FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. D-0101-CV-2010-01290

DENNIS W. MONTOYA,
Appellant,

vs.

MARY HERRERA, SECRETARY OF STATE,
STATE OF NEW MEXICO,
Appellee.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Appellant Dennis W. Montoya's Petition for Declaratory and Injunctive Relief and appeal from a decision of the Secretary of State for the State of New Mexico (or "Secretary"). The Secretary's decision denied Mr. Montoya's application for certification to receive public campaign financing pursuant to the Voter Action Act (or "Act"), Section 1-19A-6(4), NMSA 1978 (2003) and imposed a $2,000 fine upon him for violating the Act. Appellant filed his notice of Appeal on April 16, 2010. He filed a Motion for Expedited Hearing and Petition for Injunctive Relief on April 27, 2010. The matter was assigned to this Court after the disqualification of Judge Barbara Vigil pursuant to Rule 1-088.1. In light of the unusual and pressing circumstances of this case, the Court immediately granted that portion of Appellant's Motion requesting an expedited review by scheduling this matter for hearing on May 6, 2010.

In the main, Mr. Montoya asserts that the Court should issue declaratory and injunctive relief directing the Secretary to certify him for public financing, to release Act funding for his campaign and that the Court should bar the Secretary from imposition of the fine. Although, as Mr. Montoya recognizes, the Act provides for appeal of the administrative decision to the District Court, because he raises constitutional issues that could not be addressed at the administrative level, this

Court must exercise its original equitable jurisdiction in addition to its appellate jurisdiction. *See Maso v. New Mexico Taxation & Revenue Dept.*, 2004-NMCA-025, ¶¶ 11-17, 135 N.M. 152, 155-57, 85 P.3d 276, 279-81; *see also* NMSA 1978, § 1-19A-16.C (2003); NMSA 1978, § 39-3-1.1.A (1999); NMRA 1-074. In addition, because of the nature of this matter, the Court is granting expedited review of the issues raised. Because this Court finds that no constitutional violations have occurred and that the Secretary complied with applicable statutory provisions, the Secretary's decision to deny Mr. Montoya's application for public financing and to impose a $2,000 fine is affirmed and the Petition for Declaratory and Injunctive Relief is denied.

A. Analysis Pursuant to This Court's Appellate Jurisdiction

As an appellate matter, this Court must affirm the decision of the Secretary unless it is fraudulent, arbitrary or capricious, not supported by substantial evidence, outside the scope of the agency's authority, or not in accordance with the law. *See* Rule 1-074(Q) NMRA; § 39-3-1.1.D. Mr. Montoya does not dispute any factual findings but instead raises issues of law, which are reviewed de novo. *See Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶24, 136 N.M. 630, 637, 103 P.3d 554, 561. Although a reviewing court cannot be bound by an administrative entity's interpretation of the law, a reviewing court may give a "heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Id.* at ¶ 25 (internal quotations and citations omitted).

When construing statutory provisions, the reviewing court begins with the plain language and assumes "that the ordinary meaning of the words expresses the legislative purpose." *New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 45, 46, 150 P.3d 991, 996. The main goal is to give effect to the Legislature's intent, which is

ascertained "by reading all the provisions of a statute together, along with other statutes in pari materia." *Id.*

Here, the plain language of the Act resolves the issues raised, without any need to give any deference to the Secretary's special expertise. Section 1-19A-5 of the Act provides:

> A. An applicant candidate may collect seed money from individual donors and political action committees in amounts of no more than one hundred dollars ($100) per donor or committee. ***An applicant candidate may contribute an amount of seed money from the applicant candidate's own funds up to the limits specified in Subsection H of this section.***
>
> . . . .
>
> H. An applicant candidate ***shall limit seed money contributions and expenditures to five thousand dollars ($5,000).***

(Emphasis added). "Seed money" is defined as "a contribution raised for the ***primary purpose*** of enabling applicant candidates to collect qualifying contributions and petition signatures." NMSA 1978, § 1-19A-2.K (2007) (emphasis added).

