STATE EX REL. STATE ENGINEER V. MONTEVERDE

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STATE OF NEW MEXICO ex rel. STATE ENGINEER,
Plaintiff-Appellee,
v.
RONALD P. MONTEVERDE,
Defendant-Appellant.

NO. A-1-CA-35398

COURT OF APPEALS OF NEW MEXICO

December 14, 2018

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY

COUNSEL

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JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: JULIE J. VARGAS, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Ronald Monteverde appeals from an amended memorandum opinion and order sustaining the State's objections to the Special Master's report and determining that Monteverde has abandoned his water right. Specifically, Monteverde challenges the district court's conclusions that (1) the Special Master's sua sponte application of equitable tolling and laches deprived the State of notice and opportunity to defend against them, and (2) Monteverde failed to provide sufficient evidence to rebut the presumption that he intended to abandon his water right.

{2} Monteverde also asserts, for the first time on appeal, that the delay in prosecuting his case has deprived him of his constitutional right to due process. Because Monteverde has failed to show he was prejudiced by the alleged delay, we find no due process violation. We affirm the district court.

BACKGROUND

{3} Monteverde purchased property at the end of the Vigil Ditch, a community ditch fed by the Gallinas River, in 1979. The purchase included a surface water irrigation right appurtenant to 9.5 acres, as adjudicated to his predecessor in interest by *United States v. Hope Community Ditch, et al.*, Cause No. 712 (Equity) (D.N.M. 1933). When Monteverde bought the property, the ditch "was in disrepair. . . . In the early and mid-1980s, . . . Monteverde and a neighbor cleared the ditch and water flowed sporadically through the ditch but the flow was sufficient to reach [Monteverde's p]roperty on only one occasion." Upstream property owners constructed roads and installed utilities across the ditch, further obstructing water flow from reaching Monteverde's point of diversion. Despite attempts to work with the upstream property owners and to create a culvert under the northern roads, water has not flowed to Monteverde's point of diversion since the early 1990s.

{4} A hydrographic survey published in 1991 found that Monteverde's property was not being irrigated. Monteverde began diverting water directly from the Gallinas River into an artificial pond on his property and irrigating parts of his property from this artificial pond as well as with water from an intermittent groundwater seepage-fed pond also on his property. This practice ended in 2008, and Monteverde has not attempted irrigation from any source since then.

{5} In 1991 the State served Monteverde with an offer of judgment stating that his property had no water right. Though not submitted for the record, the district court found that Monteverde rejected this offer of judgment. The State renewed its offer of judgment of no water right in 2009, which Monteverde again rejected. Between these two offers of judgment, Monteverde filed an application for permit to change point of diversion with the State, requesting authorization to change his point of diversion to the Gallinas River. The State informed Monteverde that he had used an outdated form and had tendered the incorrect application fee. Monteverde submitted evidence that he had paid the correct application fee but did not provide evidence that he submitted the correct application, nor did he testify to that effect. The State rejected the application, finding

that the property had no water right and that Monteverde had not followed official procedure.

{6} The parties do not dispute that Monteverde has not irrigated his property with water from the Vigil Ditch since the early 1980s. Following a hearing, the Special Master recommended that the district court conclude that Monteverde's "obligation to make beneficial use of water was tolled when the State served the 1991 No-Right Offer or, in the alternative, that the State is bar[red] by laches from arguing that . . . Monteverde was obligated to make beneficial use of water while the State's abandonment litigation [was] pending." The Special Master, based upon his conclusion that any alleged nonuse after 1991 should not be considered in an abandonment analysis, also recommended that the district court conclude that the State "failed to prove by clear and convincing evidence that . . . Monteverde intended to abandon" his water right.

{7} The State objected to the Special Master's recommendations, raising three issues before the district court: (1) the legal theories of equitable tolling and laches were not raised by Monteverde and therefore the State was deprived notice and opportunity to defend; (2) the legal theories of equitable tolling and laches were inapplicable to the case; and (3) Monteverde abandoned his water right. The district court found that "[t]he State was never given notice that the affirmative defenses of equitable tolling and laches would be raised, and it did not have an opportunity to defend against them." The district court agreed with the State that the Special Master was without authority to sua sponte raise these defenses for Monteverde and therefore determined that the period of continued, unexcused nonuse was from 1991 until 2015. The district court next concluded that Monteverde "failed to put water to beneficial use on [his] property for a period of twenty-four years, triggering the presumption of intent to abandon the water right," and that Monteverde "offered no excuse cognizable under the law to rebut the presumption of abandonment." The district court ultimately sustained the State's objections and declared that Monteverde had abandoned his water right. This appeal followed.

