Home Licensing Standards). The new regulations "supersede[d] Sections 82 through 127 of 7.8.3 NMAC[,]" including the pharmacy licensure requirement, and became the exclusive standards for licensing community homes. 8.26.6.6 NMAC. Following the adoption of 8.26.6 NMAC, the Ranches did not renew their pharmacy license.

{3} In 2017, the Board notified the Ranches they needed a pharmacy license to maintain their CYFD licenses because they were considered "custodial care facilities" under both the Act, Section 61-11-2(F), and the Nursing Home Drug Control regulations, 16.19.11.7(B) NMAC. The Act defines a "custodial care facility" as "a nursing home, retirement care, mental care or other facility that provides extended health care[,]" and the Nursing Home Drug Control Regulations, promulgated by the Board, define "Licensed Custodial Care Facility" as "[a]ny facility or business, including non-profit entity which provides care and services on a continuing basis, for two or more in-house residents, not related to the operator, and which maintains custody of the residents' drugs." 16.19.11.7(B) NMAC; *see* § 61-11-2(F).

{4} The Ranches responded to the Board and explained that they were not required to hold a pharmacy license because they were not custodial care facilities, but rather community homes regulated under 8.26.6 NMAC. The Community Home Licensing Standards defines "[c]ommunity home" as "a facility which operates [twenty-four] hours a day and provides full time care, supervision and support to no more than [sixteen] children in a single residential building, and which meets the definition of 'group home' as outlined in the Human Services Department Act, NMSA 1978, [§] 9-8-13 [(2007)]." 8.26.6.7(D) NMAC. The Human Services Department Act defines a group home, in relevant part, as "any home[,] the principal function of which is to care for a group of children on a twenty-four-hour-a-day residential basis . . . and that is a member of any state or national association that requires it to observe standards comparable to pertinent recognized state or national group home standards for the care of children . . . or that is certified by any such organization as complying with such standards." Section 9-8-13.

{5} CYFD then contacted El Ranchito de los Ninos and directed them to comply with the Board's regulations and obtain a pharmacy license. CYFD indicated that failure to do so would affect El Ranchito de los Ninos' licensure status as a community home and that its license may be suspended or revoked. In response, the Ranches filed a complaint in district court seeking declaratory and injunctive relief to prevent the Act and the Board's regulations from applying to the Ranches. CYFD did relicense the Ranches between the filing of the complaint and this appeal. However, CYFD noted that the Ranches' failure to obtain a pharmacy license was a substantial deficiency and that the Ranches were expected to obtain a pharmacy license should the outcome of this case require it.

{6} The Board denied the Ranches' assertion that the revised community home licensing standards superseded the Board's

[1] The Act is repealed effective July 1, 2024. Section 61-11-29.

authority to require the Ranches to obtain a pharmacy license. The Board stated that, pursuant to the Act, the Ranches have always been required to obtain a pharmacy license from the Board.

Injunction Hearing

{7} At the hearing on the Ranches' complaint, the Ranches argued that they are community homes and not one of the facilities defined in the Act. The Ranches noted that requiring them to obtain a pharmacy license would create a duplicate system of oversight, because the community home licensing standards already require the Ranches to conform to certain health and safety standards for administering and storing medication. *See* 8.26.6.15(K) NMAC (addressing administration and storage of prescription medication at community homes). The Ranches asserted and presented testimony that they do not provide extended health care and, at most, occasionally administer medication prescribed by an unconnected provider to their residents.

{8} The Board responded that the Ranches are considered custodial care facilities under the Act regardless of whether the Ranches are also community homes. The Board noted that prescription medication is considered a dangerous drug under the Act and that facilities must be licensed to store and administer dangerous drugs. *See* § 61-11-2(G) (" '[D]angerous drug' means a drug that is required . . . to be dispensed pursuant to a prescription or is restricted to use by licensed practitioners[.]"). The Board argued that because the Ranches store and administer prescription medication, they therefore store dangerous drugs and are required to obtain a pharmacy license.

{9} The district court determined that, pursuant to the Declaratory Judgment Act (the DJA), NMSA 1978, §§ 44-6-1 to -15 (1975), an actual controversy existed, giving the district court jurisdiction over the Ranches' complaint. The district court granted declaratory and injunctive relief in the Ranches' favor, concluding in relevant part that the Ranches "are not required to obtain, possess, or maintain [a license from the Board] to continue in business as a licensed community home"; "[t]he requirement of [a license from the Board] for a custodial care facility is not required by applicable statutory language"; [the Board's] regulatory requirement of a New Mexico Board of Pharmacy is beyond the legislative authority as stated in [the Act]"; and "[the Ranches] are not required to obtain a [license from the Board] as a foster care facility, custodial care facility, or to obtain a license under the dangerous drugs regulation . . . 16.19.17 [NMAC]". This appeal followed.

DISCUSSION

{10} We first address the threshold questions of jurisdiction and injunctive relief. We then turn to the issues of statutory interpretation and regulatory authority.

Subject Matter Jurisdiction

{11} The Board asserts no actual controversy exists and therefore the district court lacked subject matter jurisdiction to issue a decision on the complaint for declaratory judgment and permanent injunction. Jurisdictional issues present a question of law that we review de novo. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. Under the DJA, a justiciable controversy is a necessary precondition to invoke a court's jurisdiction to decide a declaratory judgment action. *Am. Fed'n of State, Cnty. & Mun. Emps. v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 2016-NMSC-017, ¶ 15, 373 P.3d 989. Justiciable controversies exist where the issue raised by the plaintiff is ripe for litigation and the plaintiff has standing. *Id.* ¶ 17.

{12} The ripeness requirement "is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems." *Id.* ¶ 18 (internal quotation marks and citation omitted). The ripeness analysis normally involves a finding of fitness for review and a cognizable hardship to the parties of withholding court consideration. *Id.* ¶ 19. "Fitness is concerned with whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id.* ¶ 20 (internal quotation marks and citation omitted). "The hallmark of [a] cognizable hardship is usually direct and immediate harm." *Id.* ¶ 28 (internal quotation marks and citation omitted).