Appellant argues that he was entitled to spend "$2,922.56 for 'seed money' purposes, and . . . another $8,887.29 on 'general' campaign expenditures." *See* Petition, at 2. That proposed interpretation would lead to an untenable result that would altogether undermine the Act *Cf. Gonzales v. New Mexico Public Employees Retirement Ass'n*, 2009-NMCA-109, ¶¶ 28, 34, 147 N.M. 201, 218 P.3d 1249, 1255-56. If the Secretary were to follow the interpretation Mr. Montoya advances, a candidate could take unlimited contributions from any source and expend unlimited amounts merely by designating those amounts as "general campaign expenditures."

The Act makes no distinction between general and seed money expenditures. The Act quite clearly states that the "*primary* purpose" of seed money is to enable applicant candidates to collect qualifying contributions and petition signatures, but does not limit seed money to that one purpose. § 1-19A-2.K. The plain language of the statutory definition of "seed money" suggests that seed

money may be used in other ways that are legitimately consistent with becoming a candidate pursuant to the Act. The Act does not permit an applicant candidate to expend unlimited amounts for "general campaign" purposes. Indeed, the categories of "general campaign" contributions or expenditures advanced by Appellant are not even defined, much less authorized, by the Act.

Mr. Montoya further argues that "[h]ad the Legislature wanted to also prohibit the applicant candidate from spending his own money, it could easily have employed both the words 'contribution' and 'expenditure' in § 1-19A-5(F)." That Section states: "After becoming an applicant candidate and prior to certification, an applicant candidate shall not accept contributions, except for seed money or qualifying contributions." § 1-19A-5.F. Legislative intent must be gleaned primarily from the actual language of the statute in question. *Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 1998-NMSC-020, ¶30, 125 N.M. 401, 962 P.2d 1236, 1246. Initially, this provision on its face does not prohibit candidates from spending their own money, instead expressly providing for this possibility. *See* § 1-19A-5.A & H. Pursuant to these subsections of the Act, the Legislature also placed express limitations on those amounts of personal contributions.

Secondly, expenditures necessarily emanate from contributions, even if the source of a contribution is the candidate's personal funds. To illustrate that point by way of analogy, Subsection C of Section 1-19A-7, NMSA 1978 (2007), which applies to certified candidates, limits total campaign expenditures and debts to the amount of money distributed to the certified candidate from Act funds. The fund distributions would be in lieu of contributions from "any other source." *See* § 1-19A-7.C. The Act ostensibly limits expenditures and debts to fund distributions because to allow expenditures and debts to exceed distributions would require the candidate to obtain

contributions from other sources. The Act does not allow a certified candidate to expend more than the distribution amount so long as the candidate uses personal funds to cover excess expenditures. The statutory scheme demonstrates that expenditures flow from contributions. It is also possible to conceptualize expenditures by the candidate as consisting of personal funds that are distinct from campaign funds, and that converting those personal funds to campaign purposes constitutes a contribution to the candidate's campaign. Under either conceptual framework, reading provisions of the Act together, it is difficult to escape the conclusion that when a candidate expends his own money, he is contributing to his campaign. To conclude otherwise would permit a candidate or donor to expend unlimited funds on behalf of a campaign and claim those expenditures were not contributions. *Cf. Gonzales*, 2009-NMCA-109, at ¶¶ 28, 34, 147 N.M. 201, 218 P.3d at 1255-56.

Moreover, the plain language of Subsection H of Section 1-19A-5 limits both the seed money contributions and expenditures of an applicant candidate to $5,000. Under subsections 1-19A-5.A and H, only two sources of seed money are permitted: third party contributions in increments not to exceed $100 or other amounts contributed by the candidate, all in a combined amount not to exceed $5,000. In his pleadings, Appellant acknowledges that he exceeded $5,000 in expenditures as an applicant candidate. By doing so, he failed to comply with the clear provisions of the Act, thereby rendering himself ineligible to obtain public financing. §§ 1-19A-3, 1-19A-5, 1-19A-6.