DISCUSSION

I. Standard of Review

{8} When an appeal involves proceedings before a special master and a district court's subsequent review of the special master's report, two standards of review apply: "the standard the district court applies to review of the special master's report and the standard that our Court applies to review of the district court's order." *State ex rel. Office of State Eng'r v. United States*, 2013-NMCA-023, ¶ 10, 296 P.3d 1217.

A. District Court's Review of the Special Master's Report

{9} Rule 1-053(E)(2) NMRA provides that in a non-jury action, "the [district] court shall accept the [special] master's findings of fact unless clearly erroneous." *See Lopez v. Singh*, 1949-NMSC-022, ¶ 6, 53 N.M. 245, 205 P.2d 492 ("[T]he findings of the

[special] master, if supported by substantial evidence, are binding upon the [district] court."). In its memorandum opinion and order, the district court set forth only those findings of fact itemized by the Special Master that the district court determined were undisputed. Because neither party challenges the district court's findings of fact on appeal, they are conclusive and we need not examine them. *See* Rule 12-318(A)(4) NMRA (stating that when a finding is not specifically attacked, it is deemed conclusive). A special master's conclusions of law are reviewed by the district court de novo. *Office of State Eng'r*, 2013-NMCA-023, ¶ 17.

B. Appellate Review of the District Court's Order

{10} Our standard of review of a district court's order in cases involving Rule 1-053 is the same as the review conducted by the district court. *See Office of State Eng'r*, 2013-NMCA-023, ¶ 18 (examining the standards of review applied by our New Mexico Supreme Court and Court of Appeals when a district court has accepted or rejected parts of a special master's recommendation); *see also Creson v. Amoco Prod. Co.*, 2000-NMCA-081, ¶ 10, 129 N.M. 529, 10 P.3d 853 ("This Court reviews questions of law under a de novo standard of review and questions of fact under a substantial evidence standard of review."). Accordingly, we review the district court's conclusions of law de novo. *See Creson*, 2000-NMCA-081, ¶ 10. Monteverde asserts that the district court did not consider the applicability of equitable tolling and laches to this case because it sustained the State's objection that they were improperly raised. Because we affirm the district court's order sustaining the State's objections to the sua sponte application of equitable tolling and laches, we similarly do not reach the merits of their applicability.

II. The Special Master's Sua Sponte Application of Equitable Tolling and Laches Deprived the State of Notice and Opportunity to Defend

{11} Monteverde urges this Court to affirm the Special Master's application of equitable tolling and laches, arguing that the State "cannot reasonably claim to be unaware that delay might become an issue." In support of this request, Monteverde cites Rule 1-015 NMRA (amended and supplemental pleadings), Rule 1-041 NMRA (dismissal of actions), and Rule 1-054 NMRA (judgments; costs). In response, the State contends that the Special Master's sua sponte application of the equitable doctrines deprived the State of notice and opportunity to defend against them because the defenses were raised for the first time in the Special Master's report.

{12} "Although pro se pleadings are viewed with tolerance, a pro se litigant is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar." *Camino Real Envtl. Ctr., Inc. v. N.M. Dep't of Env't*, 2010-NMCA-057, ¶ 21, 148 N.M. 776, 242 P.3d 343 (omission, internal quotation marks, and citation omitted). "Pro se litigants must comply with the rules and orders of the court and will not be treated differently than litigants with counsel." *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126.

{13} "[A]n affirmative defense is a state of facts provable by a defendant that will bar a plaintiff's recovery once a right to recover is established." *Sonida, LLC v. Spoverlook, LLC*, 2016-NMCA-026, ¶ 25, 367 P.3d 854 (alterations, internal quotation marks, and citation omitted). Under Rule 1-008(C) NMRA, a party is required to set forth any affirmative defenses in a response pleading. *See Little v. Baigas*, 2017-NMCA-027, ¶ 22, 390 P.3d 201 (indicating that estoppel must be pled with particularity). This rule is intended to provide the opposing party with notice and the opportunity to demonstrate the inapplicability of the affirmative defense. *See Fogelson v. Wallace*, 2017-NMCA-089, ¶ 19, 406 P.3d 1012. Therefore, "if an affirmative defense is not pleaded or otherwise properly raised, it is waived." *Bronstein v. Biava*, 1992-NMSC-053, ¶ 8, 114 N.M. 351, 838 P.2d 968.

