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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BLUE CANYON WELL ASSOCIATION,

Plaintiff/Appellee,

vs.

DENISE JEVNE,

Defendant/Appellant.

Magistrate Court No. M-49-CV-2012-00512
District Court No. D-101-CV-2013-00870
COA No. 2015-34655

APPELLEE'S ANSWER BRIEF

Appeal from the District Court of Santa Fe County
The Honorable Francis J. Mathew

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ARGUMENT

This appeal raises a question of statutory interpretation and purports to challenge Appellee's, the Blue Canyon Well Association's ("Association"), standing to sue in the initial magistrate court proceeding in which judgment was entered in favor of the Association. First, Appellant, Denise Jevne ("Appellant"), argues NMSA 1978, Section 53-10-1 (1953), which states an unincorporated association or club "may file in the office of the county clerk", actually mandates filing, contrary to its plain language. Second, Appellant argues, even if the Association was not required to file a statement with the county clerk, it nevertheless lacked standing to sue Appellant in the name of the Association because NMSA 1978, Section 53-10-7 (1953) imposes a twenty-year maximum term for unincorporated associations to exist, which, according to Appellant, expired before suit was brought. Neither issue has merit.

I. THE DISTRICT COURT CORRECTLY DETERMINED THE BLUE CANYON WELL ASSOCIATION IS NOT REQUIRED TO FILE A STATEMENT OF ASSOCATION PURSUANT TO NMSA 1978, SECTION 53-10-1 TO BE AN UNINCORPORATED ASSOCIATION

A. Standard of Review

The first issue raised by Appellant is a question of statutory construction and interpretation. Therefore, it is reviewed *de novo* by the Court of Appeals. *See Cordova v. Cline*, 2013-NMCA-083, ¶ 8, 308 P.3d 975, 978-79; *State v. Herrera*, 2001 NMCA 7, ¶ 6, 130 N.M. 85, 18 P.3d 326.

B. Preservation of the Issue

The issue concerning whether filing is mandatory pursuant to Section 53-10-1 was raised initially in the Association's "Motion to Amend Caption to Properly Identify the Individual Plaintiffs/Appellees" ("Motion to Amend"). [RP 13] Following the parties' briefing and a hearing on the Motion to Amend, the district court issued a Memorandum Opinion and Order

denying the Motion to Amend on the basis that filing is permissive under Section 53-10-1. [RP 57-59] Therefore, the issue is properly preserved for review by the Court of Appeals. *Martinez v. Public Emples. Ret. Ass'n*, 2012-NMCA-096, ¶ 1, 286 P.3d 613, 616 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.").

C. **Background**

In 2013, the Association sought to amend the caption of the complaint to identify its individual Association members (excluding Appellant) as party-plaintiffs rather than the "Blue Canyon Well Association" on the basis that the individual members were the real parties in interest pursuant to Rule 1-017(A) NMRA, because the Association had not been properly formed under Section 53-10-1. [RP 13-14, 36-37] The Association's counsel believed at that time that filing with the county clerk was necessary under Section 53-10-1 to form an unincorporated association. [RP 37] The District Court disagreed and denied the Association's motion. [RP 57-59] The District Court found Section 53-10-1 "allows for permissive filing" based upon the use of the word "may." [RP 58] *See* § 53-10-1 ("an association or club *may* file in the office of the county clerk. . .". (emphasis added)). The District Court is correct. Consequently, the fact that the Association did not file a statement with the county clerk does not void its lawful existence.

D. **According to the Uniform Statute and Rule Construction Act, NMSA 1978, Sections 12-2A-1 to -20 (1997) the Term "May" is Not Mandatory**

The statutory use of the terms "may" and "shall" have long-standing, well-established definitions presumed to be known by the legislators who use them. Their meanings are so well-established that they are among the few terms separately defined by statute. "'Shall' and 'must' express a duty, obligation, requirement or condition precedent." § 12-2A-1(A). "'May' confers

a power, authority, privilege or right." § 12-2A-1(B). "The words 'shall' and 'will' are mandatory and 'may' is permissive." *Gandy v. Wal-Mart Stores*, 1994-NMSC-040, ¶ 6, 117 N.M. 441, 442, 872 P.2d 859. Despite this "canon of statutory construction", *see id.*; Appellant asks this Court to give new meaning to the term "may" and change it from a permissive term to a mandatory term equivalent to "shall." [BIC 15] However, "the plain meaning rule of statutory construction states that when a statute contains language which is clear and unambiguous, the court must give effect to the language and refrain from further statutory interpretation." *Sims v. Sims*, 1996-NMSC-078, ¶ 18, 122 N.M. 618, 622, 930 P.2d 153; *see* § 12-2A-19 ("The text of a statute or rule is the primary, essential source of its meaning."). Appellant attempts to create an ambiguity that does not exist.

Section 53-10-1 states in full:

> Whenever two or more persons **shall** desire to form an association for the promotion of their mutual pleasure or recreation of any hunting, fishing, camping, golf, country club, or association for a similar purpose, or an association not for the individual profit of the members thereof, and without incorporating the same as a corporation, or maintaining the title of its property in trust for the interest of its several members as they may exist from time to time.[, the] The said persons or members desiring to form such an association or club **may file in the office of the county clerk of the county** in which it may maintain its headquarters and pursue its objects and purposes, a statement containing the name of such association, its objects and purposes, the names and residences of the persons forming such association, together with a copy of its articles of association and any rules and/or regulations governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein.

