IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellee,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

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

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.

LEGISLATORS' AMICUS BRIEF IN SUPPORT OF REFERRAL TO THE LEGISLATURE

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INTRODUCTION

Amici Steven P. Neville, Paul Bandy, and Carl Trujillo submit this brief asking the court to rule that the agreement signed by the Navajo Nation and Governor Bill Richardson must be submitted to the Legislature for enactment, amendment, or rejection. *Amici* take no position on any other issues in this case. Their concern is to protect the role of the New Mexico Legislature under the Constitution of the State as set forth in *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.[1] *Amici* seek to protect Legislators'

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[1] Disclosure: Pursuant to Rule 12-215(F), NMRA, the undersigned counsel, C. Brad Lane Cates, Esq., states that he has worked with counsel for appellants, and that portions of this brief have been drafted by appellants' counsel. However, this brief raises points not raised by appellants, and it takes no position on many of the points that appellants have raised. As explained above, the Legislator *amici* confine themselves to one point: the Richardson-Navajo agreement is void without Legislative enactment into statutory law.

Undersigned counsel served in the New Mexico House from 1975 to 1982 as the Representative for District No. 27 in Bernalillo County. Counsel has also served as retained committee counsel for the House Judiciary and Rules Committees during numerous legislative sessions. Counsel also served as Director of the Office of Hearings and Appeals in the United States Department of the Interior, which is the highest judicial position within the Interior Department.

Counsel for *amici* submits this brief *pro bono publico*, without compensation or reinbursement, as a courtesy to the Legislature. Counsel also notes that appellants' counsel served in the New Mexico Senate from 1985 through 1992, and he has assisted with this brief without compensation or reimbursement. No one has made any monetary contribution to this brief.

right to vote. The Constitution vests this right to vote in only 112 people, those whom the people have elected to represent them in the Legislature.

Steven P. Neville is the duly elected senator for Senate District 2, San Juan County. Paul Bandy is the duly elected representative for House District 3, San Juan County (Bloomfield and Aztec). Carl Trujillo is the duly elected representative for House District 46, Santa Fe County (Pojoaque and Tesuque). As Legislators, at present they take no position as to the merits of the Richardson-Navajo agreement, because it has never been submitted to them or the other Legislators – 42 members of the Senate and 70 members of the House of Representatives. As Legislators, *amici* reserve the right to vote for the agreement, to vote against it, or to offer amendments. Our Constitution reserves the right to make and change the laws – the legislative power – to these 112 persons, exercising their individual and collective judgment.

The agreement signed by Governor Richardson and the Navajo Nation is a state-tribal compact, like the gambling compacts that were signed by Governor Gary Johnson in 1995. The Richardson-Navajo agreement purports to be an agreement in perpetuity between three sovereign entities to allocate the waters of the San Juan River: the Navajo Nation, the United States of

America, and the State of New Mexico. However, just like the gambling compacts in *Clark*, the water compact in this case was signed only by Governor Richardson, without legislative enactment. The Navajo-Richardson agreement is therefore void as a matter of law, unless and until it is enacted into law by the Legislature. *Clark*; *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997).

To become a binding compact under federal law, the agreement must be enacted into law by the legislatures of the three sovereign entities, in this case the Congress of the United States, the Tribal Council of the Navajo Nation, and the Legislature of the State of New Mexico. The United States Congress and the Navajo Tribal Council have enacted the agreement into law, but the New Mexico Legislature has not. No Governor has the authority to bind the State of New Mexico to a perpetual agreement like this without action by the Legislature itself, as the elected representatives of the people.

Action by the Legislature is compelled by several sources of law, including the compacts clause of the federal Constitution; the New Mexico Constitution; *State ex rel. Clark v. Johnson*; *Pueblo of Santa Ana*; *Tarrant Regional Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120 (2013); and NMSA 1978, § 72-14-3; § 72-1-11(C)(1); and § 72-15-5, Article VI.

