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 SAN JUAN COMMUNITY DITCHES

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Oral Argument Requested

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INTRODUCTION AND SUMMARY

Without conducting a trial, the district court awarded more than 635,000 acre-feet of water from the San Juan River to the Navajo Nation. The lower court granted summary judgment approving an agreement between Bill Richardson and the Navajo tribe that gives the Navajo tribe 635,729 acre-feet per year from the San Juan River. RP33771 635,000 acre-feet is more than 6 times the amount of water diverted by the Albuquerque metropolitan area. In 2008, Albuquerque drew 98,225 acre feet of water (mostly from wells) to serve a population of 538,586 people. The Richardson-Navajo deal would give the Navajo Nation twice as much water as the City of Phoenix. Phoenix receives 305,577 acre-feet to serve an estimated population of 1,566,190 people. Michael J. Cohen, "Municipal Deliveries of Colorado River Basin Water," June 2011, available at www.pacinst.org/reports/co_river_municipal_deliveries/; RP17848-49; RP12207-08.

The lower court summarily awarded 635,000 acre-feet to serve a population of roughly 42,000 tribal members living on the Navajo reservation, according to the 2010 census, RP14482-83.

In its opinion, the lower court rejected the universal legal requirement that water must be put to beneficial use. RP33799 Beneficial use is required

by Section 8 of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, 390 (Jun. 17, 1902); *Winters v. United States*, 207 U.S. 564 (1908); New Mexico's 1912 Constitution as approved by Congress as a condition of New Mexico's admission to the union, N.M. Const. art. XVI, § 2; the 1922 and 1948 Colorado Compacts; Section 4 of the Colorado River Storage Act, Pub. L. 84-485, 70 Stat. 105 (Apr. 11, 1956); *Arizona v. California*, 373 U.S. 545, 557 n.23 (1963); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, ¶¶ 48-73, 116 N.M. 194 ("*Mescalero")*; *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34, 1142, 1144 (10th Cir. 1981); *State ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264; *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375.[1]

The lower court also repudiated the PIA (practicably irrigable acreage) standard set forth in *Arizona* and *Mescalero* and many other cases, RP33756. The Navajo Nation and the United States admitted in court that the Navajo Indian Irrigation Project ("NIIP") is not practicably irrigable acreage. 4-30-13 CD 10:17:28-18:19; RP0016125.

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[1] In this brief, all references are to NMSA 1978 and NMRA, and all emphases are added, unless otherwise noted.

The lower court also did not apply the "minimum needs" test for federal reserved water rights, RP33799.

In violation of these controlling authorities, the district court adopted the "homeland" concept espoused by the Arizona Supreme Court in *In re General Adjudication of All Rights To Use Water in Gila River System & Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila River V*"). This theory is contrary to the above authorities, including *Mescalero*. This vague "homeland" theory has been rejected by the federal courts, see *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005).

The district court based its "homeland" award on a projected reservation population of 203,935 in the year 2110, a century from now. This demographic projection was falsified; it deliberately excluded the most recent census data from 2010. The 2010 census shows that only 42,127 Native Americans lived on the reservation in New Mexico, a decrease from the 2000 census. However, on summary judgment the lower court accepted the falsified projection and refused to consider the United States' own census data for 2010, which shows that the reservation population is shrinking rather than growing, RP33783; RP14482-83.

The lower court opinion ruled that Congress created water rights for the Navajo tribe by enacting the Navajo Indian Irrigation Project Act in 1962. However, section 13(c) of the 1962 NIIP Act explicitly states that the Act does not create any water rights:

> No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act . . . .

When Congress enacted the NIIP Act, it authorized the construction of water works, not the grant of water rights. The NIIP Act was an implementation of the Reclamation Act of 1902, which provides that water rights can only be acquired by beneficial use.

The district court denied the acequia defendants the right to file an answer and a mandatory counterclaim under the Rules of Civil Procedure, Rules 1-013, 1-071. The court dismissed the counterclaim in violation of the rules for inter se proceedings, whereby every water owner has the right to prove that his rights are superior to those of the Navajo tribe.

The district court also rejected *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562 and *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), 104 F.3d 1546, 1553-54 (10th Cir. 1997). These cases hold that the governor has no authority to bind the State of New Mexico to a tribal compact unless the legislature enacts the compact as a statute. See also § 72-

14-3 (Interstate Stream Commission is required to submit water compacts to the Legislature for approval). The proposed settlement agreement is a tripartite compact between the Navajo Nation, the United States, and the State of New Mexico, which requires enactment by all three sovereigns. Every compact must be enacted into law by a statute passed by the legislature. *Clark*, ¶¶ 39-40. The New Mexico Legislature has not enacted this proposed compact into law, so it is a nullity. *Clark*, ¶¶ 45, 49, 50. It makes no difference that Congress or the Secretary of Interior has approved the settlement agreement, because the New Mexico Legislature has not. *Clark*, ¶ 44; *Pueblo of Santa Ana*, 104 F.3d at 1553-54. Without legislative enactment, the Richardson-Navajo agreement is a nullity, just like the tribal agreements signed by Governor Gary Johnson in *Clark*.

Therefore the judgment below is moot, because there was nothing for the lower court to approve or disapprove.

STATEMENT OF FACTS AND PROCEEDINGS

The litigants.

In this inter se case, AB-07-1, the Navajo Nation, the United States, and the State Engineer are the three plaintiffs. They are seeking a court judgment against all the water users on the San Juan River, the defendants, to establish

the priority and amount of the Navajo tribe's water rights. The defendants include 26 acequias and community ditches[2] on the San Juan River and the Animas River, and the persons who have water rights on those acequias.

Various terms are used to refer to the plaintiff-appellees, including "the Navajo Nation", "Navajo tribe", "U.S.", "OSE"[Office of State Engineer], the "state engineer"; "settling parties", and "the three governments."

The defendant-appellants are referred to as "acequias" or "community ditches" including the parciantes (water users) on the acequias. Although the acequias originated as canals for irrigation, these acequias also supply water to industry, businesses, towns, and households.

This brief focuses on the issues that primarily affect the main stem of the San Juan River from Navajo Dam downstream to Shiprock. The San Juan community ditches and acequias are Farmers Mutual Ditch, Jaquez Ditch, Bloomfield Irrigation District, Acequia de La Pumpa, Manzanares Turley Acequia, Hammond Conservancy District, and Jewett Valley Water Users.

The acequias on the Animas River are filing a brief which concentrates on Animas River issues. To avoid duplication, the San Juan Community Ditches join in the arguments made by the Animas River Acequias in their brief.

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[2]The terms "acequia" and "community ditch" are synonymous, § 73-2-9.

The geography of the San Juan River and the Colorado River system.

The San Juan River is the biggest river in New Mexico, by far. By volume of water the San Juan is much bigger than the Rio Grande. The San Juan is the second largest tributary in the Colorado River system, which includes portions of California, Arizona, Utah, Colorado, Wyoming, and New Mexico.

Waters in the Colorado River system are diverted out of the Colorado River Basin to serve other areas. As an aid to the court, see attached Map of Colorado River Basin, RP17906. The San Juan-Chama project diverts water from the San Juan River through the mountains to the Rio Grande, where it supplies the cities of Albuquerque and Santa Fe and other users on the Rio Grande.

The San Juan and its tributaries (the Animas River and the La Plata River) arise in the high mountains of the San Juan Range in southwestern Colorado. All the rivers flow south into New Mexico, where the Animas and La Plata join the main stem of the San Juan near Farmington. The San Juan flows west past Shiprock, New Mexico, and then it curves north back into Colorado and then west into Utah. The San Juan meets the main Colorado

River at a confluence which is now submerged beneath the waters of Lake Powell, the reservoir created by Glen Canyon Dam.

The Colorado River flows through Glen Canyon Dam into Arizona, through the Grand Canyon, and into Lake Mead, the reservoir created by Boulder Dam. Then the river flows south, forming the border between Arizona and California, until it enters Mexico. The Colorado River no longer reaches the Gulf of Baja California. It is entirely depleted by human use and the increasing aridness of the Southwest.

Along its way, the Colorado supplies water to Denver and Salt Lake City; Las Vegas, Nevada; Los Angeles (through the California aqueduct); San Diego; the Imperial Valley; Phoenix; and Tucson. The waterworks for these huge users have already been built. No new infrastructure is needed for other states to utilize the water of the San Juan; the water that runs past Farmington will flow by gravity all the way to the diversion points for the lower states.

The Colorado River compacts.

The waters of the Colorado River are allocated among the seven states by the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948. (The Animas and La Plata Rivers are additionally governed by the Animas-La Plata Project Compact.) All of these agreements were

enacted into statute by each of the signatory states and by Congress. The Colorado River Compact is § 72-15-5; the Upper Basin Compact is § 72-15-26; and the Animas-La Plata Compact is § 72-15-1.

The San Juan River adjudication.

In 1975 the state engineer filed a general adjudication of the San Juan River under the McCarran Amendment, 43 U.S.C. § 666, joining the United States and the Navajo Nation as defendants. The McCarran Amendment waives the sovereign immunity of the United States and Indian tribes, so that state courts can adjudicate all claims to a river.

The state engineer served the United States and the Navajo Nation with process for the general stream adjudication, but no one else. Forty years later, all of the people who own water rights on the San Juan River have never been joined as parties to the general adjudication, with the exception of a few hundred people on the La Plata River section.

The Navajo water claim.