(Emphasis added.) The language of the statute is clear. The only mandatory provision is the members' desire to form an association. *See id.* The remainder of the statute clearly gives an association the authority to file a statement of association with the county clerk, but does not mandate such a filing. *See id.* If the legislature had intended filing to be mandatory, it could easily have used the phrase "shall file" or "must file" to create such a requirement. *Cf. Sims*, 122 N.M. at 623 ("the courts will not add to such a statutory enactment, by judicial decision, words

which were omitted by the legislature." (quoting *State ex rel. Miera v. Chavez*, 1962-NMSC-097, ¶ 7, 70 N.M. 289, 291, 373 P.2d 533, 534)). The fact that it chose the word "may" is a clear indication of its intent to make filing permissive. Thus, the Association was not obligated to file a statement of association with the county clerk in order to be recognized as an unincorporated association.

E. By Enacting NMSA 1978, Sections 53-10-1 to -8 the Legislature Intended to Recognize and Empower Unincorporated Associations

"When interpreting statutes, [the Court's] responsibility is to search for and give effect to the intent of the legislature." *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 43, 121 N.M. 821, 834, 918 P.2d 1321, 1334. "Our understanding of legislative intent is based primarily on the language of the statute, and [the Court] will first consider and apply the plain meaning of such language." *Id.* (citation omitted); *see Sims*, 122 N.M. at 622 (The "plain meaning rule" is the "primary source of understanding" a statute. (quotation omitted)). Here, as discussed above, the plain meaning of the phrase "may file" shows a clear intent by the legislature to make filing permissive. However, the plain meaning of a statute is not always conclusive and "must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources." *Sims*, 122 N.M. at 622 (quotation omitted). In this case, a review of the common law, the overall statutory scheme and equitable concerns also support the conclusion that the filing requirement is intended to be permissive.

As noted by the District Court, "[t]he case of *Flanagan v. Benvie*, [1954-NMSC-074,] 58 N.M. 525, 531, 273 P.2d 381 [ ], makes clear that unincorporated associations were recognized in New Mexico prior to and apart from the passage of the Statute." [RP 58] Thus, unincorporated associations were recognized at common law. *See also State ex rel. Hughes v. McNabb*, 1933-NMSC-103, 28 P.2d 521 (recognizing a New Mexico unincorporated association

without discussion). In *Flanagan*, the Supreme Court considered the ability of an unincorporated association to take and hold real property in the association's name. The Court recognized that the original Las Cruces Rifle & Pistol Club, organized in 1934, was a "voluntary association having no legal entity separate and apart from its own membership" because it was not organized under NMSA 1937, Section 52-101 *et seq.* (1941 Comp.). 58 N.M. at 530-31, 533. As such, the Supreme Court determined the association was "legally incapable in their associate name of taking and holding either real or personal property." *Id.* at 529-30 (following 7 C.J.S., *Associations*, §14(1), page 38 ("In the absence of a statute empowering it to do so, it is ordinarily held that an unincorporated association, having no legal existence independent of the members who compose it, is incapable, as an organization, of taking or holding either real or personal property in its association name. . .".) and 4 Am. Jur. *Associations & Clubs*, page 477, Section 35 (same) (other citations omitted)). The Supreme Court then declared the New Mexico Legislature's subsequent enactment of Section 52-101, the predecessor to Sections 53-10-1 to -8 was intended "[t]o avoid the inconvenience resulting from the incapacity of certain voluntary associations to take and hold property as an organization." *Id.* at 530. Thus, the legislative intent in enacting the statutes concerning unincorporated associations was to statutorily recognize them as lawful entities and empower them to possess and hold property. *See id.*; *see also* § 12-2A-20(C)(1) (the meaning of a statute may be determined by considering the circumstances that prompted the enactment or adoption of the statute or rule). Appellant's effort to make filing a mandatory requirement is contrary to the legislative purpose—which was to give unincorporated associations more privileges and rights than they had under common law, not less.

F. Unincorporated Associations Are Broadly Defined Under Common Law and in Other Jurisdictions

Stringent legal formalities were not required for unincorporated associations to exist at common law. Therefore, interpreting Section 53-10-1 as requiring them now would conflict with the common law. The rule of construction "is meant to assure that statutes will be read strictly so that no innovation upon the common law that is not clearly expressed by the legislature will be presumed." *Sims*, 122 N.M. at 623 (citing *Shaw v. Railroad Co.*, 101 U.S. 557, 565, 25 L.Ed. 892 (1879) and *Miera*, 70 N.M. at 291). "A statute will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended." *Sims*, 122 N.M. at 623 (citations omitted). The New Mexico Supreme Court has "adopt[ed] a strict rule that the common law must be expressly abrogated by a statute because, when determining the meaning of a statute, courts will often construe the language in light of the preexisting common law." *Id.* (citation omitted). There is no explicit indication that the New Mexico Legislature intended to supplant the common law with respect to unincorporated associations. On the contrary, Section 53-10-8 declares, "[t]his act [53-10-1 to 53-10-5, 53-10-7, 53-10-8 NMSA 1978] shall not be construed to repeal or modify any of the present laws of this state relative to corporations formed or [for] any purpose, but the same shall be construed as supplementary thereto." Thus, the statutes at issue are to be interpreted to supplement the common law, not abrogate it.