COMPACTS BETWEEN STATES, AND BETWEEN STATES AND TRIBES

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

A 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. A compact is treated as both a statute and a contract. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), *opinion after remand*, 485 U.S. 388 (1988). Once enacted by all three sovereign parties, the compact becomes binding federal law, so the State loses the right to change the agreement. *Texas v. New*

Mexico, 462 U.S. 554, 564 (1983). 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. at 2132-33 (Sotomayor, J.).

ARGUMENT

Point I: Under *State ex rel. Clark v. Johnson*, the Richardson-Navajo Agreement Is a Nullity, Unless It Is Enacted by the Legislature.

A. *Clark v. Johnson* holds that a governor lacks constitutional authority to bind the State to a compact with a tribe based on his own signature, unless the Legislature enacts the agreement into law.

In 1995, then-Governor Gary Johnson signed compacts with several tribes and pueblos agreeing that they could conduct casino style gambling on tribal lands in New Mexico. The Governor's action was challenged as unconstitutional by a Democratic State Representative (Rep. Max Coll), a Republican State Representative (Rep. George Buffett), and an opponent of gambling (Guy Clark).

In a major opinion by Justice Minzner, the Supreme Court ruled unanimously that the Governor exceeded his constitutional authority and infringed on the lawmaking authority that belongs to the Legislature.

> {21} Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the

compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law.

{30} We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances. We need not decide which forms New Mexico permits. . . . Further, even if our laws allowed under some circumstances what the compact terms "casino-style" gaming, we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer. . . .

{31} James Madison expressed this sentiment more than two hundred years ago when he wrote, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." 1 Alexander Hamilton, James Madison & John Jay, **The Federalist, A Commentary on the Constitution of the United States**, No. XLVII, at 329 (1901 ed.).

{34} The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law. **Cf. Texas v. New Mexico,** 462 U.S. 554, 564, 77 L. Ed. 2d 1, 103 S. Ct. 2558 (1983) (holding that, upon approval by Congress, a compact between states becomes federal law that binds the states); **West Virginia ex rel. Dyer v. Sims,** 341 U.S. 22, 28, 95 L. Ed. 713, 71 S. Ct. 557 (1951) (characterizing an interstate compact as a "legislative means" by which states resolve interstate dispute).

The Supreme Court found the agreement to be invalid because it attempted to foreclose future actions by the Legislature, in perpetuity. ¶¶ 34-35.

> {34} One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact with Pojoaque Pueblo and those of which it is representative cannot be said to be consistent with these principles.
>
> {35} The terms of the compact with Pojoaque Pueblo give the Tribe a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement. **See** Compact Between the Pojoaque Pueblo and the State of New Mexico, at 4. Arguably, even legislative change could not affect the Tribe's ability to conduct Class III gaming authorized under the original compact. The compact is binding on the State of New Mexico for fifteen years, and it is automatically renewed for additional five-year periods unless it has been terminated by mutual agreement. **Id.** at 27.

The court also ruled that the Governor overstepped his authority in attempting to strike a detailed balance between the roles of the State and the tribes in regulating and enforcing the laws about gambling.

> {36} We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. All of

> this has occurred in the absence of **any** action on the part of the legislature. While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA, **see** 25 U.S.C.S. § 2710(d)(3)(C), we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.

With her usual thoroughness, Justice Minzner listed 22 different compacts that the State of New Mexico had entered into with other sovereign entities. ¶ 39, n.3 (listing of compacts appears at Appendix A). Eight of the 22 are water compacts:

> 1. 1923 N.M. Laws, ch. 6, § 1 (now codified at NMSA 1978, § 72-15-5 (Repl. Pamp. 1985)). Colorado River Compact.
> 2. 1923 N.M. Laws, ch. 7 § 1 (now codified at NMSA 1978, § 72-15-16 (Repl. Pamp. 1985)). La Plata River Compact.
> 3. 1933 N.M. Laws, ch. 166 (now codified at NMSA 1978, § 72-15-19 (Repl. Pamp. 1985)). Pecos River Compact. **(See Texas v. New Mexico,** 462 U.S. 554, 77 L. Ed. 2d 1, 103 S. Ct. 2558 (1983)).
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> * * *
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> 5. 1939 N.M. Laws, ch. 33, § 1 (now codified at NMSA 1978, § 72-15-23 (Repl. Pamp. 1985)). Rio Grande Compact.
> 6. 1945 N.M. Laws, ch. 51, § 1 (now codified at NMSA 1978, § 72-15-10 (Repl. Pamp. 1985)). Costilla Creek Compact.
> 7. 1949 N.M. Laws, ch. 5, § 1 (now codified at NMSA 1978, § 72-15-26 (Repl. Pamp. 1985)). Upper Colorado River Basin Compact.
> 8. 1951 N.M. Laws, ch. 4, § 1 (now codified at NMSA 1978, § 72-15-2 (Repl. Pamp. 1985)). Canadian River Compact.
>
> * * *

14. 1969 N.M. Laws, ch. 57, § 1 (now codified at NMSA 1978, § 72-15-1 (Repl. Pamp. 1985)). Animas-La Plata Project Compact.

The opinion notes that "In every case, New Mexico entered into the compact with the enactment of a statute by the legislature." The opinion then proceeds to its conclusion:

> {40} Residual governmental authority should rest with the legislative branch rather than the executive branch. The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue.
>
> {45} It follows that because the Governor lacked authority under New Mexico law to enter into the compact with Pojoaque Pueblo, the State of New Mexico has not yet entered into any gaming compact that the Governor may implement. **Cf. Marbury v. Madison,** 5 U.S. 137, 176-79, 2 L. Ed. 60 (1803) (holding that an unconstitutional act of Congress has no legal effect).
>
> {49} [T]he compacts executed by the Governor are without legal effect and [ ] no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.
>
> {50} For these reasons we now issue the peremptory writ and stay. We stay all actions to enforce, implement, or enable any and all of the gaming compacts and revenue-sharing agreements executed by the Governor . . . .

Justice Minzner's opinion in *Clark* is one of the most important statements in recent years on the separation of powers and the allocation of

authority between the legislative and executive branches. *Clark* carries out basic constitutional principles which the Supreme Court has enunciated many times. "[I]t is not within the province of the court, but of the legislature, to make changes in the provisions of statute law." *Sanchez v. Bernalillo County*, 1953-NMSC-038, ¶ 26, 57 N.M. 217, 257 P.2d 909.

B. In *Pueblo of Santa Ana v. Kelly*, the federal courts upheld *Clark*, ruling that state-tribal compacts are invalid under federal law without the approval of the State Legislature.

Following Justice Minzner's decision in *Clark*, Tribes and Pueblos in New Mexico mounted a challenge in federal court to overturn *Clark* as contrary to federal law. The challenge failed. District Judge Martha Vasquez held that federal law defers to state law on the procedure for executing valid compacts:

> The Tribes assert that, contrary to *Clark,* the Governor had the authority under the IGRA to sign the compacts on behalf of the State. It is true that nothing in the IGRA that specifies which state official(s) may sign a gaming compact on behalf of the state. However, precisely because the IGRA is silent on this issue, this Court concludes that Congress intended that state law determine the procedure for executing valid gaming compacts. See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (concluding that state law determines appropriate procedure to be followed by state to assert jurisdiction over acts committed by Indians on the reservation when the federal statute is silent). Accordingly, this Court reexamined New Mexico law independent of the *Clark* case to determine, as a matter of federal

> law, whether Governor Johnson had authority to sign the compacts on behalf of the State. Having thoroughly examined applicable New Mexico law, this Court reaches the same conclusion as did the State court in *Clark,* namely that Governor Johnson's actions encroached upon the Legislature's authority, contrary to the constitutional separation of powers doctrine.
>
> * * *
>
> For these reasons, the Court holds that Governor Johnson lacked the authority to enter into compacts with the Tribes and thus the compacts are invalid as a matter of federal law.

