SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 _____ Appeal from the District Court, Water Division 3, Case No. 2018CW3003, Honorable Pattie P. Swift _____ **Appellant:** NICK MEAGHER **v.** **Appellee:** THE PEOPLE OF THE STATE OF COLORADO, ex rel. KEVIN G. REIN, State Engineer, and CRAIG W. COTTEN, Division Engineer for Water Division No. 3	DATE FILED: August 12, 2019 8:34 AM COURT USE ONLY
Attorney for Appellant Nick Meagher: Stephane W. Atencio, #13129 S. W. Atencio and Associates, P.C. 4164 Austin Bluffs Parkway #420 Colorado Springs, CO 80918 (719) 589-6005 steve@atenciolaw.net	Supreme Court Case No: 2019SA_____
NOTICE OF APPEAL	

Appellant Nick Meagher ("Mr. Meagher"), by and through undersigned counsel, pursuant to Colorado Appellate Rule 3(d), hereby submits this Notice of Appeal.

1. Nature of the Case.

A. Nature of the controversy: This matter involves a complaint to enforce "Rules Governing the Measurement of Ground Water Diversion Located in Water Division No. 3, the Rio Grande Basin" ("Measurement Rules") and an Order issued by the Division Engineer for Water Division 3 ("Division Engineer") ordering Mr. Meagher to comply with the Measurement Rules.

The Measurement Rules require, *inter alia*, that a well owner submit an annual report of the amounts of water pumped no later than December 1. In 2017 Mr. Meagher engaged the services of three Certified Well Testers to complete and submit the annual reports required by the Measurement Rules. Both the first and second Certified Well Tester failed to complete and timely submit the annual reports. The third Certified Well Tester completed and submitted the annual reports on April 4, 2018.

The State Engineer and the Division Engineer (collectively, "State Engineer") filed a Complaint for injunctive relief pursuant to section 37-92-503, C.R.S. The Complaint sought to enjoin Mr. Meagher "from further violating the Measurement Rules and Order" and to pay civil penalties and costs including attorney fees incurred by the State Engineer.

Mr. Meagher submitted the annual reports required by the Measurement Rules and then filed a Motion to Dismiss the Complaint. Mr. Meagher challenged as moot the State Engineer's request for injunctive relief to compel compliance with the Division Engineer's Order. Mr. Meagher also sought to dismiss the State Engineer's request to enjoin Mr. Meagher from "further" violating the Measurement Rules and argued that the State Engineer did not meet the requirements of C.R.C.P. 65. Mr. Meagher also sought to dismiss the State Engineer's request for civil penalties and costs including attorney fees.

The trial court denied Mr. Meagher's Motion to Dismiss, determining that the State Engineer's request for injunctive relief was not governed by C.R.C.P. 65 and that section 37-92-503, C.R.S., authorizes the State Engineer to obtain injunctive relief to enjoin future violations of the Measurement Rules. So, the trial court determined that the State Engineer's request for injunctive relief to comply with the Division Engineer's Order was not moot, even though Mr. Meagher had complied with that Order by submitting the well measurement data. The trial court also determined that an award of civil penalties, costs and attorney fees pursuant to section 37-92-503, C.R.S., is not dependant on the State Engineer prevailing in its request for injunctive relief.

Notwithstanding Mr. Meagher's late compliance with the Measurement Rules, the State Engineer sought summary judgment on its Complaint and the trial court granted the request, ordering an injunction requiring Mr. Meagher to

prospectively comply with the Measurement Rules in the future, as well awarding the State civil penalties and costs including attorney fees. The trial court accepted as true Mr. Meagher's assertion that he "did everything within his ability to comply with the Measurement Rules" but determined, in effect, that Mr. Meagher had committed strict liability offenses. The trial court found that Mr. Meagher's alleged affirmative defenses and mitigating circumstances were irrelevant because a culpable mental state is not an implied element of violation of either an Order issued by a Division Engineer or a violation of a Rule promulgated by the State Engineer.

B. The judgments or orders being appealed and the basis for the Court's jurisdiction:

Mr. Meagher is appealing the trial court's Order Denying Motion to Dismiss, entered on August 18, 2018, and the Order Granting Engineers' Motion For Summary Judgment, entered on June 28, 2019.

The Supreme Court has jurisdiction over this appeal pursuant to C.A.R. 1(a)(2) and 4(a), and section 13-4-102(1)(d), C.R.S.

C. Whether the judgment or orders resolved all issues pending before the trial court including attorney fees and costs:

The trial court's Order Granting Engineers' Motion For Summary Judgment is final and has resolved all issues with respect to the merits of the claims made in the matter pending before the Water Court.

The trial court has yet to determine the amount of costs including attorney fees to be awarded pursuant to the Order Granting Engineers' Motion For Summary Judgment. Mr. Meagher filed a Motion for Supersedeas Bond and Stay of Execution but the trial court has not yet ruled on same.

D. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b):

C.R.C.P. 54(b) is not applicable.

The trial court has yet to determine the amount of costs and fees to be awarded pursuant to the Order Granting Engineers' Motion For Summary Judgment. However, an award of attorney fees or costs is collateral to the trial court's decision on the merits; so, there is no need for a C.R.C.P. 54(b)

certification. See, *American Numismatic Association v. Cipoletti*, 254 P. 3d 1169, 1175 (Colo. App. 2011).

E. The date the judgment or order was entered and the date of mailing to counsel:

The trial court's Order Denying Motion to Dismiss was entered on August 18, 2018 and the Order Granting Engineers' Motion For Summary Judgment was entered on June 28, 2019 and served electronically on counsel on August 18, 2018 and June 28, 2019, respectively.

F. Whether there were any extensions granted to file any motion for post trial relief:

No extensions to file motions for post-trial relief were requested.

G. The date any motion for post trial relief was filed:

Mr. Meagher filed a Motion for Supersedeas Bond and Stay of Execution on July 12, 2019.

H. The date any motion for post trial relief was denied or deemed denied under C.R.C.P. 59(j):

Not applicable.

I. Whether there were any extensions granted to file any notices of appeal:

No extension to file the Notice of Appeal was requested.

2. Advisory listing of issues to be raised on appeal:

A. Whether the trial court erred as a matter of law when it determined that violation of an Order issued by the Division Engineer is a strict liability offense.

B. Whether the trial court erred as a matter of law when it determined that violation of a Rule promulgated by the State Engineer is a strict liability offense.

C. Whether the trial court erred as a matter of law in denying Mr. Meagher's Motion to Dismiss the Complaint, determining: a complaint for

injunctive relief pursuant to section 37-92-503, C.R.S., is not subject to the requirements of C.R.C.P. Rule 65; section 37-92-503, C.R.S., authorizes the State Engineer to obtain an injunction enjoining future violations of the Measurement Rules; the State Engineer's request for injunctive relief to require Mr. Meagher's compliance with the Division Engineer's Order was not moot; and, an award of civil penalties, costs and attorney fees pursuant to section 37-92-503, C.R.S., is not dependent on the State Engineer prevailing in its request for injunctive relief.

D. Whether the trial court erred as a matter of law in granting Summary Judgment, determining: violation the Measurement Rules is a strict liability offense; violation of the Division Engineer's Order is a strict liability offense; entry of civil penalties in the highest amount authorized was warranted; and, that the State Engineer was entitled to recovery of costs including attorney fees.