{14} Monteverde did not explicitly plead equitable tolling and laches. Nevertheless, Monteverde relies on his statement in the amended joint pre-trial order that "[t]he Pecos River adjudication process has been longstanding and piecemeal so much so to make further issues of law too burdensome for [Monteverde]," as sufficient to put the State on notice of his intent to raise the equitable affirmative defenses. The question, then, is whether the defenses were otherwise properly raised. *See Fredenburgh v. Allied Van Lines, Inc.*, 1968-NMSC-174, ¶ 3, 79 N.M. 593, 446 P.2d 868 ("There is no question that the matter of limitation of liability was not pleaded; thus, the question here is that of whether or not the matter was otherwise properly raised in the [district] court.").

{15} The New Mexico Rules of Civil Procedure apply to stream adjudications, except that they "do not apply where there are contrary statutory provisions concerning special statutory or summary proceedings." Rule 1-001(A) NMRA. The rules specific to stream adjudications are not contrary to the rules cited by Monteverde. *See* Rules 1-071.1 to 1-071.5 NMRA. "A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried." *Leonard Farms v. Carlsbad Riverside Terrace Apartments, Inc.*, 1977-NMSC-004, ¶ 3, 90 N.M. 34, 559 P.2d 411. Our New Mexico Supreme Court has "underscored the need for notice to the opposing party, so that an opposing party may not be prejudiced by a late shift in the theory of the case." *Credit Inst. v. Veterinary Nutrition Corp.*, 2003-NMCA-010, ¶ 25, 133 N.M. 248, 62 P.3d 339. "Due process still requires that the opposing party have notice and an opportunity to defend against the theory not stated in the pleadings." *Id.*

{16} "In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . laches, . . . and any other matter constituting an avoidance or affirmative defense." Rule 1-008(C). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period[,]" and it is typically applied "in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 15, 135 N.M. 539, 91 P.3d 58. "However, where a plaintiff fails to receive notice of the right to sue through his or her own fault, equitable tolling does not apply." *Id.*; *see id.* ¶ 16 ("[S]ince equitable tolling is based in equity, the individual claiming equitable tolling must have clean hands."). To establish laches, a party must assert the following facts:

> (1) Conduct on the part of the defendant, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy;
>
> (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit;
>
> (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
>
> (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.

Brown v. Taylor, 1995-NMSC-050, ¶ 11, 120 N.M. 302, 901 P.2d 720 (internal quotation marks and citation omitted); *see id.* (noting that "laches is not favored and it should be applied sparingly" (internal quotation marks and citation omitted)).

{17} Monteverde's defense before the Special Master was grounded in evidence presented of his efforts to remove various obstructions rendering his portion of the Vigil Ditch inoperable, irrigate his property by means of water diverted directly from the Gallinas River or from an intermittent pond, dig a lateral ditch on his property, and change his point of diversion. His theory of the case did not raise affirmative defenses nor suggest that they be applied. In fact, the evidence is demonstrative of Monteverde's efforts to preserve his water right rather than establish excusable inaction due to the State's alleged delay in prosecuting his case. Accordingly, the State was not given notice by Monteverde's pleadings or his theory of the case that the affirmative defenses of equitable tolling and laches would be raised, and was not given an opportunity to defend against them. *See Credit Inst.*, 2003-NMCA-010, ¶¶ 26, 32 (concluding "that the [district] court erred in sua sponte awarding restitution to [the p]laintiff" when there was no pretrial order defining the issues for trial, no argument made by the plaintiff on the issue, the plaintiff did not submit requested findings and conclusions on the issue nor move to amend the pleadings, and the issue was only raised by the court after trial). Having concluded that Monteverde failed to plead affirmative defenses and failed to make them a theory of his case, we must next determine whether a special master has the authority to sua sponte raise the defenses after the case has been heard.

