IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
THE STATE ENGINEER,

Plaintiff-Appellee,

v.

Ct. App. No. 33535
See also
Nos. 33437, 33439, 33534
San Juan County
D-1116-CV-1975-00184, AB-07-1

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; HAMMOND CONSERVANCY DISTRICT; BLOOMFIELD IRRIGATION DISTRICT; VARIOUS DITCHES AND VARIOUS MEMBERS THEREOF,

Defendant-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

BRIEF IN CHIEF BY ANIMAS RIVER ACEQUIAS

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Oral Argument Requested

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Introduction

This brief is submitted by the acequias and parciantes who draw their water from the Animas River in San Juan County in northwest New Mexico. The Animas River flows south from Colorado to Farmington, New Mexico, where the Animas joins the main stem of the San Juan River. Starting from north to south, the acequias (also known as community ditches) participating in this brief are: Twin Rocks Ditch, Ralston Ditch, Cedar Ditch, Graves-Atteberry Ditch, Stacey Ditch, Aztec Ditch, Sargent Ditch, Lower Animas Ditch, Farmers Irrigation Ditch, Eledge Ditch, Kello-Blancett Ditch, Halford Ditch, Independent Ditch, Ranchmans Ditch, Farmington Echo Ditch, North Farmington Ditch, and Wright-Leggett Ditch. The water owners or parciantes on these acequias are also participating in this appeal. (Hereafter the appellants are referred to collectively as "the Animas River Acequias" or "the acequias".)

The Animas River Acequias join in the brief filed by the San Juan Community Ditches. However this brief concentrates on other issues.

Statement of Facts and Proceedings

The acequias concur with the Statement of Facts and Proceedings filed by the San Juan Community Ditches, with the additional note that the

Animas River is governed by the Animas-La Plata Project Compact, § 72-15-1, in addition to the Colorado River Compact, § 72-15-5, and the Upper Colorado River Basin Compact, § 72-15-26.

ARGUMENT

All issues of law and fact are subject to de novo review in this appeal, for the following reasons: issues of law are decided de novo on appeal; the lower court granted summary judgment rather than conducting a trial; and Article XVI, Section 5 of the New Mexico Constitution and § 72-7-1 require de novo review in water cases. See *Santa Fe Resource Alliance LLC v. D'Antonio*, No. 33,704, 2015-NMCA-___, ¶ 26 (Dec. 9, 2015); *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation and Revenue*, 2006-NMCA-050, 139 N.M. 498 (burden is on party who obtained summary judgment to show there are no disputed issues of fact).

A. By signing the Navajo agreement, Governor Richardson attempted to limit the jurisdiction of the New Mexico courts; the authority of the state engineer; and a water owner's constitutional right to de novo judicial review. The Navajo agreement subjects San Juan water owners to a Navajo administrative tribunal, even when the water owners are not Navajo and do not live on the reservation.

By executive action – by signing the Richardson-Navajo agreement – Governor Richardson has attempted to infringe the plenary jurisdiction of the New Mexico courts under Article VI of the Constitution. Governor

Richardson has also tried to cede the regulatory authority of the state engineer to the Navajo tribe. He has also tried to abolish a water owner's constitutional right to de novo review in the district court, which is guaranteed by N.M. Const. art. XVI, § 5 and NMSA 1978, § 72-7-1. The Richardson-Navajo agreement tries to subjugate the water rights of non-tribal members to the legal authority of a yet-to-be-created Navajo administrative tribunal, which would be the only forum for non-Navajos to protest changes in places and purposes of use by the Navajo tribe.

1. The Richardson-Navajo agreement destroys state court jurisdiction because it does not contain a waiver of sovereign immunity by the Navajo Nation or the United States.

The Richardson-Navajo agreement ousts the New Mexico state courts from exercising jurisdiction over the Navajo Nation and the United States. The agreement does not contain a waiver of sovereign immunity by the Navajo Nation, or by the United States. This agreement would continue in perpetuity, but it can never be enforced, because the Navajo Nation and the United States can assert sovereign immunity whenever they choose.

Without comprehensive and perpetual waivers of sovereign immunity by the Navajo Nation and the United States, the Richardson-Navajo agreement is illusory and unenforceable by the state or non-Indians. *State ex*

rel. Clark v. Johnson, 1995-NMSC-048, ¶¶ 3, 39, 44, 120 N.M. 562; *Srader v. Verant*, 1998-NMSC-025, ¶¶ 9-40, 125 N.M. 521 (lawsuit dismissed because Indian tribes were indispensable parties that had not waived sovereign immunity); *Navajo Nation v. United States Dep't of the Interior*, 34 F. Supp. 3d 1019, 1029-30 (D. Ariz. 2014) (Administrative Procedures Act did not waive United States' sovereign immunity).

2. The Richardson-Navajo deal terminates the jurisdiction which the state court currently has under the McCarran amendment.

In 1975, State Engineer Steve Reynolds filed a general stream adjudication for the San Juan River. Since then, the state District Court has been exercising full judicial authority over the San Juan River and the Navajo Nation and the United States, thanks to the waiver of sovereign immunity in the McCarran amendment, 43 U.S.C. § 666. The settlement agreement terminates the McCarran waiver of sovereign immunity, so that the United States and Navajo Nation would be immune from lawsuit. The agreement is cleverly drafted so that the state courts would lose their existing jurisdiction under the McCarran Amendment. RP875-76, in particular sections 13.1, 13.3, 13.4.

The United States and the Navajo Nation have repeatedly told the water court that the court has no authority and no jurisdiction to hear challenges to

actions by the U.S. and the Navajo Nation. The OSE apparently agrees with that position. And the court itself has ruled that it has no authority to review actions by the United States under any standard, RP33797.

In essence, the United States and the Navajo Nation have repudiated the McCarran Amendment, and the lower court has agreed with them. This repudiation of state jurisdiction under the McCarran Amendment is sufficient reason, by itself, to reject Mr. Richardson's settlement. Bill Richardson had no legal authority to destroy the judicial protections which water rights owners have under the McCarran Amendment. He had no legal right to waive the rights of others.

3. The Richardson-Navajo deal destroys the regulatory authority of the state engineer over the San Juan River. Section 17 prohibits the state engineer from metering Navajo water use and eliminates the engineer's authority over changes in points of diversion and purposes of use.

Section 17 cedes all of the state's regulatory authority over 635,000 acre-feet to the Navajo Nation, RP914-21. Section 17 provides that the Navajo Nation, not the OSE, shall have authority to administer the diversion and uses of water awarded by the decree. The Navajo Nation is given the authority to "measure, distribute, administer and regulate the use of water" under the decree, RP915. The OSE is deprived of any real authority: it can

only monitor the use of water and cooperate with the Navajo tribe, *id*. Section 17 prohibits the state engineer from installing measuring devices to monitor water usage by the Navajo tribe. The Navajo tribe would install and run the measuring devices, *id*, so the state engineer would be totally dependent on the tribe; the OSE would have no way to know whether the Navajo figures were correct.

In addition, there is no provision for measuring return flows to the San Juan River, RP16192. So there is no way to measure or limit the total consumption by the Navajo tribe.

Section 17(c) allows the Navajo tribe to change the purpose and place of use without the approval of the state engineer. The tribe is only required to consult with the state engineer "on proposed changes and potential impairment," RP916. The decree authorizes the Navajo Nation to establish an administrative tribunal for receiving protests from Navajo and non-Navajo users, *id*. This provision destroys the regulatory authority vested in the state engineer by New Mexico's water code, and it also destroys the right of water owners to file a protest with the state engineer. This section subjects non-Navajo water owners on the San Juan River to the extraterritorial

jurisdiction of a Navajo administrative tribunal. There is nothing in the state or federal constitutions that allows this.

Section 17 would allow the Navajo Nation to unilaterally change diversion points and purposes of use anywhere on the San Juan River from Navajo Reservoir to the state line, a distance of more than 100 miles. Any change in diversion points or purposes could impair the water rights of non-tribal water users, such as the Cities of Farmington and Bloomfield, and the acequias on the north bank of the river across from the reservation. Section 17 recognizes the potential for impairment of non-tribal rights, but then Section 17 gives the tribe administrative authority over impairment of water rights belonging to persons who aren't tribal members and who don't live on the reservation.

Section 17 deprives the state engineer of his statutory authority to hear protests when the tribe wants to change the point of diversion or the purpose for its water rights. If the Navajo tribe wants to change its point of diversion, it does not have to apply to the state engineer and go through the standard hearing processes. The Navajo Nation can unilaterally change places and purposes of its water use. The state engineer has no authority, because any protests must be heard by some yet-to-be-created Navajo administrative

tribunal. The Navajo tribunal will decide whether the water rights of non-Navajos are impaired, and the tribunal's decision is only subject to minimal review by the New Mexico courts under the substantial evidence standard. If the Navajo tribunal finds the facts against a non-Navajo user, the non-Navajo has no meaningful rights in the state courts, since there will almost always be "substantial evidence" to support the tribunal's decision.

4. The Richardson-Navajo deal unconstitutionally delegates state court jurisdiction over water protests to a yet-to-be-created administrative tribunal run by the Navajo Nation.

Section 17 impairs the authority of the New Mexico judiciary under Article VI, Section 13 of the New Mexico Constitution. The constitution itself vests the judicial branch with jurisdiction and authority "in all matters and causes . . . ." *State ex rel. Foy v. Austin Capital Management, LTD*, 2015-NMSC-025, ¶ 7, ___ N.M. ___, 355 P.3d 1; *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 40, 150 N.M. 64. The Richardson-Navajo deal attempts to cede some of this judicial authority to the Navajo Nation.

