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 ACEQUIAS

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Oral Argument Requested

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STATEMENT OF FACTS AND PROCEEDINGS

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, to serve a population of roughly 40,000 tribal member living on the reservation in New Mexico. RP33771; RP17779. 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. RP17848-49; RP12207-08.

The litigants.

In this *inter se* case, AB-07-1, the three plaintiffs are the Navajo Nation, the United States, and the State Engineer. They are seeking a court judgment against all the water users on the San Juan River, to establish the priority and amount of the Navajo tribe's water rights. The defendants include 24 acequias and community ditches[1] on the San Juan River and the Animas River, and the persons (parciantes) who have water rights on those acequias.

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[1]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, 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. See Map of Colorado River Basin, RP17906. The San Juan River provides water to the Rio Grande via the San Juan-Chama Project to supply the cities of Albuquerque and Santa Fe.

The Colorado River Compacts.

The waters of the Colorado River are allocated by the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948. All of these water 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.

The Richardson-Navajo agreement would give the Navajo Nation more than half of the water allocated to New Mexico by the Colorado Compacts. RP13646-47.

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 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 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 two weeks before he left office, without sending it to the Legislature. The Richardson-Navajo agreement has been enacted into statute by Congress and by the Navajo Tribal Council, but not by the New Mexico Legislature.

The summary judgment.

The district court dispensed with a trial. RP17557. It awarded summary judgment for approximately 635,000 acre-feet to the Navajo Nation. The court ruled that there were no disputes about any material facts, and decided all issues of law in favor of the Navajo Nation.

The Court's summary judgment award includes 508,000 acre-feet for the Navajo Indian Irrigation Project. RP17930-32. 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, § 5 of the New Mexico Constitution and § 72-7-1 guarantee 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." Governor Richardson's executive action in signing the water agreement with the Navajo Nation comes within the scope of the constitutional guarantee, along with the actions of the state engineer in trying to carry out Mr. Richardson's plan. See *Santa Fe Resource Alliance, LLC v. D'Antonio*, No. 33,704, 2015-NMCA-___, ¶ 26 (Dec. 9, 2015) (decision of an

executive agency on water matters is entitled to no deference whatsoever; the law places state engineer in the same position as other parties; engineer must participate in the district court proceedings, challenge the opposing evidence and argument, and even offer his own evidence and argument).

On appeal. 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. The burden is on the Navajo Nation and the U.S. to demonstrate the absence of any genuine dispute about the facts. *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation and Revenue*, 2006-NMCA-050. 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. *Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 8.

In this case there were genuine factual disputes over most of the key issues such as: beneficial use; PIA (practicably irrigable acreage); NIIP; the Navajo population; the amount of water available from the San Juan River; the worsening drought in the Southwest; global warming; water for endangered species; the water supply to the Rio Grande via the San Juan-Chama Project; the unbuilt Navajo-Gallup pipeline; and the effect on acequia water rights adjudicated by the Echo Decree of 1948. 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,* without deference to the lower court's rulings on the law. *San Juan Agric. Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶ 8.

ARGUMENT

POINT 1.

The lower court rejected the beneficial use requirement and the PIA standard, and substituted the vague "homeland theory" espoused by the Arizona Supreme Court. By awarding water without proof of beneficial use, the lower court violated the Reclamation Act of 1902; the New Mexico Constitution; § 72-1-2; *Winters*; the Colorado Compacts; *Arizona v. California; Mescalero*; *Erickson*; *Mimbres*; *City of Las Vegas*; and the Colorado River Storage Act of 1956.

In granting summary judgment for the Navajo Nation, 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 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 water court tossed out all the controlling 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, 35 P.3d 68 (Ariz. 2001) ("*Gila V*").

Gila 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 *State ex rel. Martinez v. Lewis*, 1993-NMCA-063 (hereafter "*Mescalero*"), criticizing it as unacceptable and inequitable:

> 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.

The Arizona Supreme Court may have some latitude in construing the laws of Arizona, but lower courts in New Mexico have an absolute duty to follow the decisions of the New Mexico appellate courts, including *Mescalero* and *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009.

Beneficial use is an essential requirement of every federal law governing the allocation of water in the arid West, including *Winters* and

subsequent cases. Beneficial use is also an essential and explicit requirement of state law, including Article XVI of the New Mexico Constitution, ratified by Congress in 1911.

At RP33754-55, the lower court repudiated the doctrine of beneficial use:

> 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 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 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 V* "homeland" concept is utterly undefined. *Gila 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 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.

Federal courts have rejected *Gila V*. In *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005), the court held that the "homeland purpose" theory in *Gila 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.

The U.S. Supreme Court requires beneficial use as an essential requirement for quantifying *Winters* claims. See *Arizona v. California*, 373 U.S. 546, 557 n.23 (1963). "'Beneficial consumptive use' means consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose."

The rule of beneficial use dates from the earliest days of water law in the arid West. Beneficial use is required by all the cases and statutes – except for *Gila V* and the lower court's decision 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.

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

> [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), 43 U.S.C. § 372. The 1902 Reclamation Act was a federal 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 1902 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. 564, 576 (1908). *Winters* incorporates and rests upon the concept of beneficial use. ***Winters* and subsequent cases may change priority dates, but they do 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.

> 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 the beneficial use and prior appropriation clauses in New Mexico's Constitution. Joint Resolution of Admission of August 21, 1911, 37 Stat. 39.

- In 1922, Article I of the Colorado River Compact of 1922 (§ 72-15-5) recites that the Compact is "to establish the relative importance of different beneficial uses of water." Article III apportioned 7,500,000 acre-feet of water per annum for "the exclusive beneficial consumptive use" of the upper basin and the lower basin respectively.

- In 1948, the Upper Colorado River Basin Compact (§ 72-15-26) also adopted beneficial use as the basis for apportioning water between the upper basin states.

- **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 the projects shall be governed by Reclamation Act of 1902, which requires beneficial use.

- **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. Further, the NIIP statute states that the authorization of the NIIP project does not create water rights. Pub. L. No. 87-483, 76 Stat. 96, § 13.

- 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." "**[T]he only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage**." *Id*. at 601.

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, and 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. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34, 1142, 1144 (10th Cir. 1981); *Mescalero*, 1993-NMCA-063, ¶ 52.

When the lower court summarily 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. 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."

> [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.