{18} Rule 1-015(B) allows for amendments to pleadings as a matter of course or "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties[.]" Monteverde, however, made no motion to amend his pleadings before the Special Master or the district court, and we have already concluded that these issues were not part of the theory of his case. Monteverde seems to rely on the district court's brief discussion of the potential applicability of Rule 1-015 to this case: "In recognition of the equitable powers of the court, [Rule 1-015] provide[s] . . . 'when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.' " This reliance is misplaced for two reasons. First, the district court dismissed the applicability of Rule 1-

015 in light of *Leonard Farms*. Second, we do not read Rule 1-015(B) to allow for sua sponte amendments to the pleadings. Our reading of the rule is in line with this Court's precedent that "[a district] court does not have the power *sua sponte* to amend a party's pleadings." *Berry v. Meadows*, 1986-NMCA-002, ¶ 31, 103 N.M. 761, 713 P.2d 1017; *see id.* ¶¶ 31-32 (considering whether an affirmative defense in a divorce proceeding was waived when it was not raised and the party did not move to amend its pleadings but it was otherwise tried and ruled upon by the district court). Monteverde has not cited to authority that supports his assertion that Rule 1-015 gave the Special Master the authority to sua sponte raise equitable tolling and laches. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party does not cite to legal authority in support of an argument, we may assume that no such authority exists and will not do the research for them). Accordingly, we conclude that Rule 1-015 did not grant this authority.

{19} Monteverde also briefly raised Rule 1-054 as support for his assertion that the Special Master had the authority to raise and apply equitable tolling and laches. However, this argument was not fully developed. Because Monteverde has not developed this argument, we will not review it "or guess at what his arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076.

{20} Finally, Monteverde cites Rule 1-041 as support for his contention that the State should not have been surprised that delay in prosecution "poses a problem." However, Monteverde again fails to identify any specific prejudice, instead resorting to generalized arguments like "justice delayed is justice denied." Without more, we cannot properly consider Monteverde's argument. Because Monteverde has not developed this argument, we will not review it "or guess at what his arguments might be." *Headley*, 2005-NMCA-045, ¶ 15.

{21} Monteverde did not explicitly plead affirmative defenses, the evidence he presented was solely grounded in his efforts to preserve his water right, and the Special Master lacked the authority to sua sponte raise affirmative defenses. Therefore, we conclude that Monteverde waived these defenses.

III. Abandonment

{22} The State bears the burden of proving abandonment by clear and convincing evidence. *State ex rel. Office of State Eng'r v. Elephant Butte Irrigation Dist.*, 2012-NMCA-090, ¶ 23, 287 P.3d 324. After unreasonable periods of nonuse, however, "the burden of proof shifts to the holder of the right to show the reasons for nonuse." *State ex rel. Reynolds v. S. Springs Co.*, 1969-NMSC-023, ¶ 20, 80 N.M. 144, 452 P.2d 478. A holder of a valid water right can "avoid the common law abandonment that arises after a protracted period of nonuse by establishing the absence of intent to abandon the water right." *Elephant Butte Irrigation Dist.*, 2012-NMCA-090, ¶ 24.

{23} Intent is required in order to establish abandonment of a water right and can be established either expressly or implicitly. *S. Springs*, 1969-NMSC-023, ¶¶ 10, 12. Absent a declaration of intent to abandon the right, an intent to abandon "may be inferred from acts or failures to act so inconsistent with an intention to retain [the right] that the unprejudiced mind is convinced of the renunciation." *Id.* ¶ 12 (internal quotation marks and citation omitted). "[W]here by clear and convincing evidence it is shown that for an unreasonable time available water has not been used, an intention to abandon may be inferred in the absence of proof of some fact or condition excusing such nonuse." *Id.* ¶ 22 (quoting *Commonwealth Irrigation Co. v. Rio Grande Canal Water Users' Ass'n*, 45 P.2d 622, 623 (Colo. 1935)). "[T]o rebut the presumption of abandonment arising from such long period[s] of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse." *Id.* ¶ 21 (quoting *Mason v. Hills Land & Cattle Co.*, 204 P.2d 153, 156 (Colo. 1949)).