The Legislature made clear that in New Mexico, "the common law as recognized in the United States of America, shall be the rule of practice and decision." NMSA 1978, § 38-1-3 (1953). Therefore, "[t]he common law fills in the gaps not addressed by statute." *Sims*, 122 N.M. at 623; *see Estate of Brice v. Toyota Motor Corp.*, 2016-NMSC-018, ¶ 25 (No. S-1-SC-34873, May 16, 2016) (following *Sims, supra* and interpreting fraudulent concealment statute in

conformity with common law). In New Mexico, unincorporated associations existed at common law. *See Flanagan*, 58 N.M. at 525. Therefore, recognition of these associations, with no specific organizational or filing requirements, forms the baseline for the inquiry. *See* § 12-2A-20 (the common law may be considered in ascertaining the meaning of statutory text). While New Mexico courts have not expressly opined on what is needed for recognition of an unincorporated association under common law, other courts have.

In *Johnson v. Chilcott*, 599 F.Supp. 224 (D. Colo. 1984), the federal district court provides an instructive analysis of state and federal trends in assessing unincorporated associations at common law and their respective statutes. In *Chilcott*, the court examined whether the Chilcott Futures Fund (CFF), an investment fund, constituted an unincorporated association with the capacity to sue under Colorado law. In *Chilcott*, Thomas D. Chilcott set up a "classic Ponzi scheme" that ultimately "lost momentum, and in its crash most of the investors' money was lost." 599 F.Supp. at 225. A receiver was appointed to collect and administer Chilcott's assets. The receiver sued on behalf of CFF. Like here, the defendant challenged "CFF's capacity, standing and very existence as an entity cognizable in law." *Id.* To decide these issues, the federal district court examined Colorado state law as well as the law of other state and federal jurisdictions.

First, the court determined in Colorado a "'partnership or other unincorporated association' has the capacity to sue or be sued in its own name and right." *Id.* at 266 (citing Colo. Rev. Stat. § 13-50-105 (1973)). The court found CFF did not constitute a partnership under Colorado law. *Id.* at 226-27. It then looked to *Hidden Lake Development Co. v. District Court*, 515 P.2d 632 (Colo. 1973) for guidance on whether CFF constituted an unincorporated association. In *Hidden Lake*, the Colorado Supreme Court declared:

> Rule 17 is procedural, providing how a legally constituted entity may bring its action; it does not however, grant the right to sue to a loosely formed group. The status of an unincorporated association must be founded on more than a bald allegation. To sue as an unincorporated association in name only is insufficient. Such legal entity must in fact exist. Colorado has no statutes pertaining to such associations, so the common law must govern their existence. It is *usually* characterized by having by-laws governing its organization and operation, a stated purpose for its existence, and providing for its continuity though its membership may change. There should also be responsible officers elected according to the by-laws, whose duties and responsibilities may be ascertained and upon whom valid process may be had.

Id. at 515 P.2d 632, 634-35 (emphasis added) (citations omitted); *Chilcott*, 599 F.Supp. at 228 (quoting *Hidden Lake, supra*). Applying the *Hidden Lake* criteria, the court in *Chilcott* found that CFF had no by-laws, but had a very specific, three-page, original investment agreement. 599 F.Supp. at 228. The agreement expressly identified CFF as a common investment fund, included a statement of purpose, established requirements for capital contributions and procedures for investors to "cash out," and identified a "managing agent," but no officers. *Id.* Based on these facts, the *Chilcott* court found the *Hidden Lake* requirements had been met for establishing an unincorporated association.

In reaching this conclusion, the court looked not only to Colorado precedent but also found that "that the trend in other jurisdictions 'has been the rejection of legal niceties to assure full recognition of the unincorporated association as a separate legal entity.'" *Chilcott*, 599 F.Supp. at 230 (quoting *Barr v. United Methodist Church,* 90 Cal.App.3d 259 (1979), *cert. denied* 444 U.S. 973, *rehearing denied* 444 U.S. 1049 (1980)). The California Supreme Court stated:

> We must recognize that the society of today rests upon the foundation of group structures of all types, such as the corporation, the cooperative society, the public utility. Such groups must, of course, operate successfully within the society; one of the prerequisites to that functioning is generally, liability to suit and opportunity for suit. To frustrate that viability by the imposition of outmoded

> concepts would be to impair the institutions as well as to impede the judicial process.

Chilcott, 599 F.Supp. at 230 (quoting *Daniels v. Sanitarium Assn., Inc.*, 381 P.2d 652, 656-57 (Cal. 1963)). Following this trend, the California courts formulated "a liberal definition of an unincorporated association," declaring "'[t]he criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity.'" *Chilcott*, 599 F.Supp. at 230 (quoting *Barr*, 90 Cal.App.3d at 266).