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

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, where this Court ruled that there was no implied federal reservation of water rights for state trust lands.

> 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) . . . .

POINT 2.

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 3.

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* case and all applicable federal and state statutes.

In *Arizona v. California*, 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, the tribe carries the burden of proving that irrigating the acreage is economically feasible.

The Navajo Nation, the U.S., and OSE admitted that NIIP is not practicably irrigable acreage (PIA). See transcript of hearing April 30, 2013. RP16948, 16954-56:

> 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:
> **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.** ...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,**

The three governments also conceded this point during the summary judgment process. RP16948, 16954-56; RP15291-92; RP16436-37. The acequia defendants listed the following facts as undisputed:

> 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.

RP15291-92. 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.

NIIP absolutely does not meet the PIA tests for economic feasibility set forth in *Mescalero*, 1993-NMCA-063, ¶¶ 48-73. This Court held 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. 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 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 required evidence about the economic feasibility of hypothetical irrigation projects which might be built in the future. *Id*. ¶ 54. In comparison, the PIA question in the present case was much easier, because 50 years of actual

operating experience has proved that NIIP is not practicably irrigable acreage – as the Navajo Nation and U.S. were forced to admit.

POINT 4.

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.

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*; *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. *DIRECTV, Inc. v. Imburgia*, ___ U.S. ___, 136 S. Ct. 463, 468 (2015).

> 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."

Because the settling parties have admitted NIIP is not PIA, the lower court had no legal authority to award irrigation water for NIIP.

PIA is simply the broader principle of beneficial use, applied to irrigation projects. All of the governing statutes and cases, both state and federal, require appropriators of water – including irrigators – to put the water to beneficial use. 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. As the New Mexico Supreme Court said in *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶¶ 20-21, 28:

> **[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.** . . .
>
> * * * *
>
> 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.

The Tenth Circuit quoted and followed *Erickson,* in *Jicarilla Apache*. The circuit 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). Therefore, because NIIP is not PIA, the Navajo Nation does not have a right to water for NIIP. Governor Richardson had no legal authority to award water for a nonbeneficial (wasteful) use. His act was *ultra vires*.

In contrast to NIIP, the Navajo Nation does have substantial PIA rights for the Hogback and Fruitland projects, because those irrigation projects are practicable. They are located down in the valley, right next to the San Juan River, not up on the mesa like NIIP. The exact PIA amounts for these projects must be quantified at trial.

POINT 5.

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

The 1962 Act, Public Law 87-483, authorized 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 public works 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 acequia 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. RP33801-02. 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 6.

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 perpetuity. 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 tribal compact into statute. *State ex*

rel. Clark v. Johnson, 1995-NMSC-048, ¶ 30. 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 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. 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). Compact are "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.

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. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), 104 F.3d 1546,

1553-54 (10th Cir. 1997). Confirming *Clark*, the federal court held that Governor Johnson lacked authority under New Mexico law to sign a tribal gambling compact, and therefore the compact was void, even though it had been approved by a federal statute and by the Secretary of the Interior.

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.

In its summary judgment, the lower court rejected *Clark* and *Pueblo of Santa Ana*. The district court opined that *Clark* is irrelevant because "The Legislature has specifically granted the Court jurisdiction to adjudicate water rights." RP33807. This is a non-sequitur: the 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 that is not the question. The question 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.

POINT 7.

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.

> That said commission is hereby authorized to negotiate compacts …**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 8.

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 New Mexico Legislature imposed the statutory 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** . . . .

§ 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. RP17928. Section 9.11.3, RP873.

The settlement does not resolve the Navajo tribe's water claims:

● in the Little Colorado River Basin, which includes parts of the main Reservation, many Navajo communities, the Ramah Navajo Reservation, and the town of Gallup;

● in the Rio Grande Basin, which includes the Alamo Navajo Indian Reservation and the Tohajiilee Navajo Indian Reservation;

● in Utah and Arizona. The Navajo Nation asserts huge claims in those states for water, in addition to the water from New Mexico.

POINT 9.

The Richardson-Navajo agreement is contrary to the "minimum needs" and "primary purpose" tests in *United States v. New Mexico* and *Mimbres Valley Irrigation Co. v. Salopek*.

In *United States v. New Mexico*, the Supreme Court held that a federal reservation of water will be implied by a court only for the minimum amount of water necessary to fulfill the primary purpose of the reservation.

> 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, 702 (1978), *aff'g Mimbres Valley Irrigation Co. v. Salopek*, 1977-NMSC-039, ¶ 4, which cites *Cappaert v. United States*, 426 U.S. 128, 139, 141 (1976).

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.

> 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 . . . .

Hampton Sides, *Blood and Thunder: The Epic Story of Kit Carson and the Conquest of the American West*, at 26 (2006), RP12777-78; 13887-88.

Livestock grazing was the primary way of life for Navajos as a matter of necessity, because most of the lands lacked rainfall and surface water. There were only a few spots in the canyons and mountains practicable for small scale irrigation.

In the mid-1860s, the United States uprooted the Navajo people, marched them to Bosque Redondo on the Pecos River, and tried to force the them to become farmers. Many of them died. In 1868 General William T. Sherman was moved by their plight, so he allowed them to go back to their native lands and traditional ways. Because the Navajos needed large areas to continue their traditional grazing, the U.S. enlarged the reservation boundaries many times, expanding it from 5,030 to 23,103 square miles, making the Navajo Nation almost twice the size of Switzerland. RP15118. Meanwhile, the U.S. was taking lands away from other Indian tribes, for example the Milk River Reservation in *Winters*.

So 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 irrigation is practicable, as NIIP has proved.

POINT 10.

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

In the Colorado River compacts, the signatory states and the United States agreed that the obligation (if any) to supply water to Indian tribes would

rest upon the U.S., not the states. **The United States has many other ways to ensure an adequate water supply to the Reservation without taking 635,000 acre-feet from the San Juan River, so there is no necessity for implying a federal reserved water right.** *Winters* is an example of judicial implication by necessity. Therefore a court will imply federal reserved water rights only when absolutely necessary, and only if "without the water the purposes of the reservation would be entirely defeated." *U.S. v. New Mexico*, at 700.

Under the "minimum needs" standard required by *U.S. v. New Mexico* and *Mimbres Valley*, the Navajo Nation already has sufficient water supplies, and can obtain more if needed, without creating a federal reserved right.