Appellant also challenges the $2,000 fine imposed upon him by the Secretary. That challenge is also resolved by the plain language of the Act. Subsection B of Section 1-19A-3, NMSA 1978 (2003), requires an applicant candidate to submit a declaration of intent "mak[ing] explicit . . . that the candidate has complied with ***and will continue to comply with that act's contribution and expenditure limits.***" (Emphasis added). Subsection A of Section 1-19A-17,

NMSA 1978, provides: "In addition to other penalties that may be applicable, a person who violates a provision of the Voter Action Act [1-19A-1 to 1-19A-17 NMSA 1978] is subject to a civil penalty of up to ten thousand dollars ($10,000) per violation." (Bracketed language contained in original). That provision gives the Secretary the discretion to impose a fine if the Secretary makes a determination that a violation of the Act has occurred. § 1-19A-17.A. Alternatively, the Secretary is empowered under this provision to transmit the finding to the Attorney General for prosecution.

Mr. Montoya filed a declaration of intent that includes a candidate statement in which he pledged to comply with the Act. As determined by the Secretary, Mr. Montoya violated the Act's contribution and expenditure provisions. Where, as here, the Secretary chooses not to transmit the matter to the Attorney General, the Secretary has statutory authority to impose a fine of up to $10,000 for the violation. The fine imposed by the Secretary was well within the statutory limit.

Appellant suggests that the Secretary's conclusion that all pre-certification expenditures must be reported as seed money essentially requires him "to falsify public records." Petition, at 13. This Court views the requirement differently. That is, the Secretary required nothing more of Mr. Montoya than to comply with the Act and to accurately report the actions he took under the seed money category clearly specified by the Act. The statutory framework for public financing of certain campaigns does not permit a candidate to create new categories of contributions or expenditures in order to create the impression that a candidate's actions conform with the law. The Secretary properly determined that Appellant failed to comply with the Act by contributing and expending in excess of the statutory $5,000 seed money limitations established under Section 1-19A-5 of the Act. These are limitations that candidate Montoya agreed to abide by in seeking public financing for his campaign. The Secretary merely required Appellant to honestly report the actions he took under the

clear, unambiguous and strict categories created by the Legislature.

For the reasons stated, this Court finds, pursuant to its appellant jurisdiction, that the decision of the Secretary is in accordance with the law.

B. Analysis Pursuant to This Court's Original Jurisdiction

"Without question, the district court has the authority to consider constitutional claims in the first instance" and may do so by exercising its original jurisdiction to require an administrative entity to engage in certain procedures. *See Maso*, 2004-NMCA-025, at ¶¶ 14-15, 135 N.M. at 156, 85 P.3d at 280. This Court thereby exercises its original jurisdiction to address Appellant's constitutional claims.

Authority cited by Appellant does not support his contention that the Act's limitations on expenditures impede his political speech. A candidate is not subject to the Act's provisions unless that candidate affirmatively chooses to seek and accept public financing. *Cf., e.g.*, § 1-19A-3.A ("A candidate *choosing* to obtain financing pursuant to the Voter Action Act . . . ."). In that regard, the Act only regulates public financing, which a candidate is free not to pursue, and not a candidate's expenditure of his personal funds or his political speech affiliated with such expenditures. If a candidate chooses not to pursue public financing, the Act's limitations simply do not apply.

Appellant's interpretation of the Act, if allowed to stand, would create an untenable circumstance where a candidate could seek and obtain public financing without being subject to the contribution or expenditure limitations upon which the Act is predicated. In oral argument, Appellant's counsel acknowledged that under his interpretation of the Act, Appellant or any other candidate would be permitted to spend an unlimited amount of personal funds on that candidate's campaign prior to receiving public financing. There would be little or no public benefit to such an

arrangement and thus no need for the Act. Stated in other terms, a candidate would be permitted to frustrate the purposes of the Act, rendering the entire legislative framework a nullity.