3. Transcript:

No evidence was taken and no hearings were conducted in this matter so a transcript is not necessary for this Court to resolve the issues to be raised on appeal.

4. Whether the order on review was issued by a magistrate where consent was necessary.

The order on review was not issued by a magistrate where consent was necessary.

5. Names of counsel for the Parties:

Attorney for Appellant Nick Meager: Stéphane Walter Atencio, Reg. No. 13129, S. W. Atencio & Associates, PC, 4164 Austin Bluffs Parkway #420, Colorado Springs, CO 80918; (719) 589-6005, steve@atenciolaw.net.

Attorney for Appellees State and Division Engineers: Andrew B. Nicewicz and Philip E. Lopez, Assistant Attorney Generals, 1300 Broadway, 7th Floor, Denver, CO 80203, (720) 508-6259 (Nicewicz) and (720) 508-6312 (Lopez); andy.nicewicz@coag.gov; philip.lopez@coag.gov.

6. Appendix containing judgment or order being appealed.

Appendices containing copies of the trial court's Order Denying Motion to Dismiss and the Order Granting Engineers' Motion For Summary Judgment are attached hereto.

Dated this 12th day of August, 2019.

/s/ Stéphane Walter Atencio
Stéphane Walter Atencio, #13129
Attorney for Appellant Meagher

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2019, a true and accurate copy of this Notice of Appeal was served on all counsel or parties of record via email.

I further certify that an advisory copy of this Notice of Appeal was served on the clerk of the trial court, via ICCES in Alamosa District Court Case No. 2018CW3003, within the time for its filing in the appellate court.

/s/ Stéphane Walter Atencio

Filed pursuant to C.R.C.P. Rule 121 §1-26. A printed or printable copy with original, electronic, or scanned signature(s) is on file in the office of S. W. Atencio & Associates, PC.

District Court, Water Division 3, State of Colorado Court Address: 702 Fourth St., Alamosa, CO 81101 Phone Number: (719) 589-4996	DATE FILED: August 21, 2019 10:44 AM CASE NUMBER: 2018CW3003
Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO, *ex rel.* KEVIN G. REIN, State Engineer, and CRAIG W. COTTEN, Division Engineer for Water Division 3 **v.** **Defendant:** NICK MEAGHER, an individual	**Δ COURT USE ONLY Δ** Case Number: 18CW3003 Div.: 1 Ctrm:

ORDER DENYING MOTION TO DISMISS

THIS MATTER comes before the court on defendant Nick Meagher's *Motion to Dismiss* ("Motion"). Plaintiff, the State and Division Engineers ("Engineers"), filed a response and defendant replied. Defendant also requested oral argument but the court finds oral argument unnecessary to determine the issues in the motion. Having reviewed the motion, response and reply as well as all matters of record in this case, the court denies the motion to dismiss for the reasons state below.

I. STANDARD OF REVIEW

A C.R.C.P. 12(b)(5) motion to dismiss tests the sufficiency of the complaint. *Allen v. Steele,* 252 P.3d 476, 481 (Colo. 2011). The court may only grant a C.R.C.P. 12(b)(5) motion to dismiss when the plaintiff's factual allegations, viewed in the light most favorable to the plaintiff, do not, as a matter of law, support a claim for relief. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010) (citations omitted). When considering a motion to dismiss, the court may only consider those matters stated within the complaint. *Kratzer v. Dolo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 769 (Colo. App. 2000).

II. FINDINGS OF FACT

The Engineers' complaint alleges the following facts:

1. Defendant owns and uses three tributary groundwater wells located in Conejos County, with well permit numbers 11507-R, 11509-R, and 11511-R.
2. Defendant's wells are subject to the Rules Governing the Measurement of Ground Water Diversions Located in Water Division No. 3, the Rio Grande Basin ("Measurement Rules").
3. The Measurement Rules are necessary for the Engineers to obtain information to administer the waters in Water Division No. 3 and to assist in compliance with the Rio Grande Compact.
4. Rule 6.1 of the Measurement Rules requires that:

   > All owners of Wells within the scope of these rules shall report in writing the annual amounts of water pumped from Wells for the period of November 1, to October 31 and, for irrigation Wells, the method of irrigation (flood, center-pivot, etc.) to the Division 3 Engineer no later than December 1, 2008 and every irrigation year thereafter.

5. Defendant did not submit his meter readings for November 1, 2016, through October 31, 2017 by December 1, 2017, as required by Rule 6.1.
6. On December 12, 2017, the Division Engineer mailed a "Notice of Violation and Order to Comply with Rules Governing Measurement of Ground Water Diversions" ("Order") to the defendant pursuant to C.R.S. § 37-92-502. The order required the defendant to complete and submit Form 6.1 - Water Use Data Submittal Form, to the Division 3 Office within ten days of the receipt or posting of the Order.
7. Defendant did not submit the required form by the December 26, 2017, deadline set in the Order.

8. The Engineers filed the complaint in this matter on March 16, 2018, seeking: (1) to enjoin defendant from further violating the Measurement Rules and the Order; (2) civil penalties up to five hundred dollars for each violation of the Measurement Rules and the Order; and (3) costs, including attorney's fees for the proceeding. *Complaint* at 7.
9. Defendant filed the required Form 6.1 with the Water Division 3 Office on April 4, 2018.

III. ANALYSIS

Defendant asks the court to dismiss the Engineers' first claim for relief, seeking an injunction against his further violation of the Measurement Rules, because it is moot since he complied with the measurement requirements for 2016-17 in April 2018. In addition, he argues that the Engineers are not legally entitled to an injunction compelling him to comply with the Measurement Rules in the future and that the Engineers have not met the requirements for an injunction under C.R.C.P. 65. Defendant asks the court to dismiss the second and third claims for relief because he argues the Engineers are barred from seeking civil penalties, costs, or attorneys' fees since they are not entitled to an injunction. In contrast, the Engineers argue that C.R.S. § 37-92-503 plainly grants the Engineers authority to seek a permanent injunction to prohibit future violations of the Measurement Rules and, therefore, the first claim for relief is not moot. In addition, the Engineers argue that, because they are seeking an injunction pursuant to a statutory scheme for enforcement of water administration rules and regulations, they are not required to meet the requirements of C.R.C.P. 65. Finally, the Engineers argue that the enforcement statute provides for the award of civil penalties even if the court does not grant an injunction and therefore the court should deny the motion to dismiss the second and third claims for relief. The court agrees with the Engineers.

A. First Claim for Relief—Injunctive Relief

The Engineers' request for an injunction to permanently enjoin the defendant from violating the Measurement Rules is proper under the statute and, therefore, the first claim for relief is not moot even though the defendant complied with the Measurement Rules after this lawsuit was filed. In addition, because the statute authorizes the Engineers to obtain an injunction, the C.R.C.P. 65 factors do not apply to the Engineers' request.

1. C.R.S. § 37-92-503 Authorizes Engineers to Seek an Injunction to Enjoin Future Violations.

C.R.S. § 37-92-503 grants authority to the Engineers to seek an injunction to enjoin a person who has not complied with an order of the Engineers. Section (6)(b) specifically provides that:

> Any person who, when required to do so by rules and regulations adopted by the state engineer, fails to submit data as to amounts of water pumped from a well …shall forfeit and pay a sum not to exceed five hundred dollars for each violation.

