IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
STEVEN P. NEVILLE; CARL TRUJILLO;
PAUL BANDY; and JIM ROGERS,

Petitioners/Relators,

v. Case No. _____

INTERSTATE STREAM COMMISSION;
OFFICE OF THE STATE ENGINEER;
and SCOTT VERHINES, STATE ENGINEER,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITORY MANDAMUS, OR OTHER APPROPRIATE WRIT, AND REQUEST FOR STAY

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Petitioners request oral argument.

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INTRODUCTION AND SUMMARY

1. Petitioners seek a writ of prohibitory mandamus similar to the writ which this Court issued in *State ex rel. Guy Clark, George Buffett, and Max Coll v. Gary Johnson*, 1995-NMSC-048, 120 N.M. 562. The situation in *Clark* has happened again: a governor has signed a tribal compact without statutory authorization from the New Mexico Legislature. Therefore the Petitioners, including three current legislators, respectfully request a writ like the writ in *Clark,* prohibiting and staying the Respondents from taking any actions to "enforce, implement, or enable" the proposed water compact with the Navajo Nation, unless and until the Legislature has enacted the compact into law.

2. In December 2010, shortly before leaving office, former Governor Bill Richardson signed a state-tribal water compact with the Navajo Nation and the United States. Exhibit 2. This proposed compact would make major changes to several New Mexico statutes, including: § 72-15-5 (the Colorado River Compact); § 72-15-26 (the Upper Colorado River Basin Compact); and § 72-15-1 (the Animas-La Plata Project Compact).

3. A compact is a tripartite agreement between the State of New Mexico, the United States, and another state or tribe. A compact is formed when the agreement is enacted into statute by all three of the sovereign parties. After

that, the compact becomes binding federal law. A compact is treated as both a statute and a contract.

4. Under these three Colorado River compacts, the State of New Mexico is entitled to a small and fluctuating share of water from the Colorado River system. The proposed Navajo compact would award more than half of New Mexico's share to the Navajo Nation: over 600,000 acre-feet of diversion from the San Juan River. This is six times the amount of water diverted by the Albuquerque metro area, and twice as much as the City of Phoenix. Michael J. Cohen, *Municipal Deliveries of Colorado River Basin Water* 14, 27 (Pacific Institute, June 2011). The 600,000 acre-feet would serve a population of approximately 42,127 Native Americans living on the Navajo Reservation in New Mexico, according to the 2010 census.

5. The proposed Navajo compact would also change or override other New Mexico water statutes, court decisions, and administrative regulations.

6. The United States and the Navajo Nation have enacted statutes authorizing this proposed compact. But the State of New Mexico has not. This proposed compact has not been submitted to the New Mexico Legislature for enactment or rejection or modification, as required by *Clark*. In an opinion by Justice Minzner, this Court held unanimously that a governor does not

have the constitutional authority to bind the State of New Mexico to a compact with an Indian tribe without a statute. To be binding on the State of New Mexico, the terms of every proposed compact with another state or an Indian tribe must be enacted into law by statute. In this instance, the New Mexico Legislature has not passed, and the Governor has not signed, a bill enacting the Navajo water compact into law. Therefore the Navajo water agreement is a nullity, just like the tribal gambling compacts signed by Governor Gary Johnson.

7. § 72-14-3 requires the Respondent Interstate Stream Commission to submit proposed water compacts to the Legislature for final approval. The ISC has failed to do this.

8. In 2003 the Legislature ordered the ISC and OSE to prepare and implement a comprehensive statewide water plan. § 72-14-3.1. The ISC and OSE have failed to do this.

9. It makes no difference that the United States Congress has authorized the Navajo water compact, because the New Mexico Legislature has not. See *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), 104 F.3d 1546, 1553-54 (10th Cir. 1997). Agreeing with *Clark*, the Tenth Circuit ruled that state law determines the procedures by which a state may validly enter into a

compact. Because Governor Johnson lacked authority under New Mexico law to sign a tribal gambling compact, the compact was void even though it had been approved by a federal statute and by the Secretary of the Interior.

10. Respondents have misinformed the public that the proposed compact is "a done deal" because it was approved by Congress and signed by Governor Richardson. As a matter of law, this is flatly wrong under *Clark* and *Pueblo of Santa Ana.* This Court's ruling in *Clark* has been forgotten, so public officials must be reminded that the Legislature has an irreplaceable role in the formation of tribal compacts.

11. Respondents are violating *Clark*; § 72-14-3; and *Pueblo of Santa Ana*. They are infringing and usurping the lawmaking powers of the Legislature under Article III, section 1 and Article IV, section 1. "[A]rticle III, Section 1 mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws." *Clark*, ¶ 33.