Section 17(d) unconstitutionally limits the jurisdiction and authority of the New Mexico judiciary to adjudicate controversies. Once this Navajo administrative tribunal has issued a decision, the decree severely limits the power of the New Mexico courts. Even if a Navajo administrative decision

impairs the water rights of non-tribal members, the decree does not allow New Mexico state courts to protect those rights. The courts' jurisdiction is limited to deciding whether the Navajo decision is fraudulent, arbitrary, capricious; not supported by substantial evidence; or not in accordance with the decree or applicable law.

Bill Richardson had no legal authority to limit the Article VI jurisdiction of the New Mexico courts. His agreement to Section 17 is unconstitutional and *ultra vires*. No Governor – not Governor Richardson, Governor Johnson nor Governor Martinez – has the constitutional authority to limit the plenary jurisdiction of the judicial branch.

The New Mexico Legislature has never enacted any law giving an administrative arm of the Navajo Nation the power to decide objections to changes in purposes and places of use. The legislature has never attempted to restrict the jurisdiction and authority of the New Mexico courts over water rights. To the contrary, the legislature has guaranteed water owners the right of de novo review in district court in water matters. § 72-7-1(E).

5. The Richardson-Navajo deal destroys a water owner's right of de novo review, which is guaranteed by Article XVI, Section 5 of the New Mexico Constitution and § 72-7-1.

Section 17 destroys a water owner's constitutional right to de novo fact-finding by a district court judge in matters related to water. N.M. Const. art. XVI, § 5 guarantees that the District Court will exercise de novo review and fact-finding on any action or inaction by an executive agency relating to water. It is noteworthy that Section 5 of Article XVI was not part of New Mexico's 1912 Constitution. It was added by the legislature and the voters in 1967 to provide the protections of an independent and objective judge. Section 17 of the decree destroys these protections. *Santa Fe Resource Alliance, LLC v. D'Antonio*, 2015-NMCA-___, ¶ 26 (Dec. 9, 2015).

Section 17 also violates statute § 72-7-1, the statute which carries out the constitutional guarantee of de novo review.

B. The U.S., Navajo Nation, and the OSE violated due process by deliberately using defective lists for mailing notice of the inter se, even after the acequias offered to provide better membership lists at no cost to the government.

The record below shows the following:

1. The three governments did not conduct a current hydrographic survey of the San Juan River, which is required by statute. §§ 72-4-13 through 17. RP2221. Instead, "The United States' Hydrographic Survey of Navajo Lands in the San Juan River Basin," RP949-1364, was substituted. This purported hydrographic survey was limited to Navajo lands; it was not based

on any new field work; and it was prepared by the U.S., an adversarial party. A current hydrographic survey was needed to identify current water owners, so that they can be given notice and an opportunity to participate in court proceedings. Obviously, the U.S. document did not do that. The three governments avoided doing a real hydrographic survey because it would have identified many additional water owners who opposed the Navajo water claim.

2. **The United States, OSE, and Navajo Nation used the 1938 hydrographic survey, which was 73 years out of date.** They also used the 1948 Echo decree, which is more than 63 years out of date, RP2221.

3. **The plaintiffs did not check the San Juan County real estate records filed with the County Clerk**. These records show the current owners of every parcel of land along the San Juan River. These records are available at the County Clerk's office. See RP6928 (email from Victor Marshall to Arianne Singer: "Have you looked in the county real estate title records (at the county clerk), in addition to the county assessor, to see who currently owns tracks below the ditches?"). The real estate records are also available at title companies, which are required by statute to keep current title records. § 59A-12-13. Title records are easily searchable by computer. (The plaintiffs said

they looked at the County Assessor's records, but those are not the same and not as complete as the County Clerk's records.)

4. **The plaintiffs refused to use the updated acequia membership lists which the San Juan Agricultural Water Users Association offered to provide at no cost**. RP6931, 6933, 6929, 6924, 6918-23, 6925-33.

5. **The plaintiffs received 2,425 returned envelopes from the U.S. Postal Service without forwarding addresses. The plaintiffs made no effort to locate any of those people**. RP2233-34.

6. Arianne Singer, the OSE attorney, admitted during the court hearing on July 19, 2011, that she had no personal knowledge of how the mailing lists were prepared. By then the lists were more than a year out of date, and the employees who compiled the list had left.

7. After the plaintiffs refused to use the updated acequia membership lists, the acequias filed them with the court. The acequias asked the three plaintiffs to do a merge/purge of the mailing lists to do an additional mailing to the persons who had been missed. The plaintiffs refused, and the court did not require a supplemental mailing to the missing persons.

8. After the acequias filed updated mailing lists with over 10,000 current water owners, the plaintiffs joined in motions to strike their entries of appearance. See point C below.

9. The acequia defendants filed a Notice of Constitutional Defect in Service List, RP7542-45, but it had no effect.

The government plaintiffs deliberately violated the minimum due process requirements imposed by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and a long line of subsequent cases, including *Macaron v. Associates Capital Services Corp.*, 1987-NMCA-005, 105 N.M. 380, and *Patrick v. Rice*, 1991-NMCA-063, 112 N.M. 285. The three governments made a conscious decision to avoid searching the records, contrary to *Mullane*. This litigation tactic drastically reduced the number of persons who could object to the Navajo water claim.

In *Mullane v. Central Hanover*, the United States Supreme Court decided that the due process clause of the United States Constitution requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court applied *Mullane* to invalidate an Indiana tax

sale, because the Indiana tax code did not provide that the holder of a recorded mortgage, whose identity and address were reasonably ascertainable, be given actual notice of an impending tax sale. *Mennonite* holds that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." 462 U.S. at 798.

Following *Mennonite*, the New Mexico Court of Appeals has ruled that notice by publication does not provide a mortgagee of real property with constitutionally adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. *Macaron*, ¶ 7. The trial court had found that the bank should have been on notice of a possible tax sale because a tax lien had been filed prior to the mortgage. ¶ 6. The Court of Appeals reversed, noting that *Mennonite* does not impose any extraordinary obligations on the state, only reasonably diligent efforts to discover names and addresses of those whose interest could be ascertained. "Here, extraordinary efforts were not necessary; the Bank had recorded the mortgage in county clerk's office so that the identity and address of the bank were readily ascertainable." ¶ 10.

In *Patrick v. Rice*, this Court invalidated a tax sale because the county tax division did not provide mailed notice to the taxpayers, even though there was substantial evidence that the division searched for the address with reasonable diligence. 1991-NMCA-063, at ¶ 8. Even though the plaintiffs and the taxing authority were both partly to blame for the tax delinquency, ¶¶ 3, 4, the county's efforts were inadequate to meet due process standards. Bare compliance with statutory notice requirements does not meet constitutional standards; the means employed to give notice must be "such as one desirous of actually informing [the interested party] might reasonably adopt to accomplish it." *Patrick*, ¶ 10, quoting *Mennonite* and *Mullane*.

Patrick also holds that the constitutional adequacy of notice is "a static threshold based in law", i.e., a question of law, not a question of fact. ¶¶ 13-14. The reasonable ascertainability of a property taxpayer's identity and address must be decided independently by the appellate court. *Patrick* held that there were numerous ways the taxing authority could have ascertained the taxpayers name and address, such as information in the file, a check with the correct address and phone number, and tagging the property. The court declined to decide whether any particular piece of information made the current address reasonably ascertainable. "Overall, there were too many ways

the division could have ascertained plaintiffs' current address for us to say that it was not reasonably ascertainable." ¶ 16.

Mullane and later cases deal with the due process rights of persons who might not be the actual owner of the property, like a mortgagee. In the present case the plaintiffs were required to give notice to property owners themselves, whose names and addresses are easily ascertainable from the records of the San Juan County Clerk. Since water rights are appurtenant to the land, § 72-1-2, the owners of the land also own the water rights being affected by the Navajo inter se, except in rare instances. In the relatively few instances where water rights have been transferred or leased away from the real property, the name and address of the transferee or lessor is ascertainable from the OSE's own records and the records of the County Clerk. Wherever acequias and community ditches are supplying water to the properties, the membership records of the acequia provide readily ascertainable data about the current water users.

C. The lower court prevented more than 9,000 water owners from having an attorney in the Navajo inter se. The court required every individual water owner to sign an attorney contract in ink, contrary to *George v. Caton*.

After the three governments mailed notices about the Navajo inter se using the defective mailing lists, RP7542-45, the court allowed a time period

for filing "notices of intent to participate", RP2236. The Marshall law firm had been working with more than 20 acequias to provide legal representation to them and their members, so the law firm filed a notice of intent to participate listing 10,025 water owners who were shown on the acequias' membership lists, RP5204-5573. During this period most of the acequias in the San Juan Valley signed a written contract with the Marshall law firm to represent them and their members in the Navajo inter se proceeding, with funding to be provided by assessments of $3 per irrigated acre, RP6918. The contracts for legal representation were approved and signed by the boards of the 24 participating acequias, RP6917.

Because there would inevitably be some errors in a list of more than 10,000 water owners, the Marshall firm filed an explanation of its entries of appearances and offered to exclude anyone who wished to hire other counsel, or to participate pro se, or to not participate at all, RP5050.

From the list of more than 10,000 names, 23 water users notified the firm, so they were eliminated from the firm's entry of appearance, RP6893-94; 6939-40; 7427-28; 7574-75; 8293-94.

The lower court ruled that this was insufficient. The court held that in order to obtain legal representation in the Navajo inter se case, each individual

water owner had to sign and execute a written contract with the law firm, RP7822-44.

The court-imposed requirement was impossible to fulfill, because there were thousands of water owners scattered up and down the San Juan and Animas River valleys, on both banks of the rivers over a total distance of more than 120 miles. And many water owners lived elsewhere, some of them outside of San Juan County and some outside of New Mexico.

