**BEFORE THE NEW MEXICO COURT OF APPEALS**

**THE ELDORADO AREA WATER AND SANITATION DISTRICT, a governmental subdivision of the State of New Mexico,**

**Plaintiff/Appellee,**

**v.**

**THE JOSEPH AND ALMA MILLER REVOCABLE TRUST,**

**and**

**JOSEPH F. MILLER, Trustee,**

**Defendants/Appellants.**



**No. 34,524**
**Santa Fe County**
**No. D-101-CV-2012-01329**

# APPELLEE'S ANSWER BRIEF

**Appeal from the Santa Fe County District Court**

**The Honorable Sarah Singleton, District Judge**

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## SUMMARY OF PROCEEDINGS

In his Summary of Proceedings, Defendants/Appellants the Joseph and Alma Miller Revocable Trust and Joseph F. Miller, Trustee (collectively "Miller") fail to apprise this Court of the full extent of the testimony and exhibits below, preferring to leave the Court with a skewed understanding of both the events leading up to this dispute and the testimony and exhibits that were presented at trial. To remedy those shortcomings, the Eldorado Area Water and Sanitation District ("Eldorado") will direct the attention of this Court to the lengthy evidentiary record on which the Trial Court based its Findings of Fact and ultimate determination of the dispute in favor of Eldorado.

Eldorado and Miller have a lengthy history concerning Miller's longstanding attempts to obtain subdivision approval for his three subdivisions in the Eldorado area outside of Santa Fe, New Mexico. As part of the statutory subdivision review process, Miller needed to convince the County of Santa Fe ("County") that he could provide water service to residents in his Eldorado subdivisions. Separate and distinct from Miller's efforts to cajole the County into approving his subdivision submittals, Miller became embroiled in a dispute with Eldorado over granting Eldorado an easement to provide a power supply from the Public Service Company of New Mexico ("PNM") to a newly drilled well needed by Eldorado to service its customers. The two matters became intertwined when Miller saw an opportunity to

force Eldorado to exert pressure on the County to approve his subdivisions by illegally denying Eldorado the use of easements to gain access to its new well.

The Trial Court clearly saw through Miller's machinations and found in favor of Eldorado on all counts of its Complaint and against Miller on all counts of his Counterclaim. The Trial Court entered a punitive damages award against Miller for the reckless nature of his acts and his defiance of the Court's order. A fuller explanation of the factual record supporting the lower court's factual determinations and legal conclusions will be presented under each point raised by Miller in his appeal.

## INTRODUCTION

In this appeal from a final Judgment of the District Court, following a bench trial on the merits, Miller attempts to reargue the case before this Court using the same "facts" and arguments that were heard by the lower court and soundly rejected. Cherry picking facts and testimony favorable to him, and ignoring all facts on which the Trial Court relied in ruling against him, Miller urges this Court to conclude that there are either no material facts in contention and that Miller should prevail on those facts as a matter of law or that the lower court's findings of fact are not supported by substantial evidence.[1] As will be further developed, Miller had ample opportunity

[1] Miller also claims the trial court abused its discretion when it found facts not supported by substantial evidence. **[BIC 5-6]** This is essentially a substantial evidence argument and will be treated as such. Finally, he asserts that the standard

to convince the lower court of the legitimacy of his position and failed miserably. The lower court considered the evidence, evaluated the credibility of the testifying witnesses, and rejected Miller's positions on all questions considered. The final Judgment should be affirmed in all respects.

In his Brief in Chief, Miller claims the standard of review for his appeal is variously *de novo* based on undisputed facts or on a document review, lack of substantial evidence, and abuse of discretion. As will be discussed, however, there were material facts in dispute, which disputes were resolved in Eldorado's favor. Thus, the standard of review is not *de novo*. *State v. Axtolis*, 2015 WL 7199205 (N.M. Ct. App.), *3, *cert. denied*, 2015-NMCERT-12 ("With regard to disputed facts, we defer to the district court's findings of fact that are supported by substantial evidence.").

In this appeal, whether the standard is lack of substantial evidence or abuse of discretion, Miller had a duty to cite all of the relevant evidence—that which supports him and that which does not. Miller does not cite to a single piece of the volumes of evidence that contradict his position. This complete distortion of the record is an egregious breach of the rules of appellate procedure that require the Brief in Chief to include "the substance of the evidence bearing upon the proposition." Rule 12-

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is a *de novo* review based on interpretation of documents. Again, this is essentially the same argument as his *de novo* review based on undisputed facts and will be treated as such.

213(A)(3) NMRA. This means *all* evidence bearing on the question must be brought to the appellate court's attention. *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶¶8–11, 115 N.M. 181 ("On appeal, the party challenging the sufficiency of the evidence supporting an administrative agency's action 'must set forth the substance of *all* evidence bearing upon the proposition' in the light most favorable to the agency's decision and 'then demonstrate why, on balance, the evidence fails to support the finding made.'"). The appellate court will not comb the record to determine whether the evidence supports the findings. *Id.*; *see also*, *Jones v. Auge*, 2015-NMCA-016, 344 P.3d 989, 993, *cert. denied*, 2015-NMCERT-001, 344 P.3d 989 ("New Mexico case law is clear that this requirement compels appellants to set out a full summary of the pertinent evidence admitted at trial, including the facts supporting the district court's findings and conclusions, and that this Court may decline review for failure to do so.").

Substantial evidence is defined as "relevant evidence that a reasonable mind would find adequate to support a conclusion." *Sitterly v. Matthews*, 2000-NMCA-037, ¶22, 129 N.M. 134. A substantial evidence review tests whether the court's findings of fact are supported by substantial evidence. It does not test whether there is substantial evidence to support a contrary result. *Skeen v. Boyles*, 2009-NMCA-080, ¶17, 146 N.M. 627 ("In reviewing facts found by the district court, we consider whether substantial evidence supports the result reached, not whether there is

substantial evidence to support the opposite result."). If there is a conflict in the testimony, the appellate court will defer to the trial court's findings. *Sunnyland Farms v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶37___N.M.___ ("When there is a conflict in the testimony, we defer to the trier of fact.... It is not error for a trial court to credit one [witness's] testimony over another's."). A trial court's determination of factual matter will not be disturbed on appeal. *Lopez v. Adams*, 1993-NMCA-150, ¶2, 116 N.M. 757, 758 ("It is for the trial court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent statements, and determine where the truth lies."). It is not the role of the appellate court to make its own determination of the facts by reweighing evidence. *Sanchez v. Homestake Mining Co.*, 1985-NMCA-022, ¶7, 102 N.M. 473, 476 ("The appellate court may not reweigh the evidence [or] substitute its judgment for that of the trier of fact."); *Thomas v. Barber's Super Markets, Inc.*, 1964-NMSC-251, ¶5, 74 N.M. 720, 723 ("The rule that an appellate court may not weight the evidence is so firmly established as to need no citation of authority."). All inferences are construed in favor of the lower court's findings. *Lahr v. Lahr*, 1970-NMSC-165, ¶2, 82 N.M. 223 ("In reviewing for substantial evidence, we resolve all disputes and indulge all inferences in favor of the successful party and disregard all contrary inferences.").