In 2007, during the Richardson administration, State Engineer John D'Antonio filed an expedited inter se to obtain quick court approval of an agreement that Governor Bill Richardson was negotiating with the Navajo tribe. Bill Richardson signed the final agreement in December 2010, about 2

weeks before he left office. The Richardson-Navajo agreement has been authorized and enacted into law by the Congress of the United States and by the Tribal Council of the Navajo Nation, but not by the Legislature of the State of New Mexico.

The Richardson-Navajo water agreement would give the Navajo Nation more than 635,000 acre-feet of water per year from the San Juan River, more than half of the water allocated to New Mexico by the Colorado Compacts. According to figures released by the Richardson administration's Executive Summary, the waters of the San Juan would be divided as follows:

Navajo Nation	56%	Irrigation and domestic uses
Jicarilla Apache Nation	5%	Most leased for power plants/municipal uses
San Juan-Chama Project	17%	Municipal/irrigation uses in Rio Grande Basin
Power Plants	6%	Use 9% of total including lease with Jicarilla
Non-Indian uses in San Juan Basin	16%	Irrigation and municipal uses

RP13646-47.

The district court dispensed with a trial, RP17557. It awarded summary judgment for approximately 635,000 acre-feet to the Navajo Nation. The lower court issued summary judgment in favor of the Navajo Nation and the United States on all issues of law and fact. The court ruled that there were no

disputes about any material facts. The court awarded water for the following uses:

Navajo Indian Irrigation Project	508,000 af
Navajo-Gallup Water Supply Project	22,650
Animas-La Plata Project	4,680
Municipal and domestic uses	2,600
Hogback-Cudei Irrigation Project	48,550
Fruitland-Cambridge Irrigation Project	18,180

RP0017930-32.

The Navajo Indian Irrigation Project (NIIP).

The lower court awarded over 500,000 acre-feet to the Navajo Indian Irrigation Project. NIIP diverts water from the San Juan River behind Navajo Dam, east of Bloomfield. NIIP's waterworks transport water by canals and pipes and pumping stations to irrigate desert lands on the top of the mesa, miles from the San Juan River. Congress authorized the construction of the project in 1962. Navajo Indian Irrigation Project Act, Pub. L. No. 87-483, 76 Stat. 96 (Jun. 13, 1962) (NIIP Act). Originally NIIP was designed with the capacity to irrigate 110,630 acres, RP15274, but Congress refused to extend the project beyond approximately 78,000 acres, RP15431. In 2013 NIIP was expected to use roughly 180,000 acre-feet, RP14987.

During the summary judgment proceedings, the Navajo Nation and the United States admitted that NIIP is not practicably irrigable acreage (PIA), but

the court awarded water to NIIP anyway, 4-30-13 CD 10:17:28-18:19; RP16125.

STANDARD OF REVIEW

In the district court. Article XVI, Section 5 of the New Mexico Constitution guarantees a de novo proceeding in the district court relating to "decision, act or refusal to act of any state executive officer or body in matters relating to water rights." Section 72-7-1 also guarantees a de novo proceeding in the district court. Governor Richardson's executive action in signing the water agreement with the Navajo Nation comes within the scope of the constitutional guarantee, and so does the action of the state engineer in trying to carry out Mr. Richardson's agreement. See *Santa Fe Resource Alliance, LLC v. D'Antonio*, No. 33,704, 2015-NMCA-___, ¶ 26 (Dec. 9, 2015). The Court of Appeals ruled that the decision of an executive agency on water matters is entitled to no deference whatsoever; the law places the state engineer in the same position as the appellant; the engineer must participate in the district court proceedings, challenge the opposing evidence and argument, and even offer his own evidence and argument.

On appeal. The lower court granted summary judgment on every issue of law and fact in favor of the Navajo Nation, and against the defendants.

Therefore, the summary judgment standard applies to this appeal; the substantial evidence standard does not apply at all.

When the lower court has granted summary judgment, the appellate courts only look to see if there are any disputed issues of fact. *C & H Constr. & Paving Co. v. Citizens Bank*, 1979-NMCA-077, ¶ 8, 93 N.M. 150. If there is any genuine issue about any material fact, summary judgment is improper and must be reversed. When reviewing a summary judgment, "we view the facts in the light most favorable to the party opposing summary judgment . . . ." *Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 8, 137 N.M. 192 (internal quotation marks and citation omitted). In this appeal, the court views the facts in the light most favorable to the acequias and local water users, not the Navajo Nation or the U.S. The burden is on the Navajo Nation and the U.S. to demonstrate the absence of a genuine disputes about the material facts of material fact. *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation and Revenue*, 2006-NMCA-050, 139 N.M. 498.

In this case, the record shows that there were disputes over most of the material facts in this case, but the lower court ignored them. To give just a few examples, there were major factual disputes about:

- beneficial use;

● PIA (practicably irrigable acreage);

● the Navajo population, present and future. Is the reservation population shrinking or growing?;

● the amount of water available from the San Juan River. Is there enough water to supply the Navajo claim and other users as well?;

● whether NIIP will ever be completed. When will NIIP be shut down because of unsustainable costs?;

● the amount of water available from the Colorado River system under the Colorado compacts;

● the effects of global warming and the growing long-term drought in the Southwest;

● the amount of water claimed by the U.S. for endangered species;

● the effect of the Navajo-Richardson deal on the water supply to the Rio Grande via the San Juan-Chama Project;

● how the Richardson-Navajo deal will affect the Aamodt and Taos settlements;

● how the agreement adversely affects the adjudicated water rights that defendants hold under the Echo Decree of 1948;

● whether the Navajo-Gallup pipeline will ever be built; and

● whether the Richardson-Navajo deal will affect the water rights of other tribes and pueblos that have not had their rights adjudicated yet.

On all these issues, the facts are construed in the light most favorable to the acequia defendants. *Gormley, supra*.

As to issues of law, the appellate courts decide these issues *de novo*. *San Juan Agric. Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶ 8, 150 N.M. 44. There is no deference to the lower court's rulings about the New Mexico Constitution, state statutes, federal statutes, or caselaw from state and federal courts.

ARGUMENT

POINT 1.
The lower Court rejected the beneficial use requirement and the PIA standard, in violation of all controlling state and federal law. Instead the lower court substituted the vague "homeland theory" espoused by the Arizona Supreme Court. The lower court had no legal authority to do this.

The San Juan district water court rejected the PIA standard and the requirement of beneficial use. RP 33754-56. In so doing, the water court flatly rejected all of the controlling precedents from the courts of the United States and New Mexico, and all of the federal and state statutes which govern this case. The lower court had a duty to obey the governing precedents and statutes on beneficial use and PIA. Instead, the water court tossed out these

precedents and statutes, and adopted the amorphous "homeland" concept espoused by the Arizona Supreme Court in *In re General Adjudication of All Rights To Use Water in Gila River System & Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila River V*").

Gila River V is an aberration; it has been rejected by the federal courts. *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005). And *Gila River V* is directly contrary to the law in New Mexico, as the Arizona Supreme Court itself acknowledged. The Arizona Supreme Court flatly rejected the PIA standard and this court's decision in *Mescalero*, criticizing it as unacceptable and inequitable:

> Arizona's topography is such that some tribes inhabit flat alluvial plains while others dwell in steep, mountainous areas. This diversity creates a dilemma that PIA cannot solve. Period. . . . Tribes who fail to show either the engineering or economic feasibility of proposed irrigation projects run the risk of not receiving any reserved water under PIA. *See, e.g., State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235, 246-51 (N.M. Ct. App. 1993) (denying water rights to the Mescalero Apache Tribe, situated in a mountainous region of southern New Mexico, for failure to prove irrigation projects were economically feasible). This inequity is unacceptable and inconsistent with the idea of a permanent homeland.

35 P.3d at 33-34.

As the highest court in its own state, the Arizona Supreme Court may have some latitude in construing the laws of Arizona, and in rejecting judicial

decisions from another state. However, unlike the Arizona Supreme Court, a district court in New Mexico has an absolute duty to follow the decisions of the New Mexico Supreme Court and the New Mexico Court of Appeals, like *Mescalero*.

The lower court also rejected the rule of beneficial use, despite the fact that beneficial use has always been an essential requirement of every federal law and every federal case governing the allocation of water in the arid West, including *Winters* and subsequent cases. Beneficial use is also an essential and explicit requirement under the Constitution of New Mexico, New Mexico's water code, and all of New Mexico case law.

At RP33754-55, the lower court ruled as follows:

> The quantity of federal reserved rights is also determined by federal law. Whereas state rights are based on the amount of water put to beneficial use, federal reserved rights are defined by the amount of water necessary to fulfill the purpose of the reservation.

The water court opted to follow *Gila River V*, which holds that a federally reserved right for an Indian tribe "is not dependent on beneficial use." 35 P.3d at 72. According to *Gila River V*, tribal reserved rights are "uncircumscribed by the beneficial use doctrine." 35 P.3d at 73 n.1. The Arizona Supreme Court cited no authority for these conclusions, and neither did the district court.

The *Gila River V* "homeland" concept is utterly undefined. It is more a slogan than a legal standard. *Gila River V* contains no objective measures for quantifying the amount of water. *Gila River V* simply tells the judge to consider everything, giving the judge a blank check to award any amount of water, "uncircumscribed by the beneficial use doctrine." As the Arizona court said, by rejecting PIA, "we now enter essentially uncharted territory." 35 P.3d at 38. The opinion gives no map for a judge to follow in navigating that uncharted territory. *Gila River V* tells the trial judge to pick a number for a tribe's water rights, based on a "myriad of factors", including tribal history, rituals, culture, topography, ground water, irrigation, human resources, technology, potential employment base, raw materials, financial resources, master land use plans, and population.

Gila River V remains an aberration; it has been rejected by other courts. In *United States v. Washington*, the court held that the "homeland purpose" theory in *Gila River V* is contrary to the primary purpose doctrine under federal law.