Many of these water owners did not even know about the Navajo case, because they never received notice, since the court allowed the three governments to use defective mailing lists.

The community ditches pointed out that this requirement was illegal under *George v. Caton*, 1979-NMCA-028, 93 N.M. 370, which holds that the existence of an attorney-client relationship does not depend on the execution of a written contract. 10-26-11 Hearing 2:41:05 through 2:44:39, RP7506. However the lower court declined to follow *George*, RP7832-33.

The court's ruling prevented more than 9000 local water owners from having legal counsel in the case. To comply with the lower court's order, the entry of appearance was reduced from 10,005 persons to less than 1,000.

The lower court's order was a plain violation of *George*, 1979-NMCA-028, ¶¶ 24-25:

> No formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978); *Farnham v. State Bar*, 17 Cal. 3d 605, 131 Cal. Rptr. 661, 552 P.2d 445 (1976); *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977); . . . *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975); . . . *Lawrence v. Tschirgi*, 244 Iowa 386, 57 N.W.2d 46 (1953); . . . . [some citations omitted]
>
> The contract may be implied from the conduct of the parties. *Kurtenbach*, *supra*; *Lawrence*, *supra*. All that is required is a statement by an attorney that he would "handle" her matter. *Fuschetti v. Bierman*, 128 N.J. Super. 290, 319 A.2d 781 (1974), or that the work requested will be done "in very good fashion." *Farnham*, *supra*, or, "it's all been taken care of," *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288, 294 (1970), or, an attorney's promise "to see what could be done with regard to settlement,'" *Tormo*, *supra* [398 F. Supp. at 1169], or, when asked if he would take the case, the attorney said that he would. *Bresette*, *supra*.

George also holds that an attorney has a duty to act to protect the client, regardless of formalities, ¶ 40.

Prior to a recent rule amendment, a client did not need to sign a written contract to obtain the services of an attorney. See Rule 16-105(C) in effect at the time (only contingent fee contracts are required to be in writing).

The court's action runs contrary to a judge's duty to see that litigants have counsel to the maximum possible extent. Rule 21-206(A).

In addition to preventing thousands of local water owners from having legal representation, the court imposed a sanction of $500 on the Marshall law firm for attempting to represent them. The lower court did this at the request of the San Juan Water Commission, even though the court acknowledged that the firm was acting in good faith, RP7839, 7843.

This ruling and this sanction must be reversed. If this precedent is not reversed, ordinary water owners will have no feasible way to join together to hire an attorney. Ordinary water rights owners on other rivers will be excluded from water adjudications by the thousands, just as happened here.

D. The lower court violated due process and the Rules of Civil Procedure by creating special rules in consultation with the settling parties before the defendants were given notice of the proceeding. These ad hoc procedures were slanted in favor of the settling parties.

The lower court established special ad hoc procedures for hearing the Navajo inter se before local water owners were even given notice that they were being sued. The trial court deprived water owners the acequias of the opportunity to be heard on the procedures that would be used against them in the inner say, while it allowed the settling parties and other special interests to recommend procedures that were slanted against the defendants. This is a violation of due process and the Rules of Civil Procedure, because a party to

litigation has a right to be heard on the procedures to be used in the case, not just the substance of the case.

The lower court entered its order establishing procedures for the inter se on August 19, 2010, almost nine months before notice of the proceeding was mailed to water owners in May of 2011, RP2212. Although the San Juan adjudication had been pending since 1975, more than 35 years, none of the water rights owners on the San Juan had were served with process, except for a relatively small number of persons on the La Plata section.

As a result most water owners did not even know about the preceding until months after the court had established special procedures after listening to the settling parties and other special interests. Water rights owners had no opportunity to hire a lawyer or to be heard on the procedures that would be used, or to make suggestions of their own to the court.

Because the defendants had no notice and opportunity to be heard about the procedures to be used in the case, and because the court only heard from the three governments and the big special-interests who already had lawyers and knew about the case, the court adopted ad hoc procedures that were slanted in favor of the settling parties and against the water owners. For example, the court abolished the pleading requirements under the Rules of

Civil Procedure so that the settling parties did not have to file a complaint setting forth the legal and factual basis for their claims. And the court denied water owners their right to file a counterclaim to establish that their water rights were superior to those of the Navajo Nation.

The court did away with service of process, because the settling parties told the court that proper service of process would be too costly. The court also abolished the requirement of a hydrographic survey, which is required by statute. §§ 72-4-13 through -17. The court substituted a fake hydrographic survey prepared by the United States and the Navajo Nation without any fieldwork, RP949-1364. This pseudo-hydrographic survey was a compilation of unverified information compiled by the adversarial claimants – the Navajo Nation and the United States – from unverified and unidentified sources.

A real hydrographic survey is required by statute because it is the only reliable way of identifying the current water users on the San Juan River. Many water rights are transferred when properties are bought and sold, and many of these transfers are never reported to the OSE. The OSE records are a shambles. For many years the OSE simply maintained a physical file folder with no controls, so that a person could take records from the file or add them. Title companies do not keep records of water rights, and do not include them

in their title policies. So a hydrographic field survey is the only way to identify the names and addresses of water rights owners. The state engineer did an actual hydrographic survey in preparation for the Echo decree in 1948. That was a very thorough and comprehensive survey, but the survey was more than 75 years ago.

The settling parties convinced the judge that the OSE was unable or unwilling to do the hydrographic field survey required by § 72-4-13. So the court simply junked the requirement, which it had no authority to do.

The lower court erroneously asserted that it had the legal authority to override the Rules of Civil Procedure and the water statutes because of Rule 1-016(C)(10), RP784. This is legal error: Rule 1-016(C) only pertains to subjects that might be discussed at pretrial conferences after all the parties have been joined. Rule 1-016 does not even apply to this situation, because the defendants had not yet been joined in the action, or even given notice of it, so they had no ability to participate in the supposed pretrial conference.

Rule 1-016(C)(10) does not swallow up all the other Rules of Civil Procedure. It does not give a judge authority to modify the rules on pleading, or the rules for summary judgment, or the rules of evidence. Rule 1-016 simply gives an incomplete laundry list of the sorts of things that might be

discussed by the participants in a pretrial conference. Rule 1-016(C)(10) does not abolish all the other rules of civil procedure. Many of the other rules are mandatory, not optional like Rule 1-016, so the other rules remain in place. All of the rules of civil procedure must be construed together, to secure just, speedy and inexpensive determination of every action. Rule 1-001(A).

Therefore the lower court erred when it misconstrued Rule 1-016(C)(10) to override the other rules of procedure.

E. The lower court denied the acequia defendants the right to prove their water rights relative to the Navajo Nation, in violation of *Reynolds v. Allman*, *Tri-State*, and Rule 1-071.2.

In the Navajo inter se proceeding, AB-07-1, the Navajo Nation, the United States, and the State Engineer sought a court judgment that the Navajo Nation has a right to 635,000 acre-feet of water with specified priorities relative to the acequia defendants and all other water users in the San Juan Basin, RP841-948.

In response, the acequias community ditches filed a counterclaim seeking a judgment from the court that the rights and priorities of the acequias are superior relative to the rights of the Navajo Nation, at least for the most part, RP12178-260. For the very first time, after more than 37 years of litigation, other water rights users should have been allowed the opportunity to

prove that the Navajo Nation is not entitled to more than 600,000 acre-feet of water from the San Juan River, and to show why other water users have water rights which are superior in amount and priority to the Navajo claims. The adjudication of relative amounts and priorities is the essence of any inter se proceeding. An inter se allows – and requires – competing claimants to prove the priority and the amount of their water rights relative to other water users. In their counterclaim, the acequias sought court orders enforcing their superior water rights as against the Navajo Nation, the United States, and the State Engineer. In their prayer for relief, the community ditches asked for for a court judgment that can be enforced against the Navajo Nation, the United States, and the State of New Mexico, so that the community ditches actually receive the wet water to which they are legally entitled, RP12214-16. The acequias later moved to amend their counterclaim to conform to the evidence and law developed during the course of the proceedings, RP17817-17906.

The law required the acequias to assert their counterclaim in the inter se, because it was a mandatory counterclaim under Rule 1-013(A):

> A pleading shall state as a counterclaim any claim which . . . the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The claims of the acequias against the U.S. and Navajo Nation fall under this rule, because the claims arise out of the same subject matter – establishing rights to the San Juan River. And the water court already had jurisdiction over the U.S. and the Navajo Tribe pursuant to the McCarran Amendment. Indeed, the San Juan adjudication is the only forum where the acequias can enforce their water rights against the U.S. and Navajo Nation. In any other forum, those two could assert sovereign immunity, and the case would be dismissed. *See, e.g., Srader v. Verant*, 1998-NMSC-025, 125 N.M. 521.

Counterclaims among water claimants are also essential under Rule 1-071.2, whereby the court adjudicates the quantities and priorities of water rights against all others. Rule 1-071.2(B)(1):

> An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit . . . both as between the plaintiff and the defendant and as among the defendant and other water rights claimants.

The penalties for omitting a mandatory counterclaim are harsh. If a party fails to assert a mandatory counterclaim, it is lost forever. *Adams v. Key*, 2008-NMCA-135, ¶ 15, 145 N.M. 52 (citing *Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces*, 1987-NMSC-018, 105 N.M. 433).

Therefore the acequias had to assert their water rights against the Navajo Nation in AB-07-1. They had no choice. Their counterclaim must be asserted in the inter se proceeding, because "[f]ailure to plead a compulsory counterclaim bars a later action on that claim." *Bentz v. Peterson,* 1988-NMCA-071, ¶ 18, 107 N.M. 597; *see also Financial Indem. Co. v. Cordoba*, 2012-NMCA-016, ¶ 17, 271 P.3d 768.