932 F. Supp. at 1294-95.

The Tribes and Pueblos then appealed to the Tenth Circuit. The Tenth Circuit quoted extensively from Justice Minzner's opinion in *Clark* before upholding that decision under federal law.

> The Tribes and the United States argue that approval by the Secretary is all that is required to make the compacts valid and in effect, regardless of whether the compacts were valid under state law.[9] . . .
>
> [9] It appears that the Pueblo of Acoma argues that, in fact, the Governor did have authority to enter into the compacts. The other Tribes appear to argue that, in any event, the Secretary's approval cured any problem with the Governor's execution of the compacts.
>
> We hold that: (1) IGRA imposes two separate requirements—the State and the Tribe must have "entered into" a compact *and* the compact must be "in effect" pursuant to Secretarial approval—before class III gaming is authorized; (2) state law determines the procedures by which a state may validly enter into a compact; and (3) in determining whether the State and the Tribes have entered into compacts, valid and binding under New Mexico law, we agree with and follow the New Mexico Supreme Court's decision in *Clark.*

104 F.3d at 1553.

C. *Clark* is reinforced by the later decision of the United States Supreme Court concerning water compacts in *Tarrant County*, 133 S. Ct. 2120 (2013).

Years later, Justice Minzner's opinion for a unanimous court was reinforced by Justice Sotomayor's decision for a unanimous United States Supreme Court in *Tarrant County*.[2]

Tarrant County holds that states do not lightly surrender their sovereignty over water, so the federal courts will not construe interstate water compacts as surrendering state sovereignty by silence. *Tarrant County* holds that states do not easily cede their sovereign powers, especially over waters within their own territory, which states possess as sovereign entities in the federal system.

Tarrant construed an interstate water compact allocating the waters of the Red River basin among Oklahoma, Texas, Arkansas, and Louisiana. That compact had been enacted into law by each of the compacting states and approved by Congress. As Justice Minzner did in *Clark*, Justice Sotomayor stressed the perpetual and preemptive nature of a compact, once it takes effect.

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[2] The lower court did not have the benefit of *Tarrant*, because the decision was issued on June 13, 2013, one day after the lower court concluded its summary judgment hearings in this case.

> The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." Art. I, § 10, cl. 3. Accordingly, before a compact between two States can be given effect it must be approved by Congress. See *Virginia v. Maryland,* 540 U.S. 56, 66, 124 S. Ct. 598, 157 L. Ed. 2d 461 (2003). Once a compact receives such approval, it is "transform[ed] . . . into a law of the United States." *Ibid.* (internal quotation marks omitted). The Supremacy Clause, Art. VI, cl. 2, then ensures that a congressionally approved compact, as a federal law, pre-empts any state law that conflicts with the Compact. See *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S. 141, 152–153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

133 S. Ct. at 2130, n.8.

Because interstate water compacts can preempt any state laws to the contrary, water compacts run contrary to "the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories." 133 S. Ct. at 2132.

> The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts. We have long understood that as sovereign entities in our federal system, the States possess an "absolute right to all their navigable waters and the soils under them for their own common use." *Martin v. Lessee of Waddell,* 16 Pet. 367, 410, 10 L. Ed. 997 (1842). Drawing on this principle, we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, "is an essential attribute of sovereignty," *United States v. Alaska,* 521 U.S. 1, 5, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).

Id.

> Tarrant asks us to infer from § 5.05(b)(1)'s silence regarding state borders that the signatory States have dispensed with the core state prerogative to control water within their own boundaries. But as the above demonstrates, States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence.