Miller perfunctorily lists a number of the lower court's Findings that he challenges on appeal, yet never discusses any evidence on which the Findings are

based. Rather, he hides the true facts from this court, cherry picks facts the Trial Court rejected, and then seeks reversal as though the record he falsely created was the record in this case. As noted in the Summary of the Proceedings, Eldorado will apprise the Court of the full extent of the actual evidentiary record in response to Miller's points on appeal.[2]

## ARGUMENT

### I. MILLER VIOLATED HIS DEVELOPMENT AGREEMENT BY NOT PROVIDING VALID WATER RIGHTS TO ELDORADO. MILLER IS NOT ENTITLED TO ANY CREDIT FOR THE INVALID WATER RIGHTS HE TRANSFERRED TO ELDORADO.

In his Point I, Miller claims that he transferred valid water rights to Eldorado pursuant to his Spirit Wind West ("SWW") Development Agreement ("DA") and that Eldorado bargained them away in secret negotiations with the Office of the State Engineer ("OSE"), leaving him without the benefit of those rights. **[P.Ex. 1]** The evidence presented at trial, and accepted by the Trial Court, presents a far different story.

#### A. Additional Facts.

Eldorado is a water and sanitation district formed for the purpose of providing a domestic water supply to the Eldorado area, outside of Santa Fe, New Mexico.

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[2] In the discussion of the evidentiary record, Eldorado will also provide a footnote for challenged Findings, demonstrating the location in the record where the evidence supporting the Finding may be located.

**[Tr.I 32]** It is a public body, regulated by various state agencies, including the OSE. **[Tr.I 32]** Eldorado's primary function is to provide water service to those persons inside the service area who pay taxes. **[Tr.I 123]** After the formation of Eldorado, the utility, then owned by AmRep Corporation, was condemned, with Eldorado taking control of operations in late 2004. **[Tr.I 33, 89]**

When a land developer wants to have water utility service provided by Eldorado to ten lots or more, there are three fees that must be paid: water source fee, water rights fee, and system service fee. **[Tr.I 34, 162, 166]** In lieu of paying all these fees, the developer may, instead, bring with it a water source and/or water rights. **[Tr.I 34-36, 162]** The agreement between Eldorado and the developer with respect to the provision of water is memorialized in a DA. **[Tr.I 34]** With the completion of the DA, the developer receives a "Will Serve" letter from Eldorado that the developer may take to lenders or other governmental agencies for necessary approvals. **[Tr.I 34-35, 55]** Eldorado "Will Serve" letters have three components: 1) a commitment to being ready, willing, and able to deliver water; 2) a water budget; and 3) a condition requiring compliance with a DA and with Eldorado's New Water Service Policy ("NWSP"). **[Tr.I 127]** Eldorado's policies regarding water and water deliveries are embodied in the NWSP, which is amended from time to time. **[Tr.I 36-37]**

Miller entered into a DA covering the SWW development in October 2008.

**[Tr.I 39; 169, P.Ex. 1]** Of thirty-eight anticipated hook-ups to the water system in the SWW development, the DA obligated Miller to provide water for twenty-seven connections.[3] **[Tr.I 166]** Under the DA, Miller was obligated to provide 4.8 acre-feet of water associated with well RG-18523 to meet the water requirements for the twenty-seven connections.[4] [5] **[Tr.I 40]** The water rights calculation is based on .25 acre-feet per "equivalent dwelling unit" or residence. **[Tr.I 44]**

Within thirty days of the execution of the DA for the SWW development, Miller agreed to transfer title to the 4.8 acre-feet of water rights by "warranty deed, bill of sale or other conveyance that has the same effect to the District...." **[Tr.I 43; P.Ex. 1]** Eldorado, while negotiating with Miller, believed Miller's water rights to be valid. **[Tr.I 41-42; 93; 115-117]** Warranty language in the DA also led Eldorado to believe in the validity of the water rights. **[Tr.I 43]**[6] The DA had no disclaimer stating that the 4.8 acre-feet of water rights might not be valid or that Eldorado had any burden to establish their validity. **[Tr.I 43; P.Ex. 1]** The SWW DA further provided that Miller would pay the District $25,000 per acre-foot of water rights if he did not provide his own water supply. **[Tr.I 44; 47]** It further provided that

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[3] Miller was already entitled to some connections by virtue of a prior agreement with Eldorado's predecessor-in-interest. **[Tr.I 40]**

[4] The label refers to the number assigned to the well by the OSE.

[5] As of the time of the trial, the Eldorado Board of Directors had approved an amendment to the SWW Development Agreement to add a 39th tap to the development. **[Tr.I 166-167]**

[6] Supporting FOF 102.

transfer of 4.8 acre-feet of valid water rights plus payment of all other fees under the DA would fulfill all Miller's obligations under Eldorado's NWSP, which was incorporated into the DA by reference. **[Tr.I 45-46; P.Ex. 1]**[7] Eldorado cannot provide water service to a development project if there are no water rights to support it. **[Tr.I 55]**

Eldorado has never accepted an inchoate water entitlement (a water right that is not vested by beneficial use) under its NWSP because an inchoate right is not a water right.[8] In Eldorado's understanding, only water rights that are valid or vested can be put to beneficial use. **[Tr.I 47]** The provisions of the NWSP specifically provide that "the District shall have the right at its sole discretion, to accept or reject water rights." **[Tr.I 48; P.Ex. 1]** If water rights are not valid, they are rejected. Absent a court adjudication of a water right, the only way to know whether a water right is valid is through a determination by the OSE. **[Tr.I 48]**

Despite the contractual requirement in the DA that Miller deliver a Warranty Deed for valid water rights, Miller delivered to Eldorado a Quitclaim Deed for the 4.8 acre-feet of water rights. **[Tr.I 55; Def's Ex. AA7A]** The Quitclaim Deed was prepared by Miller.[9] **[Tr.I 65, 85]** Eldorado does not generally prepare deeds. **[Tr.I**

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[7] Supporting FOF 97.
[8] Supporting FOF 102.
[9] Miller has previously conveyed water rights to Eldorado, utilizing a special Warranty Deed that he or someone on his behalf prepared. **[Tr.I 109-110]**

**110]**

In 1972, Amrep and Eldorado at Santa Fe, predecessors-in-interest to Eldorado, quickly drilled eighty-four wells in anticipation of the coming declaration of the Rio Grande Basin by the OSE. **[Tr.I 60]** Well RG-18523, which purportedly contained the 4.8 acre-feet at issue, was included in the inventory of the eighty-four wells drilled before the declaration of the Basin.[10] **[Tr.I 60]** Thereafter, litigation ensued to test the validity of any declared water rights in the eighty-four wells. **[Tr.I 60]** A Judgment was ultimately entered in the litigation that resolved the status of many of eighty-four wells, including specifying which wells could be deepened and which could be used to divert water for beneficial uses in the future. **[Tr.I 60, 85-88; P.Ex. 32; P.Ex. 45]** When ownership of the utility passed to Eldorado in 2005, RG-18523 was included among the assets transferred. **[Tr.I 61]** The Judgment authorized the pumping and metering of these wells to vest the water rights through beneficial use.