Section (6)(e) goes on to indicate:

> The state engineer and the particular division engineer… shall apply to the water judge of the particular division to recover the civil penalties specified in paragraphs (a), (b), and (c) of this subsection (6) or for a temporary restraining order, preliminary injunction, or permanent injunction, as appropriate, enjoining *further* violations of this subsection (6). If the state engineer and the division engineer prevail, the court shall also award the costs of the proceeding including the allowance of reasonable attorney fees.

Id. at (6)(e)(emphasis added). The Engineers argue that the word "further" in this statute authorizes the Engineers to obtain an injunction that enjoins the defendant from future violations of the Measurement Rules while the defendant argues the word "further" in this statue only allows the Engineers to obtain an injunction to prevent the defendant from continuing to violate

the Measurement Rules for 2017, which is a moot question since the defendant filed the required Form 6.1 on April 4, 2018.

When interpreting a statute, the court's primary goal is to give effect to the intent of the legislature. *Goodman v. Heritage Builders Inc*., 390 P.3d 398, 401 (Colo. 2017). To determine legislative intent, courts look first to the statutory language and give the words and phrases their ordinary and commonly accepted meaning. *Id*. The court must consider the statutory text as a whole to give a "constant, harmonious, and sensible effect to all of its parts and avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Am. Family Mut. Ins. Co. v. Barriga*, 418 P.3d 1181, 1183 (Colo. 2018) quoting *Pineda-Liberato v. People*, 440 P.23d 160, 164 (Colo. 2017).

In C.R.S. § 37-92-503(6)(e), the General Assembly used the word "further" as an adjective to describe the plural noun "violations." A common and ordinary definition of "further" when used as an adjective is "additional to what already exists or has already taken place, been done, or been accounted for." *Oxford Dictionaries, available at* https://en.oxforddictionaries.com/definition/further(August 20, 2018). "Additional to what has already taken place" includes violations of the Measurement Rules that take place in the future or in addition to the violations that have already taken place. Accordingly, the plain meaning of the statute provides that the court may enjoin the defendant from committing additional, including future, violations of the Measurement Rules.

2. Engineers' Request for an Injunction Pursuant to C.R.S. § 37-92-503 is Not Governed by C.R.C.P. 65.

Furthermore, because the Engineers' statutory request for a permanent injunction to enjoin the defendant from further violation of the Measurement Rules is authorized by the statute, it is not governed by C.R.C.P. 65. In a similar situation, the Colorado Supreme Court

determined that "statutory procedures may supersede or control the more general application of a rule of civil procedure" such as C.R.C.P. 65. *Kourlis v. District Court,* 930 P.2d 1329, 1335 (Colo. 1997). In *Kourlis,* the supreme court reversed the trial court's order denying the Commissioner of Agriculture a preliminary injunction to enforce his cease and desist order issued against an unlicensed, noncomplying pet care facility. *Id.* at 1336. The supreme court said the trial court should not have relied on required elements for a preliminary injunction under C.R.C.P. 65—the *Rathke* factors—to frustrate the state licensure requirements. *Id.* (*Rathke* factors set out in *Rathke v. MacFarlane*, 648 P.2d 648, 653-53 (Colo. 1982)).

Defendant, however, argues that *Kourlis* is distinguishable because the case involved a comprehensive licensure statute which included a provision expressly eliminating the requirement that the Commissioner prove irreparable injury before the court could grant an injunction. The court disagrees because the current situation is similar to the situation in *Kourlis* rather than distinguishable from it. C.R.S. § 37-92-503 is a comprehensive statute that governs the enforcement of water regulations and administrative orders. The statute expressly provides the Engineers with authority to bring a suit seeking to enjoin a water user who is not in compliance with a valid order of the Engineers. This statute is sufficiently comprehensive to fall within the bounds of *Kourlis.* Also, although the statute in *Kourlis* expressly eliminated the requirement that the Commissioner prove irreparable injury, unlike the statute at issue in this case, the supreme court and court of appeals have repeatedly held that, in the context of a governmental entity seeking relief to prevent harm to the public, such as the current situation, there is no need for the governmental entity to prove immediate and irreparable injury whether the statute at issue eliminated that requirement or not. *E.g., Town of Carbondale v. GSS Properties, LLC,* 140 P.3d 53, 64 (Colo. App. 2005), rev'd on other grounds, 169 P.3d 675

(Colo. 2007); *Lloyd A. Fry Roofing v. State Dep't of Health Air Pollution Variance Bd.*, 191 Colo. 463, 473, 553 P.2d 800, 808 (1976).

Defendant also argues that the *Kourlis* court's holding indicates the trial court should apply the remaining *Rathke* factors to a governmental entity's request for an injunction pursuant to an enforcement statute. The court disagrees with this reading of *Kourlis.* Defendant argues that when the *Kourlis* court stated "The remaining *Rathke* elements *should not have been employed* by the court in a manner that frustrated state licensure requirements," *Kourlis* 930 P.2d at 1336 (emphasis added), it means lower courts should continue to apply the other *Rathke* factors to government entities' suits for injunctions, so long as the authorizing statute does not expressly disallow them. But, this passage has the opposite implication. The passage states that the court should not employ the *Rathke* elements if doing so will frustrate the purpose of the statute. So even though C.R.S. § 37-92-503 does not expressly state the *Rathke* factors do not apply to an injunction proceeding pursuant to the statute, *Kourlis* requires the court to disregard those requirements if applying them will frustrate the purpose of the statute.

The Engineers cite other cases to show that the court can grant an injunction pursuant to C.R.S. § 37-92-503 even if the Engineers have not proved all of the *Rathke* factors. For example, in *Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd.*, the Colorado Supreme Court held that the State Department of Health was not required to prove irreparable injury to obtain an injunction against a company releasing air pollution when the Department brought suit under a statute that authorized the state to seek an injunction. 553 P.2d 800, 808 (Colo. 1976). In *Fry Roofing* the air pollution statute did not expressly eliminate the requirement for irreparable injury. *Id*. But, the court noted that in a "special statutory

proceeding… any inconsistency between C.R.C.P. 65(d) and section 25-7-102, C.R.S. 1973, is resolved in favor of the statutory section." *Id*.

Defendant, however, argues that "[t]he opinion in *Fry Roofing* is inapposite because Plaintiffs fail to cite any 'public policy' statement or any 'express criteria' provided by section 37-92-503(6) which state[s] that failure to submit well pumping data on a timely basis embodies sufficient injury to the public interest to permit injunctive relief without the required showing of irreparable injury." *Reply* at 9. The court disagrees. The *Fry Roofing* court stated that, "the acts which the state is attempting to enjoin … are imbued with great public importance." *Lloyd A. Fry Roofing Co.*, 553 P.2d at 808. Similarly, the legislature has indicated that, with regard to water rights and administration, it is the policy of the state "to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state." C.R.S. § 37-92-102 (1)(a). Further, the legislature has declared that "the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state," *Id.* at (2), and that under the Water Rights Determination and Administration Act of 1969, C.R.S. § 37-92-101 *et seq.*, the Engineers are required to "administer, distribute, and regulate the waters of the state" in furtherance of these policies. C.R.S. §37-92-501(1). These statutes show the importance the General Assembly places on the proper administration of water under the constitution, statutes and regulations of the state, a part of which is accomplished by the Engineers' collection of water pumping data. Furthermore, the statute sets forth express criteria that permit the state to seek an injunction. *Fry Roofing* supports the Engineers' arguments that C.R.S. § 37-92-503(6) supplants the injunction requirements set forth in the rules of civil procedure.