{13} "The standing question bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention." *Id.* ¶ 31 (internal quotation marks and citation omitted). To obtain standing in New Mexico, a litigant must allege an injury-in-fact, meaning they are faced with a real risk of future injury due to the challenged action, statute, or regulation. *Id.* ¶ 32. Here, the ripeness and standing inquiries converge because this case involves pre-enforcement review of an agency's action and the possibility of future injury. *See id.* ¶ 31 ("In some cases, the issues of standing and ripeness will completely overlap." (internal quotation marks and citation omitted)).

{14} The Board challenges the ripeness of the controversy and the Ranches' standing, asserting the Ranches failed to allege an immediate or imminent harm that would result from the enforcement of the Board's regulations. The Ranches respond that the letter from CYFD threatening to "suspend or revoke" El Ranchito de Los Ninos' CYFD license if El Ranchito did not apply for a pharmacy license within thirty days is a direct and imminent harm and an imminently threatened injury. Additionally, CYFD found the Ranches to be out of compliance with the community home licensing standards in the community home agency licensing report it issued after the Ranches filed their complaint. CYFD noted that the Ranches' lack of a pharmacy license was a substantial deficiency, meaning that the Ranches are currently out of compliance with 8.26.6 NMAC and are subject to license suspension or revocation. *See* 8.26.6.7(J) NMAC (defining "[d]eficiency" as "non-compliance with 8.26.6 NMAC" and "[s]ubstantial deficiencies" as "deficiencies that impair the safety, permanency or well-being of a child"); 8.26.6.13 NMAC (describing sanctions, including suspension or revocation of community home license, that may result if CYFD determines "a community home has failed to comply with 8.26.6 NMAC"). Therefore, CYFD has made an adverse finding against the Ranches due to noncompliance with the Board's regulations, threatening the Ranches' ability to continue operating.

{15} Based on the foregoing, we agree with the Ranches. The CYFD letter and licensing report demonstrate a direct and imminent harm to the Ranches—sanctions imposed on their CYFD licenses—due to the Board's regulations, sufficient to establish standing. *See* 8.26.6.13(A) NMAC (discussing sanctions against community homes). "[O]nce the party seeking review alleges he himself is among the injured, the extent of the injury can be very slight." *De Vargas Sav. & Loan Ass'n v. Campbell*, 1975-NMSC-026, ¶ 12, 87 N.M. 469, 535 P.2d 1320. We conclude that the Ranches' complaint was ripe and that the Ranches had standing to pursue relief in court, thereby satisfying the justiciable controversy requirement of the DJA.

Declaratory Relief

{16} The Board also argues that the district court erred in granting the Ranches a permanent injunction. In addition to a declaratory judgment, the district court has discretion to grant injunctive relief. *See Hines Corp. v. City of Albuquerque*, 1980-NMSC-107, ¶ 13, 95 N.M. 311, 621 P.2d 1116. Injunctions are drastic remedies and should only be issued "where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." *State ex rel. State Highway & Transp. Dep't of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 18, 129 N.M. 151, 3 P.3d 128 (internal quotation marks and citation omitted). The injury must be actual and substantial or imminently threatened, and a mere possibility of harm is not sufficient. *Id.* ¶ 19. We review a grant

of equitable relief for abuse of discretion, and will not reverse unless a clear abuse of discretion is shown. *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 22, 101 N.M. 556, 685 P.2d 964.

{17} Regarding the district court's grant of equitable relief, the Board argues that the Ranches failed to allege that no adequate or complete remedies were available to them under the law. We disagree. The Ranches' options outside seeking relief in court were to comply with the Board's regulations or face sanctions from CYFD. CYFD demonstrated it will issue sanctions if this Court determines community homes are subject to the Act and the Ranches fail to obtain a pharmacy license. The Ranches are threatened with an imminent injury with unascertainable monetary damages that will not cease until this controversy is decided. *See, e.g.*, *Hines Corp.*, 1980-NMSC-107, ¶ 13 ("In the present case the hardship suffered by [the] defendants was not clearly ascertainable. Nor was [the] plaintiff's hardship measureable by reasonably certain monetary damages. We therefore cannot say that the court abused its discretion.").

{18} We do not believe that the Ranches must wait for CYFD sanctions before they seek relief. Therefore, we next address the propriety of the district court's granting a declaratory judgment and permanent injunction.

Custodial Care Facilities and Community Homes

{19} The Board's claim that the district court erred in granting the declaratory judgment and permanent injunction turns in part on whether the Ranches fall within the definition of custodial care facilities under the Act. We therefore interpret custodial care facilities as defined under Section 61-11-2(F). This is a question of law that we review de novo. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 10, 309 P.3d 1047. Our primary goal when interpreting statutory language is "to give effect to the Legislature's intent." *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, ¶ 11, 133 N.M. 756, 69 P.3d 1199. When interpreting a statute, we first look to its plain language and give the words their ordinary meaning, unless the Legislature indicates a different one was intended. *Baker*, 2013-NMSC-043, ¶ 11 ("We use the plain language of the statute as the primary indicator of legislative intent." (alterations, internal quotation marks, and citation omitted)). "Under the plain meaning rule, statutes are given effect as written without room for construction unless the language is doubtful, ambiguous, or adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious purpose." *T-N-T Taxi, Ltd. v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-016, ¶ 5, 139 N.M. 550, 135 P.3d 814; *accord State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352.

{20} The Act defines "custodial care facility" as "a nursing home, retirement care, mental care or other facility that provides extended health care[.]" Section 61-11-2(F). The Board contends the Ranches fall within the definition of a custodial care facility because the Ranches (1) maintain or restore the physical, mental, or emotional well-being of their residents; (2) administer medication to their residents; and (3) maintain a relationship with consultant pharmacists.