In 2009, in response to questions raised by the OSE regarding Eldorado's water rights and the sufficiency of its water supply to serve the Eldorado area, a long process was initiated to review all of the claimed rights with the OSE and resolve longstanding questions as to the extent of Eldorado's water rights. **[Tr.I 59, 62-64, 89-90]** The process of review included a hydrologic assessment as to whether

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[10] Well RG-18523 is also referred to as Well #11. **[Tr.I 60]**

Eldorado had a 100-year supply of water. **[Tr.I 77-78]** After hiring a hydrology firm and working with the OSE, the modeling of the aquifer confirmed the presence of a 100-year supply of water in the Eldorado area. **[Tr.I 77]**

During the process of clarifying rights in the eighty-four wells, the OSE presented Eldorado with a list of wells that it was willing to recognize as having vested water rights, based upon actual production records on file with the OSE. **[Tr.I 81; 90]**[11] The discussions with the OSE resulted in a determination that fourteen wells had valid water rights as documented by OSE records. **[Tr.I 62-64, 105]** The recognition that fourteen wells had valid water rights was based entirely upon prior beneficial use documented in the OSE files through meter readings. The OSE issued a partial license to Eldorado for the fourteen wells. **[Tr.I 63; 81-82; P.Ex. 45]** RG-18523 was not included among the fourteen wells with valid water rights because the right was inchoate – it had never produced the amount of water claimed, and thus, could not be licensed by the OSE for future use. **[Tr.I 64-65, 106]**

Significantly, despite the 1972 Judgment requirement that future pumping from designated wells be documented by meter readings, a meter was not installed on well #11 and well #11 never has had documented usage, all in violation of the terms of the Judgment. **[Tr.I 104-105; Tr.III 60; P.Ex 32]**[12]

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[11] Supporting FOF 96.
[12] Supporting FOF 92.

The partial license issued by the OSE defined the future water rights for Eldorado and foreclosed any future claims by Eldorado that it holds additional rights beyond those specified in the partial license. **[Tr.I 65, 67; P.Ex. 45]** This documentation of its water supply and the partial license formed the basis of Eldorado being able to issue "Will Serve" letters for Miller's developments. **[Tr.I 78]**

Contrary to the assertions of Miller in his Brief in Chief, RG-18523 was not a well with a history of usage. **[Tr.I 82]** Despite the Declaration claiming 4.8 acre-feet of water rights in the well, OSE records reflect minimal usage in the 1990s, with greater documented usage in 2002, 2003, or 2004. **[Tr.I 82]** The OSE did not recognize the 4.8 acre-feet because of the limited usage of the well and because the agency concluded that it was a domestic well. **[Tr.I 108]** The OSE considers domestic wells to be permitted wells that contain no vested water rights. **[Tr.I 108]** During its earlier period of ownership, Eldorado did not produce water from this well because Miller still claimed some ownership interest in the well and placed a lock on it. Eldorado finally disclaimed any ownership of the well and turned it back over to Miller in August, 2006.[13] **[Tr.I 82-83, 112-114; D.Ex. L]**

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[13] Earlier attempts to file a Change of Ownership form with the State Engineer for the well had run up against the fact that there were no water rights in the well, based upon the metering records of the OSE and attorney review of OSE files. **[Tr.I 119-120]**

Miller was informed that the process to iron out Eldorado's water rights was ongoing with the OSE. **[Tr.I 94-95]** Proof of water rights would be part of the State Engineer's review of the project. **[Tr.II 28]** The omission of well RG-18523 from the partial license was communicated informally to Miller. He chose not to participate. He was also informed that he would need to provide a fee in lieu of water rights if the water rights were invalid. **[Tr.I 66]** Because the conditions of the DA were not met, including the providing of water rights under the DA, Miller was in default at the time of trial.[14] **[Tr.I 109]**

**B. Discussion.**

In his Point I, Miller employs a mistaken understanding of the general nature of water rights, OSE permit requirements, and Eldorado's ability to overcome the fatal flaws associated with RG-18523. Rather, Miller accuses Eldorado of abandoning water rights associated with RG-18523 and of exercising bad faith and engaging in wrongful conduct. Miller is incorrect on all counts.

The New Mexico Court of Appeals determined long before Miller transferred the 4.8 acres of inchoate water rights to Eldorado that an OSE permit to appropriate water is not a water right. *Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1. Rather, it is the authority to establish a water right through diversion of water and placement of the water to beneficial use. *Id.* at ¶9 ("A water permit is an inchoate right, and 'is

[14] Supporting FOF 97.

the necessary first step' in obtaining a water right. It is 'the authority to pursue a water right—a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.'" (internal citations omitted)). Indeed, in a subsequent opinion regarding the very Declaration involved in this litigation, the Court of Appeals noted that similar to a permitted right to appropriate water, a Declaration is not a vested water right. *Eldorado Utilities, Inc. v. State of N.M., ex rel. D'Antonio*, 2005-NMCA-041, 137 N.M. 268. Instead, the water right becomes vested only upon placing the water to beneficial use. *Id.* at ¶10. In that case, involving Eldorado Declarations, water rights claimed under Amended Declarations had not been put to beneficial use. *Id.* at ¶10 ("In this case, Eldorado admitted below that the additional water claimed by the amended declarations had not been placed to beneficial use and does not claim to the contrary on appeal."). Thus regardless of the amount claimed in either the 1972 Judgment or in any Amended Declaration, it is not the Declaration or the capacity of the well that establishes a vested water right; it is the placement of water to beneficial use that determines the extent of a water right.

In the *Eldorado Utilities* case, the OSE and Eldorado at Santa Fe, Inc. ("ESF"), Eldorado's predecessor-in-interest, stipulated to the entry of Judgment that allowed ESF "the right to complete the repair, rehabilitation and conversion of, but

not to deepen or enlarge, those wells numbered consecutively from RG-18512 to and including RG-18527 and to divert the waters of the Rio Grande Underground Water Basin therefrom, and to apply said water to beneficial use for domestic, municipal, industrial, recreational and construction purposes within a reasonable time, to the capacity those wells had on or before December 31, 1970." **[P.Ex. 32 ¶2]** Thus, at the conclusion of the litigation between OSE and ESF, ESF had a right to continue to place water to beneficial use from RG-18523 up to its declared right of 4.8 acre-feet per annum within a reasonable period of time. **[P.Ex. 30]** Most important, however, under the terms of the stipulated Judgment, ESF "shall, before placing water to beneficial use from any of the wells it may use pursuant to this judgment, install upon each such well a totalizing meter to measure the amount of water diverted thereby." **[P.Ex. 30 ¶7]**

RG-18523 was eventually transferred from Eldorado to Miller.[15] **[P.Ex. 40; P.Ex. 41]** Even though Miller now claims to have pumped the well and placed water from the well to beneficial use during his ownership, he was quite candid in his admission that RG-18523 had not been metered, clearly in violation of the conditions of the 1972 Judgment. **[Tr.III 60]**[16] As Eldorado learned when trying to resolve the issue of its water rights with the OSE, the OSE would not recognize water rights

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[15] RG-18523 has changed hands between Eldorado and Miller several times. In 2008, Miller transferred the water rights to Eldorado. Miller still owns the well.
[16] Supporting FOF 95.

associated with any well for which there was not a documented history of placing water to beneficial use. Eldorado was presented with a list of wells that had documented water usage and was told these were the wells for which the OSE would recognize beneficial use and issue a license. **[P.Ex. 45]**[17] ("Whereas, Eldorado, and its predecessors in interest have applied water to beneficial use within the integrated water delivery system and has [sic] filed a Proof of Application of Water to Beneficial Use, *based upon actual meter readings*...." (emphasis added)).