A. Unreasonable Period of Nonuse

{24} Monteverde does not challenge the district court's conclusion that twenty-four years of nonuse is sufficient to establish a rebuttable presumption of an intent to abandon a water right. An unchallenged finding of the district court is binding on appeal. *See Stueber v. Pickard*, 1991-NMSC-082, ¶ 9, 112 N.M. 489, 816 P.2d 1111; *see also State ex rel. Human Servs. Dep't v. Staples*, 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (stating that "courts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories" (alteration, internal quotation marks, and citation omitted)). Monteverde instead challenges the conclusion that he was not exercising his water right during this period.

{25} Monteverde asserts that during the alleged period of nonuse he was putting water to beneficial use on his property. As a basis for this assertion, Monteverde argues that his diversion from the Gallinas River and use of water from the intermittent pond on his property were uses of water that showed he did not intend to abandon his rights. The district court concluded that these diversions were unauthorized and that unauthorized diversions do not constitute use of an otherwise valid water right. We agree.

{26} Monteverde's diversion from the Gallinas River is not evidence of putting water to beneficial use because it is an unauthorized diversion of water, and unauthorized diversions of water cannot establish beneficial use. *Cf. State ex rel. Reynolds v. Mitchell*, 1959-NMSC-073, ¶¶ 14-16, 66 N.M. 212, 345 P.2d 744 (distinguishing unauthorized use based on the unlawful change of a well location from exercise of right based upon beneficial use of water and stating that "[n]o right to the use of water from such sources was obtained by its use by [the] defendants in violation of law, nor can it be" (internal quotation marks and citation omitted)).

{27} According to the evidence, Monteverde last put water from the Vigil Ditch to beneficial use sometime in the 1980s—prior to the period of nonuse alleged. Subsequent attempts to put the water to beneficial use occurred through diversion from the Gallinas River and without a valid point of diversion permit. To have beneficial use, there must be an appropriation of water. *Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth.*, 2014-NMCA-032, ¶ 36, 320 P.3d 492 ("[A]ny diversion for a beneficial use must be accompanied by a right to the water acquired by the user's appropriation of the water to be diverted."). An appropriation of water can only occur when the taking or diversion of water occurs in accordance with the law. *Id.* (defining "appropriation" as "the taking or diversion of water from some natural stream in accordance with law" (omission, alteration, internal quotation marks, and citation omitted)). Because the point of diversion that facilitated Monteverde's use was unpermitted, it was not in accordance with the law. *See Honey Boy Haven, Inc. v. Roybal*, 1978-NMSC-088, ¶ 7, 92 N.M. 603, 592 P.2d 959 ("An individual desiring to change his point of diversion is required to follow a certain statutory procedure."); *see also* NMSA 1978, § 72-5-3 (1941) (requiring a petitioner to file an amended application within sixty days of being notified of a defect in their initial application). It therefore cannot qualify as an appropriation of water and cannot constitute beneficial use. We therefore affirm the district court's conclusion that from 1991 to 2014, Monteverde failed to put water to beneficial use.

{28} The district court cited *Mitchell*, 1959-NMSC-073, ¶ 13, and *State ex rel. Reynolds v. Fanning*, 1961-NMSC-058, ¶¶ 13-16, 68 N.M. 313, 361 P.2d 721, as support for the conclusion that Monteverde had an obligation to follow statutory procedures. Monteverde challenges the application of these cases, asserting that the statutory scheme of groundwater permitting differs greatly from the scheme of surface water permitted. While these cases analyzed forfeiture of a groundwater right, rather than abandonment of a surface water right, the district court's reliance was nonetheless proper.

{29} It is well settled that forfeiture and abandonment carry different presumptions and burdens of proof. *See S. Springs Co.*, 1969-NMSC-023, ¶ 9 (adopting the distinction between forfeiture and abandonment from 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 1118, at 2020 (2d ed. 1912) that "forfeiture . . . is the involuntary or forced loss of [a] right" and "abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it"). However, the district court did not rely upon *Mitchell* and *Fanning* for their conclusions regarding forfeiture of a groundwater right; rather the district court relied upon these cases for their conclusions that a water right claimant must follow statutory procedures to change their point of diversion. In *Mitchell*, a water right was determined to have been forfeited because the claimants had been irrigating from an unauthorized well. 1959-NMSC-073, ¶¶ 15-16. This unauthorized change in well location, the Court stated, should "be considered tantamount to not irrigating at all." *Id.* ¶ 16. In *Fanning*, an unlawful change in point of diversion again led our Supreme Court to conclude that the water right had been forfeited. 1961-NMSC-058, ¶¶ 15-16. The Court reaffirmed the doctrine stated in *Mitchell*, stating that "it is the duty of the owner of a water right to comply with the law and the forfeiture of the water right occurred without regard to the intention of [the

petitioner] or his predecessors in title." *Fanning*, 1961-NMSC-058, ¶ 16. We find no error in the district court's reliance on these cases for the proposition that the owner of a water right must comply with the law to change his point of diversion.