The Engineers cite *Town of Carbondale v. GSS Properties, LLC*, in support of their argument that they need not show irreparable injury when a statute expressly provides that the state can seek an injunction as a remedy for its violation. 140 P.3d 53 (Colo. App. 2005) *rev'd on other grounds,* 169 P.3d 675 (Colo. 2007). In *Town of Carbondale*, the Colorado Court of Appeals found that a showing of irreparable injury was not required when a statute or ordinance authorized a governmental entity to seek injunctive relief to prevent harm to the public. *Id*. at 64. Defendant argues that this case is distinguishable because it involved a nuisance ordinance to prevent water contamination, which the defendant argues "by definition, causes immediate irreparable injury." *Reply* at 9. However, that was not the basis for the court's decision. The court relied on a statute authorizing municipalities to "declare what is a nuisance" and to "summarily abate" public nuisances. *Town of Carbondale* 169 P.3d at 64. According to the court of appeals this statute authorized the municipality to seek injunctive relief "without a showing of immediate irreparable injury." *Id*. The holding in this case supports the Engineers' position that when a statute provides for a state agency to seek an injunction as a remedy for a violation of a statute, the state agency may do so without a showing of immediate irreparable injury. Since C.R.S. § 37-92-503(6) expressly provides the Engineers with authority to seek injunctive relief and since ensuring compliance with groundwater rules protects the public, under the reasoning of *Town of Carbondale,* the Engineers may seek an injunction in this case without proving that the defendant's violation of the Measurement Rules constitutes an immediate irreparable injury.

Finally, cases where a showing of irreparable injury has been required are distinguishable from this case. In *Bd. of Cty. Commr's v. Vandemoer*, the Colorado Court of Appeals affirmed the trial court's decision that a county could not obtain an injunction against a farmer for briefly obstructing a highway when he moved his motorized sprinkler from one field to another across a

county road. 205 P.3d 423, 431 (Colo. App. 2008). The appellate court determined the county could not obtain an injunction in this situation without a showing of irreparable injury or imminent threat of irreparable injury, in part, because no statute authorized the county to seek an injunction against a farmer who briefly obstructed a highway by moving his sprinkler system. *Id.* And, in *Baseline Farms Two, LLP v. Hennings*, the Colorado Court of Appeals found that a showing of irreparable injury was required when a private party sought an injunction without a special statutory procedure authorizing an injunction. 26 P.3d 1209 (Colo. App. 2001). In *Baseline Farms Two, LLP*, the court of appeals distinguished *Kourlis* and *Fry Roofing* because those cases involved a governmental enforcement action and a special statutory procedure. *Id*. at 1212. The court also noted that the statute did not expressly eliminate the requirement to prove an irreparable injury. *Id*. In the current case, unlike *Vandemoer* or *Baseline Farms*, there is a statute that expressly authorizes the Engineers to seek an injunction. And, unlike *Baseline Farms*, this is a state enforcement action on a matter of public importance. Therefore, the court finds these cases distinguishable and finds that the Engineers are not required to show irreparable injury to seek an injunction under C.R.S. § 37-92-503.

B. Second and Third Claims for Relief -- Civil Penalties and Costs

Defendant asks the court to dismiss the second and third claims for relief, the Engineers' requests for civil penalties and costs including attorneys' fees, because defendant argues the Engineers are only entitled to civil penalties and costs if they prevail on their claim for an injunction and the defendant argues the Engineers' action for an injunction should be dismissed. But, as explained above, the court has determined the complaint properly states a claim for an injunction and, therefore, since the court is not dismissing the first claim for relief, it will not dismiss the second and third claims.

Further, the court agrees with the Engineers that an award of civil penalties is not dependent on the court granting an injunction. C.R.S. § 37-92-503(6)(e) indicates that the Engineers may seek civil penalties "or" an injunction specifically to enforce the requirement that a well owner submit required data concerning the amount of water pumped from a well per section (6)(b). The plain meaning of this language is that the Engineers may obtain a judgment for civil penalties whether they seek and obtain an injunction or not. The defendant mistakenly cites to C.R.S. § 37-92-503(1)(b), rather than the operative section—(6)(e)—and the defendant fails to address the clear language of (6)(e).

In addition, whether the Engineers obtain an injunction or not, if they prevail on their claims for civil penalties, they are entitled to an award of costs and attorneys' fees. C.R.S. § 37-92-503(6)(e) plainly states: "[i]f the state engineer and division engineer prevail, the court shall also award the costs of the proceeding including the allowance of reasonable attorney fees." *Id*. Unlike the language the defendant cites from section (1)(b), this language does not indicate the award of costs and/or attorneys' fees is dependent on the court upholding the order of the state engineer, but rather is dependent on whether the Engineers "prevail." If the court awards the Engineers civil penalties, they will have prevailed in this action and will be entitled to their costs and attorneys' fees.

IT IS THEREFORE ORDERED THAT Defendant's Motion to Dismiss is DENIED.

DONE this _28th_day of August 2018.

BY THE COURT

Pattie P. Swift
Water Judge
Water Division No. 3

District Court: Water Division 3, State of Colorado 8955 Independence Way, Alamosa CO 81101 (719) 589-4996	DATE FILED: August 22, 2019 8:04 AM CASE NUMBER: 2018CW3003
Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO, *ex rel.* KEVIN G. REIN, State Engineer, and CRAIG W. COTTEN, Division Engineer for Water Division 3 v. **Defendant**: NICK MEAGHER, an individual	**Δ COURT USE ONLY Δ** Case Number: 2018CW3003 Div.: CJ-1

ORDER GRANTING ENGINEERS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the State and Division Engineers' ("Engineers") Motion for Summary Judgment ("Motion"). The Defendant, Mr. Meagher, filed a Response and the Engineers filed a Reply. Having reviewed the motion, the response and the reply as well as all matters of record in this case, the court grants the Motion for the reasons stated below.

I. PROCEDURAL HISTORY

This case concerns the Engineers' efforts to enforce the Rules Governing the Measurement of Ground Water Diversions Located in Water Division No. 3, the Rio Grande Basin ("Measurement Rules"). Mr. Meagher owns and uses three tributary groundwater wells located in Conejos County which are subject to the Measurement Rules. On December 12, 2017, the Division Engineer mailed a "Notice of Violation and Order to Comply with Rules Governing

Measurement of Ground Water Diversions" ("Order") to Mr. Meagher pursuant to C.R.S. § 37-92-502. The Order required Mr. Meagher to comply with Rule 6.1 of the Measurement Rules within ten days of the receipt or posting of the Order.

Because Mr. Meagher did not comply with the Order within the ten-day deadline, the Engineers filed a Complaint pursuant to C.R.S. § 37-92-503 on March 16, 2018, seeking: (1) to enjoin Mr. Meagher from further violating the Measurement Rules and the Engineers' Order; (2) civil penalties up to five hundred dollars for each violation of the Measurement Rules; and (3) costs, including reasonable attorney fees. Mr. Meagher filed a Motion to Dismiss on June 18, 2018, and on August 28, 2018, the court issued an order denying that motion.