12. Compacts reduce the state's sovereignty and impair the right of the Legislature to make and change laws in the future. *Clark*, ¶ 30. Water compacts can surrender "the core state prerogative to control water within their own boundaries." *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct.

2120, 2132-33 (2013) (Sotomayor, J.). Therefore water compacts require the very highest degree of caution and scrutiny.

13. The proposed Navajo compact has been approved by the district court in San Juan County, but judicial approval is no substitute for legislative action. As a matter of law under *Clark*, there is no agreement between the Navajo Nation, the United States, and the State of New Mexico, so there is nothing for the district court to approve or disapprove.

14. If Respondents wish to pursue this proposed water compact, they must submit it to the Legislature for its consideration. The Legislature might enact the proposed compact into law, which would require the amendment of several statutes. Or the Legislature might reject the proposed compact. Or it might pass a water compact with different terms, which would serve as a counter-offer to the Navajo Nation and the United States. Or the Legislature might create a new statutory mechanism to negotiate water compacts with all the Indian tribes in New Mexico, as it did after *Clark*. See § 11-13-1 (Indian Gaming Compact) and § 60-2E-4 (Gaming Control Act).

15. As legislators, Petitioners reserve their constitutional right to vote for the Navajo compact, or against it, or to amend it, or to propose alternative

legislation, using their own best judgment. Petitioners bring this action to preserve that constitutional right for all of their colleagues in the Legislature.

16. A writ is necessary to protect the constitutional processes of self-government, which begin with "the basic unit of our representative democracy, the individual vote . . . ." *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 1, 145 N.M. 563. Through elections, the individual votes of citizens are distilled down to 112 votes in the Legislature. It is those 112 legislators who must decide on the wisdom of a proposed compact.

THE PARTIES

17. Petitioners Steven Neville, Carl Trujillo, and Paul Bandy are duly elected members of the New Mexico Legislature, from the Republican and Democratic parties. As members of the Legislature they have standing to bring this Petition, which involves the constitutional separation of powers between the legislative branch and the executive branch.

18. Petitioner Jim Rogers is a citizen of San Juan County who owns water rights adjudicated by the Echo Ditch Decree (N.M. 11th Judicial Dist., San Juan Co., Judgment Apr. 8, 1948). Mr. Rogers is the Secretary-Treasurer of the San Juan Agricultural Water Users Association, which represents more

than 20 acequias and community ditches on the San Juan River. These community ditches and acequias supply water to farms, homes, industry, and towns like Aztec, Bloomfield, and Farmington. All of them would be affected by the proposed agreement.

19. All the Petitioners are citizens of the State of New Mexico, qualified and registered voters, and taxpayers in this state. As such, they are proper parties to bring this Verified Petition which involves a matter of "general public interest." *Clark*, ¶ 15. The Petitioners are acting as private attorneys general in protecting the rights of citizens generally.

20. Respondent Interstate Stream Commission is an agency of the executive branch of the State of New Mexico, created and controlled by statute. The ISC has the duty to negotiate proposed water compacts and to present them to the Legislature for its final approval. § 72-14-3.

21. Respondent Scott Verhines is the current State Engineer. The Office of the State Engineer is an agency of the executive branch, created and controlled by statute.

22. All of the Respondents have violated their duty to faithfully execute the laws of New Mexico. Instead of carrying out the laws of New Mexico,

Respondents are trying to change the laws and make new ones, without the Legislature.

JURISDICTION AND RELIEF

23. Petitioners invoke the original jurisdiction of this Court for a Writ of Prohibitory Mandamus or other appropriate writ or relief, pursuant to N.M. Const. art. VI, § 3; Rule 12-504 NMRA; *Clark*; and §§ 44-2-1 through -14.

BACKGROUND

The Geography of the San Juan River and the Colorado River System.

24. The Colorado River drains a vast arid basin in Arizona, California, Nevada, Utah, Wyoming, Colorado, and New Mexico. See Map, Exhibit 1. The San Juan, Animas, and La Plata Rivers originate in the high San Juan Mountains of southwestern Colorado. The rivers flow south into New Mexico, where they join near Farmington. The San Juan River then loops back into Colorado near the Four Corners, and then through Utah, where it joins the main stem of the Colorado River at Lake Powell.