However, the water court refused to hear the acequias' mandatory counterclaim. RP14158-62. This ruling is contrary to Rules 1-013(A) and 1-071.2 It is an outright denial of the right to be heard in court, levied against thousands of water owners who have no other forum to protect their rights. These water owners have water rights which were adjudicated by the Echo Decree in 1948, but now those rights have disappeared. Their rights cannot be enforced against the U.S. and Navajo Nation. They are barred forever, unless this court reverses the lower court ruling.

An inter se is a two-way street, but the lower court turned it into a one way street. By what authority did the district court refuse to hear a compulsory counterclaim? In the courts of this state, counterclaimants have equal rights with plaintiffs.

The district court said that it would consider the counterclaim as objections to the claim of the Navajos, RP14161, but that is not sufficient. A litigant has the right to frame and present his claims as he chooses. Further, every litigant is entitled to a judgment from the court if his claims have merit. Rule 1-054(C) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled").

When the district court refused to allow the acequia defendants to establish their priorities relative to the Navajo Nation, the court committed an outright violation of *State ex rel. Reynolds v. Allman*, 1967-NMSC-078, ¶¶ 11-16, 78 N.M. 1. *Allman* is directly on point: the Supreme Court ruled that it was a denial of due process when the trial court denied the defendant-appellants an opportunity to prove the relative priority of their water rights in an inter se proceeding.

> [W]e do not understand the basis for denying appellants an opportunity to establish their water rights in relation to those of the Canal Company.
>
> * * *
>
> [T]here can be no question that hearing and overruling appellants' motions attacking the priority adjudged to the Canal Company does not amount to a complete determination of the issues between the parties so as to satisfy the requirements of due process.
>
> * * *
>
> That a hearing to determine "relative rights of the parties, one toward the other" was to be held before the final decree was to

> be entered is specifically stated. We do not understand that anything less than a hearing where evidence could be offered and received to establish the claims concerning conflicting priority dates of rights found to exist could be considered to be a compliance with the requirements of due process as already discussed.
>
> * * *
>
> It would seem self-evident that if relative priorities "one toward the other" were open for determination before the final decree was entered, it would necessarily follow that the determination of the various rights would be made by application of identical standards and rules. . . . [Defendant-Appellants] should have been permitted to present such proof as was pertinent to establish the relative priorities of their claims as related to those of the Canal Company.

By striking the mandatory counterclaim in the inter se, the court contradicted *Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 7, n.1, ___ N.M. ___, 289 P.3d 1232 (cited as supplemental authority, RP14143).

> Inter se is defined as "between or among themselves." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 463 (2d ed. 1995). In terms of water rights, inter se adjudications provide the opportunity for parties to dispute the determination of their water rights among each other and not simply challenge their individual claims with the State Engineer. *See, e.g.*, Rule 1-071.2 NMRA (defining inter se procedures for the adjudication of stream system priorities).

The dismissal of a counterclaim is subject to the same legal standards and procedures which apply to the dismissal of a complaint. For purposes of a 12(B)(6) motion, the allegations of the counterclaim are taken as true, as well

as all inferences from the allegations. *Financial Indem. Co. v. Cordoba*, 2012-NMCA-016, ¶ 16, 271 P.3d 768 (district court erred in dismissing counterclaim because the counterclaim was based on documents which eventually might have been ruled inadmissible in evidence). A counterclaim can be dismissed only if there is no conceivable set of facts under which the counterclaimant would be entitled to relief.

A counterclaim is entitled to the same credence and weight as a complaint.

> Challenges to the sufficiency of a counterclaim . . . are subject to the same rules as when they are directed toward an original complaint. The allegations in the pleading being attacked are taken as true and the motion will be denied if there is any possible theory upon which relief ultimately might be granted.

6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 1407, at 38 (2d ed. 1990).

By refusing to hear the mandatory counterclaim , the district court violated the fundamental rule of law that "every case has two sides." This rule is set forth in the instructions to every jury. UJI 13-110: "Last, there are at least two sides to every lawsuit. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed

and submitted to you." *See also* UJI 13-302D on claims and counterclaims. A counterclaim is entitled to the same weight as a complaint.

Additionally, the New Mexico appellate courts have interpreted Rule 1-013 to mean that a defendant permanently loses its counterclaim with prejudice if the defendant voluntarily dismisses its counterclaim. *Adams v. Key*, 2008-NMCA-135, ¶ 15, 145 N.M. 52 (citing *Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces*, 1987-NMSC-018, 105 N.M. 433).

Unless it is reversed, the lower court's ruling means that all San Juan water users have lost any chance to prove their water rights relative to the Navajo Nation and the U.S. This seems to be what the lower court intended when it stated that the state engineer will be able to cut off the water supply to the acequias, RP33759-60.

F. There are no permits for the water rights claimed by the Navajo Nation and the United States.

The Navajo Nation and the U.S. falsely asserted that they held valid permits from the state engineer for NIIP and the other water rights they claimed. *See, e.g.*, 6-12-13 Tr. 8:49 am, RP17508. Stanley Pollack for the Navajo Nation told the court:

> **The United States holds water pursuant to a permit that was made in 1955.** That permit is for far more water than the amounts of water that this settlement contains. There is nothing to stop the

> Secretary of the Interior from contracting with the Navajo Nation for any amount of water in that permit, even in excess of the amounts of water that this settlement contains. . . . **So, there's nothing that this court can do to stop the United States from contracting with the Navajo Nation for that [water].**

The U.S. and the Navajo Tribe were not telling the truth. Discovery revealed that there are no valid permits held by the U.S. or the Tribe. The alleged permits do not exist.

In discovery responses filed December 3, 2012, the OSE admitted that it had no records showing that notice of the permit applications was ever published. Publication is required by § 72-5-4, so that persons can protest or object to the applications under § 72-5-5.

On May 10, 2013, the State again admitted that there are no permits: "While the applications that were endorsed by the State Engineer pursuant to NMSA 1978, § 72-5-33 may not technically be 'permits', we are referring to them as permits as a matter of convenience for the Court and parties." State's Consolidated Response at 7 n.l, RP16454; see also U.S. Response to Motions Seeking To Invalidate at 2 n.l, RP16469 (May 10, 2013) (we'll keep calling them permits).

Faced with these facts, the three governments then did an about-face. **In collusion with the U.S. and the Navajo Tribe, the state engineer argued for**

the very first time that federal projects are exempt from OSE permitting requirements, RP16455-57. This unprecedented argument is directly contrary to the position of all previous state engineers, who have always required an application, publication, and then a permit for federal projects. This novel argument nullifies the water code and abdicates state regulation to the federal government and the tribes.

The settling parties' hasty new interpretation violates long-established law. The New Mexico Court of Appeals held in *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, ¶ 14, 115 N.M. 229 that "[I]ndividuals seeking to appropriate water after that date [March 19, 1907] are required to seek a permit from the state engineer.". In *Jicarilla Apache Tribe v. Untied States*, 657 F.2d 1126, 1132, 1133, 1144 (10th Cir. 1981), the Tenth Circuit ruled that the United States must apply for a permit from the state engineer for a federal project.

Nevertheless, the lower court agreed with the state engineer, the U.S. and the Navajo Nation. The court ruled that no permit or application or publication is required for a federal project, RP33804. This ruling destroys the OSE's ability to regulate almost every river in the state.

G. The Navajo Nation can export the water to other states.

The lower court opinion erroneously concluded that the Navajo Nation and the United States have agreed not to transfer water out of New Mexico without the consent of the State Engineer, RP33779. This is plain legal error. First, the opinion misreads the agreement: the agreement does not prohibit the Navajos from exporting the water awarded under the decree. Second, the court's opinion contradicts the commerce clause of the United States Constitution. Numerous federal cases have held that a state cannot prohibit the export of water. *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984).

The Richardson-Navajo agreement is deceptively drafted to create the illusion that the Navajos cannot export the water to other states. Section 17(g), RP919, of the agreement says that the Navajos must get the consent of the State {Interstate Stream Commission and applicable law} to export water, but it does not say what happens after that. Water is an article of interstate commerce, so New Mexico cannot withhold its consent to prohibit the export of water to another state. *Sporhase*.[1]

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[1] One way to think about the issue is to ask, "Can the State of New Mexico prohibit the export of oil and gas to other states?" The answer is no, for the same reasons that the State of New Mexico cannot prohibit the export of water.

If water is awarded to the Navajos, then that water can be exported to another state. *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) (the state cannot prohibit the export of water); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984)(the state cannot discriminate against the export of water). The state cannot withhold its consent or place special burdens on exports to prevent water from leaving the state. This is why the City of El Paso is currently pumping groundwater from the Mesilla Valley in New Mexico and taking it to Texas.

The Navajo Nation takes the position that, if it were awarded water through approval of the proposed agreement, then it would have the right to export that water at a later time. The Navajo Nation's lead water attorney stated the Navajo position to The Farmington Daily Times in February of 2011, during a public meeting organized by the Navajo Nation, the U.S., and the OSE to promote the Richardson settlement to local water owners. When asked if the Navajo Nation had the right to export water to other states, Stanley Pollack saidsaid the Navajo have no such plans, but he believes it is within their right to do so. Jenny Kane, *Aztec, Bloomfield Oppose Water Rights Settlement*, The Daily Times, Feb. 2, 2011.