The OSE's position with respect to the issuance of a license for RG-15823 is certainly consistent with OSE policies and with the case law governing water rights. *See* 19.26.2.7(S) NMAC ("License: A document issued by the state engineer after final proof of application of water to beneficial use has been filed and inspection has been completed that confirms the extent of diversion and beneficial use of water made in conformance with permit conditions.").[18] If a diversion is not made in accordance with permit conditions, or in this case, in accordance with the stipulated Judgment of the District Court granting ESF permission to continue development of certain water rights, the diversion does not ripen into a vested right. *State ex rel. Reynolds v. Mitchell*, 1959-NMSC-073, 66 N.M. 212. Thus, so long as the 1972 Judgment required a totalizing meter, neither Eldorado nor Miller could ever

[17] Supporting FOF 96.
[18] Supporting FOF 101.

establish beneficial use from RG-18523 because pumping an unmetered well would have been a violation of the conditions established by the 1972 Judgment. As Miller readily acknowledged, he never placed a meter on RG-18523 even though the OSE required one. **[Tr.I 59-60]**

Eldorado had no basis for validating RG-18523 because the well was not metered. As Jerry Cooper testified, it was never Eldorado's decision as to what to include in the Partial License. The issuance of the Partial License rested entirely upon proof of beneficial use documented by meter readings on file with the OSE. **[Tr.I 81-90]** Even if water from RG-18523 had been put to beneficial use after 1972, pumping water from the well in violation of conditions on the well contained in a judgment would not have amounted to beneficial use. *Cf.*, *Reynolds*, 1959-NMSC-073, 66 N.M. 212 (holding that using water in violation of law does not amount to beneficial use of the water.)

Because there was nothing that Eldorado could do to cure or mitigate Miller's violation of the conditions stated in the 1972 Judgment, it cannot be culpable under any theory advanced by Miller.[19] Specifically, Eldorado did not breach any DA

[19] Even though Miller now claims that Eldorado is indebted to him in the amount of $125,000 for breach of contract arising from rejection of the 4.8 acre-feet of water rights, due process violations, breach of the covenant of good faith and fair dealing, and rescission and restitution, none of these theories was pleaded either in his Amended Complaint and Counterclaim, or in the Pretrial Order. **[RP 614, 698]** They were raised for the first time in Miller's Closing Arguments to the Court. **[RP 771]** The Pretrial Order governs the course of the case after it is filed. Rule 1-016(E)

because it was not up to Eldorado to recognize water rights. It is within the sole authority of the OSE to make a determination of whether a license should be issued. NMSA 1978, § 72-5-13 (1907). Because Miller had violated the provisions of the 1972 Judgment, no water right was created that could be recognized by the OSE. Eldorado cannot be liable for the OSE's refusal to validate a water right caused by Miller's failure to comply with the 1972 Judgment.

Miller did not raise any due process issues in the action below. Now he claims the right to have inserted himself into the negotiations between the OSE and Eldorado over whether a license should have issued in favor of Eldorado even though the unmetered well violated the 1972 Judgment. When negotiations were taking place between Eldorado and the OSE, Eldorado was the owner of any water rights in RG-18253, Miller having quitclaimed his interest in those rights. **[Tr.I 54; D.Ex. AA7A]** Miller, therefore, did not seek to participate and had no legal right to participate in the negotiations with the OSE, and thus, was not deprived of any such right by Eldorado. Miller attempts to deceive this Court by refusing to cite to the trial evidence that Miller was informed of the discussions with the OSE in 2009 and again in early 2010 and yet did nothing to protect his claimed interest in the

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NMRA ("This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice"). No amendment was requested. No motion to have the pleadings conform to the evidence was made. Rule 1-015(B) NMRA.

discussions. **[Tr.I 66, 94-95]** The partial license was ultimately issued in June 2010. **[P.Ex. 45]**

Miller has no claim for breach of any duty of good faith and fair dealing. As discussed, Miller's own violation of the conditions on his right to divert water from RG-18523 led to the OSE's rejection of RG-18523. There is nothing that Eldorado or anyone else could do to avoid that outcome. Eldorado is not in violation of any covenant of good faith and fair dealing.

Contrary to Miller's argument, Eldorado never sought a rescission of the DA between it and Miller. **[RP 543]** Instead, Eldorado sought to enforce that provision of the SWW DA that requires Miller to either ante up water rights, or pay a $25,000 fee for each acre-foot of water rights that Miller fails to provide. **[P.Ex. 1]**[20]

Rescission is an equitable remedy that is not appropriate for every partial failure to perform a contract. *Samples v. Robinson*, 1954-NMSC-091, ¶14, 58 N.M. 701, 705-706 ("A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom."). In the case at bar, Miller breached the portion of the DA requiring the transfer of "water rights" to Eldorado. **[P.Ex. 1]** He

[20] Supporting FOF 98, 100.

also breached that portion of the DA requiring him to transfer water rights by virtue of a Warranty Deed.[21] Finally, Miller breached the warranty covenants contained in the Quitclaim Deed that he used to transfer the purported water rights. **[D.Ex. AA7A]** The DA provides that if Miller cannot or does not transfer water rights under the contract, he will be immediately obligated to pay the $25,000 per acre-foot "in lieu" of fee. **[P.Ex. 1 at 6]** ("Pursuant to the 2007 NWSP, the Trust shall supply water rights to the District *or* pay the District $25,000 per afy in Water Rights Fees." (emphasis added)). The DA further incorporates the 2007 NWSP as part of its provisions. *Id.* at 9. The 2007 NWSP, in turn, provides that "In all cases the District shall have the right at its sole discretion to accept or reject water rights." *Id.* at 2007 NWSP, 2. Miller's breach of the contract goes only to a portion of the consideration. Eldorado stood ready to complete its part of the bargain if Miller transferred valid water rights to it, or if he paid the water rights fee. He did neither, therefore, a judgment was awarded against him. Eldorado has neither sought a rescission of the contract nor could it under the circumstances, but Miller could breach the contract and did so.

Miller's argument that Eldorado ratified the contract is inapposite because rescission was not pleaded in this case. Eldorado does not seek a rescission, and rescission was not possible. Miller's reliance on *Branch v. Chamisa Dev. Corp. Ltd.*,

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[21] Supporting FOF 99, 100.

2009-NMCA-131, 147 N.M. 397 is misplaced. In *Branch*, the plaintiff sought both to ratify his contract and to rescind it. Prior to the Judgment in this case, Miller could have enforced the contract by either tendering valid water rights or paying the "in lieu fee." Now, after the Judgment, if Miller is to receive water service, he must first pay the Judgment and appropriate interest for the "in lieu" fee. Eldorado stands ready to perform under its "Will Serve" letters. Were Miller to offer valid water rights with an equivalent value to the Judgment, Eldorado would accept that as well.

Finally, Miller claims Eldorado's action is barred by estoppel or laches. However, Eldorado's obligations to provide water service to Miller's developments only arise after Miller fulfills all his obligations under the DA. **[P.Ex. 53]** Under both the DA and the 2007 NWSP, Miller has the option of either providing water rights or paying the "in lieu" fee. In this litigation, Eldorado only sought the Court's determination that the 4.8 acre-feet provided by Miller do not satisfy his obligations under the DA and that, if Miller is to receive water service from Eldorado, he must pay the fee in the form of the Judgment and interest entered in this case. Eldorado has not sat on its rights. Estoppel and laches do not apply.

Estoppel applies whenever someone has detrimentally relied upon the actions of another. Miller provided no testimony of detrimental reliance. He provided no testimony about anything he did or money he spent on the expectation that Eldorado would serve his development with the 4.8 acre-feet of water. His final SWW

development approvals came only the day before the County development manager testified at trial, which was long *after* notification to him that Eldorado did not accept his "water rights." **[Tr.II 17-18]** Since he could not proceed without the development approvals, he has not detrimentally relied upon anything Eldorado did or did not do. And, as noted above, Miller once again withholds from the Court the trial testimony that he was, in fact, made aware of discussions with the OSE and the OSE's rejection of the 4.8 acre-feet of water rights. **[Tr.I 66, 94-95]**

Miller also does not appreciate that to seek equity, one must do equity. *Ortiz v. Lane*, 1979-NMCA-009, 92 N.M. 513. Miller did not perform equitably when he slyly delivered a quitclaim deed in place of the Warranty Deed that he was obligated to provide on the water rights. **[Tr.I 55, 65, 85]**[22] Miller agreed in the DA to provide a Warranty Deed knowing that he had no intention of guaranteeing the validity of the water rights. **[Tr.III 75]**[23] Miller has no right to invoke any equitable doctrines to escape his contractual responsibility to provide valid water rights for his development project.