{21} The Ranches contend that extended health care must be construed as similar to the type of care provided in nursing homes, retirement and mental care facilities. The Ranches argue they do not fall under the definition of custodial care facility because they are not similar to the facilities enumerated in Section 61-11-2(F) and do not provide the type of health care provided in those facilities to their residents, which consists of children without specific health care needs, beyond usual childhood illnesses. Neither the Board nor the Ranches cite to any persuasive authority defining "extended health care," nor does the Act define "extended health care." *See* § 61-11-2 (listing definitions applicable to the Act). Because the Board is the agency charged with enforcing the statute at issue, we begin with examining the Board's interpretation in the context of the Legislature's purpose for enacting the Act. *See Baker*, 2013-NMSC-043, ¶ 15. If the Board's interpretation leads to an absurd result or conflicts with the Legislature's purpose, we cannot conclude its interpretation reflects legislative intent. *Id.*; *see also Rutherford*, 2003-NMSC-010, ¶ 24 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals.").

> The Legislature's stated purpose for enacting the Act is to promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy, including the licensure of pharmacists and pharmacist interns and registration of pharmacy technicians; the licensure, control and regulation of all sites or persons, in or out of state, who distribute, manufacture or sell drugs or devices used in the dispensing and administration of drugs in New Mexico; and the regulation and control of such other materials as may be used in the diagnosis, treatment and prevention of injury, illness or disease of a patient or other person.

Section 61-11-1.1(B). To effect this purpose, the Legislature enacted a comprehensive scheme addressing drug dispensation, record keeping, licensing of pharmacists and pharmacies, and created the Board to enforce the provisions of the Act. Section 61-11-6(A); *see generally* §§ 61-11-1 to -29. The Board's numerous powers all pertain to the practice of pharmacy and the licensure of individuals and facilities engaged in this practice. *See generally* § 61-11-6 (listing the duties and powers of the Board). The Act defines the "practice of pharmacy" as

> the evaluation and implementation of a lawful order of a licensed practitioner; the dispensing of prescriptions; the participation in drug and device selection or drug administration that has been ordered by a licensed practitioner, drug regimen reviews and drug or drug-related research; the administering or prescribing of dangerous drug therapy; the provision of patient counseling and pharmaceutical care; the responsibility for compounding and labeling of drugs and devices; the proper and safe storage of drugs and devices; and the maintenance of proper records.

Section 61-11-2(CC).

{22} The Board argues that because the Ranches store prescription medication, maintain records of this medication, and administer this medication to their residents, the Ranches are engaged in the practice of pharmacy and must be licensed by the Board. However, "all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 13, 142 N.M. 248, 164 P.3d 947 (internal quotation marks and citation omitted). Therefore, we consider Section 61-11-2(CC) and the Board's assertion in the context of the Act as a whole. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 ("[W]here several sections of a statute are involved, they must be read together so that all parts are given effect."). If the Act's purpose is effective control and regulation of pharmacists and pharmacies, facilities that manufacture or distribute drugs, and other like facilities and materials that address diagnosis and treatment of injury and illness, then the Ranches' storage and administration of prescription medication and related record keeping only qualifies as the practice of pharmacy if the Ranches are, as the Board argues, custodial care facilities. *See* § 61-11-1.1(B) (stating the purpose of the Act). We are not persuaded by the Board's arguments.

{23} First, children are not placed with the Ranches for health care purposes. *See* § 9-8-13 (defining "group home" as any home in which "the principal function of which is to care for a group of children on a twenty-four-hour-a-day residential basis"); 8.26.6.7(D) NMAC (defining "[c]ommunity home" as "a facility which operates [twenty-four] hours a day and provides full time care, supervision and support to no more than [sixteen] children in a single residential building, and which meets the definition of 'group home' as outlined in . . . [Section] 9-8-13"). Second, the Ranches do not provide medical care. Whenever a resident needs care, the Ranches' staff takes the resident off site to see a medical professional. Third, the Ranches do not retain nurses or doctors on staff. Any prescription medication located on site has been prescribed by an unconnected medical professional, and the Ranches' staff follow that professional's instructions when giving that medication to their residents as anyone caring for a child would. Fourth, and of particular pertinence to our analysis, the primary purpose of community homes is to care for children's basic needs, not provide them with extended health care or prescribe them medications. *See* § 9-8-13. To the extent children have needs for prescription medication, such needs are secondary to the primary purpose of their placement and care at the Ranches.

{24} We follow the doctrine of ejusdem generis when interpreting statutes, meaning "where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *State v. Off. of Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 29, 285 P.3d 622 (internal quotation marks and citation omitted). A "custodial care facility" is "a nursing home, retirement care, mental care *or* other facility that provides extended health care[.]" Section 61-11-2(F) (emphasis added). The Board's interpretation of "other facility that provides extended health care" to include the Ranches does not logically comport with or bear significant similarity to the other facilities in Section 61-11-2(F).

{25} If we take the Board's interpretation to its conclusion, "other facility that provides extended health care" includes any facility that provides ongoing care for individuals that take medication. *Id.* We will not parse the Legislature's words in the literal and mechanical manner that the Board proposes. *See Baker*, 2013-NMSC-043, ¶ 30 ("We will not rest our conclusions upon the plain meaning of the language if the intention of the Legislature suggests a meaning different from that suggested by the literal language of the law." (alteration, internal quotation marks, and citation omitted)). We conclude that community homes are not facilities that provide extended health care and therefore are not custodial care facilities as defined in Section 61-11-2(F).

{26} Having determined that community homes are not custodial care facilities, we return to the Board's argument that the Ranches are engaged in the practice of pharmacy because they store prescription medication on site and keep records of such medication. The Board contends that the Ranches must obtain a pharmacy license because the Board must provide for the licensing of "all places where dangerous drugs are stored, distributed, dispensed or administered[,]" and the Ranches store and administer dangerous drugs—prescription medication. Section 61-11-6(A)(6); *see also* § 61-11-2(G) (defining "dangerous drug").