On September 11, 2018, Mr. Meagher filed an Answer and Cross-Claim in which he asserted that he took all actions reasonably required under the Measurement Rules and that he reasonably relied on the Engineers' designation of certified well testers and that although he hired several certified well testers to submit the report of the amount of water pumped from his wells for the irrigation year ending October 31, 2017, through no fault of his, the well testers failed to submit the required reports. *Answer and Cross-Claim*. Mr. Meagher asserted cross-claims against certified well testers Nathan Coombs, Jason Coombs and Cactus Hill for these failures. However, on January 16, 2019, Mr. Meagher filed an Amended Answer in which he did not assert any cross-claims. *See generally, Amended Answer*.

The Engineers filed the Motion for Summary Judgment on May 7, 2019. Mr. Meagher filed a Response on May 31, 2019, and the Engineers filed a Reply on June 14, 2019.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Colorado Rules of Civil Procedure allows the court to determine the merits of an action without the delay and expense of a full trial when there is no genuine issue of any material fact. Summary judgment is a drastic remedy and courts should only grant such a motion

on a clear showing that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Abrahamsen v. Mountain States Telephone & Telegraph Corp.*, 494 P.2d 1287, 1288-89 (Colo. 1972).

A material fact is a fact that will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). It is the burden of the moving party to make a "clear showing that there is no genuine issue as to any material fact." *Alien, Inc. v. Futterman*, 924 P.2d 1063, 1067 (Colo. App. 1995) (citation omitted). The moving party bears the initial burden of "informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact." *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. App. 2000). Once the moving party has met its initial burden, "the burden shifts to the nonmoving party to establish that there is a triable issue of fact." *AviComm, Inc. v. Colo. Public Utilities Com'n*, 955 P.2d 1023, 1029 (Colo. 1998). In response to a motion for summary judgment, the nonmoving party "may not rest upon mere allegations or denials in its pleadings but must provide specific facts demonstrating the existence of a genuine issue for trial." *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 404 (Colo. App. 2000) (citation omitted).

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c).

III. UNDISPUTED FACTS

1. The State Engineer adopted the Rules Governing the Measurement of Ground Water Diversions Located in Water Division No. 3, the Rio Grande Basin ("Measurement Rules")

on June 30, 2005, and the Division 3 Water Court approved the Measurement Rules on August 1, 2006, in Case Number 2005CW12.

2. Mr. Meagher owns three tributary groundwater wells with permit numbers 11507-R, 11509-R, and 11511-R ("Wells"). The Wells are located in Water Division No. 3 in Conejos County.

3. Rule 1 of the Measurement Rules states that "[t]hese rules are applicable to all Wells located in Water Division No. 3 except decreed and/or permitted 'exempt' Wells as described in section 37-92-602 . . . and 'non-exempt' Wells permitted and/or decreed for not more than 50 gallons per minute unless otherwise required by permit or decree."

4. Mr. Meagher's Wells are permitted for a pumping rate of 1000 gallons per minute ("gpm"), 900 gpm, and 1700 gpm, respectively. The Wells are not exempt under C.R.S. § 37-92-602. Accordingly, Mr. Meagher's Wells are subject to the Measurement Rules.

5. Rule 6.1 of the Measurement Rules requires owners of wells that are governed by the Measurement Rules to report the annual amount of water pumped from the wells by December 1 of each year. Specifically, Rule 6.1 states that:

> All owners of Wells within the scope of these rules shall report in writing the annual amounts of water pumped from Wells for the period of November 1, to October 31 and, for irrigation Wells, the method of irrigation (flood, center-pivot, etc.), to the Division 3 Engineer no later than December 1, 2008 and every irrigation year thereafter.

6. On October 18, 2017, the Engineers sent Mr. Meagher form 6.1, which is titled "Water Use Data Submittal Form" so he could submit his report of water pumped in compliance with Rule 6.1. Form 6.1 indicated that "[f]ailure to submit this form by [December 1, 2017] is in violation of the Rules and could subject you to further legal action which may include fines."

7. Mr. Meagher did not complete and submit Form 6.1 by the December 1, 2017 deadline. So, on December 12, 2017, as required by Rule 9 of the Measurement Rules, the Engineers sent Mr. Meagher an Order pursuant to C.R.S. § 37-92-502 directing him to complete and submit Form 6.1 to the Division Engineer within 10 days of the receipt or posting of the Order. The Order also stated that:

> If you fail to comply with the terms of this order regarding meter reading submittal this year or in subsequent years, this matter will be referred to the Office of the Colorado Attorney General for legal enforcement pursuant to Section 37-92-503, C.R.S.. Such enforcement may include initiation of judicial proceedings to enforce these orders and to recover penalties of up to $500 per day of violation, along with the costs of bringing the lawsuit, including reasonable attorney's fees.

Id. at ¶ 4. The Engineers sent the order to Mr. Meagher via certified mail and it was signed for at his mailing address on December 16, 2017.

8. Mr. Meagher did not complete and submit Form 6.1 within ten days of the receipt of the Order. He ultimately completed and submitted Form. 6.1 to the Division Engineer on April 4, 2018—99 days after the deadline set in the Order.

9. The Engineers previously brought a similar action against Mr. Meagher in 2014, Case Number 2014CW3012. In that case, this court approved a Stipulated Order and Consent Decree in which Mr. Meagher stipulated that he violated the Measurement Rules with regard to the same Wells that are the subject of this matter.

10. Since the order and decree was entered in Case No. 14CW3012 and in addition to the Order at issue in this case, the Engineers have issued multiple other orders to Mr. Meagher to compel compliance with the Measurement Rules or the conditions of his well permits and decrees, including the following:

a. Order dated December 6, 2016, ordering compliance with Rule 6.1, Well Permit Nos. 11507-R, 11509-R, and 11511-R.

b. Order dated July 10, 2017, ordering compliance with Measurement Rule 3.1 requiring periodic testing of totalizing flow meters, Well Permit Nos. 11509-R and 11511-R.

c. Order dated July 23, 2018, ordering compliance with Measurement Rule 3.1 requiring wells to be equipped with totalizing flow meters and for the totalizing flow meters to be certified, Well Permit No. 11509-R.

d. Order dated November 8, 2018, ordering the cessation of diversions in excess of the decreed and permitted pumping rate, Well Permit No. 11509-R.

IV. ANALYSIS

The Engineers argue that there are no genuine issues of material fact and, therefore, the court should "grant the Engineers' requested relief in this case by: (1) permanently enjoining Mr. Meagher from further violating Rule 6.1 of the Measurement Rules; (2) order[ing] Mr. Meagher to pay civil penalties; and (3) order[ing] Mr. Meagher to pay the Engineers' costs of bringing this proceeding, including reasonable attorney fees." *Motion* at 4. In contrast, Mr. Meagher argues that "[t]he State is not entitled to entry of judgment as a matter of law because neither the Measurement Rules nor section 37-92-503 prescribe strict liability offenses." *Response* at 2. In addition, Mr. Meagher argues that "a number of material issues of fact still exist in this case" because he "alleges affirmative defenses and mitigating circumstances" that the Engineers have not disputed. *Id.* The Court agrees with the Engineers.