1. Through prior appropriation and beneficial use, the tribe already has substantial water rights on the San Juan River, for the Fruitland-Cambridge Irrigation Project, and the Hogback-Cudei Irrigation Project. The irrigation rights for these projects are substantial; no one contests the validity of those rights; they just need to be properly quantified under the PIA standard.

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

3. The tribe and the U.S. can acquire more water for the Reservation in the future through actual appropriation and beneficial use, on an equal basis with non-Navajo users.

4. The U.S. can purchase water rights for the tribe.

5. The U.S. can lease water rights on a short or long-term basis for the tribe.

6. The tribe and the U.S. can develop substantial local sources of surface and groundwater within the Reservation. Because these sources lie within the tribal boundaries, the Navajo Nation controls their use and development.

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

This situation is quite different from *Winters*, where reserving a water right was the only possible way to provide a water supply to the Milk River reservation. *Winters v. United States*, 207 U.S. 506 (1908). Therefore, there is no necessity for creating water rights by judicial implication for the Navajo Nation.

While granting summary judgment, the court refused to consider these issues. RP12186.

POINT 11.

The government plaintiffs deliberately violated the minimum due process requirements imposed by *Mullane v. Central Hanover Bank*; *Macaron v. Associates Capital;* and *Patrick v. Rice*. The three governments made a conscious decision to avoid searching records that were readily available.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the federal Supreme Court decided that the due process clause of the United States Constitution requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314.

In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court applied *Mullane* to invalidate an Indiana tax sale. *Mennonite* holds that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." 462 U.S. at 798.

In *Macaron v. Associates Capital Services Corp.*, 1987-NMCA-005, this Court ruled that notice by publication does not provide a mortgagee of real property with constitutionally adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. *Macaron*, ¶ 7. "Here, extraordinary efforts were not necessary; the Bank had recorded the mortgage

in county clerk's office so that the identity and address of the bank were readily ascertainable." ¶ 10.

Patrick v. Rice, 1991-NMCA-063, invalidated a tax sale because the county tax division did not provide mailed notice to the taxpayers, although there was substantial evidence that the division searched for the address with reasonable diligence. 1991-NMCA-063, at ¶ 8. Even so, the county's efforts were inadequate to meet due process standards. Bare compliance with statutory notice requirements does not meet constitutional standards; the means employed to give notice must be "such as one desirous of actually informing [the interested party] might reasonably adopt to accomplish it." *Patrick*, ¶ 10. "Overall, there were too many ways the division could have ascertained plaintiffs' current address for us to say that it was not reasonably ascertainable." *Id.* ¶ 16.

In the present case, the three governments deliberately refused to use available data sources to identify and serve the defendants in the Navajo *inter se*. This unconstitutional litigation tactic drastically reduced the number of people who could object to the Navajo water claim.

The record below shows the following:

A. The plaintiffs refused to check the real estate records filed with the San Juan County Clerk. These records show the current owners of every parcel of land along the San Juan River. Because water rights are appurtenant to the land, § 72-1-2, the owners of the land also own the water rights being affected by the Navajo *inter se*, except in rare instances. See RP6928 (email from Victor Marshall to Arianne Singer: "Have you looked in the county real estate title records (at the county clerk), in addition to the county assessor, to see who currently owns tracts below the ditches?"). The real estate records are also available at title companies, which are required by statute to keep current title records. § 59A-12-13. Modern title records are easily searchable by computer.

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

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

D. After the acequias filed notices of participation on behalf of more than 10,000 defendants, the plaintiffs moved to strike their appearance as parties.

E. The three governments did not conduct a current hydrographic survey of the San Juan River, as required by statute. §§ 72-4-13 through -17. RP2221. Instead the federal government substituted a purported "hydrographic survey" limited to Navajo lands. RP949-1364. This was not based on any new field work; and it was prepared by the U.S., an adversarial party, not a neutral party. The three governments avoided doing a real hydrographic survey because it would have identified many additional water owners who opposed the Navajo water claim.

F. The United States, OSE, and Navajo Nation used the 1938 hydrographic survey, which was 73 years out of date, and the 1948 Echo decree, which was more than 63 years out of date.

RP2221.

G. The acequia defendants filed a notice that these procedures were constitutionally defective, but it had no effect.

RP7542-45.

POINT 12.

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

In the Navajo *inter se* proceeding, AB-07-1, the Navajo Nation, the United States, and the State Engineer sought a court judgment to establish the Navajo claim against the acequia defendants and all other water users in the San Juan Basin. RP841-948.

In response, the acequias filed a counterclaim seeking a judgment from the court that the rights and priorities of the acequias are superior relative to the rights of the Navajo Nation, at least for the most part. RP12178-260.

The adjudication of relative amounts and priorities is the essence of any *inter se* proceeding. An *inter se* allows – and requires – competing claimants to prove the priority and the amount of their water rights relative to other water users. In their counterclaim, the acequias sought a court judgment enforcing their superior water rights as against the Navajo Nation, the United States, and the State Engineer, so that the acequias and parciantes actually receive the wet water to which they are legally entitled. RP12214-16; RP17817-17906.

The law required the acequias to assert their counterclaims in the *inter se*, because these were mandatory counterclaim under Rule 1-013(A). The

penalties for omitting a mandatory counterclaim are harsh. If a party fails to assert a mandatory counterclaim, it is lost forever. *Adams v. Key*, 2008-NMCA-135, ¶ 15; *Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank*, 1987-NMSC-018.

Counterclaims among water claimants are also required under Rule 1-071.2, whereby the court adjudicates the quantities and priorities of water rights "both as between the plaintiff and the defendant and as among the defendant and other water rights claimants."

However, the water court refused to allow the acequias' mandatory counterclaims. RP14158-62. This ruling is contrary to Rules 1-013(A) and 1-071.2. It is an outright denial of the right to be heard in court, levied against thousands of parciantes who have no other forum to protect their rights.

The district court said that it would consider the counterclaim as objections to the claim of the Navajos, RP14161, but that is not sufficient. The acequias were entitled to a judgment which they could enforce against the U.S and the Navajos.

When the district court refused to allow the acequia defendants to establish their priorities relative to the Navajo Nation, the court committed an outright violation of *State ex rel. Reynolds v. Allman*, 1967-NMSC-078, ¶¶ 11-16.

