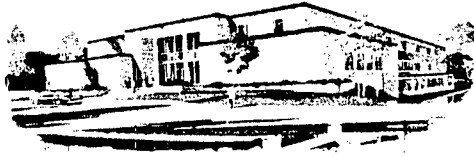


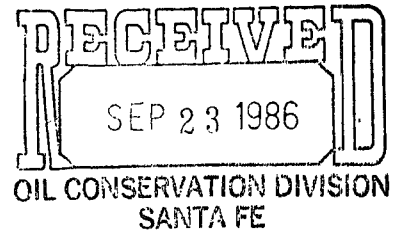


JIM BACA  
COMMISSIONER

State of New Mexico



Commissioner of Public Lands



P.O. BOX 1148  
SANTA FE, NEW MEXICO 87504-1148

September 22, 1986

The Honorable Art Encinias  
P.O. Box 2268  
Santa Fe County Judicial Complex Bldg.  
Santa Fe, New Mexico 87504-2268

RE: Etcheverry vs. Sage Oil Co., et al.  
SF 86-1509(c)

Dear Judge Encinias:

On September 5, 1986, in response to the request of the State Land Office for a presentment of the State Land Office's proposed order of dismissal of the State Land Office as a party defendant in the above-captioned case, the Court set a presentment hearing for October 16, 1986. The Court has now granted the State Land Office's Motion to Dismiss and has filed its own Partial Order of Dismissal. In view of the Court's order, a presentment hearing would appear unnecessary at this time. The State Land Office, therefore, proposes that the October 16, 1986, presentment hearing be vacated.

Very truly yours,

Louhannah M. Walker  
Attorney for Defendant  
State Land Office

cc: Michael Comeau, Esq.  
Gary Kilpatrick, Esq.  
✓ Jeff Taylor, Esq.

FIRST JUDICIAL DISTRICT COURT

COUNTY OF SANTA FE

STATE OF NEW MEXICO

JOHN ETCHEVERRY,

Plaintiff,

vs.

No. SF 86-1509(c)

SAGE OIL COMPANY, a Texas  
Corporation, STATE LAND OFFICE,  
and OIL CONSERVATION DIVISION,

Defendants.

MEMORANDUM IN OPPOSITION TO THE  
PLAINTIFF'S MOTION FOR RECONSIDERATION

The defendant State Land Office (hereinafter SLO) opposes the plaintiff's Motion for Reconsideration<sup>1</sup> of the Court's partial order of dismissal of the plaintiff's cause as to the defendant SLO. As grounds for his motion the plaintiff relies on the arguments presented to the Court in his Memorandum in Opposition to Motion to Dismiss (hereinafter cited as Plaintiff's Memorandum).

Although the plaintiff's memorandum was filed with the Court three business days after it was due, the SLO does not argue that

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<sup>1</sup>The SLO notes that the plaintiff's motion does not comply with Rule 26(a) of the Rules of the District Court of the First Judicial District.

prejudice to the SLO resulted from the untimely filing. It is the position of the SLO that the complaint fails to state a claim for declaratory relief against the SLO because such claim is dependent either upon a waiver of governmental immunity under the New Mexico Tort Claims Act, §§ 41-4-1 through -29 NMSA 1978 (1986 Repl. Pam.), or upon a valid cause of action against the SLO on constitutional grounds. As demonstrated in the statement of supporting authorities accompanying the Motion to Dismiss, the plaintiff has failed to state a claim upon which relief can be granted under either theory. It is the position of the SLO that the complaint also fails to state a claim against the SLO for declaratory relief because it alleges no facts or law from which it could be inferred that an actual controversy exists between the plaintiff and the SLO.<sup>2</sup>

The plaintiff has failed to state a claim against the SLO either under the Tort Claims Act or upon constitutional grounds. It is now the plaintiff's position that his complaint states a valid cause of action against the SLO for declaratory relief even though it does not state a claim against the SLO in tort or upon constitutional grounds. The plaintiff's failure to state a claim