> the "homeland purpose" theory is "simply a formulation that does away with determining the [primary] purpose and begs the question of what water was reserved to make the "homeland" livable.

375 F. Supp. 2d at 1065.

POINT 2.
The district court awarded water without proof of beneficial use, in violation of the Reclamation Act of 1902; the New Mexico Constitution; § 72-1-2; *Winters*; the Colorado Compacts; *Mescalero*; *Erickson*; *Mimbres*; *City of Las Vegas*; and the Colorado River Storage Act of 1956.

The San Juan water court committed plain error of law when it rejected beneficial use as a requirement of the law.

The requirement that water must be put to beneficial nonwasteful use is the cornerstone of western water law. "'Beneficial consumptive use' means consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose." *Arizona v. California*, 373 U.S. 545, 557 n.23 (1963).

The rule of beneficial use dates from the earliest days of water law in the arid West. It can be seen in all of the water statutes and cases – except for *Gila River V* and the opinion issued in this case.

In chronological order, here are a few of the laws and cases that hold that a water right can be created only through beneficial use.

- During the 1800s most of the territories and states in the West adopted the principle of beneficial use, by case law or statute or both. *See, e.g., Albuquerque Land & Irrigation Co. v. Gutierrez*, 1900-NMSC-017, 10 N.M. 177.

● In 1902, the United States enacted the Reclamation Act to develop water projects in the arid regions of the country. Section 8 of the Reclamation Act states:

> [T]he right of the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and **beneficial use shall be the basis, the measure, and the limit of the right**.

Pub. L. 57-161, 32 Stat. 388, 390 (Jun. 17, 1902), codified as 43 U.S.C. § 372. The Reclamation Act of 1902 was a federal recognition and codification of the water law which already prevailed in the arid regions of the West.

● In 1907, when New Mexico enacted its water code, it adopted the Reclamation Act verbatim:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water . . . .

§ 72-1-2.

● In January 1908, the United States Supreme Court ruled that tribes of Indians on the Fort Belknap Indian Reservation had the right to divert water from the Milk River for "beneficial use" – irrigating arid lands which were practically valueless without irrigation. See *Winters*, 207 U.S. at 576. *Winters* incorporates and rests upon the concept of beneficial use. *Winters* and the subsequent cases may change priority dates, but *Winters* does not change the requirement of beneficial use.

● In 1911, as part of New Mexico's admission to the union as a state in 1912, the delegates to the constitutional convention elevated prior appropriation and beneficial use to constitutional status. The Constitution which they proposed to the United States for approval stated that:

> All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

N.M. Const. art. XVI, § 1.

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

N.M. Const. art. XVI, § 2.

> **Beneficial use shall be the basis, the measure and the limit of the right to the use of water.**

N.M. Const. art. XVI, § 3.

● Later in 1911, the United States reviewed, approved and ratified these specific water provisions in New Mexico's Constitution, as one of the required steps towards statehood. Joint Resolution of Admission of August 21, 1911, 37 Stat. 39.

● In 1922, the federal and state delegates adopted beneficial use as the basis for apportioning the waters of the Colorado River system. Article I of

the Colorado River Compact of 1922 (NMSA 1978, § 72-15-5) recites that one of the major purposes of the compact is "to establish the relative importance of different beneficial uses of water." Article III apportions 7,500,000 acre-feet of water per annum for "the exclusive beneficial consumptive use" of the upper basin and the lower basin respectively. Article VIII protects "[p]resent perfected rights to the beneficial use of waters of the Colorado river system" against impairment.

- In 1928, Congress authorized the building of Boulder Dam for "reclamation of public lands and other beneficial uses exclusively within the United States." Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (Dec. 21, 1928).

- In 1948, the Upper Colorado River Basin Compact (NMSA 1978, § 72-15-26) also adopted beneficial use as the basis for apportioning water between the upper basin states. In Article II(b)(2) the upper basin compact also re-enacted verbatim the beneficial use limitations of the 1902 Reclamation Act:

> beneficial use is the basis, the measure and the limit of the right to use . . . .

- **In 1956, Congress explicitly reaffirmed the beneficial use requirement when it enacted the Colorado River Storage Project Act, under**

which Navajo Dam was constructed. The act recites that one of its purposes is "storing water for beneficial consumptive use." Pub. L. No. 84-485, 70 Stat. 105 (Apr. 11, 1956). Section 4 of the Colorado River Storage Project Act provides that in constructing, operating, and maintaining the projects, the Secretary of the Interior shall be governed by Reclamation Act of 1902. The Reclamation Act requires beneficial use. See Section 8, quoted above.

- **In 1962, Congress incorporated the beneficial use and PIA requirements when it authorized the Navajo Indian Irrigation Project.** Public Law 87-483 was enacted "for the purposes of furnishing water for the irrigation of irrigable and arable lands . . . and other beneficial purposes." The NIIP project is also subject to the Reclamation Act of 1902, which requires beneficial use in order to create a water right.

- In 1963, in *Arizona v. California*, 373 U.S. at 557 n.23, the U.S. Supreme Court reaffirmed the beneficial use and PIA requirements: "'Beneficial consumptive use' means consumptive use measured by diversions less return flows, for beneficial (nonwasteful) use." It "concluded, as did the Master, that **the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage**." *Id.* at 601.

● When Congress authorized the San Juan-Chama Project, the Project was subject to the Reclamation Act of 1902, with its beneficial use requirement.

In short, the governing laws and cases have never wavered from the rule that "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." This rule of law applies to *Winters* claims. It applies to every one of the projects authorized by Congress, including NIIP. No federal or state agency has the legal authority to depart from the beneficial use requirement. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34, 1142, 1144 (10th Cir. 1981); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, ¶ 52, 116 N.M. 194.

When the lower court awarded more than 500,000 acre-feet of water for NIIP, an admittedly non-beneficial use, the lower court acted contrary to *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375. In *City of Las Vegas*, the Supreme Court held that the Pueblo rights doctrine "conflicts with the fundamental principle of beneficial use that lies at the heart of New Mexico water law."

> In New Mexico, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. We have said that this fundamental principle "is applicable to all appropriations of public waters." *State ex rel. State*

> *Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). "As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use." . . .
>
>> [W]ater was placed in a unique category in our Constitution—something that cannot be said of lumbering, coal mining, or any other element or industry. The reason for this is of course too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival. . . .
>
> *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 417, 467 P.2d 986, 989 (1970). . . .
>
> * * *
>
> [Water rights] are limited by the principle of beneficial use and are to be quantified by the amount of water put to beneficial use by the pueblo within a reasonable time of the first appropriation.

City of Las Vegas, ¶¶ 34, 35, 69.

NIIP has been operating for more than 40 years, and it has never put the water to beneficial use. Why? Because NIIP is not practicably irrigable acreage. Navajo Nation, the U.S., and the State Engineer admitted this fact during the summary judgment proceedings, RP16948, 16954-56; RP15291-92; RP16436-37. See Point 4 below.

The rule of beneficial use is not merely a state law requirement; it is also required by the federal cases and statutes, including *Winters* and the cases that followed *Winters*, like *Arizona v. California*. Therefore the New Mexico Supreme Court's analysis and holding in *City of Las Vegas* applies not only to the Pueblo rights doctrine, but equally to the Winters doctrine as well.

Indeed, Congress had arrived at the very same conclusions as the New Mexico Supreme Court almost a century earlier. In 1911, Congress abolished the Winters doctrine within New Mexico, because *Winters* clashed with the rule of prior appropriation and beneficial use which Congress approved in Article XVI of New Mexico's Constitution. Congress abolished the Winters doctrine in New Mexico for the same reasons that were enunciated by the New Mexico Supreme Court when it abolished the Pueblo rights doctrine.

The lower court judgment is inconsistent with this court's decision in *State ex rel. State Engineer v. Commissioner of Public Lands*, 2009-NMCA-004, ¶ 15, 145 N.M. 433, where this Court ruled that there was no implied federal reservation of water rights for state trust lands.

> Overall, the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders. *See New Mexico*, 438 U.S. at 702 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). **Generally,**

> **water rights must be obtained by appropriation under state water law, even if those rights are developed in land owned by the federal government.** *See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935) . . . .

The same analysis applies with even greater force to the actions which Congress took in 1911, when it passed the statute, 37 Stat. 1723, approving and ratifying prior appropriation and beneficial use as the constitutional rule in New Mexico, without exception. When Congress has stated its intention expressly, by approving prior appropriation and beneficial use as part of the New Mexico Constitution, there is no room for judicial implication to the contrary.

POINT 3.
When the lower court repudiated beneficial use, it contradicted the very decree which it signed.

The district court opinion rejected the requirement of beneficial use, RP33799. In so doing, the court contradicted the very judgment which it signed. Section 12 of the partial final decree provides that "[b]eneficial use shall be the limit of the rights to use water adjudicated to the Navajo Nation.", RP17954-55.

POINT 4.
NIIP is not PIA. The Navajo Nation, U.S. and OSE admitted this fact during the summary judgment process. Therefore an award of water rights for this irrigation project is contrary to the *Winters* cases and all applicable federal and state statutes.

In *Arizona v. California*, 373 U.S. 546, 601 (1963), the U.S. Supreme Court ruled that practicably irrigable acreage (PIA) is the only proper way to quantify federal reserved rights for Indian tribes. Under *Winters*, when a tribe claims that it can put water to beneficial use for irrigation on the reservation, it has the burden of proving that irrigating the acreage is economically feasible.

