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## Lion's Gate Water v. D'Antonio, No. 31279, 2009 WL 5124536 (N.M. Dec. 2, 2009)

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Accordingly, the Indiana Court of Appeals reversed the trial court's grant of summary judgment finding that there were genuine issues of material fact the trial court needed to determine. Thus, the court remanded the case for further proceedings.

*Matt Brodahl*

## NEW MEXICO

*Lion's Gate Water v. D'Antonio*, No. 31279, 2009 WL 5124536 (N.M. Dec. 2, 2009) (holding that *de novo* review of a State Engineer's decision that water is unavailable to appropriate limits a district court's review to that sole, dispositive issue and that the statutory provision requiring the State Engineer to order notice publication applies only when water is available for appropriation).

In February 2003, Lion's Gate Water ("Lion's Gate") applied for a permit with the Water Rights Division of the Office of the State Engineer ("Water Rights Division") to appropriate new water from the Gila River located in southwestern New Mexico. The Water Rights Division summarily rejected Lion's Gate's application, concluding that there was no water available for appropriation. Finding no water available, the Water Rights Division did not answer the ancillary questions of whether the proposed appropriation was contrary to the conservation of water or whether the appropriation would be detrimental to the public welfare. Lion's Gate subsequently filed seven additional applications; the Water Rights Division rejected all of them. Despite the rejected applications, Lion's Gate twice attempted, though only once succeeded, to publish notice of its application for a permit. According to New Mexico law, the State Engineer issues all permits. Because of the statutory hearing prerequisite to an appeal, Lion's Gate demanded an administrative hearing to review the State Engineer's decision to reject Lion's Gate's amended applications. Before the required hearing, however, Lion's Gate appealed its all of its initial and subsequent rejected applications to the Sixth Judicial District Court (the "district court").

The district court dismissed Lion's Gate's appeals for failure to exhaust administrative remedies because the hearing required by statute was still pending. A year later, the State Engineer ordered a hearing on the sole issue of whether water was available for appropriation. Lion's Gate then filed an additional appeal in the district court arguing that a limited hearing denied Lion's Gate the constitutional right to fair and unbiased treatment. The district court once again found no statutory basis for appeal before completion of the required hearing. In August 2007, the hearing examiner granted the Water Rights Division's motion for summary judgment because no water was available to appropriate. Lion's Gate appealed the State Engineer's summary judgment to the district court and requested confirmation that the district court would hear the appeal as an original case, including the issues the State Engineer did not consider. The

district court granted a trial *de novo* on all issues; stating that it would consider new evidence and evidence previously introduced at the administrative hearing. Without ruling on whether the State Engineer's grant of summary judgment was proper, the district court made several findings, including: (1) the State Engineer failed its statutory obligation to provide notice of Lion's Gate's application for permit; and (2) Lion's Gate's self-initiated notice substantially complied with the requirements prescribed by statute. After the New Mexico Court of Appeals denied the State Engineer's appeal of the interim order, the State Engineer petitioned the New Mexico Supreme Court (the "court") for a writ of certiorari, which the court granted.

Since 1907, the sole statutory means of acquiring a water right in New Mexico has been by the State Engineer's issuance of a permit. A statute establishing a *de novo* standard of review for appeals to the district court from the State Engineer's rulings accompanied the 1907 water rights legislation. Judges have interpreted the 1907 statute as not allowing a district court to hear new or additional evidence when it reviews a State Engineer's decision. Agreeing with the judiciary, the legislature added language to the statute, limiting a district court's *de novo* review, "as cases originally docketed." Here, the court referred to the statutory language and the legislative intent to determine the meaning of the appeal statute's *de novo* provision.

The court reasoned that the intended effect of the water code's grant of broad powers to the State Engineer regarding water rights applications was to utilize the State Engineer's expertise and to provide for a comprehensive administration procedure. Consequently, the court determined that interpreting the appeals statute to permit the district court to hear evidence on ancillary issues not decided by the State Engineer would circumvent the intended effect of the water code. Further, the court reasoned that because the availability of water for appropriation is a threshold issue, the ancillary issues of whether the proposed appropriation is contrary to the conservation of water or whether the appropriation would be detrimental to the public welfare are irrelevant when there is no water available. As a result, the court concluded that the statute providing for a *de novo* standard of review limits the district court's review to the sole decision made by the State Engineer that water was unavailable. Additionally, the court noted that public notice before a determination that water is available for appropriation would unnecessarily involve the public and prior appropriators. Therefore, the statutory provision requiring the State Engineer to order notice publication applies only when water is available for appropriation.

Accordingly, the court reversed and remanded the district court's ruling.

*Crystal Lay*