25. The Colorado River flows through Glen Canyon Dam, and then the Grand Canyon to Lake Mead, the reservoir created by Boulder Dam. The Colorado then flows south, where more dams divert water to Phoenix and Tucson, Los Angeles and San Diego, and the Imperial Valley. The Colorado

River then flows into Mexico and ultimately to the Gulf of California. By this point the River is so depleted that it rarely reaches the sea.

26. All the states on the Colorado River divert water to other areas. New Mexico diverts water from the headwaters of the San Juan River through the San Juan-Chama project to the Rio Grande, as a water supply for Santa Fe, Albuquerque, and other users.

27. The natural flow of the Colorado fluctuates wildly from month to month and year to year. Melting snow causes a big runoff, but afterwards the Colorado River can be reduced almost to a trickle during the dry months.

28. To adapt to this unforgiving natural environment, the arid western states created new water laws. The western states devised the doctrines of prior appropriation and beneficial use, which are written into New Mexico's Constitution. Art. XVI, §§ 2 and 3. And the western states entered into interstate compacts to allocate the scarce waters of the West.

Compacts are settlement agreements between states, or between states and tribes.

29. The terms "compact" and "agreement" are synonymous. A compact is defined as "An agreement; a contract. Usually applied to conventions between nations or sovereign states." *Black's Law Dictionary* 351 (4th ed. 1968) (citation omitted).

30. The federal constitution controls the ability of states to enter into pacts with other states or Indian tribes. See U.S. Const. art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."

31. A compact combines the features of a statute and a contract. Under the Supremacy Clause, when a compact has been enacted as a statute by all the contracting sovereigns, it becomes binding federal law that pre-empts any conflicting state law. *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. at 2130 n.8. A compact thus surrenders some of a state's sovereignty to the federal government. See *Clark*, ¶ 34; *Tarrant*.

32. Because compacts are contracts, they are construed as contracts under the principles of contract law. *Tarrant*, 133 S. Ct. at 2130; *Texas v. New Mexico,* 482 U.S. 124, 128 (1987). Because compacts are also statutes, they are also interpreted under the rules of statutory construction.

33. However there is a major difference between compacts and other statutes, which Justice Minzner emphasized in *Clark*. A compact becomes federal law, so the state Legislature loses its power to amend or repeal that statute, unless that is allowed by the terms of the compact. *Clark*, ¶¶ 34-35.

34. Therefore, unless they are carefully crafted, water compacts can surrender "the core state prerogative to control water within their own boundaries." *Tarrant*, 133 S. Ct. at 2132-33.

35. Most compacts are settlement agreements, like the proposed Navajo water compact, which is called a "Settlement Agreement." A compact is a "legislative means" by which states settle disputes with other states or tribes. *Clark*, ¶ 34. In New Mexico and the west, compacts are used most often to settle disputes over the allocation of water.

The waters of the Colorado are divided by the Colorado River Compact, § 72-15-5 and the Upper Basin Compact, § 72-15-26.

36. **The Colorado River Compact**. In 1922 the seven Colorado River states sent delegates to Bishops Lodge near Santa Fe to negotiate an interstate compact to divide the waters of the Colorado River.

37. The commissioners could not agree on a complete formula to apportion the waters of the Colorado to each of the seven states. They were hampered by an intractable dispute between California and Arizona, and a scarcity of hydrologic data about the flow of the Colorado River. James Lawrence Powell, *Dead Pool: Lake Powell, Global Warming, and the Future of Water in the West* 69 (2008); Norris Hundley, Jr., *Water and the West* 193 (2d ed. 2009).

38. Nevertheless, the 1922 commissioners did manage to compromise on a partial allocation of water. They divided the river system into the Upper and Lower Basins at Lee Ferry, just below Lake Powell. The commissioners assumed that the natural flow of the Colorado system would average 16 to 17 million acre-feet ("maf") per year at Lee Ferry. To leave a cushion, they reduced this number to 15 million acre-feet and split it equally between the Upper and Lower Basins: 7.5 maf to California, Arizona, and Nevada, and 7.5 maf to Colorado, Utah, Wyoming and New Mexico.

39. However, the Upper Basin states agreed to a lower priority for their water. They agreed that they "will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series . . . ." § 72-15-5, Article III(d). The Upper Basin also agreed to provide one-half of any treaty obligation to Mexico and 50,000 acre-feet for Arizona's upper basin lands. *Id.*, at III(c) and § 72-15-26, Article III(a)(1). So the Upper Basin's perpetual delivery obligation totals roughly 83 million acre-feet every ten years, rolling forward. The Upper Basin states must take their share from whatever water is left over, if any, after they meet their joint delivery obligation.