## II. ELDORADO IS ENTITLED TO DAMAGES CAUSED BY MILLER'S INTENTIONAL DELAY IN PROVIDING THE EASEMENT AND FOR HIS VIOLATION OF THE COURT'S ORDER.

Once again, and in a particularly egregious fashion, Miller fails to apprise the

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[22] Supporting FOF 98, 99.
[23] Supporting FOF 102.

Court of the totality of the evidence that was adduced at trial and on which the Trial Court relied in entering her Findings of Fact. Rather, Miller claims the facts to be undisputed and asks this Court to reverse the Trial Court based upon his view of undisputed facts. Once again Miller is mistaken. Disputed facts were decided by the Trial Court in favor of Eldorado. The Court of Appeals should not now undertake to reweigh those facts and make its own factual determinations. The Trial Court's Findings are supported by substantial evidence.

**A. Additional Facts.**

In the period of 2010 to 2011, the Santa Fe area was experiencing a severe drought. As a result of the drought conditions, two of Eldorado's wells lost production, requiring the drilling and permitting of an additional well to serve its customer base. **[Tr.I 69, 190; Tr.II 79]** Miller and Eldorado reached agreement on the location of a well easement across Miller's property and a water transmission line. **[Tr.I 175-177; P.Ex. 7, 8]**[24] However, at Miller's request, the parties amended their easement agreement regarding public utilities, which effectively cut off Eldorado's access to power for new well #18.[25] **[Tr.I 184-185]** Due to access being lost, Eldorado needed to acquire a separate easement from Miller to get to its well.

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[24] Supporting FOF 54.

[25] At the time of the amendment, Eldorado felt it had other options for getting power to well #18. **[Tr.I 184-185]** However, they were later informed by PNM that the alternative access points could not accommodate both power and electric lines and Eldorado would need another easement from Miller.

Because of the severe drought conditions, Eldorado filed an application with the OSE for an emergency permit to utilize well #18 to serve its customer area and authorization was received from the OSE notwithstanding pending protests. Thus, Eldorado was able to produce water for its customers from its new well utilizing a diesel generator while it negotiated for a new easement from Miller.[26] **[Tr.I 72, 190-191]**

Miller took this opportunity to force Eldorado to leverage the County to approve his pending subdivision applications. He began telling Eldorado that there would be no power easement until his plat was approved by the County. **[Tr.I 187, 189]** Eldorado's offers to pay for a new easement were rejected based on the lack of County approvals for Miller's plat. **[Tr.I 189-190]** Miller confirmed his refusal to provide a power line easement until his subdivision received County approvals in a letter to the editor he wrote in 2011. **[Tr.I 192-193]** Other than cooperating with the County in answering their questions about the water supply, Eldorado could not intervene on Miller's behalf. **[Tr.II 130-131]** Eldorado had no particular political sway with the County.

In the summer of 2011, Miller had numerous issues with the County over

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[26] Well #18 proved to be a critical well, producing twenty percent of the system's water in 2011, thirty plus percent in 2012, and a high percentage in 2013. Currently, the well produces thirty-nine percent of the system's water supply. **[Tr.I 72]**

approvals of his subdivision, including disputes concerning affordable housing. **[Tr.II 194]** Miller set up a mediation with the County to resolve some of his issues and the mediator invited the participation of Eldorado. **[Tr.I 193-194]** During the mediation, Miller finally, verbally agreed to separate the issue of the power easement from any County approvals of his subdivision plat. **[Tr.I 195-196]** Eldorado and the County agreed to work to find an acceptable "Will Serve" letter for his Cimarron Village development that met the needs of both the County and Eldorado. **[Tr.I 195]**

Subsequent to the mediation, Miller submitted to Eldorado a proposed "Will Serve" letter that imposed new conditions on Eldorado not previously discussed, including allowing him certain water credits from earlier agreements to be used in any of the developments. **[Tr.I 196, 203]** Eldorado refused the proposed letter because it would be improper for Eldorado to amend an existing DA through the provisions of a "Will Serve" letter. **[Tr.I 196-197]** And, despite his previous agreement to divorce the matter of the plat approval from the power line easement, by August 19, 2011, Miller was once again linking the two matters. In addition, he began urging Eldorado to bring the power line up Colina Drive so that Miller could connect into the line for his project once it was developed. **[Tr.I 198-199]**

On September 2, 2011, after being offered $3,500 for a .03 acre easement, Miller again repeated his resolve to not grant a power easement until the County

approved his plats. **[Tr.I 199]** According to Miller, County approvals were being delayed because Eldorado had failed to convince the County of the sufficiency of its water supply. **[Tr.I 199]** Even though the County seemed to be experiencing some confusion regarding its own position on the adequacy of Eldorado's water supply, Eldorado nonetheless continued to try and clarify issues with both the County and the OSE. **[Tr.I 200]**

Eldorado began focusing on bringing power to well #18 alongside Colina Drive because management felt that would make it easier to resolve the easement matter with Miller. **[Tr.I 200]** Miller moderated his position somewhat by offering to grant Eldorado a temporary easement for the powerline that would be made permanent if the County approved his plat within that time period. **[Tr.I 200]** However, not only was a temporary easement unacceptable to Eldorado, it was clearly not acceptable to PNM, who would be installing the permanent electrical lines. **[Tr.I 201]**

Despite Miller's insistence that he would not grant any easements until the County approved his plat, Eldorado learned on September 23, 2011, that Miller had not even submitted his applications for approval of Cimarron Village to the County. **[Tr.I 202]** Clearly, Eldorado was not the source of any delay when the application for approval had not even been made. On September 28, 2011, Miller dropped his insistence that the "Will Serve" letters include provisions for using water credits

under previous DAs for any project. **[Tr.I 203]**

In late September 2011, Eldorado submitted a proposed power line easement to Miller for review. In accordance with Miller's wishes, Eldorado was now pursuing an option along Colina Drive rather than the overhead option to the back of the property. **[Tr.II 32]** However, in November, PNM informed Eldorado that the power line could not be placed in the same ten-foot easement that would be occupied by the water line. To run the power easement up Colina Drive would require a separate ten-foot easement from Miller. **[Tr.II 33]** Eldorado responded by entering the property to locate the water line so that a separate ten-foot easement location could be found. **[Tr.II 33]** Miller reacted by stopping Eldorado's work even though Eldorado had an easement to maintain its existing water lines. **[Tr.II 33]** Eldorado thereafter submitted another easement proposal to Miller. **[Tr.II 33; P.Ex. 12]**

Two months later, on December 30, 2011, Eldorado reached agreement with Miller to place the power line easement up the east side of Colina Drive, utilizing a route that was acceptable to PNM. **[Tr.II 34, 39-40; P.Ex. 14]**[27] The location of the easement is generally described in the easement agreement; the precise location would be established by a subsequent survey. **[Tr.II 42]**

Shortly after the easement agreement was concluded, Miller objected to

[27] Supporting FOF 56.