The previous State Engineer (John D'Antonio) unequivocally stated on many occasions that the settlement agreement prohibited the Navajos from exporting water to other states. So did Esteban Lopez, director of the Interstate Stream Commission. However, during testimony before the Senate Conservation Committee of the New Mexico Legislature on January 31, 2012, Mr. Lopez changed his position, and conceded that the Navajos did have the right to export water which they might be awarded, subject to some regulation by the State Engineer.

H. The water court correctly ruled that approval of a settlement must consider the reduction of water supply to other water users on the river. But then the court contradicted itself by ruling that it is irrelevant whether there is enough water in the river to supply other users.

On February 3, 2011, the lower court ruled that "[t]he Settling Parties shall have the burden of production and the burden of persuasion to demonstrate that . . . (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights . . . . The Objectors need not demonstrate injury to their own water rights in order to state a cognizable objection." RP9842-43. The February 2011 ruling was correct.

However, the court reversed course after the objectors presented evidence that the water supply in the San Juan River is far too small to supply 635,000 acre feet to the Navajo Tribe and supply local water users at the same time. This evidence came from the federal government's own study. Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study Report (December, 2012), www.usbr.gov/lc/programs/crbstudy.html.

This evidence made it impossible for the lower court to grant summary judgment in favor of the U.S. and Navajo Nation. So then the lower court contradicted its earlier ruling, by opining that the adequacy of the water supply is irrelevant. RP33758-60. But when the water is adequate, there will be "impacts" on junior water owners: they will be shut down.

When the court ruled that the availability of water is irrelevant, the court contradicted the entire body of western water law. Western water law is an adaption to the environment, to cope with the scarcity of water in the arid regions of the U.S. See Wallace Stegner, *Beyond the Hundreth Meridian* (1953).

Nevertheless, the lower court ruled that water scarcity does not matter, RP33796. This violates *State ex rel. State Engineer v. Commissioner of Public Lands*, 2009-NMCA-004, ¶ 17, 145 N.M. 433:

> Such dormant and indefinite rights can be very problematic when it comes to adjudicating and administering water rights in an arid state, such as New Mexico. Many stream systems in such states are already fully appropriated, and a determination that federal reserved water rights exist often requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *New Mexico*, 438 U.S. at 705. Further, as demonstrated by this case, claims to federal reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights existing under state law.

The ruling is also contrary to *State ex rel. Martinez v. City of Law Vegas*, 2004-NMSC-009, 135 N.M. 375.

If one accepts the inverted logic of this ruling, then the United States and tribes could take all the water in the Rio Grande, because it would be irrelevant to the judge that his decision would make Albuquerque and Santa Fe disappear for lack of water.

I. The lower court summarily ruled that global warming is irrelevant.

On December 12, 2012 the United States released a massive multi-disciplinary, multi-year study on climate change and its effects on the Colorado River basin during the next 50 years. Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study Report (December, 2012), www.usbr.gov/lc/programs/crbstudy.html.

The 2012 BOR study confirms many other scientific studies which show that global warming is causing a mega-drought in the American Southwest. Virtually all of these studies conclude that the American Southwest is one of the areas most damaged by current climate changes. Climate change is causing multiple adverse effects on the region: lower precipitation, higher temperatures, increased evaporation, lower snow pack, shorter runoff in the spring, depletion of groundwater, etc.

The acequias presented admissible evidence from these studies that was more than sufficient to raise major questions of fact about whether there would be enough water to supply 635,000 acre-feet to the Navajo tribe. This is a disputed question of fact which required a trial, because it was not susceptible to summary judgment. Nevertheless, the lower court disposed of the entire issue by ruling it to be irrelevant as a matter of law, RP33795-97, 33758-60.

J. The court ruled on summary judgment that water for endangered species is irrelevant.

The United States asserts that it can require more than 700,000 acre-feet to be delivered downstream to Bluff, Utah to protect endangered species under the Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973), codified at 16 U.S.C. §§ 1531-44. RP14462; 14468;

14472-75. Delivering that much water to Utah would leave New Mexico with little if any water for local use by non-Indians in New Mexico, RP14465-67.

However, the lower court refused to consider this evidence, even though it comes from the federal government's own reports. The lower court ruled that these facts, even if true, are legally irrelevant and immaterial, RP33759-60.

On the San Juan River, the United States protects 4 fishes and 1 bird as endangered species under the Act: the razorback sucker (*Xyrauchen texanus*); Colorado pikeminnow, formerly known as Colorado squawfish (*Ptychocheilus lucius*); humpback chub (*Gila cypha*); bonytail chub or bonytail (*Gila elegans*); and southwestern willow flycatcher (*Empidonax trailli extimus*). To protect these federally endangered species, the Colorado River Basin Water Supply and Demand Study Report calls for a required minimum in-stream base flow of at least 500 cfs to at least 1,000 cfs, at Bluff, Utah. In addition, larger pulses of water are required in the springtime, in the discretion of the U.S. Fish and Wildlife Service. Over the course of one year, this amounts to more than 700,000 acre-feet, RP14472-75.

Bluff is downstream from New Mexico, so any water delivered to Bluff for endangered species cannot be consumed within New Mexico. This

is unlike the silvery minnow in the Rio Grande, where the instream flow can be used farther downstream within New Mexico. Furthermore, the amount of water claimed for the razorback sucker is almost 100 times the amount claimed for the silvery minnow.

The U.S. claims that it has the right to adjust the amounts for endangered species up or down, in its sole discretion. The U.S. also asserts that the state court has no jurisdiction or authority to review any of its decisions, no matter how they affect water rights in the San Juan River. 2-4-13 CD 10:45:50 through 11:27:33, RP14021-27; RP875-76.

K. The court summarily refused to consider other U.S. claims for reserved water rights for other tribes, national parks, and forests.

The acequias asked the district court to consider the availability of water and the impacts on other water users. RP14462-77. The court refused.

L. The court summarily ruled that water shortages under the Colorado compacts are irrelevant.

Using the Colorado River Basin Water Supply and Demand Study and other data from the federal government, the acequias prepared a motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users. The federal government's own data shows that in most years the Richardson-Navajo agreement will create huge water deficits for

New Mexico under the Colorado Compacts. These deficits are the result of several factors, including:

- the shrinking natural water supply during the next 50 years as drought and global warming increase;
- the amounts of diversion and depletion in the Richardson-Navajo agreement,
- the amounts of water demanded by the United States for the protection of endangered species;
- evaporation from Colorado River reservoirs like Lake Powell and Navajo Reservoir;
- the operation of the Colorado Compact, which requires New Mexico and the other states of the Upper Basin to deliver 83 million acre-feet every 10 years to the Lower Basin.

[The source government documents were attached as exhibits to the motion, RP14462-77]

The Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948 determine how much water is available for New Mexico. Under the 1922 compact, New Mexico and the other upper basin states must deliver 83,000,000 (83 million) acre-feet of water every 10 years to

the lower basin at Lee Ferry, just below Lake Powell. This 10 year rolling obligation includes 75,000,000 acre-feet for the lower basin, plus 7,500,000 acre-feet for the treaty with Mexico, plus 500,000 acre-feet for Arizona's portion of the upper basin. § 72-15-5, Article III(d)

Under the 1948 compact, New Mexico is allocated only 11.3% of the water that remains, if there is any, after the Upper Basin delivers 83,000,000 acre-feet to the Lower Basin. § 72-15-26, Article III(a)(2).

In really dry years, which are occurring more often, the Colorado River does not supply enough water to meet the yearly delivery obligation of 8.3 MAF to the Lower Basin. In some years there might be no water available for non-Indian users in San Juan County. In most years (and in most ten-year periods) there would be huge unresolved deficits to the lower basin, amounting to hundreds of thousands of acre-feet. RP14462-77.

The BOR's own study shows that there is not enough water in the Colorado/San Juan River system to meet all of the demands on the San Juan River. The natural supply is insufficient to do all of the following:

> meet the obligations under the Colorado Compacts;
> AND
> provide 600,000 AF annually to the Navajo Nation under the Richardson agreement;
> AND
> supply instream water to Bluff UT for endangered species

AND
meet other federal claims for reserved water;
AND
supply water to Gallup;
AND
supply water to cities and farmers and industry in San Juan County;
AND
supply water to the Rio Grande through the San Juan-Chama project.

The Richardson agreement contains some shortage sharing provisions, but these temporary sharing measures will not cure the permanent problem. A shared shortage is still a shortage.

This evidence comes from the federal government, so it is admissible against the settling parties under Rule 11-801(D) (statements of a party opponent). The evidence indicates that awarding 635,000 af to the Navajo tribe would wipe out all junior water users in San Juan County.

On summary judgment, the court ruled that all these facts are irrelevant and immaterial as a matter of law, RP33771-72. This was plain legal error.

M. If the Richardson-Navajo agreement ever becomes final, in most years there will be large water deficits on the San Juan River system. These water shortages will cut off or cut back the water supply to the Rio Grande through the San Juan-Chama Project, impairing the water supply for Albuquerque, Santa Fe, and the Middle Rio Grande Conservancy District.

On the San Juan River, the San Juan-Chama Project has a very low priority date – 1955 at best. Therefore diversions for the San Juan-Chama

Project will be among the first to be shut down when there is a priority call on the San Juan River. Many users on the Rio Grande are depending on this water supply, like Albuquerque and Santa Fe, but the water won't be there.

N. There are other ways to satisfy the federal government's obligation to provide water to meet the "minimum needs" of the Navajo Reservation in New Mexico, but the court refused to consider them.

[Note – The district court never ruled on this point. This was part of the counterclaim which the court refused to hear, RP12185-87; 14158-62.]