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<sup>2</sup>If a complaint for declaratory relief does not state a valid cause of action under the rules of substantive law, it is subject to dismissal for failure to state a claim upon which relief can be granted. American Linen Supply of New Mexico, Inc. v. City of Las Cruces, 73 N.M. 30, 385 P.2d 359 (1963).

against the SLO either in tort or upon constitutional grounds results in the plaintiff's failure to state a claim against the SLO for declaratory relief under the New Mexico Declaratory Judgment Act, §§ 44-6-1 through -15 NMSA 1978 (hereinafter cited as the DJA). The plaintiff's failure to allege an actual controversy between the plaintiff and the SLO also results in the plaintiff's failure to state a claim against the SLO upon which declaratory relief can be granted.

The plaintiff in his memorandum appears to argue that Section 44-6-13<sup>3</sup> constitutes a waiver of sovereign immunity and that sovereign immunity is not applicable in suits seeking a declaration that a state agency may not exceed the scope of its lawful authority. Plaintiff's Memorandum at 3. Section 44-6-13, as construed in Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940), is not "a general consent on the part of the state to be sued" under the provisions of the DJA. Id. at 307, 101 P.2d at 1032.

In line with rule of construction in Taos County Board of Education v. Sedillo . . . we were dealing

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<sup>3</sup>44-6-13. State or official may be sued; construction of constitution or statute. For the purpose of the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

with the Declaratory Judgment Act . . . certain language whereof was relied upon as a consent on the part of the state to be sued under the Act. Section 3 of the Act reads:

"For the purpose of this act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the Constitution of the state of New Mexico, or any statute thereof."

On its face the language lent itself to such a construction. But we said:

"\* \* \* We take this first opportunity to correct any impression that section 3 of the act is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no such meaning and has no greater effect, in so far as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's consent to be sued otherwise exists and the facts warrant suit."

In re Bogert, 64 N.M. 438, 443, 329 P.2d 1023, 1026 (1958)  
(citations omitted) (quoting Taos County Board of Education).

It is clear from the foregoing language that Section 44-6-13 does not constitute a waiver of governmental immunity. In order to sue the SLO under the DJA the plaintiff must, therefore, indicate the state's consent to suit under other law or allege a cause of action against the SLO for exceeding the scope of its legal authority. See Harriett v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958). Because the complaint fails to state a claim against the SLO under the Tort Claims Act, the plaintiff has failed to identify a waiver of governmental immunity that would entitle the plaintiff to bring this action against the SLO. The complaint also fails to state a claim against the SLO for constitutional or statutory violations. The complaint thus fails

to state a claim against the SLO upon which declaratory relief can be granted.

The plaintiff has also failed to state a claim against the SLO for declaratory relief because there is no actual controversy between the plaintiff and the SLO and the plaintiff has not alleged the existence of an actual controversy. Section 44-6-2 provides that "[i]n cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations . . . ." (emphasis added). A complaint fails to set forth sufficient allegations to state a claim for declaratory relief if no justiciable controversy is alleged. Morris v. Fleming, 625 P.2d 334 (Ariz. App. 1980). Neither the plaintiff's complaint against the SLO nor his memorandum explaining his claim against the SLO alleges facts or law from which an actual controversy between the plaintiff and the SLO could be inferred.<sup>4</sup>

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An actual controversy is a jurisdictional prerequisite under the New Mexico Declaratory Judgment Act. State ex rel. Overton v. State Tax Commissioner, 81 N.M. 28, 462 P.2d 613 (1969). A court is also without jurisdiction to render a declaratory judgment where an aggrieved party fails to perfect a timely appeal from a final administrative order. Conoco, Inc. v. State Department of Health, 651 P.2d 125 (Okla. 1982). The DJA is remedial only and does not extend the jurisdiction of a court where it would not otherwise exist. Allstate Insurance Co. v. Firemen's Insurance Co., 76 N.M. 430, 415 P.2d 553 (1966). A declaratory action cannot transform an appellate court with limited jurisdiction into a court of general jurisdiction and thereby authorize a collateral attack upon an unappealed administrative decision. City of Rutland v. McDonald's Corp., 503 A2d 1138 (Vt. 1985).