Mr. Meagher does not dispute any of the court's factual findings set forth above. Rather, he contends that he "did everything within his ability to comply with the Measurement Rules in 2017" and therefore, the court "must determine the legal standards applicable to the offenses

alleged in this matter, including the culpable mental state which the State must prove at the trial of this case." *Response* at 2. The Engineers, on the other hand, contend that the purpose of C.R.S. §§ 37-92-503(1)(a) and (6)(b) is "not to 'punish' individuals with a guilty mental state, but to ensure that the orders and rules of the Engineers are complied with." *Reply* at 6. The Court agrees with the Engineers and concludes that Mr. Meagher's contentions regarding the purported "culpable mental state that the State Engineer is required to prove to establish liability," *Response* at 10, are irrelevant and do not raise a genuine dispute of material fact.

A. It is Undisputed that Mr. Meagher Failed to Comply with Rule 6.1 and the Order

Rule 6.1 requires owners of wells within the scope of the Measurement Rules to report the annual amount of water pumped from their wells by December 1, of each year. Pursuant to Rule 1, all wells that are not decreed or permitted as "exempt" wells and that are decreed or permitted for more than 50 gallons per minute are within the scope of the Measurement Rules. Mr. Meagher's Wells are not exempt and are decreed for more than 50 gallons per minute and therefore they are subject to the requirements of the Measurement Rules. Accordingly, Mr. Meagher was responsible for reporting the annual amounts of water pumped from each of the three Wells for the time period November 1, 2016, through October 31, 2017, by December 1, 2017. It is undisputed that Mr. Meagher failed to submit this information by December 1, 2017.

The Division Engineer then issued the Order pursuant to C.R.S. § 37-92-502, notifying Mr. Meagher that he had violated Rule 6.1 and indicating a timeline by which he needed to submit the required information. The Order gave Mr. Meagher 10 days from the date he received the Order to submit the required information. The Order was received at Mr. Meagher's address on December 16, 2017. Mr. Meagher did not submit the required information

to the Division Engineer within 10 days of December 16, 2017. Accordingly, Mr. Meagher violated Rule 6.1 and the Order of the Division Engineer.

B. Mr. Meagher's Violation of Rule 6.1 and the Order is also a violation of C.R.S. §§ 37-92-503(1)(a) and -503(6)(b).

Mr. Meagher's failure to comply with the Order and Rule 6.1 violates C.R.S. §§ 37-92-503(1)(a) and -503(6)(b). A person violates C.R.S. § 37-92-503(6)(b) when he fails to submit data as to amounts of water pumped from a well when required to do so by rules and regulations adopted by the state engineer. Here, Measurement Rule 6.1 required Mr. Meagher to report the annual amount of water pumped from his Wells by December 1 of each year. When Mr. Meagher failed to make the required report by December 1, 2017, he violated C.R.S. § 37-92-503(6)(b). In addition, C.R.S. § 37-92-503(1) provides that when an order of the Engineers issued under C.R.S. § 37-92-502 is not complied with, the Engineers shall apply for an injunction and to recover costs, including reasonable attorney fees. The statute directs the Engineers to seek an injunction against "the person to whom such order was directed." C.R.S. § 37-92-503(1)(a). Here, as a result of Mr. Meagher's failure to comply with Rule 6.1, the Engineers issued the Order, which directed Mr. Meagher to complete and submit a form containing the information required under Rule 6.1 within ten days of receipt of the Order. Mr. Meagher failed to comply with the requirements of the Order.

Because Mr. Meagher violated C.R.S. §§ 37-92-503(1)(a) and -503(6)(b) by failing to comply with the Order and Rule 6.1, the Engineers are entitled to: (1) a permanent injunction enjoining further violations of the Measurement Rules, C.R.S. § 37-92-503(6)(e); (2) civil penalties of up to five hundred dollars for each violation, C.R.S. §§ 37-92-503(6)(b), -503(6)(e); and (3) the costs of these proceedings, including the allowance of reasonable attorney fees, C.R.S. §§ 37-92-503(1)(b), -503(6)(e).

Mr. Meagher's failure to submit the information required under Rule 6.1 for each of the three Wells constitutes three separate violations of C.R.S. § 37-92-503(6)(b), for the purposes of assessing civil penalties under that subsection. C.R.S. § 37-92-503(6)(b) makes the failure "to submit data as to amounts of water pumped from *a well*" (emphasis added) a violation of that statute. Under the plain meaning of this statute, Mr. Meagher violated C.R.S. § 37-92-503(6)(b) each time he failed to submit the required information for "a well." Accordingly, because Mr. Meagher failed to submit the required information for each of his three Wells, each failure was a separate violation under C.R.S. § 37-92-503(6)(b).

An injunction, civil penalties, and an award of costs and fees are appropriate in this case.

C. A Culpable Mental State is Not an Implied Element of Violations of C.R.S. §§ 37-92-503(1)(a) or -503(6)(b).

Mr. Meagher argues that he can only be found liable for a violation of C.R.S. §§ 37-92-503(1)(a) or -503(6)(b) if the Engineers prove that he acted with an, as yet, undefined culpable mental state. In contrast, the Engineers argue that they do not need to prove that Mr. Meagher had a culpable mental state to prove that he violated these statutes. The Court agrees with the Engineers.

These violations are entirely creatures of statute, and as such, what constitutes sanctionable conduct under these provisions is a matter of legislative intent. *Vaughn v. People ex rel. Simpson*, 135 P.3d 721, 723 (Colo. 2006) (interpreting C.R.S. § 37-92-503(6)(a) (2005)). The legislature did not intend for violations of C.R.S. §§ 37-92-503(1)(a) or -503(6)(b) to require a culpable mental state. No mental state is described in these subsections. "It is true that legislative silence does not always indicate a strict liability offense because the statute may imply a culpable mental state." *People v. Manzo*, 144 P.3d 551, 556 (Colo. 2006). However, "the absence of a specified 'culpable mental state' in the statutes is not conclusive on the issue," and

"it is well settled that the legislature may make a prohibited act a crime, irrespective of the elements of intent or scienter, when public policy so requires." *People v. Caddy*, 189 Colo. 353, 354–55, 540 P.2d 1089, 1090 (1975) (holding that the offense of speeding is a strict liability offense). To determine whether a statute implies a culpable mental state, a court should "examine the statute in context with other statutory provisions and seek to further the legislative intent represented by the statutory scheme." *Manzo*, 144 P.3d at 556.

That no culpable mental state would be a required element for violations of C.R.S. §§ 37-92-503(1)(a) and -503(6)(b) is consistent with public policy and with the overall statutory scheme of C.R.S. § 37-92-503 and the entire Water Right Determination and Administration Act of 1969, C.R.S. § 37-92-101 *et seq*.("the Act"). As this court has already found in this case: multiple statutes that are part of the Act "show the importance the General Assembly places on the proper administration of water under the constitution, statutes and regulations of the state, a part of which is accomplished by the Engineers' collection of water pumping data." *Order Den. Mot. to Dismiss* at 8. Furthermore, the General Assembly has specifically granted the Engineers the authority to enforce their orders under C.R.S. §37-92-503(1)(a) and created a specific violation under C.R.S. § 37-92-503(6)(b) for a well owner's failure to submit data as to amounts of water pumped from a well when rules and regulations promulgated by the State Engineer require the well owner to do so. C.R.S. §§ 37-92-503(1)(a) and -503(6)(b) exist to further the Engineers' duties to "administer, distribute, and regulate the waters of the state," C.R.S. § 37-92-501(1). The Engineers' authority to promulgate rules and to issue orders is similarly intended to accomplish those same purposes. The purpose of C.R.S. §§ 37-92-503(1)(a) and -503(6)(b) therefore, is not to "punish" individuals with a guilty mental state, *see* Rsp. at 17, but to ensure that the orders and rules of the Engineers are complied with. As such, requiring proof of a

culpable mental state to prove a violation of these statutes is not consistent with the Act's statutory scheme or purpose.

