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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **HOUSTON WALL,**

3 Petitioner-Appellant,

4 v.

NO. A-1-CA-36663

5 **TOM BLAINE, P.E., NEW MEXICO**

6 **STATE ENGINEER; BOBBY J.**

7 **CARMICHAEL; HERSHAL**

8 **CARMICHAEL; SHERI**

9 **CARMICHAEL; SHANNON**

10 **CARMICHAEL; WELDON**

11 **CARMICHAEL, Deceased; KELLY**

12 **A. LONG; W.T. SIMPSON; and**

13 **KENNETH COX,**

14 Respondents-Appellees.

15 **APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY**

16 **Fred T. Van Soelen, District Judge**

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18 Marion J. Craig, III

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20 for Appellant

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1 for Appellee Tom Blaine

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6 for Appellees Bobby J. Carmichael; Hershhal Carmichael; Sheri Carmichael; Shannon
7 Carmichael; Weldon Carmichael, Deceased; Kelly A. Long; W.T. Simpson; and
8 Kenneth Cox

9 **MEMORANDUM OPINION**

10 **VANZI, Judge.**

11 {1} Petitioner Houston Wall has appealed from an order dismissing his appeal from
12 a decision rendered by the Office of the State Engineer. We previously issued a notice
13 of proposed summary disposition in which we proposed to affirm. Petitioner has filed
14 a memorandum in opposition, and Respondents have filed memoranda in support.
15 After due consideration, we remain unpersuaded that the district court erred. We
16 therefore affirm.

17 {2} The pertinent events and procedural history are undisputed. To very briefly
18 reiterate, Petitioner failed to comply with the statutory service requirements set forth
19 in NMSA 1978, § 72-7-1 (1971). This is a jurisdictional defect, which neither the
20 district court nor this Court are at liberty to disregard. *See In re Application of Angel*
21 *Fire Corp.*, 1981-NMSC-095, ¶ 5, 96 N.M. 651, 634 P.2d 202 (“Jurisdiction of the

1 matters in dispute does not lie in the courts until the statutorily required administrative
2 procedures are fully complied with. The courts have no authority to alter the statutory
3 scheme, cumbersome as it may be.”); *El Dorado Utils., Inc. v. Galisteo Domestic*
4 *Water Users Assn.*, 1995-NMCA-059, ¶ 7, 120 N.M. 165, 899 P.2d 608 (“[I]f service
5 in accordance with Section 72-7-1(C) is not effected on all interested parties within
6 the statutorily prescribed time period, the court has no jurisdiction to hear the case,
7 even as to those interested parties who have been timely served.”). Under the
8 circumstances, dismissal was in order. *See, e.g., Hope Comm. Ditch Assn. v. NM State*
9 *Engineer*, 2005-NMCA-002, 136 N.M. 761, 105 P.3d 314 (upholding the dismissal
10 of an appeal and an attempted cross-appeal where the appellant failed to timely serve
11 all interested parties with notice of appeal as required by Section 72-7-1); *Anthony*
12 *Water & Sanitation Dist. v. Turney*, 2002-NMCA-095, 132 N.M. 683, 54 P.3d 87
13 (upholding the dismissal of an appeal where the appellant failed to accomplish all four
14 instances of publication within thirty days in accordance with the requirements of
15 Section 72-7-1).

16 {3} In his memorandum in opposition, Petitioner contends that the statutory service
17 requirements should be deemed unconstitutional, at least as applied to the situation
18 presented in this case, because Petitioner was unable to personally serve all of the

1 protestants, and because “service by publication is impossible.” [MIO 6] As described
2 at greater length below, we remain unpersuaded.

3 {4} Section 72-7-1(C) provides that service may be accomplished by a variety of
4 different means, including personal service in accordance with Rule 1-004(F) NMRA,
5 service by publication in accordance with Rule 1-004(J)-(K), or service in accordance
6 with the specific publication procedure described within Section 72-7-1(C) (providing
7 that “notice of appeal may be served in the same manner as a summons in civil actions
8 brought before the district court **or** by publication . . . once a week for four
9 consecutive weeks” (emphasis added)). *See also El Dorado*, 1995-NMCA-059, ¶ 5
10 (recognizing that Section 72-7-1 “provides for two modes of service—” *either* service
11 “in accordance with law governing service in civil actions” *or* service by publication
12 in accordance with the specific procedure subsequently described in sub-part (C)). We
13 note that these are *alternative* methods of serving notice of appeal. *Id.* (observing that
14 the different modes of service “are equally acceptable alternatives under the statute”).

15 {5} In this case, Petitioner could have elected to serve the parties through
16 publication pursuant to the specific procedure set forth in Section 72-7-1(C). Contrary
17 to his assertions, [MIO 5-7] this would *not* have entailed prior approval from the
18 district court, as that requirement is not incorporated in the specific publication

1 methodology set forth in Section 72-7-1(C). *See El Dorado*, 1995-NMCA-059, ¶ 5
2 (explaining that service by publication in accordance with the procedure set forth in
3 Section 72-7-1(C) is sufficient to vest the district court with jurisdiction to hear an
4 appeal from a decision by the state engineer “even if such service would not satisfy
5 the requirements for service of summons in civil actions brought before the district
6 court” (internal quotation marks omitted)). However, if Petitioner had elected to avail
7 himself of this option, it would have been necessary for him to commence publication
8 promptly. He did not do so. Instead, Petitioner appears to have allowed roughly three
9 weeks to pass before making his initial effort at personal service. [MIO 2-3] When
10 that proved to be unsuccessful, Petitioner attempted service by publication. At that
11 juncture, service in accordance with the specific procedure described within Section
12 72-7-1(C) was no longer an option, because it could not be completed within the
13 requisite timeframe. Nevertheless, Petitioner could have sought court approval of an
14 abbreviated publication schedule pursuant to Rule 1-004(J)-(K), in order to complete
15 the process within the statutory thirty-day period. However, we find no indication that
16 he pursued this option. Under the circumstances, we conclude that Petitioner failed
17 to act with due diligence. *See, e.g., Turney*, 2002-NMCA-095, ¶¶ 11-13 (observing
18 that “[s]trict, full compliance with the service-of-notice portion of the statute has long
19 been required by our cases[,]” and rejecting a challenge based on the difficulty of

1 compliance, where service could have been accomplished had the appellant been more
2 efficient).

3 {6} We are similarly unpersuaded that service by publication has become
4 categorically impossible. Petitioner's argument to this effect [MIO 5-8] appears to
5 conflate the requirements associated with two separate methods of effectuating
6 service. *See generally El Dorado Utils., Inc.*, 1995-NMCA-059, ¶ 5 (recognizing the
7 alternative nature of the various statutorily-authorized approaches). As previously
8 described, service *either* in accordance with the specific publication procedure set
9 forth in Section 72-7-1(C), *or* in accordance with Rule 1-004(K), pursuant to a duly
10 approved alternative schedule of publication, would have been viable options. In light
11 of Petitioner's failure to diligently pursue these avenues, we reject the claim of
12 impossibility.

13 {7} Accordingly, for the reasons described in the notice of proposed summary
14 disposition, we affirm.

15 {8} **IT IS SO ORDERED.**

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LINDA M. VANZI, Chief Judge

18 **WE CONCUR:**

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MICHAEL E. VIGIL, Judge

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J. MILES HANISEE, Judge