The Supreme Court held that it was a denial of due process for the trial court to deny the defendant-appellants an opportunity to prove the relative priority of their water rights in an *inter se* proceeding.

> [Defendant-Appellants] should have been permitted to present such proof as was pertinent to establish the relative priorities of their claims as related to those of the Canal Company.

By striking the mandatory counterclaims, the court contradicted *Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 7, n.1 (cited as supplemental authority, RP14143).

> *inter se* adjudications provide the opportunity for parties to dispute the determination of their water rights among each other and not simply challenge their individual claims with the State Engineer. *See, e.g.*, Rule 1-071.2 NMRA (defining *inter se* procedures for the adjudication of stream system priorities).

By refusing to hear the mandatory counterclaim, the district court violated the fundamental rule of justice that "every case has two sides." See UJI 13-110; UJI 13-302D. An *inter se* is a two-way street, but the lower court converted it into a one-way street.

Unless it is reversed, the lower court's summary judgment means that all San Juan water users have lost any chance to prove their water rights relative to the Navajo Nation and the U.S. This seems to be what the lower court

intended, when the court stated that the state engineer will be able to cut off the water supply to the acequias without further court action. RP33759-60.

POINT 13.

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

The 1922 Colorado River Compact is a statute that settles the allocation of water among the states.

Governor Richardson's deal with the Navajo Nation violates many of the statutory provisions of the Compact, § 72-15-5.

- The Richardson agreement violates Article III, because it awards water without beneficial 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 Richardson agreement violates Article VIII by impairing the pre-1922 rights of the water users on the acequias on the San Juan River.

- The 1922 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. 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. See James Lawrence Powell, *Dead Pool: Lake Powell, Global Warming, and the Future of Water in the West*, at 69 (2008); 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).

Instead, the U.S. and the states contracted in 1922 that the minimal water needs for Native Americans would be satisfied by obtaining water using the laws of the respective states, i.e. prior appropriation and beneficial use, which Congress had already approved in the New Mexico Constitution.

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

- The agreement changes the apportionment of the waters of the Colorado, without complying with Article III(f) and (g) or Article VI.

POINT 14.

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: "beneficial use is the basis, the measure and the limit of the right" to use water. **As trustee for the Navajos, the United States is bound by the beneficial use provisions of the Colorado Compacts.**

- The agreement violates Article XIX(a) of the Upper Colorado River Basin Compact, which places the obligation, if any, to provide water to Indian tribes on the United States, not upon the states.

- 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). 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 the water accounting rules in Article VII.

- The Richardson-Navajo agreement would relinquish, forfeit, and abandon some 635,000 acre feet of New Mexico's share of the Colorado River

to the U.S. and the tribe, violating the anti-relinquishment provisions in Article XVI.

POINT 15.

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.

By making prior appropriation the 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*. Just a few years after *Winters*, 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 ratified by an act of Congress.

Why Congress abolished *Winters* in New Mexico.

Winters creates chaos in the allocation of water where water is scarce. When a court implies a federal reservation of water rights, with an early priority date, the court is upsetting state laws on prior appropriation and beneficial use. *See Comm'r of Public Lands, supra.* Therefore, to prevent any such judicial implication, New Mexico and the federal government enacted express constitutional provisions making prior appropriation and beneficial use the rule of law in New Mexico, without exception.

The delegates to the New Mexico constitutional convention decided that these rules 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 enacted them into New Mexico's organic law, the Constitution. 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. Congress rewrote one provision on voting,

and approved the constitution as amended. 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 approved the water provisions as written, without amendment. Congress did not create any exceptions for Native Americans.

Article XVI has two aspects which combine to make it unique to New Mexico. First, Article XVI elevates appropriation and beneficial use to constitutional status. Second, Article XVI was approved by the federal government after the *Winters* decision in 1908. New Mexico is the only arid state for which Congress legislated prior appropriation after *Winters*.

These explicit provisions, approved by the United States, prevent any contrary inference by a court. By approving the New Mexico Constitution, the United States abolished *Winters* in New Mexico, and negated the possibility that a court would imply federal reserved rights for Native Americans within New Mexico.[2]

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[2]It appears that point has never been raised in earlier cases perhaps because the lawyers did not consult the source materials from 1911-12.

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. New Mexico and Congress enacted these water laws to fit the state's unique history and geography. Prior appropriation protected the Indian pueblos along the Rio Grande, and also the Hispanic communities that began irrigating from their acequias before Anglo settlers arrived. In short, prior appropriation fits the special history and environment of New Mexico.

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.

Therefore 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,

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

(d) impair pre-1912 water rights.

POINT 16.

The U.S. and Navajo Nation falsified their population figures by omitting the most recent census data from 2010, which shows that the population on the reservation is shrinking, not growing. However the lower court accepted the false calculations and excluded the 2010 census data.

To support the Navajo water claim, the Navajo Nation and the U.S. submitted population projections prepared by Gretchen Green, Ph.D, a paid demographer. 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.

During the summary judgment proceedings, the acequias showed that Dr. Green had excluded the 2010 census figures from her calculations. The 2010 census figures show that the population on the Navajo Reservation is declining. RP13219, 17775; Exhibit POP-3; Rogers affidavit RP16438-39; RP16448-67. During the summary judgment process, the three governments were forced to admit that the reservation population is shrinking. RP14479; RP16995.

Given the shrinking 2010 census data, Dr. Green's concocted projections were 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; and Rules 11-702 and -703.

Nevertheless, the lower court decided to ignore the 2010 census data and the governments' admissions. RP33782. In its summary judgment 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. The governments admitted as an undisputed fact on summary judgment that the reservation population is shrinking. Furthermore, 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).

POINT 17.

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

The proposed agreement violates *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, 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. The Supreme Court 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; and *Turley v. Furman*, 1911-NMSC-030.

In its summary judgment, the lower court refused to follow *Luna Irrigation*, claiming that *Luna* only applies to water impounded in another state. RP33776. 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. 1969-NMSC-111, ¶ 6.

Once waters are released from Navajo Reservoir to flow down the natural watercourse of the San Juan River, those waters are public waters which can be taken by any person who has a valid and prior water right based on beneficial use and prior appropriation.

However, **the Richardson-Navajo agreement allows the U.S. and the Navajo Nation to operate the San Juan River like a private pipeline**. *See in particular* section 9 of the agreement, RP858 *et seq.*

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: **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 . . . .**

6/12/13 Hearing.