Moreover, when the legislature intended for proof of violations under C.R.S. § 37-92-503 to require proof of a culpable mental state, it did so expressly. C.R.S. § 37-92-503(6)(c) provides that it is unlawful for any person to "willfully" interfere with any power meter, totalizing flow meter, or other device used to measure groundwater diversions. In contrast, C.R.S. §§ 37-92-503(1)(a) or -503(6)(b) do not include such a mental state. As a general rule, when the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, the courts presume the General Assembly did so purposefully. *Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009); *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) ("[T]he inclusion of certain items implies the exclusion of others.").

Such a reading of the statute also makes sense in light of the Court of Appeals decision in *People v. Wilson*, 972 P.2d 701 (Colo. App. 1998). In that case, the Colorado Court of Appeals held that if the legislature included a specific culpable mental state in all of the subsections of a statute defining criminal offenses, C.R.S. § 18-12-106 (1997), except one, which was silent with respect to a culpable mental state, C.R.S. §18-12-106(1)(d), it was likely the General Assembly did not intend to include a *mens rea* as one of the elements of the offense defined in that subsection. *Wilson,* 972 P.2d at 703–04. Similarly, in the statute at issue in this case, by including the mental element of "willfully" in C.R.S. § 37-92-503(6)(c) while not including any mental element in C.R.S. §§ 37-92-503(1)(a) or -503(6)(b), the legislature showed its intent that a violation of each of these latter statutes could be proved without proof that the offending party had a culpable mental state..

No culpable mental state is described as an element of violations of C.R.S. §§ 37-92-503(1)(a) or -503(6)(b) and a review of these provisions within the context of the overall statutory scheme of C.R.S. § 37-92-503 and the entire Act shows that the legislature did not intend to make a culpable mental state an implied element required to prove violations of these statutes.

D. Mr. Meagher Has Failed to Raise Genuine Issues of Fact Material to Whether He Failed to Comply with the Order or Rule 6.1

In his Response, Mr. Meagher alludes to his affirmative defenses and mitigating circumstances raised in his Amended Answer arguing that these claimed defenses establish genuine issues of material fact. Rsp. at 14–15. Mr. Meagher's affirmative defenses and mitigating circumstances can be summarized as follows: Relying on the Engineers' "designation of Certified Well Testers," Am. Answer at ¶ 10, Mr. Meagher "timely engaged in the services" of three separate "Certified Well Testers" to submit the required forms, *id.* at ¶¶ 1, 3, 5, and that "[t]hrough no fault" of Mr. Meagher, these Certified Well Testers did not submit the forms, *id.* at ¶¶ 2, 4, 6. As such, Mr. Meagher claims that he "took all actions reasonably required to timely provide [the Engineers] with the requested information." *Id.* at ¶ 8.

Mr. Meagher did not actually plead any affirmative defenses. An affirmative defense must be specifically pled. *See Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 21, 351 P.3d 559, 564; *Ice v. Benedict Nuclear Pharm., Inc.*, 797 P.2d 757, 760 (Colo. App. 1990).

> An affirmative defense is "a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim, even if all the allegations in the complaint are true." . . . Thus, an affirmative defense is not merely a denial of an element of a plaintiff's claim, but rather it is a legal argument that a defendant may assert to require the dismissal of a claim, notwithstanding the plaintiff's ability to prove the elements of that claim.

Soicher, 2015 COA at ¶ 18, 351 P.3d at 564 (quoting Black's Law Dictionary 509 (10th ed. 2014)) (citations and original modifications omitted)). Affirmative defenses include "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." C.R.C.P. 8(c). Mr. Meagher's "affirmative defenses" are not affirmative defense but rather constitute factual allegations that relate solely to his incorrect legal theory that his failed attempts to comply with the Order and Rule 6.1 negate a non-existent mental state element.

Regardless of whether Mr. Meagher's affirmative defenses can be properly characterized as such, Mr. Meagher has failed to explain in either his Response or Amended Answer why the claimed defenses or mitigating circumstances would affect the outcome of this case, which turns solely on whether he violated the Order or Rule 6.1. The undisputed facts show that Mr. Meagher failed to comply with the Order and Rule 6.1 when he failed to submit the required well measurement data by the deadlines clearly stated in the Order and Rule 6.1. As such, Mr. Meagher's arguments that he made "reasonable" attempts to comply with the Order and Rule 6.1 or that his failures to comply are the fault of persons he employed are irrelevant.

In fact, *Vaughn v. People ex rel. Simpson*, 135 P.3d 721 (Colo. 2006), establishes that C.R.S. § 37-92-503 (2005) imposes liability on an owner or user of water rights for his failure to comply with a valid order issued by the Engineers even when the owner or user claims the "fault" for the failure to comply lies with another. In that case, the state and division engineers brought an action against a well owner under C.R.S. § 37-92-503(6)(a) to enforce an order requiring the well owner to cease diverting groundwater from a well. *Id.* at 721–22. The water

court entered a judgment against the well owner and assessed a monetary penalty against him for diverting ground water contrary to a valid order of the division engineer. *Id.* at 721. The well owner appealed, arguing that he could not be liable under C.R.S. § 37-92-503(6)(a) unless he had personally pumped water from the well. *Id.* at 722–23. The Supreme Court rejected the well owner's argument, and, interpreting C.R.S. § 37-92-503(6)(a) in the context of the overall statutory scheme, the court concluded that the reference in section (6)(a) to "[a]ny person who diverts groundwater" "imposes liability on an owner or user of water rights," even for the physical acts of others. *Id.* at 724. In reaching that conclusion, the court stated that it was "unnecessary to determine the full extent to which the legislature intended an owner or user's liability to be either vicarious or strict." *Id.*

Similarly, in the current case, Mr. Meagher cannot escape liability under C.R.S. § 37-92-503 for failure to comply with the Order or Rule 6.1 by pointing to the failures of his employed Certified Well Testers. Instead, Mr. Meagher is liable for these violations as the owner of the Wells and the person at whom the Order was directed. Accordingly, whether or not Mr. Meagher relied on his Certified Well Testers to timely submit the forms required by the Order and Rule 6.1 is not material to this case.

Mr. Meagher's other arguments attempting to create genuine issues of material fact fail for similar reasons. The Engineers' Motion for Summary Judgment explained the purpose of the Measurement Rules and Rule 6.1 and cited to the authorizing statement in the Measurement Rules and this Court's findings in the decree entered in Case No. 15CW3024 as support that well measurement data is needed for the Engineers to fulfill their statutorily-described responsibilities, including administration of the Rio Grande Compact. The Engineers also explained why it matters that individual well owners comply with Rule 6.1. Mr. Meagher argues

that summary judgment should be denied because these points made by the Engineers create genuine issues of material fact. Rsp. at 16–17.