During the proceedings in the District Court, the Navajo Nation, the U.S., and OSE admitted that NIIP is not practicably irrigable acreage (PIA). See partial transcript of the hearing in this case on April 30, 2013, which is Exhibit 1 to Reply in Support of Motion for Partial Summary Judgment, filed May 24, 2013, RP0016948, 0016954-56.

> JUDGE WECHSLER: . . . . And I'd ask you to elaborate for the court, what is the Navajo Nation's position with respect to the matter of proving its water rights to NIIP?
>
> MR. POLLACK: Your Honor, first of all, **we don't think that it's the court's role here to determine what the water rights are for NIIP.** We think what the court is charged with is approving an overall settlement, and **getting into proof of each of the elements of the water rights that are proposed in the settlement is beyond what the court was instructed to do.** Or at least the initial order by Judge Sanchez says that the purpose of the Navajo inter se is to determine whether or not to approve a settlement that was ratified by Congress in 2009. It is not to go into the merits of the actual water rights that are identified in the settlement decree. We believe that's a slippery slope.
>
> **But with respect to the water rights for NIIP, no one here is arguing that the water rights for NIIP are based on practicably**

irrigable acreage. And we have been consistent on that from the beginning. The court will recall that I did argue to the court when I asked for protective order to put a stop to all of this discovery about NIIP and PIA, that I argued that we were not basing the water rights for NIIP on PIA. **We were not basing it either in the settlement or in the United States statement of claim based on PIA,** and that the water right for NIIP is a water right that has been established by Congress, and that the court cannot, cannot abrogate a congressional authorization of water.

The three governments also conceded this point during the summary judgment process. On April 15, 2013, the acequia defendants listed the following facts as undisputed, RP0015291-92:

1. The land occupied by NIIP is not practicably irrigable acreage (PIA).
2. NIIP is not a beneficial (nonwasteful) use of water.
3. The lands occupied by NIIP are not suitable to sustained irrigation at reasonable cost.
4. The NIIP land is not suitable for irrigation at reasonable cost primarily due to its geography. The NIIP land is located far above the San Juan River in vertical elevation. The NIIP land is distant from the San Juan River in horizontal terms.

* * *

6. Since its inception, the cost of building and operating NIIP-NAPI has substantially exceeded the revenue of NIIP-NAPI.

The Navajo Nation and the United States did not dispute any of these numbered facts, RP16436-37.

PIA and beneficial use are a question of fact, not law. *Arizona v. California*, 373 U.S. at 557, n.23; *Jicarilla Apache Tribe v. United States*, 657 F.2d at 1133.

The Navajo Nation and the U.S. were forced to admit that NIIP is not PIA because there was overwhelming evidence in the record which they could not controvert in good faith. For example, B Square Ranch discovered NIIP documents on March 11, 2013, which say that NIIP will not be expanded to full acreage. RP16666-67.

NIIP absolutely does not meet the PIA tests for economic feasibility set forth in *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, ¶¶ 48-73, 116 N.M. 194 (hereafter the *Mescalero* PIA case). In *Mescalero*, the Court of Appeals ruled that the United States and the Mescalero tribe had the burden of proof and persuasion to prove that a particular irrigation project was economically feasible. The court ruled that the tribe "should bear the burden of production and persuasion to show how many acres it can practicably irrigate." *Id.* ¶ 43. This requires extensive evidence and testimony as to whether a particular project is susceptible to sustained irrigation at reasonable costs, using generally accepted standards for economic feasibility analyses. *Id.* ¶ 51.

In *Mescalero*, the United States and the Mescalero Apache Tribe made a *Winters* claim for diverting 17,750.4 acre-feet of water annually from the Rio Hondo River system. The case was heard by retired New Mexico Supreme Court Justice Lafel Oman, sitting as a District Court judge pro tem. Justice Oman conducted a trial and awarded the tribe 2,322.4 acre-feet of diversion. The District Court received detailed information "on soil type and quality, climate and growing season, water quantity and quality, market factors in prices, equipment, labor, and financing." The court found that the projects were not "susceptible [to] sustained irrigation at reasonable cost," which requires "not only proof of the arability but also the engineering feasibility of irrigating the land." *Id.* ¶ 51.

Quantifying PIA in the *Mescalero* case was a difficult task, because it was necessary to consider evidence about the economic feasibility of hypothetical irrigation projects which might be built in the future. *Id.* ¶ 54. By contrast, the PIA task in the present case was much easier, because NIIP has been in operation for a long time. 50 years of actual experience has proved beyond any doubt that NIIP is not practicably irrigable acreage.

POINT 5.
Because NIIP is not PIA, water for NIIP cannot be included in the Navajo water claim. Federal and state officials have no authority to allow a nonbeneficial use of water.

First, the United States Supreme Court has ruled that PIA is the only basis for quantifying and awarding federal reserved rights under *Winters*. *Arizona v. California*, 373 U.S. 546, 601 (1963) ("The only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."); *Wyoming v. United States*, 492 U.S. 406 (1989) (reaffirming the PIA standard in *In re General Adjudication of All Rights To Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988)).

The decisions of the United States Supreme Court on federal reserved rights are binding on the lower court in this case. *DIRECTV, Inc. v. Imburgia*, No. 14-462, 2015 WL 8546242, at *5 (U.S. Dec. 14, 2015) (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)):

> Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."

Second, since the settling parties acknowledged that NIIP is not PIA, water for NIIP does not meet the PIA standards required by the New Mexico courts in the *Mescalero* case.

Third, PIA is simply the broader principle of beneficial use, applied to irrigation projects. Beneficial use is the cornerstone of state and federal water

law in the arid western regions of the United States. All of the governing statutes and cases, both state and federal, require appropriators of water to put the water to beneficial use and to avoid wasting water.

The beneficial use requirement is built into the Reclamation Act of 1902, the New Mexico Constitution, and every federal and state law since then, including the Colorado River Storage Act of 1956 and the NIIP Project Act of 1962.

Fourth, nonbeneficial use never creates a water right, no matter how long it persists. NIIP has diverted water for decades, but a prolonged waste of water cannot create a water right under state or federal law. The failure of public officials to enforce the law of beneficial use cannot create a water right. The New Mexico Supreme Court so ruled in *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶¶ 20-21, 28, 62 N.M. 264:

> **[N]o matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use**, within the meaning of the Constitution. Article 16, §§ 1, 2 and 3, and § 75-11-2 of 1953 Compilation. **Water, in this state, is too scarce, and consequently too precious, to admit waste.** . . .
>
> Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated or by waste by misapplication which can be avoided by the exercise of a

> reasonable degree of care to prevent loss, or loss of a volume which is greatly disproportionate to that actually consumed.
>
> * * * *
>
> The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. . . . [T]he the rule that no one has a right to use or divert water except for beneficial use is clearly indicated by the framers of our Constitution.

Erickson is controlling precedent from the New Mexico Supreme Court, which the district court was obligated to follow, but did not.

In *Jicarilla Apache*, the Tenth Circuit quoted and followed *Erickson*. The court held that federal and state agencies have no legal authority to authorize a nonbeneficial use, whether by permit or contract or otherwise. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1144 (10th Cir. 1981). It held that storage of San Juan-Chama water in Elephant Butte was not a beneficial use, even though the BOR and the City of Albuquerque had declared and agreed that it was a beneficial use. The court also held that a contract between the state and the federal government does not create a beneficial use.

Therefore, because NIIP is not PIA, the Navajo Nation does not have a right to water for NIIP. Bill Richardson had no legal authority to award water for a nonbeneficial (wasteful) use.

In contrast to NIIP, the San Juan community ditches concede that the Navajo Nation does have PIA water rights for the Hogback and Fruitland projects, because those irrigation projects are located down in the valley, right next to the San Juan River, not up on the mesa like NIIP. The amount of water and acreage for these valley projects is in dispute, so the exact PIA amounts will have to be quantified at a trial.

POINT 6.
The 1962 NIIP Act explicitly states that it does not create any water rights.

The 1962 Act, Public Law 87-483, authorizes the future appropriation of federal money to construct NIIP. Congress authorized the possible future expenditure of money to move dirt, pour concrete and construct an irrigation project with a engineering design capacity of 508,000 acre-feet per year for 110,630 irrigated acres. Section 2. Public Law 87-483 is a construction bill: it authorizes the construction of water works. It does not create or grant a water right. And Public Law 87-483 does not repeal the federal laws and cases that require beneficial use.

In plain language, Section 13(c) of the NIIP Act explicitly disclaims any Congressional intention to create a water right:

> **(c) No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act**, and Congress does not by its enactment, construe or interpret any

> provision of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, or the Mexican Water Treaty or subject the United States to, or approve or disapprove any interpretation of, said compacts, statutes, or treaty, anything in this Act to the contrary notwithstanding.

Pub. L. No. 87-483, 76 Stat. 96, § 13(c) (Jun. 13, 1962) (*codified as* 43 U.S.C. § 615uu(c)).

Section 13(c) means several things. First, the 1962 NIIP Act does not create a water right for NIIP. Second, the 1962 NIIP Act does not prejudice the water rights of the Community Ditch Defendants and all the other water users on the San Juan River. Third, the NIIP Act does not diminish the water rights allocated to New Mexico by the Colorado River compact and the Upper Colorado River Basin compact.

The lower court refused to follow the plain meaning of the 1962 NIIP Act. The court confused the creation of water rights with the construction of water works. In the 1962 NIIP Act, Congress authorized water works, not water rights. Congress authorized the construction of water works – irrigation projects with canals, pipes, etc. – but waterworks are not sufficient by themselves to create water rights. Mere diversion and storage of water does not constitute appropriation thereof, because water must be applied to

beneficial use to constitute appropriation. *Ickes v. Fox*, 85 F.2d 294 (App. D.C. 1936), *aff'd*, 300 U.S. 82 (1937).