133 S. Ct. at 2132-33.

When one applies the holdings in *Tarrant* to the present controversy, one can see that there is no clear indication that the State of New Mexico intended to surrender its core state prerogative over water, devolving it to the Navajo Nation. *Tarrant* holds that silence does not surrender state sovereignty. In the present case, the Legislature has not been silent at all. The Legislature has spoken at least three times, in statutes which explicitly prevent any devolution of the State's core prerogatives over water. See NMSA 1978, § 72-14-3; § 72-15-5; and § 72-1-11(C)(1), analyzed in Points II, III, and IV below.

The present controversy is easier to decide than *Tarrant*, where the state legislatures had actually enacted the Red River compact into law. In the present case, the New Mexico Legislature has never authorized the Navajo water compact. It is telling that the Navajo Nation submitted the water compact to its legislative branch – the Tribal Council – for approval. And the United States submitted the compact to its legislative branch – Congress – for enactment as a statute. 123 Stat. 1367 (Mar. 30, 2009). Yet the Navajo

Nation and the United States both insist that the New Mexico Legislature has no role to play in the State's approval process. Their contentions cannot be squared with Article IV, Section 4 of the Constitution, whereby "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." If there is a Republican Form of Government that can operate without a legislative branch, the Navajo Nation and the United States have failed to identify it. These two governments would deny to the State of New Mexico the very rights which they themselves have exercised.

D. The lower court refused to follow *Clark* and *Santa Ana*.

When faced with the decisions in *Clark* and *Santa Ana*, the lower court refused to follow them, on the grounds that "The Legislature has specifically granted the Court jurisdiction to adjudicate water rights." (citing § 72-4-17) **[RP33807]**.

This ruling is a non-sequitur. It misses the point entirely: the subject of *Clark* is the division of power between the legislative and executive branches, not the power of the judicial branch. It is true that the judiciary has jurisdiction to adjudicate water rights, just as the judiciary has jurisdiction to adjudicate all disputes. But it does not follow that the judiciary has the power to approve an unconstitutional act by the governor. The teaching of *Clark* is

exactly the opposite. As Justice Minzner said, the judiciary has the constitutional duty to prohibit the governor from encroaching on the legislative power, in order to prevent "the accumulation of all powers, legislative, executive, and judiciary, in the same hands."

In the modern era, there has been an inexorable accumulation of power in the executive branch. The trend can be seen at the federal level, where the President has claimed ever-increasing powers as against Congress, and also as against the federal judiciary. The tendency is the same in New Mexico – every governor claims more power, whether the governor happens to be Gary Johnson, or Bill Richardson, or Susana Martinez. And every attorney general does the same.

Legislators do not have the financial resources to contest this accumulation of executive power in the courts. All 112 Legislators are volunteers. They receive no pay, only a small per diem. And Legislators have no money for litigation, so they must dip into their own pockets – a hardship – or find volunteer lawyers who will represent them pro bono – no easy task.

In *Clark v. Johnson*, the Supreme Court stopped this accumulation of executive power. *Clark* explicitly states that the Supreme Court must take

action to check the governor in order to preserve the separation of powers between the branches. To underline the constitutional importance of this ruling, Justice Minzner cites both James Madison, ¶ 31, and *Marbury v. Madison*, ¶ 45.

The lower court decision misses the meaning of *Clark*. The opinion turns *Clark* into nothingness, merely by stating the tautological proposition that courts have jurisdiction to adjudicate rights.

Even worse, the lower court decision turns *Clark* upside down and backwards, by using the power of the judiciary to validate an unconstitutional power grab. *Clark* does exactly the opposite. If the lower court's opinion were allowed to stand, then in the future it will only take one governor and one judge to bypass the legislative process entirely.

The lower court opinion fails to see where the Richardson-Navajo agreement makes new law or changes existing law. However, the face of the agreement shows that it violates at least 3 existing statutes: NMSA 1978, § 72-14-3; § 72-15-5; and § 72-1-11(C)(1). These specific statutes are analyzed below in Points II, III, and IV.