40. The commissioners submitted the proposed compact to their respective state Legislatures for enactment. The 1923 New Mexico Legislature enacted the compact, *verbatim* and *in toto,* as 1923 N.M. Laws, chapter 6, § 1. The compact did not take effect until 1928, after it was enacted by Arizona and California.

41. Scientific studies and stream measurements since 1922 have demonstrated that the 1922 water estimates were too optimistic, especially with global warming and prolonged drought in the Southwest. *See* Bureau of Reclamation, *Colorado River Basin Water Supply and Demand Study* (December 2012).

42. **The Upper Colorado River Basin Compact**. In 1948, the Upper Basin states negotiated the equitable division and apportionment of the water that remains for the Upper Basin states after they meet their delivery obligations to the Lower Basin. The Upper Basin Compact apportions the remaining water as follows:

Colorado	51.75%
Utah	23.00%
Wyoming	14.00%
New Mexico	11.25%

43. The New Mexico Legislature enacted the Upper Basin Compact *verbatim* and *in toto* as 1949 N.M. Laws, chapter 5, § 1.

The executive branch has not submitted the proposed Navajo water compact to the Legislature for its consideration.

44. In 2009 Congress authorized and enacted the terms of the proposed compact, as part of the Northwestern New Mexico Rural Water Projects Act of March 30, 2009, Title X, Subtitle B, the Northwest New Mexico Projects Act, Pub. L. No. 111-11, 123 Stat. 1367.

45. Governor Richardson and Attorney General King signed the compact on December 10, 2010. For unexplained reasons, this water compact has never been submitted to the New Mexico Legislature. § 72-14-3 expressly requires the Interstate Stream Commission to submit all interstate water compacts to the Legislature for final approval, but the ISC did not do so. Nor did Governor Richardson or Attorney General King.

46. This proposed compact does not settle all of the Navajo Nation's water claims. The tribe still has other claims against New Mexico for water in the Little Colorado and Rio Grande Basins, plus large claims against Arizona and Utah.

REASONS FOR GRANTING THE WRIT

A. Under *Clark v. Johnson*, only the Legislature has the constitutional authority to bind the State of New Mexico to an agreement or compact with a state or tribe, by enacting a statute.

47. In *State ex rel. Clark v. Johnson*, a citizen and two legislators (Max Coll and George Buffett) sought an extraordinary writ to protect the Legislature's constitutional powers. This court granted the writ, ruling unanimously that only the Legislature has the constitutional authority to bind the State of New Mexico to an agreement or compact with the state or tribe, by enacting the terms of the compact into statute. *Clark*, ¶ 30.

48. Despite this Court's unequivocal decision in *Clark*, the situation has repeated itself. This time Governor Richardson signed a water compact with the Navajo Nation that would bind the State of New Mexico in perpetuity. Like Governor Gary Johnson before him, Governor Richardson purported to bind the State of New Mexico to a tribal compact without legislative enactment. The two situations are almost identical, so Justice Minzner's constitutional analysis in *Clark* applies to the present case as well:

> Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states. These agreements encompass such widely diverse governmental purposes as interstate

> water usage and cooperation on higher education. In every case, New Mexico entered into the compact with the enactment of a statute by the Legislature. Apart from non-discretionary ministerial duties, the Governor's role in the compact approval process has heretofore been limited to approving or vetoing the legislation that approves the compact. This is the Governor's role with respect to all legislation passed by the Legislature. See N.M. Const. art. IV, § 22.
>
> Residual governmental authority should rest with the legislative branch rather than the executive branch. The state Legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the Legislature should be the body of government to address the issue.

Clark, ¶¶ 39-40 (footnotes omitted).

B. The proposed Navajo compact requires legislative enactment because it reduces New Mexico's share of the Colorado River under the Colorado River Compact, the Upper Basin Compact, and the Animas-La Plata Project Compact.

49. In Appendix A to *Clark*, Justice Minzner listed every New Mexico compact, including 8 water compacts. Three of those compact-statutes govern the waters of the San Juan River: § 72-15-5, § 72-15-26, and § 72-15-1.

50. The proposed Navajo compact would make major changes to these three existing statutes. *Inter alia*, the Navajo compact would reduce New Mexico's compact share of the Colorado River by 604,660 acre-feet of diversion and 323,670 of depletion, annually. The proposed agreement would reallocate

these compact amounts from the State of New Mexico to the Navajo Nation. Most of this water is designated for the Navajo Indian Irrigation Project. NIIP was authorized by Congress in 1955, but it has never been completed. Congress has refused to fund the construction of the canals and pump stations necessary to complete the project. NIIP has never put the amounts of water in the proposed compact to beneficial use.