{27} The Board's interpretation separates one provision from the statute as a whole. Reading Section 61-11-6(A)(6) in its entirety, the Act directs the Board to license pharmacies, drug distributors, drug manufacturers, health clinics, and other facilities of a similar character. *See* § 61-11-6(A)(6) (directing the Board to "provide for the licensing of retail pharmacies, nonresident pharmacies, wholesale drug distributors, drug manufacturers, hospital pharmacies, nursing home drug facilities, industrial and public health clinics and all places where dangerous drugs are stored, distributed, dispensed or administered"). The Ranches are not one of the facilities the Board must license, and appear to be dissimilar from such facilities based upon the distinct purpose of the Ranches, which are primarily purposed to provide safe care and not medical or health care.

{28} Additionally, we agree with the Ranches that CYFD already oversees the Ranches' use and storage of prescription medication. When CYFD enacted the community home licensing standards in 2014, it created a health and safety checklist that governs community homes. 8.26.6.15 NMAC. This checklist addresses a variety of health and safety considerations, including medical care and medication administration. 8.26.6.15(J), (K) NMAC. CYFD requires community homes to obtain timely medical care for their residents, to only administer medication as prescribed and directed by a medical professional, and to store medications separately from food and cleaning agents in a location not easily accessed by children. *Id.* Before a community home receives a license, CYFD must verify that the facility complies with 8.26.6 NMAC and issue written approval. 8.26.6.10(A) NMAC; 8.26.6.11 NMAC. Further, a community home's license cannot be renewed without CYFD on-site review. 8.26.6.11 NMAC; 8.26.6.12(B) NMAC. A community home license has a minimum duration of six months and a maximum duration of two years, with a standard license lasting for one year. 8.26.6.10(A)-(C) NMAC. Thus, CYFD regularly reviews the Ranches and other community homes, at most every six months and at least every two years, to ensure they properly handle medication and will not issue or renew a license without doing so. 8.26.6.10(A)-(C) NMAC; 8.26.6.12(B) NMAC.

{29} In light of the Act's purpose—the effective control and regulation of the practice of pharmacy—and the Board's duties, we hold the Legislature did not intend the Act to apply to all facilities that provide care for individuals for an extended period of time, regardless of whether those facilities practice pharmacy. *See* § 61-11-1.1(B) (stating the purpose of the Act). We affirm the decision of the district court and hold that community homes are not required to obtain a pharmacy license to operate.

The Board's Authority to Define "Custodial Care Facility"

{30} Finally, we address the Board's authority to define "custodial care facility" as it has done at 16.19.11.7(B) NMAC. The statutory interpretation of the agency charged with administering the statute is persuasive, but not binding. *N.M. Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 6, 106 N.M. 73, 738 P.2d 1318. We may substitute our own independent judgment for that of the agency because it is the function of the courts to interpret the law. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28. "We must examine [the agency's] interpretation in the context of the statute as a whole, including the purposes and consequences of the [statute]." *Baker*, 2013-NMSC-043, ¶ 15. "[We] will overturn a clearly incorrect administrative interpretation." *N.M. Pharm. Ass'n*, 1987-NMSC-054, ¶ 6.

{31} The Legislature authorized the Board to adopt rules and regulations for the purposes of carrying out the Act, including the ability to define and limit classes of licenses. Sections 61-11-6(A), -14(B). This includes licenses for custodial care facilities, which, as discussed, are statutorily defined as "nursing home[s], retirement care, mental care or other facilit[ies] that provide[] extended health care." Section 61-11-2(F). The Board's regulations define "custodial care facility"[2] as "[a]ny facility or business, including non-profit entity which provides care and services on a continuing basis, for two or more in-house residents, not related to

[2] We note that the Board has specifically defined "licensed custodial care facility," but this addition does not affect our analysis and decision. See 16.19.11.7(B) NMAC.

the operator, and which maintains custody of the residents' drugs." 16.19.11.7(B) NMAC. In effect, the Board attempts to expand the definition of "custodial care facility" beyond what was intended by the Legislature.

{32} The Board argues that adopting this definition falls within its express statutory authority to define license classifications. However, the Act authorizes the Board to "define[] and limit[]," not to impermissibly broaden or rewrite, an existing definition. Section 61-11-14(B). The Legislature clearly defined "custodial care facility" in Section 61-11-2(F), and the Board's administrative rule must yield to that definition. *See Family Dental Ctr. of N.M., P.C. v. N.M. Bd. of Dentistry*, 1982-NMSC-020, ¶ 9, 97 N.M. 464, 641 P.2d 495 ("If an agency, to whom the Legislature has delegated authority to promulgate rules and regulations within the guidelines set by the Legislature, promulgates rules which are broader than the guidelines set by the Legislature, the agency rules must yield to the guidelines."). We hold that the Board acted outside its statutory authority in defining "custodial care facility" in 16.19.11.7(B) NMAC in a manner that excessively expanded upon the Act's provisions, and that the Board's definition is therefore void.

CONCLUSION

{33} We hold that the district court had subject matter jurisdiction over this case and that it did not abuse its discretion in granting the Ranches a declaratory judgment and permanent injunction. We also hold community homes are not custodial care facilities as defined at Section 61-11-2(F) of the Act. Finally, we hold the Board exceeded its regulatory authority when it expanded the definition of "custodial care facility" in 16.19.11.7(B) NMAC. For the foregoing reasons, the decision of the district court is affirmed.

{34} IT IS SO ORDERED.