Beyond these three statutes, it also appears that the agreement might violate several other laws and cases as well. To give a few examples:

- The Partial Final Judgment and Decree of the Water Rights of the Navajo Nation awards 508,000 acre feet of water to irrigate the Navajo Indian Irrigation Project ("NIIP"), **[RP17930]**, even though the Navajo Nation and the United States have admitted that NIIP is not practicably irrigable acreage (PIA). Awarding water for an irrigation project that is not practicably irrigable acreage seems to violate PIA requirement and the beneficial use doctrine set forth in section 8 of the Reclamation Act of 1902, Pub. L. 57-161, 32 Stat. 388, 390 (Jun. 17, 1902); N.M. Const. art. XVI, §§ 1-3; NMSA 1978, § 72-1-2; *Winters v. United States*, 207 U.S. 564, 576 (1908); *Arizona v. California*, 373 U.S. 546, 601 (1963) (PIA is the only way to quantify reserved water rights for Indian reservations); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194, 861 P.2d 235 ("*Mescalero*"); and *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M.375, 89 P.3d 47.

- Section 9 of the compact deals with water administration. It cedes the regulatory authority of the State Engineer to the Navajo Nation. The agreement bars the OSE from measuring water use by the Navajo Nation. It also cedes the State Engineer's regulatory authority to hear protests under *Tri-State*, to a tribunal yet to be established by the Navajo Nation. This would seem to violate ¶ 36 in *Clark*, quoted above, where the Supreme Court held

that the delegation of regulatory authority to the tribes required action by the Legislature.

- Section 9 also seems to destroy the state judiciary's authority to hear water protests by non-Native Americans, in contravention of N.M. Const. art. VI, § 1 (judicial power is vested in the Supreme Court and the district courts and such other courts as the legislature may establish) and art. XVI, § 5 (*de novo* proceedings in district court).

In order to decide whether this compact must be submitted to the Legislature, this Court is not required to rule on all the ways that the compact modifies existing statutes and case law. As the Supreme Court said in *Clark*, ¶ 30, it was not necessary for the court to rule on all the ways that the gambling compact might modify existing laws, because it was clear that the compact departed from existing laws.

Clark provides an additional reason – mootness – why this Court is not required to decide all of the legal questions presented by the proposed water compact signed by Governor Richardson. A proposed compact executed by a Governor is a legal nullity unless the Legislature enacts it into law. If the Legislature does not pass the proposed Navajo water settlement, then all of the changes made by the proposed agreement will be moot. As a general rule, the

appellate courts "will not decide abstract, academic, hypothetical or moot questions," and they do "not give advisory opinions." *New Mexico Bus Sales v. Michael*, 1961-NMSC-034, ¶ 9, 68 N.M. 23, 360 P.2d 639; *Bell Tel. Labs, Inc. v. Bureau of Revenue*, 1966-NMSC-253, ¶ 39, 78 N.M. 78, 428 P.2d 617; *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M., 31 P.3d 1008; *Atchison, Topeka & Santa Fe Ry. Co. v. State Corp. Comm'n*, 1969-NMSC-014, ¶ 6, 79 N.M. 793, 450 P.2d 431.[3]

Point II: Section 72-14-3 Requires Legislative Approval of All Water Compacts.

In § 72-14-3 the Legislature mandated that all proposed water compacts must be submitted to the Legislature for final approval. Section 72-14-3 authorizes the Interstate Stream Commission to negotiate propose water compacts, but then the ISC must send them to the Legislature for approval.

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

[3] If the Legislature were to enact the Richardson-Navajo agreement exactly as it now appears, then the legal questions on appeal would no longer be moot, and only then would the courts be required to decide them.

[Emphasis added.] See also *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992) (Governor of Kansas may negotiate but may not enter into a compact without grant of power from legislature) (cited in *Clark*, ¶ 2).

Once a proposed compact is sent to the Legislature, any number of things could happen.