An actual controversy under the New Mexico Declaratory Judgment Act, has been defined as one involving 1) rights or other legal relations of the parties seeking declaratory relief, 2) a claim of right or other legal interest asserted against one who has an interest in contesting the claim, 3) interests of the parties which are real and adverse, and 4) an issue that is ripe for judicial determination. Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971). The complaint fails to allege any of these elements, all of which are essential to an action for declaratory relief.

The plaintiff has alleged no controversy with the SLO involving his rights or other legal relations, and, in fact no such controversy exists. The plaintiff relies on Section 44-6-4 as the source of his right to seek a declaratory judgment against the SLO. <sup>5</sup> Plaintiff's Memorandum at 2. The plaintiff apparently proceeds on the theory that he is an "interested person" whose rights are affected by the contract between the SLO and defendant Sage Oil Company (hereinafter Sage), and that he may therefore obtain a declaration of rights under the contract.

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<sup>5</sup>44-6-4. Power to construe. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The statute's requirement of an interested person makes applicable to declaratory actions the general law of standing. See 10A Wright, Miller and Kane, Federal Practice and Procedure, § 2757 (2d ed. 1983).

"There must be an invasion of some private right of the complaining party before he has standing to sue." State ex rel. Overton v. State Tax Commissioner, 81 N.M. 28, 33, 462 P.2d 613, 618 (1969). The plaintiff must allege a personal stake in the outcome of the controversy sufficient to assure a degree of adversity that will sharpen the presentation of the issues to the court. Id. There must be a nexus between the plaintiff's alleged injury or threatened injury and the conduct of the defendant. Id.

The plaintiff alleges no conduct by the SLO that resulted in the injury of which the plaintiff complains, the alleged subsurface invasion of salt water under his property. The conveyance of the easement did not authorize salt water injection on state land. Such authority is vested exclusively with the New Mexico Oil Conservation Division <sup>6</sup> and is not among the powers or

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<sup>6</sup>70-2-12(B)(15). Enumeration of powers. . . . B. Apart from any authority, express or implied, elsewhere given to or existing in the division by virtue of this act or the statutes of this state, the division is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz: . . . (15) to regulate the disposition of water produced or used in connection with the  
(Footnote Continued)



duties exercised by the commissioner of public lands or the SLO. The SLO has no authority to affect the property rights of land owners whose properties adjoin those of the state and the SLO easement does not purport to do so. <sup>7</sup> "When the defendant has no power to affect the plaintiff's rights, no controversy is presented." Riley v. County of Cochise, 455 P.2d 1005, 1010 (Ariz. App. 1969).

The plaintiff is not a party to the easement contract between the SLO and Sage and he has identified no private right of his that was in any way affected by the SLO's grant of an interest in state lands to Sage. The plaintiff has failed to allege the requisite nexus between his alleged injury and the conduct of the SLO. The plaintiff is not an interested person within the meaning of Section 44-6-4 and he is without standing to obtain a declaration of rights under the contract between the

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(Footnote Continued)

drilling for or producing of oil or gas, or both, and to direct surface or subsurface disposal of such water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer. . . .

Oil Conservation Division Rule 701(A). Permit for Injection Required. The injection of gas, liquefied petroleum gas, air, water, or any other medium into any reservoir for the purpose of maintaining reservoir pressure or for the purpose of secondary or other enhanced recovery or for storage or the injection of water into any formation for the purpose of water disposal shall be permitted only by order of the Division after notice and hearing, unless otherwise provided herein.

<sup>7</sup> The commissioner of public lands does, however, have the authority to grant easements on state lands. N.M. Const. art. XIII, § 2; §§ 19-1-1 and 19-7-57 NMSA 1978 (1985 Repl. Pamp.).