JACQUELINE R. MEDINA, Judge

WE CONCUR:

J. MILES HANISEE, Chief Judge

KRISTINA BOGARDUS, Judge

Classified

Positions

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Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time attorney to represent adult criminal defendants and juveniles in delinquency cases in Laguna Pueblo Court. Leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply now, will fill quickly. Application instructions and position details at: Employment | Pueblo of Laguna (lagunapueblo-nsn.gov)

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Attorneys
The City of Albuquerque Legal Department is hiring attorneys with the primary responsibility of advising the Albuquerque Police Department (APD). Duties may include: representing APD in the matter of United States v. City of Albuquerque, 14-cv-1025; reviewing and providing advice regarding policies, trainings and contracts; reviewing uses of force; drafting legal opinions; and reviewing and drafting legislation, ordinances, and executive/administrative instructions. Attention to detail and strong writing skills are essential. Additional duties and representation of other City Departments may be assigned. Salary and position will be based upon experience. Please apply on line at www.cabq.gov/jobs and include a resume and writing sample with your application.

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Houser LLP, a litigation law firm, is looking to add an attorney with 1-4 years' experience for its New Mexico office. Remote, hybrid or reduced schedule options are available. The ideal candidate will have strong writing, research and communication skills. We offer competitive compensation, which includes a great benefits package. Houser LLP lawyers take pride in their work, deeply value their clients, and the firm. If you're interested in this position, please submit your resume to rnorman@houser-law.com.

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Full-Time Regular Exempt position. The chief legal advisor to the City Manager and City Council, and Director of the Legal Department. Provide legal opinions and strategy, minimize risk and liability, manage legal issues, and represent the City in administrative proceedings and legal actions. Juris Doctor Degree AND seven (7) years of experience in a government legal practice, including three (3) years of administrative and management experience to include supervising personnel. Must be a member of the New Mexico State Bar Association, licensed to practice law in the State of New Mexico, and remain active with all New Mexico Bar annual requirements. If not licensed in the State of New Mexico at the time of hire, applicant must apply for a Public Employee Limited License issued under NMRA 15-301.1 and must obtain a regular State of New Mexico bar license within one (1) year of the date of hire Associated costs will be the responsibility of the applicant. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.lascruces.gov . Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed. SALARY: $148,239.79 - $217,571.79 / Annually OPENING DATE: 12/28/22 CLOSING DATE: Continuous

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Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 36 states, is currently seeking an experienced litigation attorney for an immediate opening in its office in Albuquerque, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The firm offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume to Hamilton Hinton at hhinton@cordelllaw.com

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Sutin, Thayer & Browne is looking to hire a full-time associate, with at least 3 years of transactional experience, for our Commercial Group. The successful candidate must have excellent legal writing, research, and verbal communication skills. Competitive salary and full benefits package. Send letter of interest, resume, and writing sample to sor@sutinfirm.com.

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Deputy City Attorney

Plans, coordinates, and manages operations, functions, activities, staff, and legal issues in the City Attorney's Office to ensure compliance with all applicable laws, policies, and procedures. Juris Doctor Degree AND seven years of experience in a civil and criminal legal practice; at least one (1) year of experience in municipal finance, land use, and public labor law is preferred. If not licensed in the State of New Mexico at the time of hire, applicant must apply for a Public Employee Limited License issued under NMRA 15-301.1 and must obtain a regular State of New Mexico bar license within one (1) year of the date of hire. Associated costs will be the responsibility of the applicant. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.lascruces.gov . Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. SALARY: $112,510.21 - $164,605.37 / Annually OPENING DATE: 04/05/23 CLOSING DATE: Continuous: This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed.

Assistant City Attorney

This is a professional position, involving primarily civil law practice. Under the administrative direction of the City Attorney, represents and advises the City on legal matters pertaining to municipal government and other related duties, including misdemeanor prosecution, civil litigation and self-insurance matters. Juris Doctor Degree AND three years' experience in a civil law practice; at least one year of public law experience preferred. Must be a member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico, and remain active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.lascruces.gov. Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. SALARY: $93,935.71 - $136,743.36 / Annually OPENING DATE: 04/05/23 CLOSING DATE: Continuous; This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed.

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Albuquerque-based Gridworks seeks an outstanding Associate General Counsel candidate. This position will partner with the General Counsel and executive leadership to help structure and negotiate Gridworks' EPC prime contracts, shape legal success strategy, and support other legal needs of a rapidly growing company. This role offers the opportunity to work in a supportive and flexible work environment, with great people, and towards the meaningful mission of fostering a sustainable clean-energy future. For more information and to apply, visit https://link.edgepilot.com/s/5117e3d9/U2x-wFoiZEaqnbLfDivTQw?u=http://www.gridworks.com/careers/.

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Fadduol, Cluff, Hardy & Conaway, P.C. is seeking an Associate Attorney / Briefing Attorney for immediate hire. The position will be primarily that of a briefing attorney as 60%-70% of the workload will include brief-writing with the remaining portion spent on developing other litigation skills by handling a small case list. Candidates with strong legal research and writing skills will be given preference. Additionally, candidates will have the option to work remotely for the briefing portion of their workload. We are offering a starting salary of $85,000 per year with the potential for bonuses based on performance. Salary is open for discussion dependent on your experience. We also offer a highly competitive health and benefits plan. To apply, please send your resume and a writing sample to csedillo@fchclaw.com.

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The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney – Employment/ Labor; Assistant City Attorney – Property & Finance. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

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Attorneys must possess J.D. Degree

The U.S. Attorney's Office for the District of New Mexico is to uphold the rule of law, keep New Mexico and the nation safe, and to protect civil rights. The Office earns the public trust by following the facts wherever they lead, without fear or favor. The Office adheres to the highest standards of excellence and ethical behavior, interested not in winning cases but in ensuring justice is done. And the Office values differences in people and in ideas, treating defendants, victims, witnesses, and colleagues with dignity, compassion, and fairness. Applicants must be able to independently manage all aspects of their assigned cases, including overall strategy, preparing pleadings and motions, taking depositions, preparing and answering discovery, negotiating settlements, and trying cases. If you are interested in serving the public and representing the people of the United States in a manner that will instill confidence in the fairness and integrity of the USAO and the judicial system, and have the experience necessary to do so, please apply before the vacancy closes on May 15, 2023. Qualification: Applicants must possess a J.D. Degree, be an active member in good standing of a bar (any jurisdiction) and have at least one (1) year of post-J.D. legal or other relevant experience. Salary: AUSA pay is administratively determined based, in part, on the number of years of professional attorney experience. The pay for this position is as follows, including locality pay: Albuquerque, N.M., Salary is $69,777 to $182,509 which includes a 17.63% locality pay. Las Cruces, N.M., Salary is $69,107 to $180,756 which includes a 16.50% locality pay. The complete vacancy announcement may be viewed at https://www.usajobs.gov/GetJob/ViewDetails/717055500 (USAJobs). All applicants must apply through USAJobs.