– In New Mexico, proposed legislation can only be introduced by a member of the Legislature, N.M. Const. art. IV, §§ 1, 15. So the compact might never be introduced, if the members feel it is not worthy of attention; or

– The Legislators might decide by majority votes in both houses to approve the compact without any change; or

– The Legislators might decide to reject the compact completely; or

– The Legislators might decide to pass the compact with amendments, in which case it would become a counter-offer to the U.S. and the Navajo Nation; or

– The Legislature might set up a special procedure for acting on compacts, as it did after *Clark*, see § 11-13-1 (Indian Gaming Compact) and § 60-2E-4 (Gaming Control Act); or

– The bill might die in committee or on the floor when the Legislature adjourns; or

– The bill might be passed by the Legislature but vetoed by the Governor; or

– The Legislature might override the Governor's veto.

It is pure speculation to guess what the Legislature might or might not do, when presented with this agreement. Even Legislators themselves don't know. Some Legislators may support the compact as is, while others may oppose it. Some might support the agreement with amendments. However, it is certain that the Legislators will bring 112 different perspectives to the process. They will ask questions in committees, hear from special interests and lobbyists and constituents, debate among themselves, and offer amendments, which might fail or be adopted. Lawmaking is a collaborative process, because the Constitution does not allow any one person, not the Governor, not any one Legislator, to make laws. While the executive branch may negotiate a compact for consideration by lawmakers, "we think the actual balance that is struck represents a legislative function." *Clark*, ¶ 36.

If the water settlement bill makes it through the Legislature, then it is up to the Governor to decide whether to sign or veto the legislation. "[T]he Governor's role in the compact approval process has heretofore been limited to approving or vetoing the legislation that approves the compact. This is the

Governor's role with respect to all legislation passed by the legislature." *Clark*, ¶ 39.

By design, the enactment of legislation is a political process. It is messy and cumbersome – by design. This political process is the constitutional process by which laws are made. It is the process of representative government that we have chosen, to govern ourselves as a people. "The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state." New Mexico Bill of Rights, N.M. Const. art. II, § 3. "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.* art. II, § 8.

Admittedly, what Legislators do is a far cry from what judges do. And that is one reason why one judge's approval of the compact cannot be a substitute for the processes of electoral and representative government that take place in the Legislature.

Point III: Section 72-15-5 Requires the Legislature To Enact Any Changes to the Colorado River Compact.

NOTE: The Legislator *Amici* respectfully submit the following point that was not specifically raised by any of the parties.

As Justice Minzner noted in *Clark*, ¶ 39 n.3, the Colorado River Compact of 1922 was enacted as a New Mexico statute. The Compact now appears in the statute books verbatim, as § 72-15-5. The statute explicitly requires legislative ratification of any adjustment of claims under the Compact:

> ARTICLE VI
>
> Should any claim or controversy arise between any two or more of the signatory states:
>
> (a) with respect to the waters of the Colorado river system not covered by the terms of this compact [this section];
>
> (b) over the meaning or performance of any of the terms of this compact;
>
> (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided;
>
> (d) as to the construction or operation of works within the Colorado river basin to be situated in two or more states, or to be constructed in one state for the benefit of another state; or
>
> (e) as to the diversion of water in one state for the benefit of another state;
>
> the governors of the states affected, upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, **subject to ratification by the legislatures of the states so affected.**
>
> Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method **or by direct future legislative action of the interested states**.

The OSE and the Navajo Nation and the U.S. admit that the Richardson-Navajo agreement gives the Navajo Nation more than half of New Mexico's allocation of water under the Colorado River compacts to the Navajo Nation. Article VI of the Colorado River Compact explicitly prohibits

such an arrangement unless (a) it is ratified by the Legislature, or (b) accomplished by direct legislative action of the interested state. There has been no ratification, because the compact has never been submitted to the Legislature, and no direct legislative action either.