Similar to his argument that violations of C.R.S. §§ 37-92-503(1)(a) and -503(6)(b), include an implied *mens rea* element, these arguments are merely further attempts to create additional requirements for proving a violation of these sections 37-92-503(1)(a) and -503(6)(b) that are not in the statute. *See, e.g.*, Rsp. at 17 (asserting there are factual questions of material fact warranting a trial of "how many well owners have historically flouted the requirements of the Measurement Rules; what percentage of well owners flouting these requirements are necessary to actually effect [sic] the veracity of the estimate of ground water withdrawals; and, if this is such a wide-spread problem, what efforts have [sic] the State undertaken to enforce compliance"). Although Mr. Meagher has not expressly challenged the validity of the Measurement Rules, his arguments nevertheless appear to consist of general disagreements regarding the scope and purpose of the Measurement Rules, *see, e.g.*, Rsp. at 16 ("The State does not, and cannot, allege that ground water diversions are regulated to assist in compliance with the Rio Grande Compact. The State has not established as an undisputed fact that ground water diversions have been or ever will be curtailed for the purpose of complying with the Rio Grande Compact."), not actual disputes as to whether Mr. Meagher complied with the Order or Rule 6.1. Regardless, the only showing the Engineers need to make to prevail on their claims in this case is that Mr. Meagher did not comply with the Order or Rule 6.1, and Mr. Meagher's claimed factual disputes are not material to that determination.

Similarly, Mr. Meagher points to the Engineers' statements in their Motion for Summary Judgment regarding Mr. Meagher's multiple other violations of the Measurement Rules in an attempt to argue that these previous violations create issues of fact regarding Mr. Meagher's

motives, opportunity, intent, plans, knowledge, and mistake or accident in complying with the Measurement Rules or the Order. Rsp. at 15–16. Mr. Meagher does not dispute that he has previously failed to comply with the Measurement Rules, and therefore has not actually identified any disputed facts. *See, e.g.*, *People In Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990) ("A genuine issue of fact cannot be raised simply by means of argument by counsel."). Mr. Meagher's arguments on this point are merely reassertions that the Engineers must prove a culpable mental state to prevail on their claims. But, the court has already determined that the Engineers do not need to prove that Mr. Meagher had a culpable mental state to prove that he violated C.R.S. §§ 37-92-503(1)(a) or -503(6)(b). Therefore Mr. Meagher has not raised genuine issues of material fact.

Furthermore, Mr. Meagher's citation to C.R.E. 404(b) and case law interpreting and applying that rule of evidence are inapposite. Under C.R.E. 404(b), evidence of other wrongs "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Here, however, the Engineers are not asking the Court to consider Mr. Meagher's prior violations of the Measurement Rules to decide whether Mr. Meagher violated the rules in this case or to make any determinations concerning Mr. Meagher's character. Rather, they raise the prior violations as part of their discussion about the importance of water users' compliance with the rules in the context of administering water rights in Division 3 and their explanation for why they filed the injunction proceeding and why they are seeking civil penalties in this case.

Despite his assertions to the contrary, Mr. Meagher has been allowed to present defenses to the Engineers' claims in this case. However, the defenses Mr. Meagher has raised are immaterial to the Engineers' claims, and Mr. Meagher has presented no genuine issues of fact material to whether he complied with the Order or Rule 6.1.

E. Assessment of Civil Penalties

This is not Mr. Meagher's first violation of the Measurement Rules, and the Engineers have continued to issue orders to Mr. Meagher to compel compliance with the Measurement Rules. Additionally, although Mr. Meagher finally provided the required measurement data 99 days after the deadline, that delay is not inconsequential. The measurement data obtained through the Measurement Rules is used to help update the Rio Grande Decision Support System Model. As the Court recently found in Case No. 15CW3024, *In the Matter of the Rules Governing the Withdrawal of Groundwater in Water Div. 3*, "[u]pdating the Model with new observational data is a complex and time-consuming series of tasks. . . . Since the Model operates on a calendar year basis, the Model can only be updated when data is available for each month of the calendar year." Findings of Fact, Conclusions of Law, Judgment and Decree, Case No. 15CW3024, District Court, Water Division 3, March 15, 2019, ¶ 110 (noting general model updates include additional years of metered pumping data). Although a delay in receiving Mr. Meagher's well pumping data may be not cause significant issues with updating the Model, it cannot be disputed that if numerous well owners flout the requirements of the Measurement Rules, it could cause significant delay in using well pumping data to refine the Model. The Measurement Rules are necessary for the Engineers to obtain information needed for the administration of the waters in Water Division No. 3 and to assist in compliance with the Rio Grande Compact, Measurement Rules, Authorization, and the compliance of individual well users in Water Division No. 3, including Mr. Meagher, is essential to accomplish that purpose.

Since Mr. Meagher has previously violated C.R.S. §37-92-503(6)(b) and a similar order issued by the Engineers, a fine of five hundred dollars for each of the violations in this case is appropriate.

V. CONCLUSION

The Engineers have shown that there are no genuine issues of material fact and that, as a matter of law, Mr. Meagher violated C.R.S. §37-92-503(1)(a) by failing to comply with the Engineers' Order and also violated C.R.S.§ 37-92-503(6)(b) by failing to timely submit data regarding the amounts of water pumped from his Wells. In response, Mr. Meagher made factual assertions regarding his efforts to comply, but he did not dispute the fact that he failed to timely comply with the applicable provisions of C.R.S. § 37-92-503, the Measurement Rules or the Engineers' Order. Based on the undisputed facts and authority set forth above, the court concludes that it is appropriate to grant the Engineers' Motion. Furthermore, the Court finds it is appropriate to assess a civil penalty of $500 for each of Mr. Meagher's three violations and, pursuant to C.R.S. § 37-92-503(1)(b), the court orders that Mr. Meagher "shall pay the costs of the proceeding, including the allowance of reasonable attorney fees." The Engineers are directed to file an Affidavit of Attorneys' Fees within 21 days of the date of this order.

VI. ORDER

IT IS THEREFORE ORDERED THAT the Engineers' Motion for Summary Judgment is GRANTED and that:

1. Pursuant to C.R.S. § 37-92-503(6)(e) Mr. Meagher is permanently enjoined from further violations of Rule 6.1 of the Measurement Rules, and he is ordered to complete and submit Form 6.1—Water Use Data Form, for the Wells, each year, no later than December 1st.

2. Pursuant to C.R.S. §§ 37-92-503(6)(b) and -503(6)(e), C.R.S. Mr. Meagher is ordered to pay civil penalties of $500 for each of his three violations of C.R.S. § 37-92-503(6)(b) for a total of $1,500. Mr. Meagher shall make this payment within twenty-one days of the date of this order.

3. Pursuant to C.R.S. §§ 37-92-503(1)(b) and -503(6)(e) Mr. Meagher is ordered to pay to the State of Colorado the Engineers' costs of bringing this proceeding, including reasonable attorney fees and the Engineers shall file their Affidavit of Attorneys' Fees within twenty-one days of the date of this order.

4. The trial currently scheduled in this case is vacated.

DONE this 28th day of June 2019.

BY THE COURT:

Pattie P. Swift, Water Judge
Water Division 3