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NM Retiree Health Care Authority General Counsel

General Counsel Summary: The General Counsel (GC) position is responsible for implementing, maintaining, and protecting NMRHCA's legal posture and interests within the scope established by NM Statute, NMRHCA's Board of Directors, and NMRHCA's Executive Director. This position serves as a member of the leadership team, providing expertise and experience to the NMRHCA policy and decision-making process. The General Counsel position is an exempt employment position which is on at-will basis. IDEAL CANDIDATE: NMRHCA seeks an experienced attorney who thrives in a hands-on and collaborative environment to be the next General Counsel. The ideal candidate must have the confidence, exceptional communication, and interpersonal skills to educate and advise the Board, Executive Director, and others on complex legal and regulatory matters related to health care polices and Other Postemployment Benefits. Our ideal candidate will be committed to upholding the fiduciary duty to our members and beneficiaries of NMRHCA. This person will be able to hit the ground running and quickly gain the confidence and respect of the Board and staff. In addition, this person will have experience advising public agencies and understand that legal opinions must be able to be implemented within the administrative realities the agency operates in. ESSENTIAL FUNCTIONS: Provides legal advice to Executive management and others regarding proposals or anticipated actions; Oversees coordination of legal activity performed by outside counsel and the Attorney General's Office; Monitors issues of fiduciary responsibilities of the Board and staff; Coordinates issues relating to NMRHCA benefits; Coordinates issues stemming from NMRHCA administration (contract, personnel, general liability, etc.); Oversees legal work done in connection with NMRHCA investments and policy; Ensures compliance with federal and state laws, rules, and regulations; Provides oversight and direction to leadership regarding NMRHCA's Governance Manual and compliance matters including working with third party partners; Assists the Executive Director in legislative issues; Assists the Executive Director and Board of Directors in the long-range strategic planning process; Demonstrates leadership and management capabilities to manage processes; Carries out other duties as assigned; Develop and compose rule changes and draft statutory changes as needed; Draft up responses to member appeals. QUALIFICATIONS: Juris Doctorate and license to practice in the State of New Mexico or the ability to obtain a license within 6 months; Ten years of professional work experience, preferably in the areas of retiree health plans, administrative proceedings, litigation, investments, taxes, insurance, contracts, and labor law; Experience working closely with a governing board; Experience in interpreting current and proposed state and federal laws; Experience in lobbying at the state level is preferred; Strong analytical and organizational skills; Strong interpersonal skills; Excellent oral and written communication skills. WORKING CONDITIONS: Ability to travel as necessary. COMPENSATION: NMRHCA will offer the successful candidate a competitive base salary dependent on experience and qualifications. NMRHCA offers a comprehensive benefits package including health, dental, and life insurance; annual and sick leave policy and other benefits that are available to State of New Mexico employees. All the NMRHCA employees contribute towards a defined benefit retirement plan, retiree health plan, and can elect to participate in a voluntary deferred compensation plan. APPLICATION PROCESS: Please send a current resume and cover letter by 5:00 p.m. (MST) Friday, May 12, 2023 to: Jessica Trujillo, HR Manager E-mail address: JessicaA.Trujillo@pera.nm.gov

Staff Attorney - Silver City, New Mexico

New Mexico Legal Aid seeks a staff attorney in Silver City, NM to handle poverty law issues such as domestic violence, consumer issues, public benefits , family law and housing. Experience as a practicing attorney preferred but will consider exceptional candidates without experience. Admission to practice law in NM required. This job is part of a collective bargaining agreement. Competitive salary and full benefits package. To apply provide a current resume and a cover letter that explains your interest in this position and the mission of NMLA by visiting out website at https://newmexicolegalaid.isolvedhire.com/jobs/804889.html. As an alternative, you can email the applicant packet to jobs@nmlegalaid.org.

Prosecutors

Immediate openings for Prosecutors in Las Vegas, New Mexico. Work with a diverse team of professionals, a manageable caseload with a competitive salary in a great workplace environment. If you are interested in learning more about the positions or wish to apply, contact us at (505) 425-6746, or forward your letter of interest and resumé to Thomas A. Clayton, District Attorney, c/o Mary Lou Umbarger, Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 or e-mail: mumbarger@da.state.nm.us

Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new and/or experienced attorneys. Salary will be based upon the New Mexico District Attorney's Salary Schedule with salary range of an Assistant Trial Attorney ($ 65,000.00) to a Senior Trial Attorney ($76,600.00), based upon experience. These positions are located in the Carlsbad, NM office. Please send resume to Dianna Luce, District Attorney, 100 N Love Street, Suite 2, Lovington, NM 88260 or email to 5thda@da.state.nm.us

Litigation Associate

Do you want to be a great litigator? Do you want to work at a firm that supports your professional growth? Are you passionate about representing injured people? Begum & Cowen, PLLC is hiring a litigation associate for our Albuquerque, New Mexico office. The position involves litigating car crash and other personal injury claims in New Mexico state and federal courts. Job duties include client communication, drafting pleadings and motions, case strategy, depositions, and hearings. We provide constant training and development for our lawyers, including both paid continuing le-gal education seminars and in-house training. If you want to become a great personal injury trial lawyer we will give you the tools, training, and resources to reach your full potential. To learn more about our litigation and management philosophy, listen to partner Michael Cowen's podcast, Trial Lawyer Nation. This is an in-office job, not a remote position. The base salary is $75,000 to $100,000 plus a bonus structure with no ceiling. There is also the potential for additional bonuses based on production. The firm also pays bar dues, NMTLA and AAJ dues, and continuing legal education. The firm also provides health insurance and a 401(k). To apply, please send your resume to michael@nmlawgiant.com.