Since the Act's limitations do not attach unless a candidate affirmatively chooses to obtain the benefits of the Act, the Act does not unconstitutionally limit either a candidate's use of the candidate's personal funds or the candidate's political speech. Appellant through counsel acknowledged in oral argument that Appellant submitted a declaration on intent pursuant to Section 1-19A-3.B of the Act. Such a declaration indicates that a particular applicant has complied and would continue to comply with the Act's contribution and expenditure limits as well as other requirements in the Act. *See id* at pages 5-6 herein. Pursuant to the clear framework set forth in the Act, requiring a candidate to accurately report contributions and expenditures in order to obtain public financing is consistent with *Citizens United v. Federal Election Commission*, 558 U.S. ____, 130 S.Ct. 876 (2010), and its predecessors.

Likewise, Appellant's claim that "[t]he Secretary's proposed $5,000 spending cap for some candidates, but not others, is facially discriminatory," is without merit. *See* Petition, at 9. The Act's spending cap is only applicable to those candidates who pursue public funding, which validly distinguishes "some candidates" from others. *Cf. Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998) (indicating that "at the heart of any equal protection claim must be an allegation of being treated differently than those *similarly situated*," and that those allegations must include specificity and precision with regard to how others were similarly situated (emphasis added)). *Compare* Petition, at 9 (Appellant referring to "[t]he Secretary's proposed $5,000 spending cap for *some candidates*, but not others")

C. Claim for Injunctive Relief

In order to prevail on his claim for injunctive relief, Mr. Montoya as applicant must demonstrate 1) a substantial likelihood that he will prevail on the merits; 2) that he will suffer immediate and irreparable harm if the injunction is not granted; 3) that the threatened injury to him outweighs the injury that granting the injunction will cause to the opposing party/parties; and 4) that the injunction will not will not be adverse to the public interest. *National Trust for Historical Preservation v. City of Albuquerque*, 117 N.M. 590, 595, 874 P.2d 798, 803.

With regard to the first requirement, for reasons addressed above, Applicant has not demonstrated a substantial likelihood of success on the merits. On the contrary, his arguments and interpretation of the Act are not only clearly inconsistent with the overall statutory framework, *see* §§ 1-19A-2.K,1-19A-3, 1-19A-5, 1-19A-7, they are directly inconsistent with the plain language of the statutory provisions in question, *see* §§1-19A-5, 1-19A-17.

Addressing the second requirement, it is arguable that applicant will suffer immediate, irreparable harm if the injunction is not granted since, in this instance, he would be denied public financing very close to a scheduled election. However, all of the requirements must be met in order to obtain injunctive relief.

Turning to the last two requirements, weighing the threatened injury as between applicant and the opposing party, and determining whether the injunction would be adverse to the public interest both involve different focus points in the same framework. Applicant has not demonstrated that the potential injury to him outweighs injury to the Secretary in her official capacity on behalf of the citizens of New Mexico. The Secretary is charged with reviewing, *see* §1-19-A-9 and enforcing the Act, *see* §1-19A-17, and as such is charged with promoting the public interest as regards the general oversight of public financing with respect to certain candidates who qualify for such financing.

Issuing an injunction in the circumstances here would be clearly adverse to the public interest. Applicant's strained reading of the Act, if permitted by the Court, would permit him, with a few strokes of the pen or keyboard, to create a new category of funds raised and spent that is not authorized by the Act. This in turn would permit him to spend potentially unlimited sums of money not contemplated by the Act, while at the same time accessing and spending substantial public funds in support of his campaign. This circumstance is clearly not permitted by the statutory framework at issue and is clearly adverse to the public interest.

D. Conclusion

For the reasons set forth herein, having exercised this Court's jurisdiction to review the issues raised, Mr. Montoya's Petition for Declaratory and Injunctive Relief is denied. Likewise, the decision of the Secretary is affirmed in all respects.

So ordered.

Raymond Ortiz

RAYMOND Z. ORTIZ
DISTRICT JUDGE, DIV. III

Copies provided by fax on the date of filing to:

Hazen H. Hammel
3603 Gun Club Road, SW
Albuquerque, NM 87121
Via email: hazenhammel@mac.com

Scott Fuqua, Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
Via Facsimile (505) 827-6036

Ray M. Vargas II
David Garcia
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 87501
Via Facsimile (505) 982-8012