Similarly liberal definitions of unincorporated associations are applied in other states. In New York, an unincorporated association is defined as "an organization composed of a body of persons united without a charter for the prosecution of some common enterprise." *Heifetz v. Rockaway Point Volunteer Fire Department*, 124 N.Y.S. 2d 257, 260 (1953) *aff'd*, 282 A.D. 1062, 126 N.Y.S. 2d 604 (1983)) (holding a volunteer fire department is an unincorporated association). In Alaska, "the court relied on the *Hidden Lake* standard to find that several native villages in the Aleutian Islands had capacity to sue. . . [b]ecause the villages had identifiable officers who could be held accountable for the litigation." *Chilcott*, 599 F.Supp. at 231 (citing *State of Alaska v. Aleut Corporation*, 541 P.2d 730 (Alaska 1975)). In Iowa, the state and federal "definitions of an unincorporated association were similar and very broad." *Chilcott*, 599 F.Supp. at 231 (citing *Health Care Equalization Committee v. Iowa Medical Society*, 501 F. Supp. 970, 976 (S.D. Iowa 1980) (defining an unincorporated association as "a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.")). Other federal courts have also broadly defined unincorporated associations. *See Chilcott,* 599 F.Supp. at 231 (quoting and citing *Associated*

Students of the University of California at Riverside v. Kleindienst, 60 F.R.D. 65, 67 (C.D. Cal. 1973) (An unincorporated association is "a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective."); and *Testa v. Janssen*, 482 F. Supp. 1195 (W.D. Pa. 1980) (applying the *Kleindienst* definition and holding the organization at issue did not meet the standard for unincorporated associations)).

New Mexico courts have not defined unincorporated associations under common law. However, there is nothing in the jurisprudence or legislative history to indicate New Mexico would apply a more stringent standard than the majority of other jurisdictions by requiring unincorporated associations to conform to corporate standards as Appellant suggests. [BIC 20 (stating "the fact that the statute regarding unincorporated associations is found in Corporations presupposes a higher level of organization")] The statute itself purposely distinguishes between unincorporated associations and corporations when it states the association *may* be formed "without incorporating the same as a corporation." § 53-10-1. The very nature of an unincorporated association is legal informality, which is why it is the organizational structure frequently used by volunteer, non-profit associations such as veterans' groups, rifle clubs, environmental organization, and citizens group. Individuals are members, not shareholders. They voluntarily join and leave the association without any rights or privileges following them. Appellant's effort to constrain these associations by mandating filing is contrary to their fundamental purpose; and is inconsistent with the common law, statutory trend and the legislature's intent.

G. A Review of the Statutory Scheme Demonstrates NMSA 1978, Sections 53-10-1 to -8 Are Intended to Be Generally Permissive

Appellant argues the legislature wrote "an association or club *may* file in the office of the county clerk" but really meant "an association or club *shall* file in the office of the county clerk" to be recognized as an unincorporated association. Appellant's entire argument is based on the use of the single word "required" in Section 53-10-7, which states, in part:

> Any association or club formed under the provisions of this act [53-10-1 to 53-10-5, 53-10-7, 53-10-8 NMSA 1978] may exist for such period of time not exceeding twenty years as may be fixed in *the statement required to be filed by Section 1* [53-10-1 NMSA 1978] of this act[.]

(Emphasis added). By saying "the statement required to be filed in Section 1," Appellant asserts the Legislature intended to make filing mandatory. The Association acknowledges that the use of the word "required" in reference to filing could be interpreted as conflicting with the express language in Section 53-10-1 stating an association or club "may file" a statement. "If statutes appear to conflict, they must be construed, if possible, to give effect to each." § 12-2A-10(A).

Appellant correctly states, "[i]n discerning the meaning of a particular statute or section of a statute, our courts read 'legislation in its entirety and construe each part in connection with every other part to produce a harmonious whole[.]'" [BIC 17 (quoting *State v. Javier M.*, 2001-NMSC-030,¶ 27, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citations omitted))] A review of the act as a whole demonstrates the legislature did not intend to create hurdles for unincorporated associations to form, but instead intended to give them more validity by identifying their rights and privileges. First, Appellant clearly misapprehends Section 53-10-1 when she claims:

> Although the word "may" is used with regards to filing, and "shall" is used with regards to two or more persons desiring to form an association, it is the decision to form that association that is voluntary, while the actual formation of the association requires filing with the county clerk.

[BIC 19] The Legislature chose its words carefully and employed them correctly. The only mandatory requirement for forming an unincorporated association is, in fact, the mutual desire by its members to form the organization. *See also Kleindienst*, 60 F.R.D. at 67. There must be a meeting of the minds between the members and a mutual desire to be bound by its rules and regulations. Similar to contract law, there must be mutual assent to form a contract. *See, e.g., Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 7, 115 N.M. 665, 669, 857 P.2d 776, 780 (citing *Trujillo v. Glen Falls Ins. Co.*, 1975-NMSC-046, ¶ 6, 88 N.M. 279, 280, 540 P.2d 209, 210 (1975) (holding mutual assent in contract law is elementary and it must be expressed by the parties)). If the desire to form an association was permissive, rather than mandatory, the absurd result would be that an individual—not actually intending to be a member of an organization, could find himself or herself bound by one; or alternatively, not enjoying the benefits of the organization to which he or she believed she belonged. The Legislature clearly did not intend this result. *See* § 12-2A-18(A)(3) (statutes should be construed to "avoid an unconstitutional, absurd or unachievable result"); *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 (Courts "must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction.") (internal quotation marks omitted)).