ACLU of New Mexico - Multiple Jobs

The American Civil Liberties Union of New Mexico will be filling multiple legal roles. Our mission is to protect and advance justice, liberty, and equity as guaranteed by the constitutions of New Mexico and the United States. The legal team uses litigation and policy advocacy to bring greater justice, liberty, and equity to New Mexicans. Current and upcoming openings include a paralegal role focused on criminal-legal reform and an attorney role focused on reproductive rights. Please see our website for open roles as they become available: www.aclu-nm.org

Attorneys/Law Firms to Provide Legal Services

The New Mexico Office of Superintendent of Insurance, through its Title Insurance Bureau, is soliciting proposals from attorneys/law firms to provide legal services for the Title Insurance Bureau specifically related to the biennial setting of uniform premium rates and the promulgation of all policy forms, including endorsement forms. All interested attorney or law firms may obtain a copy of the Request for Qualifications and Statement of Interest ("RFQ/SOI") from the Office of Superintendent of Insurance's website, Office of Superintendent of Insurance (state.nm.us). The deadline for submitting an RFQ/SOI is May 26, 2023 5:00 P.M. MST.

Office Manager/Legal Assistant

MARRS GRIEBEL LAW, LTD. is an Albuquerque law firm serving businesses and their owners who find themselves dealing with business disputes. We aim to provide our clients with responsive, sensible, and efficient legal services that meet their broader business objectives. Come join our growing team. Office Manager/Legal Assistant Responsibilities: Manages all aspects of firm business, including accounts payable, accounts receivable, payroll, account reconciliation, trust account management, insurance (business, health, and malpractice) and firm's SEP IRA records; Processes payroll and tax deposits; Coordinates vendors/repair technicians for building and/or equipment; Maintains the firm's billing system, including client information; Production of monthly invoices, account collection, and trust account records for each client; Manages paper client files, including daily filing, closing/storing paper files, shredding of files that have reached retention dates; Assists attorneys and paralegals with document production and management such as proofreading, e-filing and forwarding documents to clients; Manages electronic client files; maintains and monitors calendaring. Skills, Education and Experience Requirements: Collegiality and flexibility in a small office work environment; Strong bookkeeping skills and previous office management experience required; High school diploma required; some college level courses preferred. Benefits of Working with our Firm: We are a small firm that rewards collegiality and hard work; Salary begins at $50K; negotiable depending on experience and production; We offer a generous compensation plan and full benefit package. To apply, please send resume to hiring@marrslegal.com.

Entry Level and Experienced Attorneys

The Thirteenth Judicial District Attorney's Office is seeking both entry level and experienced attorneys. Positions available in Sandoval, Valencia, and Cibola Counties. Enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, providing the opportunity to advance more quickly than is afforded in larger offices. The 13th Judicial District offers flex schedules in a family friendly environment. Competitive salary depending on experience. Contact Krissy Fajardo @ kfajardo@da.state.nm.us or visit our website for an application @https://www.13th.nmdas.com/ Apply as soon as possible. These positions fill fast!

Associate Attorney

Kennedy, Hernandez & Harrison, P.C. is a small, Albuquerque-based firm with a focus on plaintiffs' civil litigation and civil rights, looking for attorneys with 0-5 years of experience who are self-motivated and eager to learn. As part of our collaborative team, you would gain experience in every aspect of our cases: meeting clients, drafting pleadings, taking discovery and depositions, briefing motions, and working a case all the way through trial and appeal. Candidates should be hard-working and organized, with strong writing skills. Our firm is fast-paced, with competitive salary and benefits. Please send resumés and writing samples to Lhernandez@kennedyhernandez.com.

Briefing/Research/Writing Attorney

Scherr Law is currently seeking an excellent and career-driven Briefing/Research/Writing Attorney with strong education, experience and appellate qualifications to join our team! Duties include drafting motions, appeals, pleadings, memos as well as preparation and research for depositions, hearings and at trial for both state and federal Courts, including Texas, New Mexico and other states. This role requires a JD, licensure as an attorney, strong research and writing skills along with creative critical analysis skills. Full-time salary range: $80,000.00 - $150,000.00+ per year. Please submit resume and writing sample to jim@jamesscherrlaw.com

Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for Assistant Trial Attorneys, Trial Attorneys and Senior Trial Attorneys. You will enjoy working in a community with rich culture and history while gaining invaluable experience and making a difference. The McKinley County District Attorney's Office provides regular courtroom practice, supportive and collegial work environment. You are a short distance away from Albuquerque, Southern parts of Colorado, Farmington, and Arizona. We offer an extremely competitive salary and benefit package. Salary commensurate with experience. These positions are open to all licensed attorneys who have knowledge in criminal law and who are in good standing with the New Mexico Bar or any other State bar (Limited License). Please Submit resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to Bmartin@da.state.nm.us. Position to commence immediately and will remain opened until filled.

General Counsel
The General Counsel will manage all the day to day in house counsel responsibilities for the office and preferably have experience litigating in state and federal court. Must also have established proficiency in anticipating and identifying legal issues to counsel management in order to develop legal strategies and solutions. Please send cover letter, resume, and 3 references to: Deputy Secretary of State at sharon.pino@sos.nm.gov.

Legal Office Manager
The New Mexico Center on Law and Poverty is hiring a Legal Office Manager to handle all aspects of running an office for a non-profit legal organization, including administrative, front office, and technology management and staff support responsibilities for in-office and remote work. Required: Strong commitment to social, racial, and economic justice; fluent Spanish speaker; organized with careful attention to detail; and technology savvy. Apply in confidence by emailing your resume and a cover letter that describes what interests you about the mission of NMCLP to contact@nmpovertylaw.org. We are an equal opportunity employer committed to a healthy, collaborative, and inclusive work environment for a diverse staff. We strongly encourage applications from Black, Native, and indigenous people, people of color, immigrants, LGBTQ+, and New Mexicans and individuals of multiple backgrounds and identities.