paying for half the cost of the survey because his surveyor had already been out there and completed most of the required work. He suggested that if his surveyor could complete the work, it would save time and money. Eldorado agreed and the parties executed an amendment to the easement agreement on February 27, 2012, allowing Miller to be responsible for the preparation of the survey, and which was to be completed within one week of execution of the amended agreement. **[Tr.II 45-46; P.Ex. 15]**

Despite Miller's agreement to provide the survey within one week of execution of the amendment to the agreement, no survey was provided. **[Tr.II 47-48]** Eldorado inquired on March, 2012, as to the status of the survey but no clear answer was given. On April 10, 2012, further inquiries were made, at which time Eldorado was informed by Miller that the County had once again removed his project from the County's approval agenda and that he would not deliver the survey until the County approved his development. **[Tr.II 48]** Miller again implied that Eldorado needed to exert pressure on the County to approve the development. **[Tr.II 48]** Even after Eldorado's counsel demanded the promised survey, the survey was not forthcoming. **[Tr.II 49; P.Ex. 16]**

On May 4, 2012, Miller delivered a form of survey to PNM, which survey was rejected because it encroached on the waterline easement. **[Tr.II 49]** On May 16, 2014, Miller delivered another easement to PNM, which was similarly rejected

for the same reason. **[Tr.II 49-50]** In neither case was a copy of the survey delivered to Eldorado. **[Tr.II 50]**

Miller erected a fence that blocked Eldorado's access to its well #18 and Eldorado was forced to file a motion with the District Court seeking injunctive relief. **[RP 051]** During a hearing on the motion, Miller appeared with a copy of an easement that had already been rejected by PNM. **[Tr.II 50]** After the hearing, the Court issued a Preliminary Injunction that, among other things, ordered Miller to remove a fence that prevented Eldorado's access to well #18; ordered Miller to take a copy of the survey produced in open court to PNM and, if accepted by PNM, to properly execute and record it; and allowed Eldorado to proceed to prepare its own survey if Miller's was rejected by PNM. **[Tr.II 51-53; Tr.II 98; D.Ex. D; RP 127]**

When, as anticipated, PNM rejected the survey, Eldorado prepared its own survey, placing the power easement in a dedicated space on the east side of Colina Drive. **[Tr.II 53-54; P.Ex. 18]** The new survey was acceptable to PNM and, in accordance with the Court's order, was sent to Miller for his signature. **[Tr.II 55-56]** Despite the Court's previous order, however, Miller refused to sign. **[Tr.II 56, 59]** As Eldorado would later discover, unbeknownst to Eldorado and the Court, and in violation of the Court's Order, Miller had prepared his own survey with the easement on the west side of Colina Drive, signed it on June 4, and presented it to

PNM for approval. **[Tr.II 56-57; P.Ex. 19]**[28] Eldorado did not learn of the existence of the new survey until the following December. **[Tr.II 57-58]** If Eldorado had known of the alternative survey in June, 2012, it is likely management would have accepted it even though it was on the west side of Colina Drive when the parties had been focusing on the east side. **[Tr.II 77]**

When Eldorado did learn of Miller's alternative easement in December 2012, it was so frustrated that it decided to accept the easement notwithstanding that the power line on the west side of Colina Drive would add cost to project. **[Tr.II 58-60]**[29] By the time Eldorado discovered the alternative survey, it had been powering well #18 with a generator for the second full irrigation season at great expense to Eldorado. **[Tr.II 60-61]** With the coming of summer, it had been run almost every day. Had the power from PNM been available, the generator would not have been required **[Tr.II 61]** Shortly after approval of the survey, Eldorado reached an agreement with PNM for installation, completed the design work, and asked PNM to commence construction. **[Tr.II 61]** Well #18 was finally electrified in March 2013. **[Tr.I 159]**

**B. Discussion.**

As the foregoing recitation of additional facts discloses, there are no

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[28] Supporting FOF 69, 72-73.
[29] Supporting FOF 76.

undisputed facts that this Court could rely on to reverse the Trial Court. The Trial Court, after hearing testimony and evaluating the credibility of the witnesses, entered numerous Findings of Fact in favor of Eldorado. Those facts are supported by substantial evidence as outlined above and should not be disturbed on appeal.

Although in his Brief in Chief, Miller focuses upon delays that occurred after the Trial Court's Order of May 30, 2012, the history of the relationship between Eldorado and Miller discloses Miller's continual efforts to link the granting of a power easement to well #18 and the County granting his subdivision approvals. As discussed, Miller's problems with the County went far beyond their questions regarding water supply. They included numerous lawsuits between the two parties, including one in federal court challenging the County's authority to impose affordable housing requirements on County developers. *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (2011), *cert. denied*, 132 S.Ct. 246 (2011). Other than assisting the County in answering questions about the water supply, dealing with the OSE in its evaluation of Eldorado's ability to serve the subdivision, and participating in a mediation among the parties, there was little more Eldorado could do to assist.

Miller's tactics did not abate with the District Court's Preliminary Injunction. **[RP 127]** Even though Miller had obtained another survey and presented it to PNM for review, a copy was never provided to Eldorado. Not knowing of the existence

of an alternative survey that PNM would approve, Eldorado commissioned and paid for its own survey in accordance with the District Court's Order, unnecessarily expending funds and wasting time. Because of the critical need to replace a water supply lost to drought, Eldorado was forced to expend funds to operate a diesel generator to keep well #18 going.

Miller now tries to justify his actions through an appellate court brief, urging the Court of Appeals to reject the findings of the Trial Court based upon the assertion that his version of the facts is "uncontested." The Court should decline the invitation. Miller was clearly in violation of the Court's Order. His delaying tactics caused damage to Eldorado in having to utilize a diesel generator to serve its customers. As the Trial Court correctly found, Miller is liable for the damages resulting from his refusal to follow the Court Order and denying electrical power to well #18.

## III. ELDORADO DID NOT FAIL TO PREPARE AND DELIVER "WILL SERVE" LETTERS THREE YEARS AFTER DEMAND.

Continuing a very disturbing pattern, Miller once again fails to apprise this Court of the evidence supporting the Findings of Fact adopted by the Trial Court, thereby misleading this Court that the facts were not in dispute and that this Court should revisit the Trial Court's conclusions based on those undisputed facts. The facts were in dispute and a review of the evidence not cited by Miller belies the validity of his arguments.

### A. Additional Facts.

Miller and Eldorado entered into DAs for three of Miller's development projects on October 17, 2008. **[P.Ex. 1, 2, 3]** Within three days following the execution of the DA for the SWW development project, Eldorado issued its "Will Serve" letter for the project on October 20, 2008. **[Tr.I 50, 103, 166; D.Ex. G]**[30]

Although no objections to the "Will Serve" letter were communicated to Eldorado by the County, Miller later reported that the County was having reservations about Eldorado's water supply. **[Tr.I 127-130, 143, 153]**[31] On August 24, 2010, Eldorado and Miller executed amendments to the DAs to clarify some aspects of the agreements. **[Tr.I 179; P.Ex. 4, 5, 6]** By this time, Miller had given Eldorado some indication that the County was questioning "Will Serve" letters provided by Eldorado. As a result of these concerns, Eldorado communicated with the County "on numerous occasions trying to resolve any questions that they had about Eldorado's will-serve letters and our ability to provide water to the gentlemen." **[Tr.I 179]**

In view of the County hydrologist's prior positive review of Eldorado's water supply, Eldorado tried to get Miller as the developer to ascertain the nature of the County's problems with the water supply. **[Tr.I 130, 166]** When Eldorado made