POINT 7.
The Richardson-Navajo agreement is a nullity because it has not been enacted as a statute by the New Mexico Legislature, as required by *State ex rel. Clark v. Johnson* and *Pueblo of Santa Ana*.

In 1995 Governor Gary Johnson signed gambling agreements with tribes in New Mexico which purported to bind the State in perpertuity. A citizen (Guy Clark) and two legislators (Max Coll and George Buffett) challenged the governor's action. In an opinion by Justice Minzner, the Supreme Court ruled unanimously that only the legislature has the constitutional authority to bind the State of New Mexico to an agreement or compact with a state or a tribe. The legislature must enact the terms of the compact into statute. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 30, 120 N.M. 562. Therefore the Supreme Court ruled that the tribal agreement signed by the governor was a nullity.

Despite the Supreme Court's unequivocal decision in *Clark*, the situation has repeated itself with Bill Richardson. In December 2010, just before he left office, Governor Richardson signed an agreement with the Navajo Nation that would bind the State of New Mexico in perpetuity. Like Governor Gary Johnson before him, Governor Richardson purported to bind the State of New

Mexico to a tribal compact without legislative enactment. The two situations are almost identical: the only difference is that Governor Johnson's tribal agreement dealt with casino gambling, while Governor Richardson's tribal agreement deals with water.

The Richardson-Navajo agreement is an unconstitutional attempt to make major changes to several New Mexico statutes without legislative action. Governor Richardson's agreement gives away 635,000 acre-feet, which is more than half of the water that New Mexico is entitled to under the Colorado River Compact of 1922, § 72-15-5; the Upper Colorado River Basin Compact, § 72-15-26; and the Animas-La Plata Project Compact, § 72-15-1.

The terms "agreement" and "compact' are synonymous. A compact is defined as "An agreement; a contract. Usually applied to conventions between nations or sovereign states." *Black's Law Dictionary* 351 (4th ed. 1968) (citation omitted). Most compacts are settlement agreements, like the proposed Navajo water compact, which is called a "Settlement Agreement". A compact is a "legislative means" by which states settle disputes with other states or tribes. *Clark*, ¶ 34. A state cannot enter into any agreement or compact with another state, or an Indian tribe, without the consent of Congress. See U.S. Const. art. I, § 10, cl. 3: "No State shall, without the

Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."

A compact is a tripartite agreement between the State of New Mexico, the United States, and another state or tribe. A compact is formed when the agreement is enacted into statute in identical form by all three of the sovereign parties. After that, the compact becomes binding federal law, so the State loses the right to change the agreement. A compact is treated as both a statute and a contract.

The United States and the Navajo Nation have enacted statutes authorizing the Richardson-Navajo compact. But the State of New Mexico has not. This proposed water compact has not been submitted to the New Mexico Legislature for enactment or rejection or modification, as required by *Clark*. Therefore the agreement is a nullity, unless and until it is sent to the legislature and enacted into statute. Clark, ¶ 30. Because the agreement is a nullity, there is nothing for the district court to approve or disapprove.

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

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

Here is part of Justice Minzner's constitutional analysis in *Clark*. It applies with equal or greater force to the present case:

> **Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states.** These agreements encompass such widely diverse governmental purposes as **interstate water usage** and cooperation on higher education. **In every case, New Mexico entered into the compact with the enactment of a statute by the Legislature**.
>
> **Residual governmental authority should rest with the legislative branch rather than the executive branch.** The state Legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the Legislature should be the body of government to address the issue.

Clark, ¶¶ 39-40 (footnotes omitted). In a footnote Justice Minzner listed 22 compacts, and 7 of them related to water.

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

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

Nevertheless, the lower court decided that the Richardson agreement is valid without legislative approval. The district court reasoned that *Clark* is irrelevant because "The Legislature has specifically granted the Court jurisdiction to adjudicate water rights." RP33807. This reasoning is a non-sequitur: the constitutional issue in *Clark* is the separation of powers between the executive branch and the legislative branch, not the powers of the judicial branch. Of course the judiciary has the power to adjudicate water rights, but the question in this case here is whether a Governor can bind the state to a tribal water compact in perpetuity by his own signature, bypassing legislative approval or rejection. No governor has that power; not Gary Johnson, not Bill Richardson, not Susana Martinez. When the district court made its statement about adjudicating water rights, it was missing the point and turning *Clark* on its head. According to the district court's errant logic, the judiciary and the executive could team up to bypass the legislature entirely. *Clark* holds exactly the opposite.

Under *Clark* and *Pueblo of Santa Ana*, the Richardson-Navajo agreement must be submitted to the legislature. **At the present time, this entire**

proceeding is moot, because the legislature might or might not enact the Richardson-Navajo agreement into law. Unless and until that happens, Mr. Richardson's agreement is a nullity; it has no legal effect. *Clark*, ¶¶ 45,49. At the present time, absent legislative action, there is nothing for this Court or the district court to rule upon.

It is pure speculation to guess what the legislature might or might not do with the Richardson-Navajo agreement. The legislature might take no action, leaving the agreement as nothing. Or the legislature might vote to reject the proposed compact. Or the legislators might pass a water compact with different terms, which would serve as a counter-offer to the Navajo Nation and the United States, and a rejection of the agreement as proposed by Governor Richardson. Or the legislators might create a new statutory mechanism to negotiate water compacts with all the Indian tribes in New Mexico, as it did after *Clark*. See § 11-13-1 (Indian Gaming Compact) and § 60-2E-4 (Gaming Control Act).

At present, without legislative enactment, the Richardson-Navajo Agreement is moot. Therefore the present appeal should be dismissed for mootness. The case should be remanded with instructions to vacate the judgments and rulings below.

It is theoretically possible, although it is very unlikely, that the legislature might enact the proposed compact into law with no changes or additions of any kind. This would require the legislature to amend numerous substantive water statutes, the Colorado Compacts, and procedural statutes. At that point, the new legislation would also have to be signed by the Governor, which is also unlikely. If all these improbable events occurred, then and only then, the Richardson-Navajo agreement would no longer be moot.

POINT 8.
The Interstate Stream Commission did not submit the proposed Richardson-Navajo agreement to the Legislature for its approval, as required by § 72-14-3.

Section 72-14-3 requires the Interstate Stream Commission to submit proposed water compacts to the legislature for final approval. The ISC has not complied with the statute:

> That said commission is hereby authorized to negotiate compacts with other states to settle interstate controversies or looking toward an equitable distribution and division of waters in interstate stream systems, **subject, in all cases, to final approval by the legislature of New Mexico**;

The statute authorizes the ISC to negotiate water compacts, but not to enter into them. Once the ISC negotiates a proposed water compact, it must send the agreement to the legislature for enactment, or rejection, or modification. Governor Richardson simply bypassed the ISC and the statute.

POINT 9.
The Richardson-Navajo settlement violates § 72-1-11(C)(1), which requires a tribal water rights settlement to resolve all of the tribe's water rights claims.

In 2005 the legislature passed a statute dealing with possible water rights settlements with Indian tribes, like the water claims by the Navajo Nation, Taos Pueblo, and Pojaque Pueblo ("Aamodt"). The legislature imposed the requirement that any settlement with a tribe must settle all of the tribe's water claims:

> (1) "Indian water rights settlement" means an agreement between the state and a tribe, but not exclusive of any other party as appropriate, **that resolves all of the tribe's water rights claims** and that has been approved by the United States congress; and
> (2) "tribe" means a federally recognized Indian nation, tribe or pueblo.

§ 72-1-11(C).

The Richardson-Navajo agreement violates § 72-1-11 because it does not resolve all of the Navajo Nation's water claims. This is evident from the title of the decree entered by the lower court – "PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION", RP17928-69.

The Richardson settlement is limited to the boundaries the San Juan River Basin within New Mexico, RP17928. Section 9.11.3 of the agreement

provides that "This Agreement shall not alter or affect the quantification of claims or rights of the Navajo Nation to the diversion and use of water outside the San Juan River Basin in New Mexico." RP873. So the express terms of the settlement are contrary to § 72-1-11.

The settlement does not resolve the Navajo tribe's water claims in the basin of the Little Colorado River, which includes parts of the main Reservation, many Navajo communities, the Ramah Navajo Reservation, and the town of Gallup.

The Richardson settlement also does not settle Navajo water claims in the Rio Grande Basin, which includes the Alamo Navajo Indian Reservation and the Tohajiilee Indian Reservation, formerly the Canoncito Band of Navajo.

The Richardson settlement also does not resolve the Navajo claims to the San Juan River or the Colorado River or the Little Colorado for the parts of the Navajo Reservation located in Utah and Arizona. The Navajo Nation asserts huge claims in those states for water from those rivers.

No one knows how any of these additional Navajo claims will be allocated under the Colorado Compact and the Upper Basin Compact. However, any additional water awarded to the Navajo Nation will reduce the

available water supply to non-Indian users in New Mexico. This is one of the reasons why § 72-1-11 insists on a complete settlement of all of a tribe's water right claims at one time, rather than piecemeal settlements. Mr. Richardson simply ignored the 2005 statute.

POINT 10.
The Richardson-Navajo agreement violates the 1922 Colorado River Compact, § 72-15-5.

The Colorado River Compact was negotiated in 1922, by a commission chaired by Herbert Hoover, who later became President of the United States. The Commission reached an agreement on allocating the waters of the Colorado River system among the states. New Mexico was represented on the commission by Stephen B. Davis Jr., who was a justice of the New Mexico Supreme Court and a recognized expert on water law.