In the Colorado River compacts of 1922 and 1948, the signatory states and the United States agreed that the obligation (if any) to supply water to Indian tribes would rest upon the U.S., not the states. **The United States has many other ways to ensure an adequate water supply to the Reservation without taking 635,000 acre-feet from the San Juan River, so there is no necessity for implying a federal reserved water right.**

Under the "minimum needs" standard required by *United States v. New Mexico*, 438 U.S. 696 (1978) and *Mimbres Valley Irrigation Co. v. Salopek,* 90 N.M. 410, 564 P.2d 615 (1977), the Navajo Nation already has sufficient water supplies, so there is no reason for an implication by necessity as in *Winters*. If the tribe ever does need more water in the future, the United States can meet its obligation by buying or leasing water for the tribe.

1. The Navajo Nation already has substantial water rights on the San Juan River through prior appropriation and beneficial use under Article XVI of the New Mexico Constitution. The tribe operates the Fruitland-Cambridge Irrigation Project, and the Hogback-Cudei Irrigation Project, which have early priority dates. The irrigation rights for these projects are substantial; no one contests the validity of those rights; they just need to be properly quantified under the PIA standard.

2. Across the Reservation in New Mexico there are irrigated fields that make beneficial use of water from local sources. All of these water rights are protected by the 1912 Constitution.

3. The Navajo Nation and the United States can acquire additional water for the Reservation in the future through actual appropriation and beneficial use, on an equal basis with non-Navajo users.

4. The United States can purchase water rights if it believes more water is needed to meet the minimum needs of the Reservation.

5. The United States can lease water rights on a short or long-term basis for the Reservation.

6. The Navajo Nation has substantial local sources of surface and groundwater within the Reservation which can be developed by the Navajo

Nation and the United States. Because these sources lie within the exterior boundaries of the Navajo Nation, the Nation controls their use and development.

7. The water needs of the Navajo Nation can be met in part by water conservation methods.

Therefore, there is no basis for judicial implication by necessity, because the Navajo Nation and the United States have at least seven other ways of meeting the minimal water needs for the reservation in New Mexico. The facts in this case are quite different than in *Winters*, where the court found that reserving a water right was the only possible way to provide water to the Milk River reservation. *Winters v. United States*, 207 U.S. 506 (1908).

O. The lower court misconstrued the federal legislation and the Richardson-Navajo settlement. The federal statute does <u>not</u> require the completion of a pipeline to Gallup. Nor does the agreement.

In granting summary judgment, the court ruled that the construction of the Navajo Gallup pipeline was a major benefit of the Richardson-Navajo agreement, and a major reason for approving the settlement without a trial.

Unfortunately, this was an error of law and a mistake of fact by the district court. The district court mistakenly assumed that the federal legislation and the settlement agreement require the federal government to

construct and complete a pipeline from the San Juan River to Window Rock, Arizona and Gallup, New Mexico. The court misinterpreted the federal legislation, because the legislation does not legally obligate the federal government to build the Navajo-Gallup pipeline. Even if the federal government ever begins the pipeline, it is very unlikely that the federal government will ever complete the project. In this regard, the Navajo Gallup pipeline is just like the Navajo Indian Irrigation Project and the Animas-LaPlata project: both of them were authorized by Congress but never completed.

The district court could have avoided this mistake of law and fact if it had heard the counterclaim by the community ditches. In the counterclaim, the defendants asserted that "the Navajo Gallup pipeline is illusory," RP17859. The counterclaimants could have presented evidence to prove this point, but the court flatly refused to hear the counterclaim.

As a result, the court committed several errors. At RP3374 the court states that Congress has authorized $870 million for the pipeline. There are several fundamental errors with this part of the court's opinion.

First, a congressional authorization is not a congressional appropriation. In Congress, the term "authorization" is used in a very misleading way,

because a congressional authorization does not allow the expenditure of federal money for the designated project or purpose. No money can be spent for a federal construction project unless and until Congress actually appropriates money in an appropriations bill, and the president signs the appropriations bill into law. See U.S. Const. art. I, § 9: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

Second, as a matter of fact it will cost far more than 870 million dollars to complete the pipeline to Window Rock and Gallup. That figure dates back several years, to the original 2009 Act, so it does not even purport to be a current estimate of the total cost of construction. The total cost of constructing the pipeline is a disputed question of fact which precludes summary judgment. Not even the proponents of the pipeline claim that it can be completed for 870 million.

Third, the federal legislation allows the construction of this supposed pipeline to be postponed.

Fourth, the federal government faces ever-growing budget deficits, due primarily to defense, health and entitlement programs. Every year the federal government allocates less money to discretionary projects like the Navajo

Gallup pipeline. So it is more likely than not that this pipeline will never be built.

Fifth, if the pipeline is not built, the agreement allows the Navajo Nation to waive that condition and still keep all the water awarded by the decree. Conversely, the agreement is written so that the State of New Mexico has no remedy if the illusory pipeline is never built.

The District Court simply shut out the evidence on this issue by refusing the counterclaim.

P. The Richardson Navajo agreement has failed by its own terms, because the Navajo Nation has rejected a settlement of Navajo claims to the Little Colorado River.

Section 10603(c)(1) of the Northwestern New Mexico Rural Water Projects Act (Pub. L. No. 111-11, title X, subtitle B) requires the Navajo Nation to settle their claims in Arizona the Colorado and Little Colorado Rivers before the Navajo Nation receives any water for use in Arizona. The federal statute provides that no project water will be delivered to Navajo communities in Arizona (like Window Rock), unless the Navajos have settled their claims in Arizona for the Lower Basin of the Colorado and the Little Colorado Basin.

On July 5, 2012, the Navajo Nation Council voted to reject the proposed settlement of its claims to the Little Colorado River in Arizona, RP11572-77. The proposed agreement had been negotiated by Mr. Stanley Pollock and others on behalf of the tribe, but the tribe's governing body rejected it.

As a result, there is no settlement of the tribe's water claims in Arizona, as required by the federal legislation for the Navajo-Gallup Pipeline. Therefore, the express conditions of the proposed settlement have failed, by their own terms. The failure of settlement conditions makes the approval of the Richardson-Navajo agreement into a moot issue. *Valencia Water Co. v. Neilson*, 1920-NMSC-076, ¶ 3, 27 N.M. 29 ("appellate court will not decide abstract, hypothetical, or moot questions").

Q. At the beginning of the case, the district court correctly held that a settlement must be the product of good faith negotiation, but then the court contradicted itself by holding that local water users can be excluded from the negotiations.

In its February 3, 2012 "Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof," RP9841-43, the water court ruled that the Settling Parties "have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations,"

RP9842. This ruling is entirely correct: good faith negotiations are one of the legal requirements for approving a settlement.

On summary judgment, the settling parties submitted an affidavit claiming that they had engaged in good faith negotiations. To dispute those assertions, the defendants submitted an affidavit by Jim Rogers about the lack of good faith negotiations. Mr. Rogers is the majordomo of the Jewett Valley Ditch, and the Secretary-Treasurer of the San Juan Agricultural Water Users Association.

> 3. When word started to leak out about a possible Navajo Nation settlement, all San Juan River agricultural water users felt threatened and worried. The proposed settlement would adversely affect all of the ditches up and down the San Juan River and the Animas River. On behalf of our community ditch association representing ditches on the upper and lower Animas River and the upper and lower San Juan River, I dispute the statements made by John Whipple about the supposed negotiations. His statements are wrong and misleading. The community ditches were not involved in the negotiations. In fact, our repeated attempts and motions for discovery were either refused or ignored. Our involvement didn't start until the proposed settlement was released. And Mr. Whipple's Affidavit does not accurately describe what happened. When we tried to make suggestions, or voiced our concerns about any particular issue, we quickly observed that the settling parties were just going through the motions. The whole thing was a sham. They had no intention of negotiating major issues with us, because they had already reached their deal among themselves without us. The US and NN and OSE told us that we would have input in court after the settlement was filed. But after they filed the settlement, they fought hard to keep us from being heard in court.

RP16180-81.

Mr. Rogers affidavit raised disputed question of facts about the negotiations, precluding summary judgment. Good faith is a question of fact. *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 13, 124 N.M. 613; *Citizens Bank of Clovis v. Runyan*, 1990-NMSC-036, ¶ 16, 109 N.M. 672; *GMAC v. Anaya*, 1985-NMSC-066, ¶ 13, 103 N.M. 72.

In their affidavits, the Navajo Nation, the U.S. and the OSE admitted that they negotiated the draft settlement agreement without participation by the Community Ditches. The settling parties first agreed among themselves on the major terms of the agreement without including the Community Ditches in the negotiations. Whipple Affidavit ¶ 43 (Apr. 15, 2013), RP15391; Leeper Affidavit ¶ 21 (Apr. 15, 2013), RP15435. After that, the changes to the agreement were largely cosmetic. The U.S., the Navajo Nation, and OSE refused to make any changes to the essential terms of the agreement.

This contradictory evidence raised questions of fact which prevented summary judgment under the standards set by the court. So the District Court abandoned its own standard. In its opinion of August 16. 2013, the court held that the Navajo Nation, U.S. and OSE "had the sole obligation to negotiate the Settlement Agreement among themselves," RP33765. In other words, the

water court held that, as a matter of law, local water owners have no right to be involved in negotiations, even when those negotiations impair their water rights. This ruling of law must be reversed, because it would allow the state engineer to exclude all water owners on every river and stream from negotiations that affect their water supply.

The opinion says that a settlement must not be the product of collusion, but how would anyone know, if the negotiations happen behind closed doors? Collusion is almost guaranteed under those circumstances.

Whenever government huddles behind closed doors with special interests, the absent public will suffer. In Washington D.C., there is a saying about backroom negotiations over taxation: "Don't tax you, don't tax me, tax that guy behind the tree."