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[30] Supporting FOF 14.
[31] Supporting FOF 17.

its own inquiries as to the nature of the County's complaints, they were told that there were other issues with Miller's application, but the County did not specifically communicate to Eldorado any problems with water for Miller's projects. **[Tr.I 130]** Jim Jenkins, President of Eldorado, made inquiries to both the County Application Manager, Vickie Lucero, and the County Hydrologist, Karen Torrez. **[Tr.I 141-142]** Jenkin's conversations with the County continued until a model "Will Serve" letter eventually was provided by the County. **[Tr.I 147]**

Although the SWW "Will Serve" letter was created specifically for that development, it was more or less a uniform type of letter. **[Tr.I 51]** Jerry Cooper, who was in charge of the water issues, was unaware of any previous issues with the County regarding the validity of the "Will Serve" letters. **[Tr.I 51]** The "Will Serve" letter recited Eldorado's commitment to serve the SWW development project in accordance with its 2007 NWSP. **[Tr.I 51; P.Ex. 48]** The "Will Serve" letter also specifically provided that "Prior to the initiation of water service, the Trust will have obtained and transferred to the District sufficient water supply and adequate water rights or satisfactory substitutes to the District necessary to meet both the short-term and the long-term needs of the project." **[Tr.I 52; P.Ex. 48]**

Miller's master plan proposal for Cimarron Village came before the Santa Fe County Commission for hearing in February, 2010. At the hearing, there were several problems discussed with respect to Miller's Cimarron Village subdivision,

including affordable housing. **[Tr.I 129]** The master plan proposal was thereafter tabled. **[Tr.I 128]**

Prior to that hearing, Eldorado had worked closely with the County hydrologist for review of Eldorado's water rights. The hydrologist ultimately issued a comprehensive report on September 2, 2009, concluding that there was no problem with Eldorado's water supply and that Eldorado's "Will Serve" letters were sufficient documentation of its water rights and ability to meet the development's water needs for at least 100 years. **[Tr.I 129, 170]**

Once Miller's application for master plan approval was tabled, he began pressing Eldorado to intervene on his behalf with the Board of County Commissioners. **[Tr.I 130]** Eldorado informed Miller that, other than by responding to the County's questions on supplying water, there was no other intervention that Eldorado could provide. **[Tr.I 130-131]** By August, 2010, Eldorado was informed by County staff that Miller's application was put on hold because it had been referred to the OSE Conservation Bureau for review and the review had been negative. **[Tr.I 131]** Eldorado immediately set up a meeting with the Conservation Bureau and with County staff to insure that the Conservation Bureau had the latest information both about Eldorado's water rights and their pumping capacity. **[Tr.I 132]** Thereafter, the County stopped communicating with

Eldorado concerning the Miller application because of litigation with Miller,[32] but Eldorado never heard further concerns from the Conservation Bureau about the adequacy of Eldorado's water supply. **[Tr.I 133]**

When Eldorado was invited to participate in a mediation between Miller and the County to clarify any water supply issues between the two litigating parties, it readily agreed. **[Tr.I 134]** During the mediation, which Miller attended, Eldorado reiterated its willingness to provide another "Will Serve" if someone would provide a model for the letter, since Eldorado was using the same form it had successfully used since 2006. **[Tr.I 134]** The County Attorney agreed to work with Eldorado and subsequently provided such a model. **[Tr.I 134]** Despite the new form of letter essentially saying the same thing the old one did, Eldorado was willing to approve the new letter. **[Tr.I 135]** Neither the County nor Miller was ever told that Eldorado would not approve and sign a "Will Serve" letter.[33] **[Tr.I 135]**[34] Miller was similarly never informed that Eldorado would not sign the new form of letter. **[Tr.I 136]** A model "Will Serve" letter was provided by the County in 2011, the Board approved it, and Jenkins signed it. **[Tr.I 144-145]** Any delay in providing Miller with a "Will Serve" letter could not have caused Miller delays in obtaining subdivision approvals

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[32] Supporting FOF 6.
[33] Indeed, County approval of the Cimarron Village master plan was accomplished under the old "Will Serve" letter. **[Tr.I 136, 156]**
[34] Supporting FOF 26-27.

because he had not even filed an application for approval by late September 2011. **[Tr.I 156; P.Ex 53]**[35]

During the discussions regarding the "Will Serve" letter in the period of 2010 to 2011, the matter of obtaining an easement for Well #18 came to the forefront. Miller and Eldorado entered into discussions concerning an easement that would allow Eldorado to provide three phase electrical service to well #18. **[Tr.I 144]** During these discussions, Miller made it clear that he was going to tie the granting of a power easement to the issuance of the "Will Serve" letter. **[Tr.I 136, 151-152, 155-156]** The easement would be conveyed once acceptable "Will Serve" letters had been issued to the County. **[Tr.I 137-139; P.Ex. 14]** Eldorado did not link the signing of the "Will Serve" letter with the granting of the utility easement. **[Tr.I 146]**

**B. Discussion.**

As detailed above, it was not Eldorado who violated the covenant of good faith and fair dealing or that committed extortion. It was Miller trying to leverage Eldorado's need to utilize a new well to serve its customer base into a capitulation by the County and approval of Miller's development proposals. The Trial Court considered all the facts presented by both sides, rejected those presented by Miller, and adopted a number of facts with respect to Miller's extortionary demands. These

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[35] Supporting FOF 33.

facts are supported by the evidence as detailed above. Contrary to Miller's assertion, his statement of "facts" is not uncontroverted and should not be the basis for the Court of Appeals overturning the final determination of the Trial Court.

Miller fails to note his own obligations to comply with the covenant of good faith and fair dealing, including the providing of easements for access to the wells conveyed by Miller. **[*See, e.g.*, P.Ex. 6]**. Miller's gamesmanship with respect to tying approvals of his subdivision to the granting of the power easement is in clear violation of this contractual duty.

## IV. ELDORADO WILL PROVIDE WATER TO MILLER ON THE SAME TERMS AS ITS OTHER CUSTOMERS.

Once again claiming that the facts are not in material dispute, Miller claims an entitlement of water service from Eldorado without having to pay for infrastructure costs necessary to physically serve his property. However, apparently realizing that the facts were not undisputed, he claims any discrepancy between his version and Eldorado's version of events to be "not relevant" so that the appellate court can construe the contract *de novo*. **[BIC 34]** Again Miller is mistaken.

The crux of Miller's argument is that the appellate court should determine whether Miller is entitled to renew his water service from Eldorado without paying the infrastructure costs necessary to serve his residence. As testified to at trial by Eldorado's general manager, Miller and Eldorado reached an agreement whereby Eldorado's interest in well #11 was conveyed back to Miller. Miller thereafter

requested his service from Eldorado to end. **[Tr.II 84, 87, 120-121]** Sometime later he requested the service to recommence. Because Eldorado previously served Miller's residence from well #11 and no longer owned the well, Eldorado would have to install additional infrastructure to serve Miller's property with sufficient water pressure. In accordance with Eldorado's practices and procedures, Miller would have to pay for that infrastructure. Miller thus asks this Court, notwithstanding the Trial Court's determination of the facts surrounding this controversy, to declare that Miller is entitled to restart the service without paying the customary fees, based on a *de novo* interpretation of his contract.[36]

One has to look no further than the language of the contract. **[P.Ex. 54]** "The District shall continue to provide water to all of Miller's present accounts with the District . . . including service to Miller's house, in accordance with the District's usual policies and procedures." As testified to by David Chakroff, Eldorado's General Manager, the usual practices and procedures of Eldorado include charging customers with infrastructure costs required to serve them. **[Tr.II 83-84; P.Ex. 54]**[37] As he also testified, because Eldorado no longer owned well #11 that previously served the residence, the only way to provide water service to Miller's residence was

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[36] Clearly a *de novo* interpretation of his contract is not appropriate. As will be discussed, the trial court's decision required an interpretation of the "usual practices and procedures" of Eldorado. The Court did interpret those procedures and made appropriate findings, which are supported by the evidence. [FOF 108-111]

[37] Supporting FOF 108-111.

through infrastructure improvements. **[Tr.II 84, 87-88]**[38] The Trial Court found that the water service was only to be provided in accordance with Eldorado's usual practices and procedures. **[FOF 108-109]**

The Trial Court's determination on this point should be affirmed.