Governor Richardson's deal with the Navajo Nation simply ignores many of the clauses in the 1922 compact.

- Article III of the Colorado River Compact adopted the principle of beneficial use as the basis for, and the limitation on, the apportionment of the Colorado River. *See* Article III of the Compact – "beneficial consumptive use."

- Article VIII provides that "[p]resent perfected rights to the beneficial use of waters on the Colorado river system are unimpaired by this compact." The proposed agreement would violate the Colorado River Compact by impairing the pre-1922 rights of the water users on the acequias on the San Juan River. The acequia defendants have water rights that were perfected by prior appropriation and beneficial use before 1922.

- The 1922 Colorado River Compact refused to recognize any priority water rights for Native Americans in the Colorado Basin. The Compact left it to the United States to supply water to Native Americans if that became necessary in the future. Article VII states that nothing in the Compact shall affect "the obligations of the United States of America to Indian tribes."

The 1922 Compact places the burden on the United States to fulfill the obligation, if any, to provide water to Indian tribes. In 1922 the United States agreed and bound itself by compact that the signatory states would have no obligation to supply water for Indian tribes. Herbert Hoover called Article VII "the wild Indian article," and said that the water rights of Native Americans were "negligible." James Lawrence Powell, *Dead Pool: Lake Powell, Global Warming, and the Future of Water in the West*, at 69 (2008). The drafters of the compact dismissed Native Americans "with a terse disclaimer" [Article VII]

and disregarded "the water needs of the nearly sixty thousand Indians residing in the [Colorado] basin in the 1920s." Norris Hundley, Jr., *Water and the West: The Colorado River Compact and the Politics of Water in the American West*, at 80, 334 (2d ed. 2009).

The parties to the 1922 Compact had no intention to reserve any water for Native Americans. If the United States had attempted to reserve water for Indian reservations in the Colorado basin, the delicate negotiations with the states would have failed. And, as a political matter, Congress itself had no intention to allow a reservation of water for tribes in the Colorado River Basin.

Instead, the U.S. and the states agreed by compact in 1922 that the minimal water needs for Native Americans would be satisfied by obtaining water using the laws of the respective states. In New Mexico, this means by obtaining water under the strict rules of prior appropriation and beneficial use, which Congress had already approved in the 1912 Constitution.

The Richardson-Navajo agreement therefore violates Article VII of the Colorado River Compact, because it shifts this water obligation from the United States to the State of New Mexico, and because it takes waters which belong to the public in the State of New Mexico, not the United States or Indian tribes.

- The proposed agreement is contrary to Article IV(b) of the Colorado River Compact, which makes the use of water for the generation of electrical power subservient to "the use and consumption of such water for agricultural and domestic purposes.

- The agreement violates Article III(f) and (g) of the Colorado River Compact. It is an attempt by the United States and the Navajo Nation and the State Engineer to change the apportionment of the waters of the Colorado without complying with the procedures and requirements in Article III(f) and (g).

- The agreement also violates Article VI of the Colorado River Compact. The Richardson agreement is an attempt to sidestep the requirements for dealing with claims or controversies without the appointment of special commissions, and without ratification or direct legislative action by the legislatures of New Mexico and other interested states. It is an invalid attempt to change the Colorado River Compact without obtaining the unanimous consent of all the signatories through amendment of the compacting statutes by each state and by Congress.

POINT 11.
The Richardson-Navajo agreement violates the 1948 Upper Colorado Compact, §72-15-26.

- The agreement violates Article III(b)(2) of the Upper Colorado River Basin Compact. The 1948 Compact provides that "beneficial use is the basis, the measure and the limit of the right" to use water. The Upper Basin Compact therefore reaffirms, <u>in identical language</u>, the rule of water law which had been adopted by New Mexico and Congress in Article XVI, Sections 2 and 3 of the New Mexico Constitution, quoted above. The Upper Basin Compact expressly adopts the same rule, making it binding upon the compacting parties, including the United States as Trustee for the Navajo Tribe.

- The proposed agreement violates Article XIX(a) of the Upper Colorado River Basin Compact. The compacting parties, including the United States, agreed and compacted that the obligation, if any, to provide water to Indian tribes was placed on the United States, not upon the states. If the parties to the 1948 Compact had intended to reserve any water for Native Americans, they would have said so. If the United States had attempted to reserve water for Indian reservations in the basins, the negotiations would have failed. And Congress would not have allowed a reservation of water for tribes in the Upper Basin.

The proposed agreement therefore violates the Upper Basin Compact because it shifts this obligation from the United States to New Mexico, and because it takes waters which the Compact expressly reserves for the State of New Mexico, not the United States or Indian tribes.

- If there is any award of water to the Navajo Nation, the award cannot be charged solely to New Mexico's share of the Colorado River. The Navajo Nation is located in three states (Arizona, New Mexico, and Utah), and located in the Upper and Lower Basins of the Colorado River. Therefore, if any water is awarded to the Navajo Nation, it must be apportioned under the two compacts as between Arizona, New Mexico, and Utah, and also as between the Upper and Lower Basins.

- The proposed agreement violates Article VII of the Upper Colorado River Basin Compact. To the extent that water is delivered from New Mexico to another state, for example water which might be delivered to Window Rock, Arizona, such water must be charged to the other state's share of the Colorado River. Further, all incidental losses relating to such water must be charged to the receiving state, including evaporation from Navajo Reservoir.

- The proposed agreement violates Article XVI of Upper Colorado River Basin Compact. Article XVI provides:

> The failure of any state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this compact, shall not constitute a relinquishment of the right to such use to the lower basin or to any other state, nor shall it constitute a forfeiture or abandonment of the right to such use.

The proposed agreement would relinquish, forfeit, and abandon some 635,000 acre feet of New Mexico's share of the Colorado River to the United States and the Navajo Nation, in violation of Article XVI.

- The proposed agreement violates Article XV(a) of the Upper Colorado River Basin Compact, which states that the use of water for the generation of electric power shall be subservient to the use and consumption of water for agricultural and domestic purposes. The Richardson agreement is would allow the use of water for generation of electric power even when that would "interfere with or prevent use" for the dominant agricultural and domestic purposes protected by Upper Basin Compact.

POINT 12.
The Richardson-Navajo agreement is contrary to the "minimum needs" test in *United States v. New Mexico*, 438 U.S. 696 (1978) and *Mimbres Valley Irrigation Co. v. Salopek,* 1977-NMSC-039, 90 N.M. 410.

In *United States v. New Mexico*, the Supreme Court held that a federal reservation of water will be implied by a court only in those specific instances where without the water the purposes of the reservation would be entirely defeated.

> While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert, supra*, at 141, 96 S.Ct., at 2071. See *Arizona v. California, supra*, at 600-601, 83 S.Ct., at 1497-1498; *District Court for Eagle County, supra*, at 523, 91 S.Ct., at 1001. Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> **This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water**. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. See *California v. United States*, 438 U.S., at 653-670, 678-679, 98 S.Ct., at 2990-2998, 3002-3003. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. **Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.**

United States v. New Mexico, 438 U.S. 696, 700-02 (1978) (emphasis added), *aff'g Mimbres Valley Irrigation Co. v. Salopek*, 1977-NMSC-039, ¶ 4, 90 N.M. 410, which cites *Cappaert v. United States*, 426 U.S. 128, 139, 141 (1976).

In New Mexico, Congress decided that the United States would acquire water for the Navajo reservation in the same manner as any other public or private appropriator – through prior appropriation and beneficial use, as stated in Article XVI of the New Mexico Constitution, which was approved and ratified by Congress after *Winters* had been decided.

Congress established the Navajo reservation for the primary purpose of preserving the Navajos' traditional way of life – the herding of livestock across a vast and mostly arid land. Before the American conquest, the Navajos followed a pastoral way of life as an adaptation to the harsh environment where they lived.

> The Navajo, almost alone among American Indians of the West, were primarily a pastoral people—shepherds, shearers, eaters of mutton, drinkers of goat's milk, master spinners of wool. Navajos followed the slow and watchful life known among anthropologists as *transhumance*, a methodical seminomadism built around the seasonal moving of flocks to higher and lower ground in search of grass. This way of life was, in fact, an ancient and widespread practice throughout the world but nearly unheard of in North America. As pastoralists, the Navajo lifestyle was in some sense more akin to that of ancient Greeks, Hebrews, and Arabs than to contemporary tribes of Native Americans.

Hampton Sides, *Blood and Thunder: The Epic Story of Kit Carson and the Conquest of the American West*, at 26 (2006), RP0012777-78; 0013887-88.

Livestock grazing was the primary way of life for Navajos as a matter of necessity, because most of the land lacked rainfall and surface water. There were only a few spots in the canyons and mountains that could be marginally irrigated from local water sources. Down on the floodplain of the San Juan River, there was a narrow strip of land that might be capable of sustained irrigation, but it was far away from most of the scattered population.

In the mid-1860s, the United States uprooted the Navajo people and marched them to Bosque Redondo on the Pecos River. The U.S. tried to force the Navajos to become farmers, but many of them died. In 1868 General William T. Sherman was moved by their plea to return to their native lands. Four years earlier, General Sherman had marched his army without mercy through Georgia, but he took pity on the Navajos. He allowed them to return to the Four Corners region, rather than sending them east to Indian Territory in Oklahoma.

Unlike most Indian reservations, the U.S. expanded the Navajo Reservation over time. Because Navajos needed more land to continue their traditional grazing, the U.S. enlarged the reservation boundaries many times, expanding it from 5,030 to 23,103 square miles. RP15118.