The same goes for negotiations over water. In the back room negotiations about the Richardson-Navajo deal, a small group of insiders settled their differences by using other people's water.

R. *Nemo dat quod non habet*.

Amid all the arguments about the elaborate provisions of the Richardson-Navajo settlement, the lower court overlooked a fundamental rule of law: *Nemo dat quod non habet*. "No one can give what he does not have."

Ackerman v. Abbott, 978 A.2d 1250, 1255 (D.C. Ct. App. 2009). "At common law this principle is known under the Latin maxim: *Nemo dat quod non habet* or just *Nemo dat*." *Snethen v. Oklahoma State Union of Farmers Educational and Co-op.*, 664 P.2d 377, 381 n.18 (Okla. 1983).

During the summary judgment proceedings below, the plaintiffs never proved that the Navajo Nation had the right to 635,000 acre-feet of water. The settling parties' proof for NIIP failed miserably; they finally were forced to admit that NIIP is not PIA. They failed to prove on summary judgment that they were entitled to that 635,000 acre feet under the *Winters* doctrine, or the applicable statutes, or the controlling precedents from the Supreme Courts of the United States and New Mexico. Instead of presenting evidence to meet their burden of proof, the settling parties convinced the court that their agreement was somehow self validating.

Bill Richardson did agree with United States and the Navajo Nation that the Navajo Nation should have 635,000 acre-feet of water from the San Juan River. However, Bill Richardson did not own the water in the San Juan River, so he had nothing to give. *Nemo dat quod non habet*. According to the New Mexico Constitution – as approved by Congress – the stream waters in New Mexico belong to the public, not to the Governor. The settling parties

never presented proof of prior appropriation and beneficial use, so they never proved that they had a right to that much water.

Bill Richardson wanted the Navajo Nation to have 635,000 acre-feet, but mere agreement by the governor does not create a water right. Those three parties agreed among themselves that the Navajo Nation owned 56% of the San Juan River, but they never actually proved ownership of that water.

Nemo dat quod habet. Suppose three parties get together and negotiate an elaborate contract that one of them owns 56% of the Brooklyn Bridge. The contract does not make it so. The contract is meaningless, except as a scam, unless one of the parties possesses good title to the Brooklyn Bridge. Hence the figure of speech, "selling someone the Brooklyn Bridge", which is a more modern way of expressing the ancient Latin maxim.

Beyond that, Mr. Richardson had no legal authority to enter into this compact with the Navajo Nation without legislative approval. His signature on the settlement agreement is a nullity under *State ex rel. Clark v. Johnson*. It makes no difference whether his agreement gives the tribe 56% of the river, or 100%, or 5 %. *Nemo dat quod non habet*.

S. At first, the lower court ruled correctly that the Navajo Nation had the burden of proof and persuasion on its water claim, but then the court abandoned the preponderance standard and substituted "a reasonable basis", which is less than a preponderance.

On February 3, 2012, the court entered an "Order establishing the legal standards for evaluating the proposed decrees and respective burdens of proof". The order provides that the Settling Parties shall have "the burden of production and the burden of persuasion" and "shall retain the burden of persuasion by a preponderance of the evidence," RP9842-43.

This initial ruling was correct, because a person claiming water rights always bears the burden of proof by a preponderance of the evidence. However, the court abandoned this standard during the proceedings and substituted a lower standard. The court ruled that the Settling Parties only needed to establish "a reasonable basis to conclude that the [settlement] describes a less extensive water right than could be secured at trial." RP3771. At RP33776, the court described its test as follows: "IS THERE A REASONABLE BASIS TO CONCLUDE THAT THE SETTLEMENT AGREEMENT AND THE PROPOSED DECREES PROVIDE FOR LESS THAN THE POTENTIAL CLAIMS THAT COULD BE SECURED AT TRIAL?"

This is not a legal standard at all, because it allows proof by less than a preponderance. In any case where there is a genuine dispute about the material facts, there will be "a reasonable basis" for finding in favor of the

plaintiff, and at the same time there will be "a reasonable basis" for finding in favor of the defendant. So "a reasonable basis" can be less than a preponderance of the evidence.

Furthermore, the new standard sets its reference point as a hypothetical trial, sometime in the future. But that trial will never happen. What witnesses will be presented at the trial, which will never happen? Who are the lawyers ? Who is the judge? How long did the hypothetical trial last? How credible were the hypothetical witnesses?

Finally, the new standard only requires a reasonable basis for saying that the settlement is less than what could be proved at this non-existent trial. That's easy to do - 635,000 acre-feet is less than 900,000 acre-feet.

This new standard is just a way to evade the real issue – the settling parties never proved that they were entitled to 635,000 acre-feet. At least not by a preponderance of the evidence, which is required in all civil cases. So the defendants never got a real trial; they got a hypothetical trial which never happened. In this case, there was conflicting evidence going both ways, so a real trial was necessary. *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194. Not a hypothetical trial.

T. In granting summary judgment, the lower court violated the rules of evidence and civil procedure. The court allowed the governments to submit anonymous "technical reports" which did not meet any of the requirements for admissible evidence. At the same time the court excluded evidence from the acequias which was plainly admissible, such as census data and testimony by local farmers and a former OSE employee about irrigation.

- The court allowed the plaintiffs to submit "technical reports"as proof.

These "technical reports" did not qualify as admissible evidence, as required by Rule 1-056. These reports were never authenticated; they did not disclose who prepared them; how they were prepared; where the underlying data came from; or whether the data was reliable. No one claimed to have sufficient personal knowledge to support these "technical reports".

- The court ruled that local irrigators cannot testify about local irrigation practices and feasibility, RP33785; 33789.
- The court even ruled that the former manager of the OSE Aztec office could not testify.
- The court accepted false population projections and excluded the 2010 census data, RP33783.
- When the defendants asked for documents, the United States argued that the defendants would have to travel to a salt mine in Kansas to look at them.

The court agreed with the U.S. RP note: these audio recordings are missing from the record.

- The court closed discovery before the governments submitted their expert affidavits, so the defendants had no opportunity to controvert them, RP14437.

U. The Richardson-Navajo agreement violates all the laws which the State of New Mexico asserted in its 2008 objections to the Ute Mountain Ute claim.

In the main San Juan case, No.75-184, the State of New Mexico filed an answer against the claims of the Ute Mountain Ute Tribe. *See* State of New Mexico's Answer to Restatement of the Claim of the Ute Mountain Ute Tribe (Feb. 28, 2008), RP29483-86. The matters raised by the State of New Mexico against the Ute water claim are well-taken, and they apply as well to the claims of the Navajo tribe. The Richardson-Navajo agreement violates every one of the points of law which the State itself asserted in 2008.

Here are the State's legal objections to the Ute Winters claim.

*Claim of a federal reserved water right to operate a power plant in New Mexico is not feasible or justifiable under either federal or state law. The rights of the Tribe recognizable in this matter are limited to the quantity of the Tribe's historic and existing beneficial uses on its lands in New Mexico.

*The claimed water use is not required to fulfill the purposes of the reservation and is not necessary for the establishment of a permanent homeland for the Tribe.

*The federal reserved water rights claimed are not tailored to the reservation's minimal need, and the claimed uses are not justified by the Tribe's history, culture, geography and natural resources, economic base, past water use and present and projected population in New Mexico.

*Together with the quantity of water available to the Tribe within the [States of Arizona and Utah], the Tribe's historic and existing beneficial uses in New Mexico constitute an amount of water sufficient to fulfill the purposes of the reservation and to establish a permanent homeland within the reservation situated in both states.

*The Tribe is barred and estopped from making claims for additional and future uses for the Navajo Reservation that were settled and compromised, including by, but not limited to, the legislation authorizing Navajo Dam.

*Any federal reserved rights the Tribe may have to divert and use water are limited to such manners and quantities as are necessary to accomplish the primary purpose of the reservation.

*The Tribe's right to divert and use groundwater is limited to existing and historic use as allowed under the laws of the State of New Mexico.

*No right the Tribe may have to divert and use waters of the State of New Mexico may have a priority earlier than: 1) the date the water was first put to beneficial use; or 2) establishment [or expansion] of the reservation in New Mexico.

*No federal reserved right the Tribe may have to divert and use the waters of the State of New Mexico includes the right to use, lease, market or otherwise authorize use by others of the water off the Tribe's reservation in New Mexico.

*The claims of the Tribe are limited to federal reserved claims, and the Tribe is not entitled to make any aboriginal or other claims to the use of water in New Mexico.

*Administration of any water right quantified to the Tribe shall be under New Mexico state law and by the State of New Mexico, pursuant to the McCarran Amendment, 43 U.S.C. 666.

RP29484-86.

All of the State's objections are well taken. All of them are based on the laws that govern Indian water claims by <u>any</u> tribe in New Mexico, whether it

is the Ute Mtn Ute Tribe or the Navajo Tribe. So a governor has no legal authority to waive those laws for the Navajos while enforcing them against other tribes. All tribes must be treated consistently, under the same laws.

V. The court sanctioned counsel for pointing out that a judge cannot visit the scene of litigation until all parties have been joined, so that their lawyers can participate in the visit.

In September 2007, long before any of the local water owners had been given notice of the Navajo claim, the district court (Hon. Rozier Sanchez, pro tem) scheduled a judicial tour and viewing of the Animas-La Plata Project.

The Association and the Hammond Conservancy objected to any judicial viewing of the project until all parties had been joined and given an equal opportunity to participate in the judicial viewing, RP28743-47.