A review of the other Sections also shows permissive actions an unincorporated association may take. Section 53-10-2 says, "[a]ny such club or association *may* hold and acquire real or personal property" (emphasis added); while Section 53-10-3 permits the association to mortgage or sell the property. § 53-10-3 (Property "*may* be mortgaged or sold at such time and upon such terms as the then members of such club or association *may* determine by vote as its rules or by-laws [bylaws] *may* prescribe." (emphasis added)). Section 53-10-4

says associations "*may* prescribe from time to time" rules and regulations regarding its governance and any dues or fees associated with membership. (Emphasis added). However, the association is clearly not mandated to create such rules and regulations. Sections 53-10-5 and 53-10-6 say an unincorporated association "*may* sue or be sued" in its name or common name. (Emphasis added). Finally, Section 53-10-7 says an unincorporated association "*may* exist for such period of time not exceeding twenty years as *may* be fixed in the statement required to be filed by Section 1." (Emphasis added). This section also demonstrates a general scheme of permissiveness regarding the association's duration allowing an association to choose whether or not to include a limitation in its statement of association.

Therefore, contrary to Appellant's assertion, a review of the entire act shows a general scheme of permissiveness. Consequently, the Court is left to construe, if possible, the statement in Section 53-10-7 identifying statements as "required to be filed" in a manner that does not conflict with the plain language of Section 53-10-1 making filing permissive; and against the backdrop of the liberal common law requirements for unincorporated associations and the overall statutory scheme of permissiveness. *See* § 12-2A-10(A) (construing irreconcilable statutes); § 12-2A-19 (plain meaning is primary source of statutory interpretation); § 12-2A-20(B)(5) (consider common law to determine statutory meaning). It may not be possible.

The word "required" is not a legal term of art or statutorily defined like "shall" or "may." *See* § 12-2A-4. It does not carry the same weight or measure of authority. In order to avoid the absurd result of up-ending an entire statutory scheme and conflicting with the plain language in Section 53-10-1 as well as the common law, the Court must attempt to give meaning to the word "required" in the context in which it is written. *See* § 12-2A-20(A)(1) ("the meaning of a word or phrase may be limited by the series of words or phrases of which it is a part"). Section 53-10-

7 concerns the maximum term an unincorporated association may exist if organized under the statute and other dissolution measures. Such term "may be fixed" in the statement of association identified in Section 1. Reading the phrase "required to be filed" in the context of the surrounding statutory language, it could be interpreted as meaning if an unincorporated association *files* a statement of association under Section 1, then the maximum term that it may exist under the statute is twenty years. This interpretation does not conflict with Section 53-10-1 or the other statutory provisions of the act, and gives meaning to the language in the context of the statute in which it exists. However, regardless of whether the Court adopts this possible interpretation, determines another interpretation is more fitting, or determines the conflict cannot be resolved; it is imperative the Court *not* usurp a long-standing history and a clear legislative intent to liberally recognizing unincorporated associations without imposing strict legal requirements in order for them to exist. *See Chilcott, supra.*

H. **Equity Requires Interpreting Section 53-10-1 as Making Filing Permissive**

This Court has inherent equitable jurisdiction concurrent and supplemental to the legal remedies created by statute. *Sims*, 122 N.M. at 624 (citations omitted). "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id.* at 625 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (quotation omitted)). Here, the statutory manner in which an unincorporated association may be formed is set forth in its entirety in Section 53-10-1. Section 53-10-7 addresses the duration of an unincorporated association, and more importantly, the issue of how real property is held following the dissolution of an unincorporated association. This section does not purport to address formation issues, but on the contrary, speaks solely to the

winding-up of associations. Therefore, if a group desires to form an unincorporated association, it would look to Section 53-10-1 for guidance, not Section 53-10-7.

In Section 53-10-1, groups are advised they "may file", and therefore are not obligated to do so. Consequently, interpreting this language to really mean they "shall file" as Appellant requests, would effectively strip currently operating associations that relied on the plain language of the statute of their legal status without notice. These associations would quickly and quietly become defunct. This result is certainly not the intent of the legislature that sought to empower, not destroy, unincorporated associations. Moreover, the result would be inequitable and unfair to countless organizations that have not filed statements with the county clerk, but are otherwise operating as lawful unincorporated associations like the Association in this case. Equity demands proper notice by an express legislative enactment if unincorporated associations are now mandated to file statements with the county clerk. Therefore, if the legislature truly intends to mandate filing, the legislature—not this Court, should amend Section 53-10-1 to make that intention clear by changing the provision from "may file" to "shall file." For now, equity requires the statute be interpreted as it is plainly written as a permissive provision.

II. NMSA 1978, SECTION 53-10-7 DOES NOT EXTINGUISH THE ASSOCIATION'S STATUS AS AN UNINCORPORATED ASSOCIATION OR DEFEAT ITS STANDING TO SUE

A. Standard of Review

"Whether a party has standing to bring a claim is a legal question we review *de novo*." *Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2016-NMCA-010, ¶ 15, 365 P.3d 8, 13 (citation omitted). However, if the issue raised is actually an issue concerning the real party in interest and not a question of standing, then it must be properly preserved in the trial court, otherwise it is waived. *See Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 42, 126 N.M. 288,

297, 968 P.2d 799, 808 ("[O]bjections based on real party in interest status can be waived and, thus, are not jurisdictional.").