The Navajo Nation is the largest Indian reservation in America; it is larger than the states of Connecticut, Massachusetts, New Hampshire, and Rhode Island combined. The Navajo Nation is almost twice the size of Switzerland. Because the Navajo Nation is so big, there is no practicable way to transport irrigation water from the San Juan River to the rest of the Reservation. And most of the Navajo uplands are too dry and infertile to sustain irrigation, as NIIP has proved.

Thus history and geography both demonstrate that irrigated agriculture was never the primary purpose of the Navajo Reservation. At best, irrigation was a secondary or incidental purpose, because there are so few locations where it is practicable.

POINT 13.
In 1911 Congress abolished the so-called "Winters doctrine" within New Mexico, by enacting a federal statute (37 Stat. 39) that approved and ratified Article XVI of the New Mexico Constitution, making prior appropriation and beneficial use the universal rule within New Mexico. The United States approved prior appropriation in 1911 to eliminate the possibility that a court would imply prior federal reserved water rights under the 1908 *Winters* decision.

The Richardson-Navajo agreement violates Article XVI, Sections 1, 2, and 3 of the Constitution of the State of New Mexico. Congress approved and ratified these water provisions in 1911 as part of the process for New Mexico's admission to the Union. Enabling Act for New Mexico, Section 4 , 36 Stat.

557 (Jun. 20, 1910); Joint Resolution of Admission of August 21, 1911, 37 Stat. 39. So these provisions have the force of federal law.

Congress and the voters of New Mexico jointly established prior appropriation and beneficial use as the rules of water law for New Mexico.

> Section 1
> **All existing rights to the use of any waters** in this state for any useful or beneficial purpose **are hereby recognized and confirmed.**
>
> Section 2
> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. **Priority of appropriation shall give the better right.**
>
> Section 3
>
> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

By approving prior appropriation in plain text as the constitutional rule of law for New Mexico, the United States and New Mexico jointly intended to, and did, eliminate the possibility that a court might create federal reserved water rights by judicial implication for Indian reservations in New Mexico, as the courts had done in Montana in the 1908 case of *Winters v. United States*, 207 U.S. 564 (1908). Just a few years after *Winters* was handed down, Congress overruled it by statute, 37 Stat. 39, as regards the State of New

Mexico. Congress and the voters of New Mexico recognized that *Winters* cannot be reconciled with prior appropriation, so they abrogated *Winters* within New Mexico by elevating prior appropriation to a constitutional clause which was approved by federal statute.

The Winters case.

In *Winters*, the district court had decided that United States impliedly reserved 5,000 miners' inches of water (120 cubic feet per second) from the Milk River in Montana for use by the downsized Fort Belknap Indian Reservation. In 1889 and 1890 the government began diverting water from the River for domestic and irrigation uses, and in 1898 the government completed a canal and began irrigating approximately 5,000 acres. 143 F. 740, 741. Meanwhile, non-Indians began diverting water upstream, and by the time the case reached court, the Milk River had gone dry on the Reservation.

The United States claimed 10,000 miners' inches for the reservation, but the district court awarded only 5,000 inches. The Ninth Circuit affirmed the trial court. 143 F. 740.

The Supreme Court affirmed the Ninth Circuit. Even though there was no express reservation of water, congressional intent to reserve water for this reservation could fairly be implied by the court from all the pertinent facts,

such as the geography of the Fort Belknap Reservation and the 1888 downsizing from a much larger reservation. As the court said,

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession.

207 U.S. at 576.

Why Congress abolished *Winters* in New Mexico.

Although such a judicial implication may be permissible under clear circumstances like those in *Winters*, it creates chaos in the allocation of water where water is scarce. In a prior appropriation state, when a court implies a federal reservation of water rights for an Indian reservation, with a priority dating back to the establishment of the reservation, the court is upsetting state laws on prior appropriation and beneficial use. Therefore, to exclude any such judicial implication, New Mexico and the federal government agreed to explicit constitutional provisions making prior appropriation and beneficial use the rule of law in New Mexico, without exception.

If New Mexico and the United States had intended to reserve water for Indian reservations within the state, they would have said so during the statehood process. Congress and the New Mexico Constitutional Convention were aware of the *Winters* decision, so they jointly decided to prevent it from

becoming the law in New Mexico. Instead, they agreed that prior appropriation and beneficial use would be the universal law in New Mexico, without exception.

As part of the process of admitting New Mexico to the Union, the United States retained the power to approve or disapprove any particular provision of the proposed state constitution. (The United States actually exercised its veto power on one provision, relating to constitutional amendments.) The 1910 Enabling Act for New Mexico required the Territory of New Mexico to convene a constitutional convention of elected delegates to draft a state constitution, to be approved by the voters at an election, and to submit the provisions of the proposed constitution to Congress and the President for review and approval or disapproval. New Mexico would become a state only "if congress and the president approve said constitution **and the said separate provisions thereof** . . . ." Enabling Act for New Mexico, Section 4 , 36 Stat. 557 (Jun. 20, 1910).

One of the elected delegates to the constitutional convention was Stephen B. Davis, Jr., a lawyer from Las Vegas. Mr. Davis was a recognized expert on water law. Ira G. Clark, *Water in New Mexico: A History of Its Management and Use*, at 224 (1987). He later became a justice of the New

Mexico Supreme Court and served as New Mexico's delegate on the commission that negotiated and wrote the Colorado River Compact, discussed above.

The delegates to the constitutional convention decided that the rules of prior appropriation and beneficial use were essential to the survival and prosperity of the state-to-be, given the extreme scarcity of water in this arid territory. So the delegates decided to elevate these rules and place them into New Mexico's organic law, the Constitution, rather than leaving them as mere statutes. The delegates, including Mr. Davis, drafted Articles 2 and 3 to impose the strict rules of prior appropriation and beneficial use, with no exceptions for anyone.

The proposed constitution was approved by the voters at an election on January 21, 1911. The constitution was then submitted to Congress for review and approval under the Enabling Act. Congressional approval was delayed by a maneuver to tie the admission of Arizona to the admission of New Mexico. And Congress disapproved the a provision which allowed amendment of the New Mexico Constitution by a majority of voters. Congress rewrote the amendment provision; approved the constitution as amended; and by joint resolution of August 21, 1911, 37 Stat. 39, Congress

authorized the admission of New Mexico "into the union upon an equal footing with the original states," provided that voters approved the congressional amendment.

Congress did not change the water provisions in Article XVI. It agreed to and approved those provisions as written, without amendment. Congress did not create any exceptions for Native Americans. Congress is presumed to have known about the *Winters* decision, yet it did not write a *Winters* reservation into the New Mexico Constitution.

The amended constitution was ratified by voters in another election on November 7, 1911. On January 6, 1912, President Taft issued a proclamation admitting New Mexico as a state "into the union on an equal footing with the other states . . . ."

Article XVI is unique to New Mexico, for two reasons. First Article XVI elevates appropriation and beneficial use to constitutional status. Second, Article XVI was approved by the United States <u>after</u> the *Winters* decision in 1908. Arizona was also admitted in 1912, but its constitution contains no provisions on prior appropriation and beneficial use. In Arizona and some other states such rules are left to statutes. New Mexico is the only arid state for which Congress legislated prior appropriation after *Winters*.

The proposed agreement violates not only Article XVI of the New Mexico Constitution, but also the Enabling Act of 1910, 36 Stat. 557; and the Resolution of Admission, 37 Stat. 39; and the Proclamation Admitting New Mexico as a State, 37 Stat. 1723. By those acts, the United States agreed to and approved the provisions of the New Mexico Constitution, "including the said separate provisions" of Article XVI.

These explicit provisions, approved by the United States, override any contrary or inconsistent inference by a court. By approving the New Mexico Constitution, the United States intended to abolish *Winters* in New Mexico, and to negate the possibility that a court would imply federal reserved rights for Native Americans within New Mexico.

By approving Article XVI, Congress decided and agreed that the acquisition of water for Navajos, if that ever became necessary, would be accomplished through prior appropriation and beneficial use, just like other users, not by backdated judicial implication. By enacting prior appropriation and beneficial use as the universal rule of water law, New Mexico and Congress fashioned water laws adapted to the state's unique history and geography. Prior appropriation protected the Indian pueblos along the Rio Grande, which used water for irrigation "from time immemorial". Congress

also protected the Hispanic communities who started irrigating from their acequias before Anglo settlers arrived. In short, prior appropriation fits the special history and environment of New Mexico.

In 1911, when Congress approved and ratified Article XVI of the New Mexico Constitution, Congress was carrying out a more general policy of federal deference to state water laws in arid states. In 1952, Congress reaffirmed and expanded this federal deference by enacting the McCarran Amendment, 43 U.S.C. § 666, 66 Stat. 560 (Jul. 10, 1952). In furtherance of federal deference to state water laws, the United States waived its own sovereign immunity along with the quasi-sovereign immunity of Indian tribes, so that federal water claims can be adjudicated in state court, in compliance with state law.

Most of the defendant-counterclaimants have pre-1912 water rights which were explicitly guaranteed by Congress when it approved Article XVI of the New Mexico Constitution. The Richardson-Navajo agreement infringes those pre-existing rights, contrary to the congressional confirmation of those rights. The Richardson-Navajo agreement violates the constitution and 37 Stat. 39, because it would (a) create water rights by judicial implication, (b)

violate prior appropriation, and (c) give the Navajo Nation water which they have never put to beneficial use.

The proposed agreement, if it ever became final, would violate the equal footing doctrine, whereby states are admitted to the Union on an equal footing with other states. The proposed agreement would give approximately one-third of all the available river water in New Mexico to the Navajo tribe, thus depriving New Mexico of a major benefit of its statehood – the scarce waters in its rivers. Without these public waters, New Mexico is not a viable state.