SLO and Sage. The plaintiff has thus failed to satisfy the first requirement of the Sanchez test for presenting an actual controversy.

The complaint against the SLO alleges no claim of right that the SLO could have an interest in contesting. The declaration of rights sought by the plaintiff, i.e., that the SLO easement does not authorize subsurface trespass, would not affect any rights in state lands asserted by the SLO or the SLO's authority to issue such easements. The commissioner of public lands is an indispensable party in cases involving certain public land questions, Swayze v. Bartlett, 58 N.M. 504, 510-11, 273 P.2d 367, 371 (1954), but such issues are not here involved. There is no allegation that the SLO easement is illegal or its execution beyond the commissioner's lawful authority. There is no dispute concerning the propriety of an easement provision or Sage's compliance with the terms of the easement. The SLO has no interest to protect in contesting the plaintiff's claims and thus the plaintiff has not met the second requirement of Sanchez for presenting an actual controversy.

The plaintiff has failed to allege facts or law from which it might be inferred that a controversy exists in which the plaintiff and the SLO have adverse interests and, in truth, none does exist because the plaintiff and the SLO do not have adverse interests. It is the SLO's position that its easement does not

authorize a subsurface invasion under adjoining lands and the Court's declaration to that effect would resolve no dispute between the plaintiff and the SLO.<sup>8</sup> The plaintiff and the SLO assert the same position. No actual controversy exists when the plaintiff and the defendant assert the same position. Oregon Medical Association v. Rawls, 557 P.2d 664, 666 (Ore. 1976). An actual controversy requires two opposing sides. Morris v. Fleming, 625 P.2d 334, 336 (Ariz. App. 1980). The element of adversity essential to an actual controversy is totally lacking in the plaintiff's claims against the SLO and the plaintiff has, therefore, failed the third requirement of an actual controversy.

The plaintiff has also failed to allege any facts which might indicate the presence of an issue between the plaintiff and the SLO that is ripe for judicial determination. The plaintiff has not even identified any triable issue between the plaintiff and the SLO. The plaintiff seeks a declaration that the SLO easement does not authorize a subsurface trespass, not for the purpose of determining rights under the easement, but in order to obtain from the Court an impermissible advisory opinion

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<sup>8</sup>It is generally held that a court should, in its discretion, refuse to render a declaratory judgment that would not terminate the uncertainty or controversy giving rise to the proceedings. National Liberty Insurance Co. v. Silva, 43 N.M. 283, 289, 92 P.2d 161 (1939) (opinion withdrawn on rehearing upon other grounds); see 10A Wright, Miller and Kane, Federal Practice and Procedure, § 2759 (2d ed. 1983).

concerning the validity or invalidity of a defense the plaintiff theorizes the defendant Sage may possibly raise at some point in the litigation. A mere apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment. Fash v. Clayton, 78 F.Supp. 359 (D.N.M. 1948); see 13A Wright, Miller and Cooper, Federal Practice and Procedure, § 3532 (2d ed. 1984). The plaintiff has failed to present an issue that is ripe for judicial determination and has met none of the requirements of Sanchez. No actual controversy exists between the plaintiff and the SLO and the plaintiff has thus failed to state a claim upon which declaratory relief against the SLO can be granted.

In order to state a claim against the SLO upon which declaratory relief can be granted the complaint must allege an actual controversy between the plaintiff and the SLO and either a waiver of governmental immunity under the Tort Claims Act or constitutional or statutory violations by the SLO resulting in the injury of the plaintiff. The complaint alleges none of these and thus fails to state a claim upon which relief can be granted.

The Court's partial order of dismissal of the plaintiff's cause is correct. The defendant SLO respectfully requests the Court to deny the plaintiff's Motion for Reconsideration.

**CERTIFICATE**

**I hereby certify that I  
mailed a copy of the fore-  
going pleading to opposing  
counsel of record, Sept. 22,  
1986.**

*Louhannah M. Walker*

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