B. The Issue Was Not Properly Preserved for Appeal

"To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review." Rule 12-216(A) NMRA. "In analyzing preservation, [the appellate courts] look to the arguments made by [the d]efendant below." *Holcomb v. Rodriguez*, 2016-NMCA-___ (No. 33,481, June 16, 2016) (quoting *State v. Vandenberg*, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19). "To preserve an issue for review on appeal, it must appear that [the] appellants fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Holcomb, supra* (quoting *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717). In *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791, the Court of Appeals held:

> [T]he 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.

See State v. Lopez, 2008-NMCA-002, ¶ 8, 143 N.M. 274, 277, 175 P.3d 942, 945; *see also Holcomb, supra* (quoting *Sandoval*).

In this case, Appellant did not argue in a pre-trial motion, at trial or any other time before the district court entered its final Judgment that the Association was not a real party in interest, or lacked standing to sue, based upon the expiration of the twenty-year period identified in Section

53-10-7. The district court issued its Judgment on September 18, 2013 with no mention of the twenty-year period or Section 53-10-7. [RP 106]

Following entry of the Judgment, on October 2, 2013, Appellant filed a Motion to Amend Judgment [RP 113] and a Motion for New Trial [RP 123]. Appellant did not assert in either of these motions that the twenty-year period had lapsed pursuant to Section 53-10-7, divesting the Association of its ability to sue; therefore, it was again not addressed by the district court. It was not until the district court held a hearing on Appellant's post-trial motions on February 27, 2015, that Appellant first made reference to Section 53-10-7; arguing briefly that the Association ceased to exist pursuant to Section 53-10-7, and therefore lacked standing to sue. [CD, 2-27-15, 02:44-03:44] *See Sandoval*, 2009-NMCA-095, ¶ 56 ("Generally, a motion for a new trial cannot be used to preserve issues not otherwise raised during the proceedings." (citing *Goodloe v. Bookout*, 1999-NMCA-061, ¶ 13, 127 N.M. 327, 980 P.2d 652)). The Association was not given a fair opportunity to respond. Furthermore, given the fact that the argument was asserted so late in the game with no factual development other than those related facts pertinent to the issues actually raised at trial, the district court was unable to make and intelligent ruling on the issue, and therefore declined to address the merits of the argument, leaving the standing issue, if any, to be decided by the appellate court. [CD 28:08-27] *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (timely objection required to apprise a district court of the nature of a claimed error that allows the district court to make an intelligent ruling thereon). Therefore, the issue was not fairly invoked and does not satisfy any of the three purposes requiring preservation of the issue set forth in *Sandoval, supra*. *See also Woolwine, supra.*

C. The Association Has Standing in Accordance with the Court of Appeals' Decision in *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*

In *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, 317 P.3d 842, the Court of Appeals considered facts and arguments similar to those presented here. In *Los Vigiles*, the Los Vigiles Land Grant ("Los Vigiles") asserted claims of easement by implication and necessity against defendants after the owner of the defendant, Rebar Haygood Ranch, prevented use of a road for travel to the plaintiffs' properties by placing an impassable, welded gate structure across the road. 317 P.3d at 845. The district court found in favor of the plaintiffs, and defendants appealed, arguing for the first time that Los Vigiles did not have standing to sue because it was "legally non-existent and, as such, the district court did not have subject matter jurisdiction to entertain Los Vigiles's claims." *Id.* at 845-46.

To decide the issue, the appellate court analyzed the underlying facts in the case. It began by finding the land at issue was first a part of the Las Vegas Land Grant of 1860. *Id.* at 846. The Town of Las Vegas, New Mexico administered the Las Vegas Land Grant and "conveyed various parcels of the Las Vegas Land Grant to predecessors in interest to [the plaintiff] Martinez and to Defendants." *Id.* Members of the Las Vegas Trustees also conveyed approximately 3,000 acres of the Las Vegas Land Grant to Ricardo Varela, the Justice of the Peace, Precinct No. 33, and his successors in office by deed in 1951 ("1951 Deed"). The 1951 Deed stated that the land was to be held in trust for the community of Los Vigiles and used for grazing and collecting wood. *See id.* It also stated that residents were required to pay taxes based on assessments. *Id.* In 1966, the justice of the peace referred to in the 1951 Deed was abolished. *Id.* at 847.

In response to the defendants' argument that it lacked standing to sue, Los Vigiles asserted "the property was taken in trust and that Los Vigiles is an entity that holds the property pursuant to the Las Vegas Trustees' 1951 deed." *Id.* "Plaintiffs specifically argued that,

although Los Vigiles may not be a land grant, it is nevertheless a legally existing entity—'a trust or association that possesses, administers, and cares for the lands commonly known as Los Vigiles Land Grant for the benefit of its members.'" *Id.* The plaintiffs presented no evidence that Los Vigiles was in the chain of title from the 1951 Deed. However, at trial they offered evidence that "Los Vigiles paid real estate taxes assessed on the property, had sixty members, had rules apparently defining 'heredero' as persons who could be members, and required that members pay 'fees or taxes' as a condition of membership", and identified a President. *Id.* Based on these facts, the plaintiffs asserted Los Vigiles had standing to sue as an unincorporated association.