POINT 14.
The U.S. and Navajo Nation submitted falsified population projections to prove the reservation population would grow to 202,293 in the year 2110. The U.S. and Navajo Nation deliberately omitted the most recent census data from 2010, which shows that the population on the reservation is shrinking, not growing. However the lower court excluded the 2010 census data and accepted the false calculations instead.

To support the Navajo water claim, the Navajo Nation and the U.S. submitted population projections prepared by Gretchen Green, Ph.D, a paid expert. Dr. Green calculated that the population on the New Mexico reservation would grow from 40,745 in the year 2000 to 202,293 in the year 2110. RP17779. This is an increase of 496% over 110 years.

During the summary judgment proceedings, the acequias pointed out that Dr. Green had excluded the 2010 census figures from her calculations.

The 2010 census figures show that the American Indian population on the Navajo Reservation is declining. Total reservation population shrank from 175,232 in 2000 to 169,321 in 2010. RP13219, 17775. This is a decrease of 5,911 during the decade, or 3.37%. Exhibit POP-3 lists the population of every Navajo chapter for 1980, 1990, 2000, and 2010, and it shows that population decreased in most chapters during the last decade. For example, the Indian population of the Hogback Chapter declined from 1,377 in 2000 to 1,206 in 2010, a decrease of 12.4%; the Coyote Canyon Chapter shrank from 941 in 2001 to 680 in 2010, a loss of 27.7%.

On summary judgment, the three governments admitted that the reservation population is shrinking, RP16995. As undisputed fact #3, the Motion for Partial Summary Judgment Concerning Minimum Needs stated:

> 3. The Navajo tribal population living on the Navajo reservation is shrinking rather than growing.

RP14479. The plaintiffs did not dispute this fact, RP16995. They also did not dispute the affidavit submitted by James Rogers, mayordomo of the Jewett Valley Ditch, which borders the Navajo Reservation. Mr. Rogers testified that the reservation population is declining, RP16438-39; RP16448-67.

Given the census data, Dr. Green's concocted projections are utterly inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1998); *Andrews v. United States Steel Corp.*, 2011-NMCA-032, 149 N.M. 461; and Rules 11-702 and -703.

Population is germane to the "minimum needs" analysis required by *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 545 (1963); and *United States v. District Court for Eagle County*, 401 U.S. 520 (1971). Population is also a major consideration in the erroneous *Gila River V* "homeland" theory which the district court adopted. The amount of water needed by 40,000 tribal members is quite different than the amount of water that would be needed by 200,000 tribal members.

Faced with the government's own census figures, the court elected to ignore the 2010 census data, RP33782. In its opinion, the court erroneously stated that the comparable 2000 census data was not in the record. RP33783. This is simply incorrect, because the census figures appear at multiple places in the record, RP13217, 17775. Furthermore, the governments admitted as an undisputed fact on summary judgment that the reservation population is shrinking rather than growing.

To block out the truth about the Navajo population, the court also excluded Mr. Rogers' testimony about the declining population on the

reservation, RP33783. This is reversible error for several reasons. First, Mr. Rogers was simply confirming the government's own figures. Second, population is a matter of fact, not opinion. Third, Mr. Rogers was testifying about his own observations so he does not need to be a paid "expert". Rules 11-601 and 11-701. Fourth, US census data is a frequent and proper subject for judicial notice. *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011). Fifth, the lower court's low opinion of Mr. Rogers' testimony goes to the weight of the evidence, not its admissibility. Sixth, New Mexico disfavors summary judgment; rejecting the testimony of witness as non-expert is subject to de novo review. *Zamora v. St. Vincent Hospital*, 2014-NMSC-035, ¶¶ 9, 21, 335 P.3d 1243.

POINT 15.
The Richardson agreement violates *Luna Irrigation*, 1969-NMSC-111.

The proposed agreement violates *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, 80 N.M. 515, which holds that water released from storage reservoirs into public streams is not subject to private ownership, but rather is subject to diversion and use by the public by priority date. *See in particular* section 9 of the agreement, RP858 *et seq.*

In *Luna Irrigation*, the Luna Irrigation Company claimed that it retained "dominion and control" over water which the company released from its

reservoir in Arizona to flow down the San Francisco River for diversion by the company's dams in New Mexico. The supreme court rejected that argument; it held that waters flowing in a a natural stream are public waters, not subject to private control, even if the waters were previously impounded. The Court cited § 72-1-1; *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021, 16 N.M. 172; and *Turley v. Furman*, 1911-NMSC-030, 16 N.M. 253.

In its opinion, the lower court declined to follow *Luna Irrigation*, claiming that *Luna* only applies to water impounded in another state. This is legal error, because *Luna* is not so limited. *Luna* and § 72-1-1 apply to all water flowing in a natural stream, even if some of the water was once impounded. As the Court explained in *Luna*, when surface waters are released from storage into a river bed, they necessarily merge and interchange with other waters of the stream system. "It is readily apparent that merger of storage waters of the San Francisco River system cannot be prevented." 1969-NMSC-111, ¶ 6.

So once waters are released from Navajo Reservoir to flow down the natural watercourse of the San Juan River main stem, those waters are public waters which can be taken by any person who has a valid water right based on beneficial use and prior appropriation. *Luna Irrigation* is essential to preserving

New Mexico's system of water rights. It is also essential to preserve the regulatory control of the state engineer.

Consider the following situation: Suppose there is a free flowing river within New Mexico. Then the BOR builds a dam across the river. When that happens, every drop of water in the river is impounded in the reservoir. When the water is released back into the river, does the BOR retain "dominion and control" over the water as it flows down the natural course of the river? Under *Luna Irrigation* and § 72-1-1 and N.M. Const. art. XVI, § 2, the answer is NO. Otherwise, the BOR would control every drop of water in the San Juan below Navajo Dam.

However, **the Richardson-Navajo agreement allows the U.S. and the Navajo Nation to operate the San Juan River like a private pipeline**. During the summary judgment hearing the federal lawyers argued this position, and the court ultimately agreed with them.

> 8:49 am Stanley Pollack for the Navajo Nation: 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…**

> Guss Guarino for the United States: If in the event the United States and the Navajo Nation are asked to litigate, **the contract rights for the Navajo Nation will exist and they will exist no matter what this court ultimately rules or quantifies for the reserved rights of the Navajo Nation.**
>
> 8:53:30 Judge Wechsler: **So why are we here?** ....
> 8:55:37 Judge: - **Okay, and so if this court were to say the Navajo Nation is not entitled to any reserved rights**...**what I'm hearing you say right now is, that doesn't make any difference with respect to the Navajo Nation's use of the water in the Navajo Reservoir.**
> Guarino: That's stored in Navajo Reservoir. **That's correct. That's correct**.

This is patently illegal under both state and federal law. When the waters of the river are stored behind a dam across the river, they retain their character as public waters. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, 51 N.M. 207. The mere diversion and storage of water does not constitute appropriation thereof, but water must be applied to beneficial use to constitute appropriation. *Ickes v. Fox*, 85 F.2d 294 (App. D.C. 1936), *aff'd*, 300 U.S. 82 (1937).

POINT 16.
The Richardson-Navajo agreement violates § 72-5-17, which requires reservoir owners to make unused storage capacity available to other water users.

The Richardson-Navajo deal is contrary to the statute that requires the owners of reservoirs with unused capacity to store water for others, as a trustee.

> **§ 72-5-17. Excess waters; sale**
> The owner or owners of any works for the storage, diversion or carriage of water who may make application to store or carry water in excess of their needs for irrigation or other beneficial use, shall be required, as trustee of such right, to deliver such surplus at reasonable and uniform rates to parties entitled to use the same under like conditions and circumstances.

On the San Juan River above Bloomfield, Navajo Reservoir has huge unused capacity which the acequias and municipalities desperately need to store their water. The need for storage is growing greater with global warming and the long-term drought in the Southwest. And the unused capacity in Navajo Reservoir is growing also, for the same reasons. For example, on August 1, 2014, during the peak irrigation season, Navajo Reservoir had 442,575 acre-feet of unused capacity. It only held 1,253,525 acre-feet, out of a live storage capacity of 1,696,100 acre-feet. U.S. Bureau of Reclamation, http://www.usbr.gov/uc/wcao/water/rsvrs/ds/navajo.html.

The Richardson agreement only allows the local users to store up to 20,000 acre-feet, which would only last a few days in a crisis. Imposing an arbitrary maximum of 20,000 af is contrary to § 72-5-17. In most months

Navajo Reservoir has several hundred thousand acre-feet of unused storage, so the U.S. is obligated to make it available at reasonable and uniform rates to local users who need storage.

The community ditches raised this statute in their counterclaim. Mr. Robert Oxford also raised this statute, RP16192. Mr. Oxford is an engineer who was formerly the manager of the Aztec office of the OSE, RP16189.

The lower court never addressed this issue in its opinion. The court apparently decided that the U.S. has no obligations under this law.

CONCLUSION

Mr. Richardson's agreement with the Navajo Nation is illegal. Mr. Richardson's agreement violates Article III of the New Mexico Constitution (separation of powers); Article IV (vesting the legislative power in the senate and house), as set forth in *State ex rel. Clark v. Johnson*; and Article XVI (prior appropriation, beneficial use, and de novo review).

The judgment below must be reversed, and the case remanded with instructions that the Richardson-Navajo agreement must be submitted to the legislature for its consideration. This court should also rule on each of the other points raised here, so these errors do not perpetuate themselves.

Respectfully submitted,

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By /s/ Victor R. Marshall

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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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