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. The 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 18.

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

Navajo Reservoir has huge unused capacity which the local acequias and municipalities desperately need to store their water. The Richardson agreement only allows the local users to store a maximum of 20,000 acre-feet,

which would only last a few days in a crisis. In most months Navajo Reservoir has several hundred thousand acre-feet of unused storage, so § 72-5-17 requires the BOR to make unused capacity available at reasonable and uniform rates to local users who need storage.

POINT 19.

The Richardson-Navajo infringes the jurisdiction of the New Mexico courts; the regulatory authority of the state engineer; and a water owner's constitutional right to *de novo* judicial review.

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

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

Without comprehensive and perpetual waivers of sovereign immunity by the Navajo Nation and the U.S., the Richardson-Navajo agreement is illusory and unenforceable by the state or non-Indians. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 3, 39, 44; *Srader v. Verant*, 1998-NMSC-025, ¶¶ 9-

40 (lawsuit dismissed because Indian tribes were indispensable parties that had not waived sovereign immunity); *Navajo Nation v. United States Dep't of the Interior*, 34 F. Supp. 3d 1019, 1029-30 (D. Ariz. 2014) (Administrative Procedures Act did not waive United States' sovereign immunity).

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

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

The United States and the Navajo Nation have repeatedly told the water court that the court has no authority and no jurisdiction to hear challenges to actions by the U.S. and the Navajo Nation. And the court itself has ruled that it has no authority to review actions by the United States, under any standard. RP33797.

C. **The Richardson-Navajo deal impairs the regulatory authority of the state engineer over the San Juan River.**

Section 17 cedes the state's regulatory authority over 635,000 acre-feet to the Navajo Nation. RP914-21. Section 17 provides that the Navajo Nation, not the OSE, shall have authority to administer the diversion and uses of water awarded by the decree. RP915. The OSE is deprived of any real authority: it can only monitor the use of water and cooperate with the Navajo tribe. *Id*. Section 17 prohibits the state engineer from installing measuring devices to monitor water usage by the tribe.

Section 17(c) allows the Navajo tribe to change the purpose and place of use without the approval of the state engineer. RP916. The decree authorizes the tribe to establish an administrative tribunal for receiving protests from Navajo and non-Navajo users. *Id.* This provision destroys the regulatory authority vested in the state engineer by New Mexico's water code, and it also destroys the right of water owners to file an administrative protest with the state engineer. This section subjects non-Navajo water owners on the San Juan River to the extraterritorial jurisdiction of a Navajo administrative tribunal. There is nothing in the state or federal constitutions that allows this.

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

Section 17 impairs the authority of the New Mexico judiciary under Article VI, Section 13 of the New Mexico Constitution. The Richardson-Navajo deal attempts to cede some of the state's judicial authority to an administrative tribunal of the Navajo Nation.

Once this tribal administrative tribunal has issued a decision, the decree severely limits the power of the New Mexico courts. Even if a Navajo action impairs the water rights of non-tribal members, the decree does not allow New Mexico state courts to protect those rights. The courts' jurisdiction is limited to deciding whether the Navajo decision is fraudulent, arbitrary, capricious; not supported by substantial evidence; or not in accordance with the decree or applicable law.

No Governor – not Governor Richardson, Governor Johnson nor Governor Martinez – has the constitutional authority to limit the plenary jurisdiction of the judicial branch.

E. **Section 17 destroys a water owner's constitutional right to *de novo* fact-finding by a district court judge under Article XVI, § 5.**

See *Santa Fe Resource Alliance, supra.* It is noteworthy that Section 5 of Article XVI was not part of New Mexico's 1912 Constitution. It was added by the legislature and the voters in 1967 to provide the protections of an independent and objective judge. The legislature also enacted a statute that mandates *de novo* fact finding. § 72-7-1.

Section 17 of the decree destroys these protections.

POINT 20.

The lower court prevented more than 9,000 water owners from having an attorney in the Navajo *inter se*.

After the three governments mailed notices about the Navajo *inter se* (using defective mailing lists), RP7542-45, the court allowed a time period for filing "notices of intent to participate". RP2236. During this time, 24 acequias in the San Juan Valley signed written contracts with the Marshall law firm to represent them and their members in the Navajo *inter se* proceeding, with funding to be provided by assessments of $3 per irrigated acre. RP6917-18. The law firm filed a notice of intent to participate on behalf of 10,025 water owners (parciantes) who were shown on the acequias' membership lists. RP5204-5573. The entry of appearance offered to exclude anyone who wished

to hire other counsel, or to participate pro se, or to not participate at all. RP5050; 6893-94; 6939-40; 7427-28; 7574-75; 8293-94.

The lower court struck this participation by water rights owners. The court ordered that in order to obtain legal representation in the Navajo *inter se* case, each individual parciante had to sign and execute a written contract with the law firm. RP7822-44. This court-imposed requirement was impossible to fulfill, because there are thousands of water owners scattered up and down the rivers for more than 120 miles, plus water owners outside of San Juan County and the state.

Many of these water owners did not even know about the Navajo case, because they never received notice, due to the defective mailing lists.

The court's ruling prevented more than 9,000 parciantes from having legal representation in the Navajo *inter se*. To comply with the lower court's order, the entry of appearance was reduced from 10,005 persons to less than 1,000. RP14341.

The community ditches pointed out that this requirement was illegal under *George v. Caton*, 1979-NMCA-028, RP75062 which holds that the existence of an attorney-client relationship does not depend on the execution

of a written contract. See also Rule 16-105(C) in effect at the time – only contingent fee contracts are required to be in writing.

However the lower court refused to follow *George*. RP7832-33. The lower court even imposed a sanction of $500 on the Marshall law firm for attempting to represent these parciantes. RP7839, 7843.

If these ruling are not reversed, ordinary water owners will have no feasible way to join together to hire an attorney. Water owners on other rivers will be excluded from water adjudications by the thousands, just as happened here.

POINT 21.

The lower court set special rules to favor the three governments before the defendants were even joined as parties, thereby denying defendants the due process right to be heard on procedural issues.

The lower court established special ad hoc procedures for hearing the Navajo water claim before local water owners were even given notice that they were being sued. The lower court entered its order establishing procedures for the *inter se* on August 19, 2010, almost nine months before notice of the proceeding was mailed to water owners in May of 2011. RP2212.