## V. ELDORADO DID NOT FAIL TO MITIGATE ITS DAMAGES.

Under its fifth Point, Miller asks the appellate court to find that Eldorado failed to mitigate its damages by not launching an immediate condemnation action against himself when he would not grant a power easement for the well. His argument is that he was not at fault because an injunction would have forced him to stop acting illegally. He flippantly suggests that such a condemnation easement would have cost Eldorado only "a few hours of a lawyer's time to draft a petition and motion and order of entry," yet offered no evidence concerning costs associated with a condemnation. Despite Miller's arguments, the Trial Court was correct in rejecting Miller's requested findings of fact regarding mitigation of damages.

First, there is no testimony whatsoever in the record as to how much a condemnation action would have cost and how that would compare to the Court's $60,943 monetary award in favor of Eldorado. We have only Miller's counsel's observation that such an action would cost only a few hours of attorney time. An attorney's argument is not evidence. *Muse v. Muse*, 2009-NMCA-003, 145 N.M.

[38] Supporting FOF 108-109.

451 ("The mere assertions and arguments of counsel are not evidence.").

Second, the argument completely ignores Miller's threats to make a condemnation action extremely expensive to Eldorado by including extraneous allegations in such litigation. **[D.Ex. 8]** ("Accordingly, if the District wants to condemn to get access to power for the well site, I believe the process will be considerably more involved. Further, the impact on Joe's development will involve more than simply taking a square footage measurement of the access route and applying a square footage dollar amount. There is an overall economic impact which I believe the District over looks." Miller goes on to promise protracted and expensive litigation should Eldorado choose a condemnation route:

> If the District wants to ignore Joe's effort to develop a County approved "Will Serve" letter and instead focus on condemning Joe's property, that is its choice. But in any condemnation action there will be counterclaims filed for damages resulting from the District's failure to serve and for rescission seeking to set aside the well and easement conveyances for failure of consideration."

Given Miller's threats of expensive litigation, Eldorado correctly chose to pursue a negotiated settlement. Without any evidence whatsoever of the relative costs involved in a condemnation action versus a negotiated settlement of the easement question, the Trial Court correctly determined this issue in favor of Eldorado and should be affirmed in its decision.

## VI. MILLER DID NOT PROVE THAT ANY ACTIONS BY ELDORADO CAUSED HIM DAMAGE. EVEN IF THEY DID, MILLER'S "DAMAGES" WERE COMPLETELY SPECULATIVE.

Again, Miller misleads this Court as to the "undisputed" nature of his damages evidence. Clearly, the evidence at trial established that Eldorado did nothing to cause Miller damages because his continuing disputes with the County prevented the approvals of his subdivisions until after the amended "Will Serve" letter was prepared. Even if he were damaged, the speculative nature of his "damages" prevented any award. **[Tr.III 26]**[39]

The evidence at trial clearly established that Miller had disputes with the County over approval of his subdivisions, including disputes regarding the providing of affordable housing. A developer cannot obtain final plat approval until there is an executed affordable housing agreement between the developer and the County. **[Tr.II 6]** Miller did not resolve his affordable housing issues until 2012. **[P.Ex. 57]**[40]

The amended "Will Serve" letter was signed in late 2011, but Tierra Bello did not receive final plat approval on any phase until 2013; SWW did not receive final plat approval until 2013; and, Cimarron Village was not authorized for lot sales as of the date of trial. **[Tr.II 17-19].** Miller was not authorized to sell any lots in his

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[39] Supporting FOF 35-36.
[40] Supporting FOF 7, 30.

subdivisions until the day before trial. **[Tr.III 51-52]**[41] Nothing Eldorado did or did not do caused any damage to Miller.

Even if Eldorado had proximately damaged Miller, any claimed damages were little more than speculation. A party claiming lost profits must establish that the loss is calculable. Miller offered no expert testimony, provided no real basis for comparing the costs of lots sold by others to his own, and, in particular, had no basis for testifying that had he sold lots he would have made a profit. **[Tr.III 56]** Rather, Miller acknowledged that he could not predict a profit. Specifically as to residential properties, Miller conceded his inability to determine damages because he could not know what the sales price would be. Likewise with commercial property, he could not predict damages because there had been no sales of commercial property in the area. **[Tr.III 26-29]** Any commercial sales in Eldorado had been distress sales.

Because there is no evidence that any actions by Eldorado caused any damage to Miller and because he was unable to produce any testimony to quantify any lost profits, even had he been able to sell lots, he must be denied any damages under this claim. Any award for lost profits must be "reasonably certain, supported by substantial evidence, and not based on speculation." *Sunnyland Farms*, 2013-NMSC-017, ¶29. The Trial Court should be affirmed in her findings.

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[41] Supporting FOF 35.

## VII. THE TRIAL COURT SHOULD BE AFFIRMED IN ITS PUNITIVE DAMAGES AWARD.

Miller complains that "nothing" supported the award of punitive damages, again neglecting to discuss his flagrant disregard for the Trial Court's Order of May 30, 2012. As previously discussed, Miller was ordered to deliver his survey to Eldorado within days of the Order. Rather than doing so, he hid the fact that he had prepared an alternative survey and that the survey had been approved by PNM. The survey only needed to be presented to Eldorado for approval and recordation. Instead, he decided to hide the existence of the survey, delaying electrification of the well for months. As the Trial Court correctly found, Miller defied the court's Order. **[FOF 5]** As a result, the Court concluded that Miller's actions were done with a culpable state of mind and a reckless disregard for Eldorado's rights. **[FOF 5]**

Because the Trial Court's imposition of a punitive damages award was appropriate, so too was its imposition of the punitive interest rate on the Judgment. NMSA 1978, § 56-8-4 (2004). Once again, the Trial Court should be affirmed in all respects.

## CONCLUSION

Miller flaunts the procedural rules of the appellate courts and refuses to direct this Court's attention to the totality of the evidence presented at trial. A full review of the record discloses, however, that the Trial Court's decision was not based on undisputed facts, but that the facts were determined after three days of testimony.

The Court judged the evidence and the credibility of witnesses and entered her Findings of Fact accordingly. Because Miller has not shown these Findings to be unsupported by substantial evidence, the Trial Court's Judgment should be affirmed in all respects.

Respectfully submitted,

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## STATEMENT OF COMPLIANCE

In accordance with Rule 12-213(G) NMRA, the undersigned hereby certifies that the foregoing Answer Brief used Times New Roman typeface, a proportionally-spaced type style or typeface, and that the number of words contained in the body of the Reply as defined in Subparagraph (1) of Paragraph F of Rule 12-213 is 10,929.

Tanya L. Scott

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was emailed to the listed parties on this 20th day of May, 2016.

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