51. Sections 8.1 and 8.2 change the Colorado compacts by giving the Navajo Nation 50% of any additional compact water that might become available to New Mexico.

52. In many years, the proposed Navajo compact would take more than half of New Mexico's compact share of the Colorado River, depending on fluctuating variables like precipitation, reservoir drawdowns, and water deliveries at Lee Ferry. For example, if the Colorado's natural flow is 10,000,000 acre-feet in a given year, New Mexico would be entitled to roughly 200,000 acre-feet of depletion for all users. [10,000,000 - 8,300,000 x .1125 = 191,250 acre-feet]. This would be far less than the amount that the proposed compact awards to the Navajo tribe.

53. In 2012 and again in 2013, the natural flow of the Colorado River at Lee Ferry was approximately 5 million acre-feet, far less than the delivery

obligation of 8.3 maf. Colorado Basin River Forecast Center, www.cbrfc.noaa.gov. The Upper Basin states satisfied their delivery obligation to the Lower Basin by drawing down reservoirs like Lake Powell and relying on the 10-year rolling total.

54. The proposed compact has some limited shortage sharing provisions, but in most years it would drastically cut the amount available to non-Navajo water users throughout New Mexico, including the water supply to the Rio Grande through the San Juan-Chama Project.

C. The proposed Navajo compact tries to change New Mexico's water statutes, judicial decisions, and regulations.

55. In addition to changing the Colorado Compacts, the proposed Navajo agreement tries to change New Mexico's other water laws. It purports to override New Mexico's water code and its case law on water, change the procedures for water applications, and abrogate the regulatory authority of the State Engineer:

- Appendix 1 section 2 provides that the Navajo water rights are not subject to abandonment, forfeiture, or loss for non-use, contrary to § 72-5-28.
- Section 5E1 allows the tribe to change the purpose or place of use without the approval of the State Engineer, contrary to §§ 72-5-23 and -24.

- Section 7 exempts ground water rights from regulation by the State Engineer.

- Section 9.3.1 subordinates New Mexico's water administration to the terms of the Navajo compact.

- Sections 15, 16, and 17 divest the State Engineer of authority over metering, recordkeeping, and administration of the water rights that would be given to the Navajo Nation.

- Section 17P provides for a limited standard of review (arbitrary, capricious, etc.). This deprives citizens of the constitutional right of de novo review guaranteed by N.M. Const. art. XVI, § 5.

56. Several parts of the compact provide that water released from Navajo Reservoir into the natural stream of the San Juan cannot be used by downstream water users, even if they have priority rights. This is contrary to *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, 80 N.M. 515.

57. Many of the provisions in the compact violate Article XVI, Sections 2 and 3 of the New Mexico Constitution, whereby river water belongs to the public through prior appropriation and beneficial use. These constitutional rules cannot be abrogated by state officials or by federal officials, because

Congress approved these constitutional provisions as part of New Mexico's admission to the Union in 1912.

58. Under the Endangered Species Act, 16 U.S.C. §§ 1531-44, the federal government claims the right to require New Mexico to deliver more than 700,000 acre-feet of instream flow down the San Juan River to Bluff, Utah, for the protection of endangered species like the Razorback Sucker (*Xyrauchen texanus*). No one knows how New Mexico would be able to provide 600,000 acre feet of diversion to the Navajo Nation, and 700,000 acre-feet of instream flow to Utah for endangered species, and still have water left over for local consumption.

59. The proposed Navajo agreement commits the State of New Mexico to future funding of $50,000,000 for water projects. Pub. L. No. 111-11, title X, subtitle B, § 10602(d)(1)(D). This infringes upon the Legislature's exclusive power to appropriate money under Article IV, Section 30: "money shall be paid out of the treasury only upon appropriations made by the legislature."

60. The ISC and the State Engineer have not complied with § 72-14-3.1, a 2003 statute ordering them to prepare and implement a comprehensive state water plan, with an inventory of the state's water resources and water budgets for all major river basins. The Respondents propose to give away most of the

water in the San Juan River Basin without a strategic water plan for the State or the Basin.

61. In summary, the Navajo water compact is like the tribal compact in *Clark*. It is

> disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of [gambling] . . . and the respective civil and criminal jurisdictions of the State and the Tribe . . . . All of this is occurred in the absence of **any** action on the part of the Legislature. . . . [T]he Governor cannot enter into such a compact solely on his own authority.

Clark, ¶ 36 [emphasis in original].