The trial court deprived water owners of the opportunity to be heard on the procedures that would be used against them in the *inter se*, while it allowed

the settling parties and other special interests to recommend procedures that were slanted against the defendants. This is a violation of due process and the Rules of Civil Procedure, because a party to litigation has a right to be heard on the procedures to be used in the case, not just the merits of the case.

● For example, the court abolished the pleading requirements under the Rules of Civil Procedure: it excused the three governments from filing a complaint setting forth the legal and factual basis for their claims under Rule 1-008. RP7806.

● The court did away with service of process, because the governments told the court that proper service of process would be too costly. RP786-92.

● The court abolished the requirement of a hydrographic survey, which is required by statute. §§ 72-4-13 through -17. The court substituted a fake hydrographic survey prepared by the United States and the Navajo Nation without any fieldwork. RP949-1364. This pseudo-hydrographic survey was a compilation of unverified information compiled by the adversarial claimants – the Navajo Nation and the United States – from unidentified sources.

● The court allowed the plaintiffs to submit "technical reports" as proof. RP8357-9824. These "technical reports" did not qualify as admissible evidence. These reports were never authenticated; they did not disclose who

prepared them; how they were prepared; where the underlying data came from; or whether the data was reliable. No one claimed to have sufficient personal knowledge to support these "technical reports".

● The court denied water owners their right to file a counterclaim to establish that their water rights were superior to those of the Navajo Nation. RP14158-62.

● The court ruled that local irrigators cannot testify about local irrigation practices and feasibility, because they are not "experts". RP33785; 33789.

● The court even ruled that the former manager of the OSE Aztec office could not testify. RP17746-54.

● In 2008, the court refused to allow discovery into the 2007 hydrologic determination. RP29376-77; 29547-48. The three governments took advantage of this delay to destroy the emails about the 2007 hydrologic determination before discovery was allowed.

● When the defendants requested documents in discovery, the U.S. referred them to boxes of documents archived in a salt mine in Kansas. RP11329-34. The court agreed with the U.S.

● The court knowingly accepted false population projections. RP33783.

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

● The lower court erroneously ruled that it had the legal authority to override the Rules of Civil Procedure and the water statutes because of Rule 1-016(C)(10), which deals with pretrial conferences. RP784. This is legal error: Rule 1-016(C) only pertains to subjects that might be discussed at pretrial conferences after all the parties have been joined. Rule 1-016 does not even apply to this situation, because the defendants had not yet been joined in the action, or even given notice of it, so they had no ability to participate in the supposed pretrial conference. Furthermore, Rule 1-016(C)(10) does not give a judge discretion to abolish the rules on pleading, summary judgment, and evidence.

The lower court admitted that it was rushing to approve the settlement before December 31, 2013. RP11334. In reality, there was no deadline. Under questioning by Special Master Snyder, the three governments admitted that they could extend the "deadline" by agreement, without any action by Congress. RP note: This audio recording is missing from the appellate record.

POINT 22.

The court levied improper sanctions against counsel when counsel cited established law that a judge cannot visit the scene of litigation until all parties have been joined.

In September 2007, long before any of the local water owners had been given notice of the Navajo claim, Judge *pro tem* Rosier Sanchez scheduled a judicial tour and viewing of the Animas-La Plata Project, a major contested issue in the litigation.

Some of the acequias objected to the judge's viewing of the project until all parties had been joined and given an opportunity to participate. RP28743-47. The objection cited ample authority to support their objection, such as UJI 13-119; *Travis v. Preston*, 643 N.W.2d 235, 242 (Mich. Ct. App. 2002), etc. RP28744-45. Counsel was trying to protect the rights of unrepresented persons and non-parties, as counsel is required to do. See Rules 16-403 and 16-404 of the Rules of Professional Conduct.

Nevertheless, the lower court imposed sanctions on counsel for raising the issue. RP28794-96.

This court cannot allow these sanctions to stand. The judicial system cannot function if counsel are sanctioned for raising valid concerns that are well supported by case law and the Rules of Professional Conduct.

POINT 23.

Ex parte contacts with the judge are not proper, and not necessary.

Ex parte communications between a judge and a litigant are never a good idea. They undermine public trust in the judiciary. *Ex parte* communications under Rule 1-071.4 are not necessary.

It appears that Rule 1-071.4 has contributed to many instances in this and other cases where the basic rights of water owners have been sacrificed to accommodate the interests of the OSE. There was no physical depository of water court documents anywhere in the San Juan judicial district. Most of the hearings were held in Santa Fe, not in Aztec. These arrangement are convenient for the state engineer, but they deny due process and fundamental rights to the parties whose water rights are at stake.

Query: Is the location of court records and hearings deemed to be a "general problem of administration" for *ex parte* discussions?

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

POINT 24.

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

Even when *ex parte* contacts are permitted, a judge must promptly disclose *ex parte* contacts and give other parties an opportunity to respond. Rule 21-209(A)(1)(b). RP18029-31. The judge never made any disclosures, and never explained why not.

POINT 25.

The lower court ruled that the governments can exclude local water users from negotiations.

On February 3, 2012, the water court ruled that the Settling Parties "have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations." RP9842. This ruling is entirely correct: good faith negotiations are one of the legal requirements for approving a settlement.

Good faith is a question of fact. *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 13; *Citizens Bank of Clovis v. Runyan*, 1990-NMSC-036, ¶ 16. On this factual question, the acequias submitted an affidavit by Jim Rogers, the majordomo of the Jewett Valley Ditch, describing how local users were excluded from the negotiations. RP16180-81.

The Navajo Nation, the U.S. and the OSE largely confirmed Mr. Rogers' testimony. The three governments admitted that they negotiated the draft settlement agreement without participation by the Community Ditches. The settling parties first reached agreement among themselves on the major terms of the agreement without including the Community Ditches in the negotiations. RP15391; RP15435. After that, the changes to the agreement were largely cosmetic.

This affidavit raised questions of fact which precluded summary judgment. The lower court changed the standard for good faith. On August 16, 2013, the court held that the Navajo Nation, U.S. and OSE "had the sole obligation to negotiate the Settlement Agreement among themselves." RP33765. As a matter of law, the water court held that local water owners have no right to be involved in negotiations, even when the governments are impairing their water rights.