Point IV: The Navajo Water Settlement Violates § 72-1-11(C)(1), Which Requires a Tribal Water Rights Settlement To Resolve All of the Tribe's Water Rights Claims.

In 2005 the Legislature passed a statute dealing with possible water rights settlements with Indian tribes, like the water claims by the Navajo Nation, Taos Pueblo, and Pojaque Pueblo ("Aamodt"). The Legislature imposed the 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** and that has been approved by the United States congress; and
> (2) "tribe" means a federally recognized Indian nation, tribe or pueblo.

§ 72-1-11(C).

The Navajo water settlement violates § 72-1-11 because it does not resolve all of the Navajo Nation's water claims. This is evident from the title of the decree entered by the lower court – "PARTIAL FINAL JUDGMENT

AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION", **[RP17928-69]**.

The Navajo settlement is confined to the boundaries of the San Juan River Basin within New Mexico, **[RP17928]**. Section 9.11.3 of the agreement provides that "This Agreement shall not alter or affect the quantification of claims or rights of the Navajo Nation to the diversion and use of water outside the San Juan River Basin in New Mexico," **[RP873]**. So the express terms of the settlement are contrary to § 72-1-11.

The proposed Navajo settlement does not resolve the Navajo tribe's water claims in the basin of the Little Colorado River, which includes parts of the main Reservation, many Navajo communities, the Ramah Navajo Reservation, and the town of Gallup. These tribal claims will be very substantial, and they will be asserted against a very small supply of water in the Little Colorado Basin.

The Navajo settlement also does not settle Navajo water claims in the Rio Grande Basin, which includes the Alamo Navajo Indian Reservation and the Tohajiilee Indian Reservation, formerly the Canoncito Band of Navajo. The Navajos will be claiming water in a basin where New Mexico is already short of water to supply Texas under the Rio Grande Compact. See *Texas v.*

New Mexico, United States Supreme Court Original Case No. 141, Complaint (U.S. Jan. 10, 2013).

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

No one knows how any of these additional Navajo water claims will affect the Colorado Compact River, the Little Colorado, or the Rio Grande. However, any additional water awarded to the Navajo Nation will reduce the available water supply to non-Native American users in New Mexico. This is one of the reasons why § 72-1-11 insists on a complete settlement of all of a tribe's water right claims at one time, rather than piecemeal settlements. Yet Mr. Richardson simply ignored the 2005 statute. So did the Interstate Stream Commission and the Office of State Engineer.

As it stands now, the agreement between Governor Richardson and the Navajo Nation agreement is illegal on its face. However, if the agreement is sent to the Legislature, the Legislature does have the means to fix some of these problems. The Legislature could amend or repeal § 72-1-11 and some of the other affected statutes, because only the legislative branch has the

constitutional power to change the law. Neither the executive branch nor the judicial branch has the power to change the existing statutes to cure some of the illegalities, but the Legislature could, if the Legislators so choose. Whether or not they would decide to do so, the Constitution leaves to them.

CONCLUSION

The lower court decision disregards *Clark v. Johnson* and *Pueblo of Santa Ana*. The decision disrespects the constitutional role of the Legislature. The lower court ruled on issues which at this point are moot and hypothetical. Without enactment by the Legislature, the Richardson-Navajo agreement is a nullity, just like the gambling agreements signed by Gary Johnson. *Clark*, ¶¶ 45, 49, 50, quoted above. As yet, there is no compact between the State and the Navajo Nation, so there is nothing for the judiciary to approve or disapprove. If the Legislature does not approve the compact, then the issues in this case are moot.

Amici therefore ask the Court to reverse the lower court decision, based upon *Clark v. Johnson* and the other authorities cited above. *Amici* respectfully request this Court:

– to vacate the decision of the lower court as moot;

– to instruct the lower court and the parties that the agreement must be submitted to the Legislature for enactment, rejection or modification; and

– to stay proceedings in case AB-07-01 pending action by the Legislature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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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