Similar to this case, the defendants argued in response that Los Vigiles lacked standing to sue because it was not a legal entity. It argued both that Los Vigiles "did not meet statutory requirements either for a trustee to sue on behalf of a trust or for an unincorporated association to sue." *Id.* at 847 (citation omitted). Additionally, the defendants argued Los Vigiles did not present "any document [to] show that an association was created and, even if one were created, its duration was limited by statute to twenty years and would, by the time of this action, have gone out of existence." *Id.* (citing NMSA 1978, § 53-10-7 (1937) (stating a twenty-year maximum term of existence for unincorporated associations). The appellate court summarized the defendants' argument as asserting: "[i]n short . . . Los Vigiles cannot have access to the court to assert its easement claim because a named plaintiff that does not exist cannot be injured in fact." *Id.* at 847-48 (citation omitted).

Based on the evidence at trial, the Court of Appeals found:

> [A] reasonable inference can be drawn that a trust or association or organization does in fact exist, commonly called Los Vigiles Land Grant, which appears, indisputably, to hold and possess the property for the benefit of certain individuals. With no evidence in the record to the contrary, and based solely on

> the record on appeal, whatever its entity status in form or legal existence, Los Vigiles can be presumed for the purposes of this action to be a lawful successor to the original named grantees of the property in question to hold the property for the benefit of the individuals described in the 1951 deed.

Id. at 848.

The Court of Appeals then concluded, first, to the extent the defendants assert a real party in interest claim pursuant to Rule 1-017(A), it is waived and not properly preserved because the defendants did not make the argument in the district court. Second, the Court of Appeals concluded Los Vigiles "succeeded to or acquired and continues to have 'a personal stake in the outcome of [the] case[,]' as well as "a traceable . . . connection between the claimed injury and the challenged conduct.'" *Id.* at 848-49 (quoting *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 768, 918 P.2d 350). The Court found "[d]enials of ingress and egress easement rights to an owner's property, if proved, constitute an injury in fact to the owner traceable to the defendants' conduct." *Id.* at 849 (citing *N.M. Gamefowl Ass'n v. State ex rel. King*, 2009-NMCA-088, ¶ 30, 146 N.M. 758, 215 P.3d 67 (An association has standing to sue on behalf of its members when (1) the members would otherwise have standing to sue, (2) the interests that the association seeks to protect are germane to the association's purpose, and (3) the claim asserted and the relief requested do not require the individual members to participate in the lawsuit). In sum, the Court determined Los Vigiles assumed the position of trust previously held by the justice of the peace.

Based upon its findings and conclusions, the Court of Appeals held:

> Whether Los Vigiles's formal entity status has been perfected, whether Los Vigile's authority to act as successor in fact in a position of trust with respect to the property, and whether Los Vigiles's legal action here was properly authorized by individuals with authority to act on behalf of the entity, are matters we have no need to pursue in this appeal.

> In sum, we hold that, on the state of the record, Los Vigiles was not barred for lack of subject matter jurisdiction from seeking to establish easements as it has done in this case.

Id.

In this case, the district court found the parties entered into an Original Well Sharing Agreement that created rights and obligations for the owners of Tracts A, B, C and D and their predecessors. [RP 106-109] The Original Well Sharing Agreement set forth terms and conditions for capital expenses, maintenance, contributions, the appointment of a manager, and the maintenance of a repair fund. [RP 108 FOF 12] The district court also found:

> [The Association] is an unincorporated association which was formed for the purposes of carrying out the requirements of Paragraphs 4, 5 and 6 of the Original Well Sharing Agreement, including without limitation, the collections of the amounts owed for the repair maintenance, upkeep and management of the Well.

[RP 109 FOF15] Furthermore, the district court concluded the Original Well Sharing Agreement "is a legally binding contract among the former and current owners of Tracts A, B, C and D." [RP 111 COL D] Additionally, the Original Well Sharing Agreement "created an easements in favor of each of the owners of Tracts A, B, C and D, which run with the lands of said owners and which are binding upon the heirs successors and assigns of said owners." [RP 111 COL E]

The facts in this case are similar to the relevant facts in *Los Vigiles*. Ultimately, there was sufficient record evidence to support a finding that the association at issue was created and operated to serve a common purpose with stated rules and regulations. Additionally, neither the Los Vigiles Land Grant nor the present Association filed a statement of association or articles of incorporation with the county clerk.[1] Nevertheless, the appellate court found Los Vigiles's formal entity status irrelevant to the issue of standing. 317 P.3d at 849. Additionally, although

[1] In *Los Vigiles*, the appellate court did not find the Los Vigiles Land Grant did not file a statement or articles pursuant to § 53-10-1, or address that particular issue. However, from the record described on appeal, it is clear that a filing did not occur.

the defendants in *Los Vigiles* argued Los Vigiles was "legally non-existent" because the twenty-year term set forth in Section 53-10-7 had expired—just as Appellant argues here, the Court of Appeals disagreed, ultimately finding Los Vigiles had standing to sue despite the statutory provision. *Id.* Consequently, this Court should follow its analysis and decision in *Los Vigiles* by finding the Association is an unincorporated association with standing to sue.