POINT 26.

The lower court abandoned the preponderance standard and substituted "a reasonable basis", which is not a standard of proof for a trial court.

On February 3, 2012, the court held that the Settling Parties shall have "the burden of production and the burden of persuasion" and "shall retain the burden of persuasion by a preponderance of the evidence." RP9842-43. This

ruling was correct, as a person claiming water rights always bears the burden of proof by a preponderance of the evidence.

During the proceedings, the court abandoned the correct standard and substituted a lower standard. The court ruled that the Settling Parties only needed to establish "a reasonable basis to conclude that the [settlement] describes a less extensive water right than could be secured at trial." RP3771. At RP33776, the court described its test as follows: "IS THERE A REASONABLE BASIS TO CONCLUDE THAT THE SETTLEMENT AGREEMENT AND THE PROPOSED DECREES PROVIDE FOR LESS THAN THE POTENTIAL CLAIMS THAT COULD BE SECURED AT TRIAL?"

This is not a legal standard at all, because it allows proof by less than a preponderance. In most court cases, when presented with conflicting evidence, there will be "a reasonable basis" for finding for one side, and also "a reasonable basis" for finding for the other side. So "a reasonable basis" can be less than a preponderance of the evidence.

Furthermore, the new standard is meaningless because it is based on a hypothetical trial, sometime in the future. But that hypothetical trial will

never happen. Who are the witnesses? Who are the lawyers? How long did the hypothetical trial last?

This new standard is just a way to evade the real issue – the settling parties never proved that they were entitled to 635,000 acre-feet. At least not by a preponderance of the evidence, which is required in all civil cases. The defendants never got a real trial; they got summary judgment against them based on a hypothetical trial which never happened. In this case, there was conflicting evidence on the tribal water claim, so a genuine trial was necessary, like the trial Justice Oman conducted in *Mescalero*. Not a hypothetical trial.

POINT 27.

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

The Navajo Nation and the U.S. incorrectly asserted that they held valid permits from the state engineer for NIIP and their other water rights. *See, e.g.*, 6-12-13 Tr. 8:49 am, RP17508. However, discovery revealed that there are no valid permits held by the U.S. or the Tribe. These alleged permits do not exist.

On December 3, 2012, the OSE admitted that it had no records showing that notice of the permit applications was ever published. RP16454.

On May 10, 2013, the State again admitted that there are no permits: "While the applications that were endorsed by the State Engineer pursuant to

NMSA 1978, § 72-5-33 may not technically be 'permits', we are referring to them as permits as a matter of convenience for the Court and parties." RP16469.

Faced with these facts, the three governments then did an about-face. **In collusion with the U.S. and the Navajo Tribe, the state engineer argued for the very first time that federal projects are exempt from OSE permitting requirements. RP16455-57. This unprecedented argument is directly contrary to the position of all previous state engineers, who have always required an application, publication, and a permit for federal projects**. This flip-flop abdicates state regulation to the federal government and the tribes.

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

The lower court decided to disregard *Elephant Butte* and *Jicarilla*. The court ruled that no permit or application or publication is required for a federal

project. RP33804. This ruling destroys the OSE's ability to regulate almost every river in the state.

POINT 28.

The lower court erred by opining that the Navajo Nation has no right to export water to other states, contrary to *Sporhase* and *City of El Paso v. Reynolds*.

The lower court opinion erroneously concluded that the Navajo Nation and the United States have agreed not to transfer water out of New Mexico without the consent of the State Engineer. RP33779. This is plain legal error. Numerous federal cases have held that a state cannot prohibit the export of water. *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984).

The Richardson-Navajo agreement is deceptively drafted to create the illusion that the Navajos cannot export the water to other states. Section 17(g), RP919, of the agreement says that the Navajos must get the consent of the state to export water, but it does not say what happens if the state withholds consent. Water is an article of interstate commerce, so New Mexico cannot withhold its consent to prohibit the export of water to another state. *Sporhase*; *El Paso I; El Paso II*.

POINT 29.

The federal statute does not require the completion of a pipeline to Gallup. Nor does the agreement.

In granting summary judgment, the court ruled that the construction of the Navajo Gallup pipeline was a major benefit of the Richardson-Navajo agreement, and a major reason for approving the settlement without a trial. RP3374. The court relied on a Congressional authorization of $870 million for the pipeline. The court's reliance is misplaced.

First, a congressional authorization is not a congressional appropriation. No money can be spent for a federal construction project unless and until Congress actually appropriates money in an appropriations bill. See U.S. Const. art. I, § 9.

Second, it will cost far more than $870 million to complete the pipeline to Window Rock and Gallup, as even pipeline supporters admit.

Third, the federal legislation allows the construction of this supposed pipeline to be postponed for decades, or indefinitely.

Fourth, the federal government faces ever-growing budget deficits. Every year the federal government appropriates less money for discretionary projects like the Navajo Gallup pipeline.

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

The lower court could have avoided these mistakes by hearing the counterclaim, which asserted that "the Navajo Gallup pipeline is illusory." RP17859.

POINT 30.

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

Section 10603(c)(1) of the Northwestern New Mexico Rural Water Projects Act (Pub. L. No. 111-11, title X, subtitle B) requires the Navajo Nation to settle their claims in Arizona before the Navajo Nation receives any water for use in Arizona.

On July 5, 2012, the Navajo Nation Council voted to reject the proposed settlement of its claims to the Little Colorado River in Arizona. RP11572-77.

As a result, there is no settlement of the tribe's water claims in Arizona, as required by the federal legislation. This makes the approval of the Richardson-Navajo agreement a moot issue. *Valencia Water Co. v. Neilson*,

1920-NMSC-076, ¶ 3 (“appellate court will not decide abstract, hypothetical, or moot questions”).

POINT 31.

***Nemo dat quod non habet*.**

Amid all the arguments about the elaborate provisions of the Richardson-Navajo settlement, the lower court overlooked a basic rule of law: *Nemo dat quod non habet*. “No one can give what he does not have.” *Ackerman v. Abbott*, 978 A.2d 1250, 1255 (D.C. Ct. App. 2009). “At common law this principle is known under the Latin maxim: *Nemo dat quod non habet* or just *Nemo dat*.” *Snethen v. Oklahoma State Union of Farmers Educational and Co-op.*, 664 P.2d 377, 381 n.18 (Okla. 1983).