The Association and the Hammond cited ample authority to support their objection, such as UJI 13-119; *Travis v. Preston*, 643 N.W.2d 235, 242 (Mich. Ct. App. 2002) ("An unauthorized view by the finder of fact is misconduct.") (quoting *Vanden Bosch v. Consumers Power Co.*, 224 N.W.2d 900 (Mich. Ct. App. 1974)); *State v. Eckard*, 2002 WL 1357788 (Ohio Ct. App. 2002); Annotation, *Prejudicial Effect of Unauthorized View by Jury in Civil Case of Scene of Accident or Premises in Question*, 11 A.L.R.3d 918 (1965).

> [S]afeguards are also required when judges visit the locations involved in a case. Unless careful safeguards are observed, and all

> parties are given an equal opportunity to participate, and a proper record of the viewing is made, it is reversible error for a judge to view the scene

American Family Mut. Ins. Co. v. Shannon, 356 N.W.2d 175, 177 (Wis. 1984)

The objection explained why a premature judicial viewing would be prejudicial to absent water users:

> A judicial viewing of the Animas La Plata Project at this time would be reversible error, because all the parties and their attorneys have not been given notice and an opportunity to participate and be heard at the scene. Indeed, it is estimated that over 80% of the affected parties in the San Juan Basin have not even been served and joined, so they have no notice and opportunity whatsoever. . . .
> Furthermore, the proposed tour is hosted by the San Juan Water Commission, so the Commission would have the opportunity to select the viewing sites and to present their own viewpoint or "spin" about the project. Other parties and participants would not have an equal opportunity to present other viewpoints, i.e., that the Animas La Plata Project has been an economic and environmental disaster. . . .
> At some point during this litigation, it may be appropriate for the Court to view some of the locations at issue in this adjudication, but only after proper safeguards have been put in place and all parties and their counsel have been given a fair opportunity to be heard.
> This points up a recurring problem in this case: the attempts to influence the Court about the merits of the case before all the parties have been joined. The proponents of the Gallup pipeline deal, such as the San Juan Water Commission, BHP, the OSE and the Tribe, are presenting their views to the Court at these early stages of the case, before all parties are joined, so that the Court will have formed its opinions before the vast majority of water users can express themselves. This raises serious questions of fairness and due process.

RP28744-45.

This objection was entirely proper and well supported by authority. Counsel was complying with the ethics rules about respecting the rights of unrepresented persons and persons who are not parties. Rules 16-403 and 16-404.

Nevertheless, the lower court imposed sanctions on counsel for raising these objections, RP28794-96. The court also ordered counsel to review at his expense the entire court file and record . . . and present a report to the Court . . . concerning the accuracy [of the paragraph quoted above], RP28795.

These sanctions cannot be allowed to stand. The judicial system cannot function if counsel are sanctioned for raising valid concerns which are well supported by authority. Although the court may have wished to visit the site of the Animas La Plata Project, such a premature visit would have been improper and injudicious. The Animas La Plata Project was and is a major issue in the Navajo inter se, as the Navajo Nation claims water from the project. There was no legal basis whatsoever for imposing sanctions against counsel for raising a valid objection.

X. The lower court violated the rights of water owners in a rush to meet a non-existent deadline.

During one of the hearings, Special Master Snyder questioned the plaintiffs about the supposed "deadline" for approval of the Richardson-Navajo agreement. Under his questioning, the three governments admitted that they could extend the "deadline" by agreement, without any action by Congress. RP note: This is one of the audio recordings that are missing from the appellate record.

Y. Ex parte contact with the judge is not proper, and not necessary.

Ex parte communications between a judge and a litigant are never a good idea. They undermine public trust in the judiciary.

Ex parte communications under Rule 1-071.4 are not necessary. The federal courts somehow manage to adjudicate streams without allowing *ex parte* communications. If there are "general problems of administration and management" in an adjudication, those problems can and should be discussed in open session with the court, so that all affected parties can participate, not just the state engineer. General problems of administration can also be discussed at the annual joint working session set forth in Rule 1-071.3, so long as water rights holders are given notice and an equal right to be heard at those sessions.

Ex parte communications between the judiciary and the office of the state engineer compromise the integrity and independence of the judicial branch. These *ex parte* contacts create the danger that the judiciary will begin to act as an administrative arm of the state engineer, rather than as a separate and independent branch of government.

Rule 1-071.4 favors one adversarial party over all the other parties. In many water adjudications the state engineer is an adversarial party, not a neutral or disinterested one. In the present case the state engineer is asking the court to deny, reduce or subordinate the water rights claimed by acequia parciantes, so it is improper for the state engineer to have *ex parte* contacts with the water judge. On its face, the rule compromises the neutrality of the courts and is unfair to water rights owners.

Ex parte contacts in water adjudications are particularly egregious because water cases adjudicate constitutional rights, that is, the irrigation and water rights which are given special protection by Article XVI of the New Mexico Constitution. *Ex parte* contacts run contrary to § 72-7-1(E), which guarantees water rights owners a *de novo* determination of water rights by the judiciary, notwithstanding any decisions of the state engineer.

The courts should want to be informed about general problems of administration and adjudication, but the courts will get one sided information if they rely on *ex parte* communications from one side, i.e. the state engineer. What about the problems experienced by the other parties to water adjudications, like water rights owners? Rule 1-071.4 gives them no right to be heard, and no opportunity to rebut the *ex parte* information provided by the state engineer.

It appears that Rule 1-071.4 has contributed to many instances around the state where the basic rights of water owners have been sacrificed to accommodate the interests of the OSE. The San Juan River adjudication has been pending in the Eleventh Judicial District Court in San Juan County for 40 years, but there is no physical depository of court documents anywhere in the judicial district. If a water rights owner in San Juan County wanted to inspect the initial disclosures and "technical reports" by the state engineer, he must make a round trip of approximately 416 miles to the state engineer's office in Santa Fe. The physical documents were not available for inspection anywhere in San Juan County, even though San Juan County is the forum for the adjudication. Some documents were posted on court approved websites,

but many were not. And many of the defendants do not have internet or computer capabilities to access those documents.

Most of the hearings were held in Santa Fe, not in Aztec, contrary to the water owners' fundamental right to have the case tried in the judicial district. The video links usually made it difficult or impossible for persons to follow the hearings in Santa Fe.

These arrangement are convenient for the state engineer, but they deny due process and fundamental rights to the parties whose water rights are at stake.

Query: Is the location of court records deemed to be a "general problem of administration?" Does Rule 1-071.4 allows the OSE to engage in *ex parte* communications to convince the water court that the document depository should be located in Santa Fe. That is hard to say, but the *ex parte* rule creates very real problems for thousands of litigants all around the state.

Query: Is the cost of proper notice a "general problem of administration?" Did the OSE engage in *ex parte* contacts to convince the judge that it would be too burdensome for the three governments to search readily available public records?

There is no bright line distinction between "general problems" in a pending adjudication and specific problems relating to a particular water claim. Most general problems are simply an accumulation of many specific problems which affect many individual claims. Therefore *ex parte* communications under Rule 1-071.4 are likely to taint the adjudication of many individual water rights at once. Moreover, even if there were a real difference between general and specific problems, there is no way to enforce the distinction, because the communications were kept secret, in violation of Rule 21-209.

Z. The judge did not disclose his *ex parte* contacts as required by Rule 21-209.

In the rare instances when *ex parte* contacts are allowed, the judge must promptly disclose them so that other parties are given the opportunity to respond.

> **21-209. Ex parte communications.**
> A. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) **the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.**

The acequias filed a motion asking the judge to disclose information about *ex parte* contacts, RP18029-31. The judge never ruled on this motion, and never made any disclosures, and never explained why not.

Under Rule 21-209, the acequias should not have been forced to file a motion for disclosure. When *ex parte* contacts do occur, the rule places a positive duty on the judge to make prompt disclosures and give the parties an opportunity to respond.

AA. The Richardson-Navajo deal eliminates a key provision of the Jicarilla settlement: the requirement that the U.S. buy back 11,000 acre-feet to accommodate the Jicarilla settlement.

The proposed settlement would eliminate the federal buyback of 11,000 acre-feet to partially offset the Jicarilla Settlement. The elimination of this buyback prejudices the community ditches and other users. This is a major change in the Jicarilla Settlement, RP17859. This deletion was negotiated in secret, by collusion among the three governments, without notice to water users.

BB. The OSE has never prepared a statewide plan under § 72-14-3.1, so it does not know how what percentage of the water in New Mexico is being given to the Navajo Tribe.

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. Therefore no one knows what portion of the state's available water is being given to the Navajo tribe.

By some estimates, the Richardson deal gives away 1/3 of the river water in New Mexico. But no one knows.

CC. The Richardson-Navajo agreement is unfair to the other tribes and pueblos in New Mexico. Awarding 635,000 acre-feet to the Navajo Nation will eliminate or reduce the amount of water available for the Aamodt and Taos settlements.

Perhaps one cannot fault the Navajo tribe for trying to grab as much water as it can, before the other tribes and pueblos come forward with their water claims. However, it is not fair to award a grossly excessive amount of water – 635,000 acre-feet – to one tribe, while the other tribes have not yet presented their water claims. For example, the Navajo agreement creates shortages that will curtail water from the San Juan for the Aamodt and Taos settlements.

All of the other tribes in New Mexico have legitimate water claims, and all of them must be judged by the same consistent legal standards and the same

rules of evidence and procedure. Yet the Richardson-Navajo deal recites that it is a special deal which was done outside the laws. See agreement section 14.3: nothing in the agreement establishes a precedent or standard for quantifying federal reserved rights or Indian water rights, or the applicability of interstate water compacts. RP877.

CONCLUSION

The errors described above must be corrected, and the judgment below must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, a true and correct copy of the foregoing was served on counsel for the appellees and the appellants by email.

/s/ Victor R. Marshall
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