D. Construing Section 53-10-7 as Terminating All Unincorporated Associations After 20 Years is Contrary to the Overall Legislative Purpose of Recognizing and Empowering Unincorporated Associations

It would be an absurd result if a fully functioning unincorporated association with the desire to continue as such was required to disband by law twenty years from its inception. The association could simply reorganize and begin again the next day, making Section 53-10-7 entirely meaningless. *See State v. Johnson*, 1998-NMSC-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (Courts have "always rejected an interpretation of a statute that would make parts of it mere surplusage or meaningless."). "It is this Court's role to construe ambiguous language and to give it sensible construction." *Id.* (citation omitted). The common sense interpretation of Section 53-10-7 is the one suggested by the Association previously—namely that the twenty-year period is intended to apply to associations that file a statement of association with the county clerk, with the possible intention of keeping such public records accurate and providing notice of the association's continued existence. Admittedly, this interpretation is merely a hypothesis. It may not be reasonable or possible to give meaning to this provision of the statute that does not conflict with the remainder of the act. The Association does not know the Legislature's actual intent in establishing the twenty-year term. However, what is clear, and not mere speculation, is the fact that the New Mexico Legislature, like others around the country, enacted statutes in large

part to recognize and empower unincorporated associations, giving them the right to sue and to hold and possess property. *See* § 53-10-2 to -3, § 53-10-5 to -6.

Furthermore, unincorporated associations were recognized at common law. *See Flanagan, supra.* They did not need statutory recognition to exist. Thus, enactment of the statutes was intended to expand their rights and privileges. Interpreting Section 53-10-7 as mandating termination of all unincorporated associations after twenty years is contrary to common law. Moreover, even if an unincorporated association organized under the terminated after twenty years pursuant to Section 53-10-7, it could nevertheless continue as such under common law. *See* § 38-1-3 (common law is rule of practice and decision); *Sims*, 122 N.M. at 623 ("[t]he common law fills in the gaps not addressed by statute."). The legislature did not provide an explicit indication of an intention to supplant the common law by enacting Section 53-10-7; therefore, the Court should not do so here by interpreting it as intending to strip all unincorporated associations of their lawful existence at the end of twenty years as suggested by Appellant. *See Sims*, 122 N.M. at 623 (citations omitted) ("A statute will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended."); *see also Los Vigiles, supra* (rejecting argument that expiration of twenty-year period rendered association "legally non-existent"). Moreover, there is no indication that the legislature intended to extinguish the right to sue it gave to unincorporated associations in Section 53-10-5 and Section 53-10-6. Section 53-10-7 primarily addresses how real property is to be treated upon the dissolution of an unincorporated association. There is no mention of extinguishing an association's right to sue, which the legislature could have made explicit if that were the intent. Consequently, as in *Los Vigiles, supra*, the Court should find that the twenty-year period does

not serve to terminate the Association as an unincorporated association or strip it of its right to sue.

E. If Standing is Genuinely at Issue Pursuant to Section 53-10-7, the Case Must Be Remanded to the District Court for an Evidentiary Hearing

The Association acknowledges that a standing challenge is jurisdictional and can be raised at any time— as an afterthought in a hearing on a post-trial motion, or for the first time on appeal. *See Phoenix Funding, LLC, supra*. However, if the Court finds that Appellant has made a genuine challenge to the Association's standing based upon Section 53-10-7, then it must remand the matter to the district court for an evidentiary hearing. Although the district court found that the parties entered into the Original Well Sharing Agreement in March of 1991 [RP 107 FOF 5], no findings were made (or necessary at that time) concerning the ongoing actions of the parties from 1991 through the filing of the lawsuit that would show the members of the Association, including Appellant, ratified the Association or renewed its charter by their actions and subsequent written agreements that were entered into by the parties. Development of these facts is necessary to determine if and when the twenty-year period actually began. An appellate court will not weigh the evidence or engage in fact-finding. *See Wheeler v. Commissione*r, 528 F.3d 773, 784 (10th Cir. 2008) (courts of appeals do not engage in fact-finding); *Sandoval*, 146 N.M. at 859 (appellate courts do not weigh evidence). Therefore, if this Court finds standing pursuant to Section 53-10-7 is a genuine issue, it must remand for additional findings of fact by the district court on the issue.

I. CONCLUSION

Appellant's argument that Section 53-10-1 mandates filing by the Association of a statement of association and articles with the county clerk is incorrect. The district court correctly held that the statute allows for permissive filing. [RP 58] Therefore, the Association requests this Court

affirm the district court's decision on the Motion to Amend. However, if this Court finds the district court's legal conclusion was made in error, the Court must remand this case to the district court for redetermination of the issue. *Sisneroz v. Polanco*, 1999-NMCA-039, ¶ 21, 126 N.M. 779, 785, 975 P.2d 392, 398 (citing *Garcia v. Sanchez*, 1989-NMCA-020, 108 N.M. 388, 395, 772 P.2d 1311, 1318 (stating that "where . . . the trial court decision is grounded upon an error of law a reviewing court may properly remand the case for redetermination of the issues under correct principles of law")).

Appellant's argument that Section 53-10-7 divests the Association of its capacity to sue is also erroneous. The Association requests this Court find the Association has standing to sue as an unincorporated association, and affirm the decision of the district court. Alternatively, if the Court finds Section 53-10-7 can divest the Association of standing after the expiration of a twenty-year period, then the Association requests this Court remand the case to the district court for an evidentiary hearing and findings of fact on the issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief was served by first class mail on Chris Graeser, Attorney for Appellant, at P.O. Box 220, Santa Fe, NM 87504 on this 25th day of July, 2016.

Karl H. Sommer