Bill Richardson did put his signature on an agreement to give the Navajo Nation 635,000 acre-feet of New Mexico’s water from the San Juan River. However, Bill Richardson did not own the water in the San Juan River, so he had nothing to give. *Nemo dat quod non habet*. According to the New Mexico Constitution – as approved by Congress – the stream waters in New Mexico belong to the public, not to the Governor. The settling parties never proved prior appropriation and beneficial use, so they never proved that they had a

right to that much water. Mere agreement by a governor cannot not create a water right.

POINT 32.

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

In the main San Juan case, No.75-184, the State of New Mexico filed an answer against the claims of the Ute Mountain Ute Tribe, signed by John Utton, Esq. RP29483-86. The points of law interposed by the state against the Ute claims are well-taken, and they apply with equal force of law against the Navajo claims. In this case the acequias are asserting many of the same defenses which the State itself is asserting against the pending Ute water claim. The State correctly asserts that the tribal claims are limited by beneficial use, prior appropriation, and the minimum needs rule; the water was not needed to fulfill the purposes of the reservation; the tribe's existing water rights are sufficient; federal reserved water cannot be used off the reservation; and any tribal water rights must be administered under state law. RP29484-86.

These water laws govern Indian water claims by any tribe in New Mexico, whether it is the Ute Mtn Ute Tribe or the Navajo Tribe. So

Governor Richardson no legal authority to waive those laws for one particular tribe.

What is even worse, the lower court has issued an opinion that none of these defenses are valid, so its ruling will leave the state defenseless against other tribes and pueblos when they claim water rights.

POINT 33.

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

RP17859.

POINT 34.

The lower court erred by holding that it is irrelevant whether there is enough water in the river to supply other users.

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

However, on summary judgment the acequias presented evidence that the water supply in the San Juan River is far too small to supply 635,000 acre-feet to the and to supply local water users at the same time. At this point, the court reversed course, the lower court contradicted its earlier ruling, and ruled that the adequacy of the water supply is irrelevant as a matter of law. RP33758-60.

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

When the lower court ruled that water scarcity does not matter, RP33796, it acted contrary to *Commissioner of Public Lands* and *City of Las Vegas, supra*.

POINT 35.

The lower court summarily ruled that global warming is irrelevant.

On December 12, 2012 the United States released a massive multi-disciplinary, multi-year study on climate change and its effects on the Colorado River basin during the next 50 years. Bureau of Reclamation,

Colorado River Basin Water Supply and Demand Study Report (December, 2012), www.usbr.gov/lc/programs/crbstudy.html. RP14466.

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

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

POINT 36.

The court summarily ruled that water for endangered species is irrelevant.

On the San Juan River, the United States protects four fishes and a bird under the Endangered Species Act, 16 U.S.C. §§ 1531-44: the razorback sucker; Colorado pikeminnow; humpback chub; bonytail chub; and the southwestern willow flycatcher. **To protect these endangered species, the**

U.S. asserts that it can require more than 700,000 acre-feet per year to be delivered downstream to Bluff, Utah. RP14472-75. Delivering that much water to Utah would leave New Mexico with little if any water for local use by non-Indians in New Mexico. RP14465-67.

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

Bluff, Utah is downstream from New Mexico, so any water delivered to Bluff for endangered species cannot be consumed within New Mexico. This is unlike the silvery minnow in the Rio Grande, where the instream flow can be used farther downstream within New Mexico. Furthermore, the amount of water claimed for the razorback sucker is almost 100 times the amount claimed for the silvery minnow.

The lower court decided that water for endangered species was a non-issue. And the lower court ruled that it has no jurisdiction or authority to review any of federal actions, no matter how they deplete water rights in the San Juan River. 2-4-13 CD 10:45:50 through 11:27:33, RP14021-27; RP875-76.

POINT 37.

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

RP14462-77.

POINT 38.

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

The federal government's own data shows that in most years the Richardson-Navajo agreement will create huge water deficits for New Mexico under the Colorado Compacts. RP14462-77.

The Colorado River Compacts of 1922 and 1948 determine how much water is available for New Mexico. Under the 1922 compact, New Mexico and the other upper basin states must deliver 83,000,000 (83 million) acre-feet of water every 10 years to the lower basin at Lee Ferry, just below Lake Powell. § 72-15-5, Article III(d).

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

In really dry years, which are occurring more often, the Colorado River does not supply enough water to meet the delivery obligation to the Lower

Basin. In some years there might be no water available for non-Indian users in San Juan County. In most years (and in most ten-year periods) there would be huge unresolved deficits to the lower basin, amounting to hundreds of thousands of acre-feet. RP14462-77.

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

> meet the obligations under the Colorado Compacts;
> AND
> provide 635,000 AF annually to the Navajo Nation under the Richardson agreement;
> AND
> supply instream water to Bluff UT for endangered species
> AND
> meet other federal claims for reserved water;
> AND
> supply water to Gallup;
> AND
> supply water to cities and farmers and industry in San Juan County;
> AND
> supply water to the Rio Grande through the San Juan-Chama project.

RP14465-69; 14472-77.

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

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

POINT 39.

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

On the San Juan River, the San Juan-Chama Project has a very low priority date: 1955, at best. Therefore diversions for the San Juan-Chama Project will be among the first to be shut down when there is a priority call on the San Juan River.

POINT 40.

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

By some estimates, the Richardson-Navajo deal gives away approximately 1/3 of the river water in New Mexico. But who knows? Who cares?

POINT 41.

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

The Navajo agreement creates shortages that will make less water available to other tribes, e.g., the Aamodt and Taos settlements.

All of the other tribes in New Mexico have legitimate water claims, so all of them must be judged by the same consistent legal standards and rules of evidence and rules of procedure. Yet the Richardson-Navajo agreement expressly states that it is a special deal, done outside the laws. See agreement section 14.3: nothing in the agreement establishes a precedent or standard for quantifying federal reserved rights or Indian water rights, or the applicability of interstate water compacts. RP877.

CONCLUSION

The summary judgment below must be reversed; the rulings below must be corrected; and the case remanded with instructions that the Richardson-Navajo agreement must be submitted to the legislature for enactment or rejection or modification, as required by *Clark v. Johnson*.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellants request oral argument because this case presents many questions of first impression and great importance to the State of New Mexico.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 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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