D. The proposed compact is binding in perpetuity on the State of New Mexico, but revocable by the Navajo Nation. So the proposed compact forever precludes future action by the Legislature, depriving the people of their continuing right of self-government.

62. In *Clark*, Justice Minzner wrote that a governor disrupts the constitutional powers of the Legislature when he or she attempts "to foreclose legislative action in areas where legislative authority is undisputed." A governor cannot preclude future legislative action, or foreclose legislative actions which are inconsistent with the governor's agreement. *Clark*, ¶ 34.

63. Like the tribal compacts in *Clark*, the proposed Navajo water compact would forever foreclose legislative action on all matters in the compact. According to its terms, the compact would be binding on the State in perpetuity, because it would be a federal-state-tribal compact, and because it would be adopted as a final decree of the District Court. The proposed Navajo compact is one-sided, because the Navajo Nation has the right to revoke the agreement, but the State of New Mexico does not. Section 5.4 and Appendix 1 section 22.

64. In *Clark*, this Court was particularly concerned with the perpetual nature of the gambling compacts signed by Governor Johnson. Compacts can result in a permanent deprivation of state sovereignty, depending on how they are drafted. Justice Sotomayor also stressed the infringement of state sovereignty in *Tarrant*, *supra*.

65. When a governor signs an agreement that forecloses the Legislature from future legislation, he or she infringes the constitutional authority of the Legislature and the people's continuing right of self-governance under New Mexico's Bill of Rights, N.M. Const. art. II, §§ 2, 3, 8. The Navajo compact would forever prevent the voters of the state from electing legislators who

could protect their water rights and shape the water laws to meet changing conditions, now and in the future.

66. Compacts can also defeat the jurisdiction and authority of the judicial branch of the State of New Mexico. See *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013). The federal district court overruled this court by holding that state courts have no jurisdiction over certain personal injury cases, notwithstanding such provisions in the compact between Santa Ana and New Mexico.

67. Water compacts also require the utmost caution because the Court of Appeals has held that interstate allocations of water are binding on private water users. *Elephant Butte Irrigation District v. Regents*, 1993-NMCA-009, 115 N.M. 229.

E. If the Navajo Nation obtains this water, it can export the water to other states.

68. New Mexico has the least amount of surface water of any state, according to some calculations. *How much of your state is wet?* http://ga.water.usgs.gov/edu/wetstates.html. New Mexico's very viability as a state hangs in the balance, depending upon its scant water supply. "Agua es vida." The Richardson-Navajo agreement gives away such huge amounts of

water that it raises real doubts whether New Mexico will have enough water to be viable.

69. Water is an article of interstate commerce. *Sporhase v. Nebraska*, 458 U.S. 941 (1982). Therefore the Navajo Nation would have the right under the federal constitution to export its water to other downstream states, like Arizona, Utah, Nevada, and California. *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1982) and 597 F. Supp. 694 (1984) (City of El Paso can pump water from wells in New Mexico for use in Texas).

F. The Legislature might or might not enact the Navajo compact in its present form, and the Governor might or might not sign it into law.

70. As Justice Minzner said in *Clark*,

> {37} . . . Whether or not the Legislature, if given an opportunity to address the issue of the various gaming compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a legislative policy decision.

71. The legislative branch is charged with the duty of enacting such laws as it deems calculated to promote the prosperity, happiness, and general welfare of the people. *Kelley v. Marron*, 1915-NMSC-092, ¶ 5, 21 N.M. 239. "If a change in the statute is necessary or proper, that task [is] for the Legislature." *In re Application of Januskiewicz*, 1986-NMCA-130, ¶ 9, 105 N.M. 306.

72. As Justice Minzner said,

> {20} . . . Although it is not within the province of this Court to evaluate the wisdom of an act of either the Legislature or the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution.

73. It is worth noting that, in the aftermath of *Clark*, the Legislature ultimately passed a statute authorizing gambling compacts, but on very different terms. § 11-13-1. For one thing, the Legislature eliminated the perpetual term of the compacts signed by Gary Johnson.

74. It is pure speculation to guess whether the Legislature would approve, disapprove, or amend the proposed compact in its present form. The only way to find out it is to present the compact to the Legislature for its consideration, with each legislator exercising his or her best judgment. This is the political process – and the constitutional process – mandated by the Constitution and *Clark*.

G. A writ is necessary to preserve the Legislature's constitutional role, to prevent delay and irreparable injury, and to start real negotiations on a viable water compact with the Navajo Nation.

75. An extraordinary writ is necessary for the reasons which Justice Minzner identified in *Clark*. The present proceeding implicates fundamental constitutional questions of great public importance; an early resolution of the

dispute is desirable; large sums of money might be invested; the relevant facts are virtually undisputed; and this pure issue of law will inevitably come to this Court.