Full-Time Paralegal
Durham, Pittard and Spalding, LLP is looking for a full-time paralegal for their office in Santa Fe. Experience in trial law and appellate law preferred. Duties/Responsibilities include: Document and case management; Drafting pleadings, correspondence and related documents; Maintaining firm calendar; Extensive communication with clients, court personnel and attorneys; Trial preparation; Experience in New Mexico appellate law (state and federal) helpful; Familiar with Texas trial and appellate law a plus, but not required. Required Skills/Abilities: Paralegal degree/certificate; Bachelor's degree with experience will be considered; Ability to multi-talk; Strong litigation support skills; Prior experience with State and Federal District Court rules and filing procedures. Appellate experience helpful.; Highly organized and detail oriented; Computer skills in Microsoft Office Suite, Westlaw, PACER, eFile and other electronic filing systems in New Mexico. Benefits include health, dental, 401(k) plan and PTO. Must love working with an amazing legal team. Please email cover letter, resume and salary requirements to kblackburn@dpslawgroup.com.

Legal Assistant
Conklin, Woodcock & Ziegler, P.C, a medium-sized downtown litigation firm is accepting resumes for a full-time legal assistant position. We are seeking a motivated, team-orientated person with experience in civil litigation, court rules and filing procedures. There may be some opportunity for paralegal work as well. Candidates must have solid clerical, organizational, computer and word processing skills. Excellent benefits, including 401K, health insurance benefits, paid vacation and sick leave, as well as year-end bonus opportunities. Salary will be based on ex-perience and skills. Please respond to this ad with your resume and references to jobs@conklinfirm.com.

Legal Assistant
Dixon Scholl Carrillo PA is seeking a full time legal assistant with a minimum of 5 years experience in Litigation support. Must be self-motivated have strong writing, organizational, calendaring and multitasking skills. Knowledge of Office 365, and Word and WordPerfect. Knowledge of Worldox a plus but not a must. We offer excellent benefits and great work environment. Competitive Salary. Submit your resume to Michaela O'Malley at momalley@dsc-law.com.

Paralegal
The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is $24.68 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $25.89 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

2023 *Bar Bulletin* Publishing and Submission Schedule

The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, three weeks prior to publication.**

For more advertising information, contact:
Marcia C. Ulibarri at 505-797-6058 or
email marcia.ulibarri@sbnm.org

The publication schedule can be found at
www.sbnm.org.

Full-time Legal Assistant/Paralegal
Quinones Law Firm LLC is a well-established defense firm in Santa Fe, NM in search of a full-time paralegal with minimum 5 years of Legal Assistant/Paralegal experience. Please send resume to quinoneslaw@cybermesa.com

Paralegal
The Santa Fe office of Hinkle Shanor LLP seeks a paralegal for the practice areas of litigation and administrative law. Candidates should have a strong academic background, excellent research skills and the ability to work independently. Competitive salary and benefits. All inquiries kept confidential. Santa Fe resident preferred. Please email resume to: gromero@hinklelawfirm.com.

Paralegal
MARRS GRIEBEL LAW, LTD. is an Albuquerque law firm serving businesses and their owners who find themselves dealing with business disputes. We aim to provide our clients with responsive, sensible, and efficient legal services that meet their broader business objectives. Come join our growing team. Paralegal Job Responsibilities: Document review, organization, and analysis; preparing document summaries and indices; Working directly with clients regarding document retrieval and discovery response; Assisting with the preparation, filing and service of pleadings; Coordinating the collection, review and production of documents and responding to discovery requests; Assisting with trial preparation including the assembly of exhibits, witness binders and appendices for depositions and court filings; Summarizing deposition transcripts and exhibits; Researching case-related factual issues using in-house files and outside reference sources. Benefits of Working with our Firm: We are a small firm that rewards hard work Salary begins at 50K and up depending on experience and production; We offer a generous compensation plan and full benefit package; Hours can be flexible and working remotely is allowed if desired. Skills, Education and Experience Requirements:; Research and investigation skills; Ability to prioritize workload and assignments with moderate level of guidance; Bachelor's Degree preferred; Paralegal certificate from an ABA accredited program preferred, or a combination of education and/or experience; 2+ years of significant and substantive litigation experience as a paralegal; Basic legal drafting skills for less involved filings – simple motions; Managing medium to large-scale document production experience; Proficiency with Document Review Software (Adobe) and MS Suite; SharePoint experience preferred. To apply, please send resume to hiring@marrslegal.com.

Full-Time Paralegal
Armstrong Roth Whitley Johnstone Family Law is seeking a full-time paralegal to join our team. We are looking for someone with at least two years of work experience as a paralegal or other comparable employment position. Family law experience is preferred but not required. Responsibilities include: Drafting and preparing pleadings for filing, interacting with and handling client inquiries, assisting attorneys with discovery requests and trial and hearing preparations, scheduling of meetings and hearings, interacting with Court staff, and other duties as assigned. Our ideal candidate has excellent organizational skills, the ability to handle dead-lines in a fast-paced environment, strong oral and written communication skills, the ability to work well under pressure, knowledge of computer programs, the ability to process and format complex documents, and the ability to learn and adapt to our client management software. Benefits include: 401(k) with employer matching, medical, dental and vision insur-ance, generous paid time off, short/long term disability and group life insurance. Pay to be determined commensurate with experience. To apply email resume and cover letter to arwjllc@gmail.com

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"I have worked at a few different District Attorney Office's across the State from the North to the South and in between. The 13th allows for greater discretion and flexibility than any other office I have worked in. Further, it is an atmosphere with little contentiousness, especially compared to other offices. If you wish to be a career prosecutor, this is where you belong." John L. – Trial Attorney

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