B. Insufficient Evidence Was Presented to Rebut the Presumption of Intent to Abandon

{30} "After a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse." *S. Springs Co.*, 1969-NMSC-023, ¶ 20. Monteverde asserts that his expression of intent to preserve his water right in combination with his continued irrigation of his property are evidence of an intent to retain his water right. The State asserts that a mere expression of intent is not sufficient to rebut a presumption of intent to abandon, that the water used to irrigate Monteverde's property was an unauthorized use of water, and that Monteverde failed to assert his right against adjacent property owners. We agree.

{31} First and as we previously noted, our Supreme Court has provided that "to rebut the presumption of abandonment arising from such a long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse." *Id.* ¶ 21 (internal quotation marks and citation omitted). Monteverde failed to provide us with evidence of facts or conditions excusing his long nonuse.

{32} Second, Monteverde had the right to divert water from the Vigil Ditch. While his application of water from other points of diversion may have been an expression of his desire, hope, or intent to retain his water right, the application, without more, was not enough to excuse his long period of not using available water, thereby rebutting the presumption of abandonment. *See id.* (requiring a showing of some fact or condition excusing long nonuse). Water right owners are required to seek and receive approval from the Office of the State Engineer prior to changing the point of diversion of their water right, and approval is not guaranteed. NMSA 1978, § 72-5-24 (1985). We disagree with the district court's conclusion that Monteverde failed to comply with the State Engineer's requirements to apply for a change in the point of diversion in light of the fact that Monteverde satisfied the State Engineer's directive that if he submitted the correct fee, it would proceed with publication of his application. We note, however, that Monteverde presented no evidence that after paying the correct fee, he ever followed up on or monitored the processing of his application.

{33} Finally, Monteverde's water right provided him a ditch easement enforceable against adjacent property owners to ensure that water could reach his point of diversion. NMSA 1978, § 73-2-5(A) (2005) ("[I]t is unlawful to interfere with th[e] easement or prevent access to the ditch by the owner of the dominant estate."); NMSA 1978, § 73-2-64(A) (2005) (providing that "[a] person shall not . . . cut, break, stop up or otherwise interfere with any community ditch or dam in this state"). When his upstream neighbors constructed private roads across the Vigil Ditch, Monteverde failed to enforce his easement.

{34} Monteverde's failure to follow through on his application to change his point of diversion, or use the resources available to enforce his easement tend to support—rather than rebut—the presumption that he intended to abandon his right. *See Mitchell*, 1959-NMSC-073, ¶ 16; *see also Fanning*, 1961-NMSC-058, ¶¶ 15-16.

{35} Accordingly, we affirm the district court's conclusion that Monteverde offered no excuse cognizable under the law to rebut the presumption of abandonment triggered by the twenty-four-year period of nonuse.

IV. Constitutional Due Process Claim

{36} Monteverde, for the first time on appeal, asserts that the State's delay in prosecuting his case resulted in a violation of his constitutional right to due process. To prevail on a due process claim alleging prosecutorial delay, "the defendant must show the delay caused substantial prejudice, that is, his defense would have been more successful absent the delay." *Zurla v. State*, 1990-NMSC-011, ¶ 61, 109 N.M. 640, 789 P.2d 588 (noting that lapse of time alone is insufficient to establish prejudice), *modified on other grounds by State v. Garza*, 2009-NMSC-038, ¶ 22, 146 N.M. 499, 212 P.3d 387. Monteverde has failed to demonstrate prejudice, by failing to cite to facts demonstrating prejudice, or by presenting arguments as to how the delay was detrimental to the success of his case. Monteverde is therefore not entitled to reversal based on a due process violation.

CONCLUSION

{37} For the foregoing reasons, we affirm the amended memorandum opinion and order of the district court.

{38} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

HENRY M. BOHNHOFF, Judge