76. In addition, there are other factors that support a writ in this case. The district court declined to follow *Clark*. The district court concluded that *Clark* is inapplicable because the Legislature has specifically granted the district courts jurisdiction to adjudicate water rights. Exhibit 3, pages 58-59. However, the pertinent question is not the authority of the judiciary, but the authority of the Governor. The only question raised by this writ is the separation of powers between the executive branch and the legislative branch, a question already decided by *Clark*. Since Governor Richardson lacked the constitutional authority to enter into the Navajo compact on his own authority, the agreement is a nullity. As yet, there is no compact for the judiciary to approve or reject. The decision of the district court is premature. The fairness and reasonableness of the compact must be decided in the first instance by the Legislature. Only then would it become ripe for judicial review.

77. Since the Legislature and the current Governor might or might not approve this compact, the courts may never be presented with the proposed

compact in its present form. As Exhibit 3 shows, this particular water compact raises dozens of legal and factual questions of the first magnitude. However, all of those questions are moot, hypothetical, and premature, unless and until the Legislature acts. Courts do not decide questions which are moot or hypothetical, or render advisory opinions. By deciding this one dispositive issue of law, the Governor's lack of authority under *Clark*, the Court will conserve scarce judicial resources, because the writ will moot all of the other questions in the current appeals.

78. The Court may invoke original jurisdiction even when a matter might have been brought first in the district court. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343, citing *Clark*. Legislators in particular must rely on this Court's original jurisdiction to protect their constitutional prerogatives, because it is impossible for legislators to monitor and intervene in all the pending district court cases around the state which might impair their rights.

79. Although there are several writs which the Court could issue, a narrowly drawn writ of prohibitory mandamus seems most appropriate. It is not necessary to include the current Governor in the writ, because the Governor does not directly control the ISC or the OSE. *New Energy Economy, Inc. v.*

Martinez, 2011-NMSC-006, ¶¶ 14-17, 23, 149 N.M. 207. Nor is it necessary to issue a writ to the district court, because all lower courts are required to obey the decisions of this Court; no writ is required.

80. In the ordinary course, an appeal and certiorari will take years. During this time, the Navajo Nation will receive huge amounts of water under an agreement which is illegal and unconstitutional. This will cause irreparable injury, because there is no effective remedy once the water has flowed down the river, or been consumed by the tribe.

81. The Court of Appeals does not have the power of mandamus, so this speedy remedy is not available in a regular appeal.

82. The courts interpret and construe statutes in order to carry out the intent of the Legislature. Here the Legislature has not yet formulated its intent, so there is no statute and no intent for a court to follow.

83. The governing law is absolutely clear, thanks to *Clark*, *Pueblo of Santa Ana*, and § 72-14-3.

84. The State needs to start real negotiations with the Navajo Nation on a binding and workable water compact, but this will not happen unless the Court issues the writ. Until now, most public officials and legislators have been operating under the mistaken legal belief that the compact is "a done

deal." But the Navajo water agreement signed by the Governor is a nullity, and the judiciary cannot supply the legislative action that a compact requires. By issuing the writ, this Court will jump-start the negotiations and the legislative processes that are needed to arrive at a binding compact. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d at 1559: "The only hope for a satisfactory solution is through dialogue and good faith negotiation between all involved parties."

RELIEF SOUGHT

85. Petitioners respectfully ask the Court to issue an appropriate writ, similar to the writ of prohibitory mandamus which this Court issued in *Clark v. Johnson*. The writ should:

A. Declare that the proposed Navajo water compact is a nullity, because it has not been enacted by the Legislature;

B. Order the Respondents, if they wish to pursue the agreement in its present form, to submit the proposed Navajo compact to the Legislature for its statutory approval, or rejection, or modification; and

C. Prohibit and stay the Respondents from taking any actions to "enforce, implement, or enable" the proposed Navajo compact, unless and

until the Legislature has decided whether a compact should be enacted into law, and if so, on what terms.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

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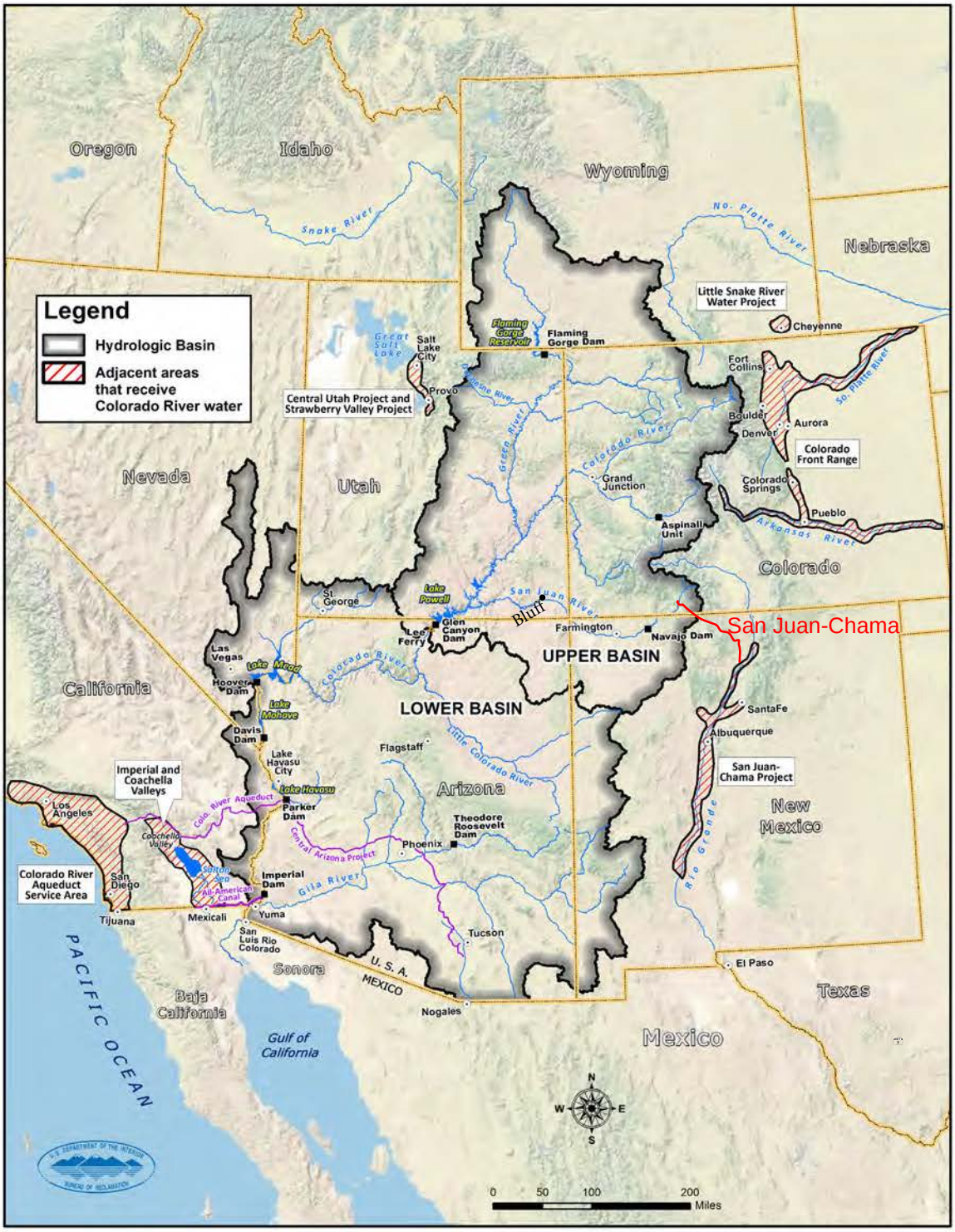
I hereby certify that a true and correct copy of the foregoing was served on the Respondents and the Attorney General on May 14, 2014.

Victor R. Marshall

FIGURE 1
The Study Area



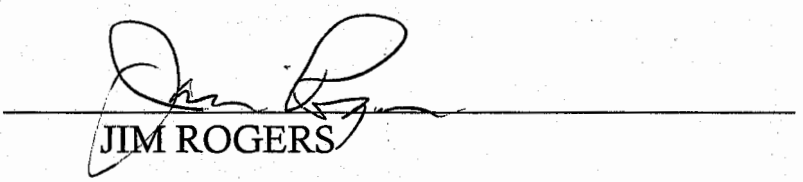
COLORADO RIVER WATER SUPPLY AND DEMAND STUDY
U.S. Department of Interior and Bureau of Reclamation
released December 12, 2012

[San Juan-Chama added.]

EXHIBIT
1

VERIFICATION

I, JIM ROGERS, am one of the petitioners herein. I state and affirm that I have read the foregoing Verified Petition, and that the statements and allegations contained therein are true and correct, to the best of my knowledge, information, and belief.



JIM ROGERS