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.

ACEQUIAS' REPLY TO OFFICE OF STATE ENGINEER
[Corrected Version]

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Oral Argument Requested

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A. *Clark v. Johnson* and *Pueblo of Santa Ana* Require the Richardson-Navajo Agreement To Be Submitted to the New Mexico Legislature for Enactment As a State Statute.

State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 95, 904 P.2d 11, is a landmark of constitutional law in New Mexico. Justice Minzner's opinion for a unanimous court is the pre-eminent authority on the separation of powers between the three branches of government. The decision reaffirms that "it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws. . . . The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature." *Id.* ¶¶ 33-34.

To evade *Clark*, the appellees make several spurious arguments. Their answer briefs contradict or ignore several well-established rules of federal and state law.

1. Compacts between a state and a tribe are governed by the compacts clause in the federal constitution. Attorney General Balderas and the OSE staff argue that compacts between a state and a tribe do not fall within the compacts clause of the United States Constitution, because they are not "interstate" compacts. **[OSEAB to Legislators 10-11]** The AGs' argument shows alarming ignorance about the United States Constitution and

the basic concepts of federalism. The compacts clause governs compacts between a state and an Indian tribe, as well as compacts between states. *Florida House of Representatives v. Crist*, 999 So. 2d 601, 608 (Fla. 2008) (citing and following *Clark* and *Santa Ana*). The compact clause treats tribes as foreign powers for good reason. In 1787 the United States occupied and controlled only a strip of land along the Atlantic seaboard. Foreign powers controlled the rest of North America; sovereign Indian tribes controlled most of the continent west of the Appalachian Mountains.

The OSE argument also fails because *Clark* and *Pueblo of Santa Ana* subject tribal compacts to the same requirements as interstate compacts. *Clark* lists 22 interstate compacts (including 6 water compacts) in reaching the conclusion that tribal compacts are treated like interstate compacts: they must be submitted to the legislature for enactment. The Tenth Circuit concurred in *Santa Ana*.

2. The state must enact the terms of the compact into statute. The answer brief contends that the enactment of a state statute can be skipped if the legislature passes memorials supporting the compact, or if the legislature appropriates funds which might (or might not) be spent for projects which

might (or might not) be included in the compact, if the compact ever comes into existence.

This argument ignores the most basic principle about compacts: a compact is both a statute and a contract. *Clark*. To form a compact, the contracting sovereigns must enact the terms of the contract in the form of the statute. The statute must be enacted in identical form by each sovereign entity. And the contract/statute must be approved by a federal statute. Only at that point, after all the steps have been completed, will the compact become federal law which binds the state and the tribe in perpetuity.

Compacts are tripartite agreements, so they require each of the following elements:

(1) a valid contract between the state and the tribe;

(2) a tribal statute enacting the terms of the contract as a statute;

(3) a state statute enacting the terms of the contract as a statute, identical to the tribal statute;

(4) a federal statute enacting the identical terms of the contract as federal law.

In the present case, requirements (1) and (3) have not been met. The agreement signed by Governor Richardson is invalid because the governor has

no authority to enter into contracts which are contrary to state law. And the governor has no authority to contract away water rights which belong to others, i.e. the persons who hold adjudicated water rights on the San Juan River, because those property rights do not belong to Governor Richardson or any other governor. *Nemo dat quod non habet.*

Requirement (3) is missing, because the New Mexico Legislature has not passed a statute enacting the terms of the contract *verbatim* into state law. As Justice Minzner points out in *Clark*, in every other instance the legislature has done so. To enact the Colorado River Compacts of 1922, the legislature passed the exact terms of the agreement as a statute and the governor signed it. Laws 1923, ch. 6; now codified as § 72-15-5. For the 1948 Upper Basin Compact, the legislature enacted the complete text of the agreement into statute. Laws 1949, ch. 5; § 72-15-26. The Richardson-Navajo agreement requires statutory enactment because it would give away more than half of New Mexico's statutory allocation of water under § 72-15-5 and § 72-15-26.

Yet the Navajo Nation, U.S. and OSE claim that this can be done without legislative enactment, solely through the governor's signature. *Clark* ruled squarely against this argument, so why are the appellees repeating it?

Water compacts in particular must be enacted by statue, because states jealously guard "the core state prerogative to control water within their own boundaries." *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013) (Sotomayor, J.).

In sum, state tribal compacts are tripartite arrangements that stand on three legs: a tribal statute; a federal statute; and a state statute, all in substantially identical form. The Richardson-Navajo agreement is a two legged stool. It is missing its third leg, which is a state statute enacting the exact terms of the agreement into law.

3. The Attorney General has no authority to change the laws of New Mexico. In the answer briefs Attorney General Hector Balderas makes an even more radical argument. Mr. Balderas contends that he can change the Colorado Compacts and force the state and water owners to give up their water rights in perpetuity, with his signature only. According to Mr. Balderas, he can do this without the governor, and without the legislature. **[OSEAB to Legislators 10]** Mr. Balderas' assertion is contrary to *Clark*.

4. Legislative memorials and appropriations cannot create a compact. The OSE argues that the legislature sufficiently approved the Richardson-Navajo agreement by passing memorials. As all legislators know,

and the OSE knows as well, legislative memorials do not have the force of law. They are merely expressions of sentiment, not the creation of law. *See, e.g.*, House Memorial 10 of 2016, "SOUTHWEST CHEESE DAY"; House Memorial 12 of 2016, "WEAR RED DAY".

The legislature has passed memorials asking Congress to move forward on Indian water settlements. But passage of a memorial is not the enactment of a statute. It made sense for legislators to ask Congress to move first, because it was a waste of time for the legislature to consider the agreement until it was enacted by Congress and the Navajo Nation. Until then, the issue was moot. Furthermore, the legislature could not know the exact terms of the Richardson-Navajo agreement after Governor Richardson signed the amended final agreement and Congress passed authorizing legislation. This did not occur until late 2010.

As the legislators point out in their *amicus* brief, they are fighting to preserve the constitutional right of all 112 legislators to vote on the agreement, to support or oppose or amend it, or to offer substitutes. Many legislators might support the Richardson-Navajo agreement in its present form; others might not. The point is not whether the legislators might or might not pass

this legislation. The point is that the Constitution vests that judgment and discretion in 112 legislators, acting collectively, not in the executive branch or the judiciary. In separation of powers case, the question always is, WHO DECIDES? Under *Clark v. Johnson*, it is the legislature that decides.

As for legislative appropriations, the Navajo settlement does not meet the requirements of the 2005 statute creating the Indian water rights settlement fund, inasmuch as it does not settle all of the Navajo tribe's water claims. If the executive branch has been expending money from the fund on the Navajo settlement, then it has been acting in violation of law. (It should be noted that the settlement fund includes the Aamodt and Taos settlements, which appear to qualify for funding.)

The OSE answer brief acknowledges that the power to appropriate money is vested solely in the legislature. **[OSEAB to Legislators 17]** But what about the legislature's other power, the power to make and change the laws of New Mexico? The answer briefs never address this constitutional power. *Clark* stresses the legislature's plenary power over substantive laws, but this issue drops from sight in the answer briefs. Likewise, this lower court opinion neglects this aspect of *Clark*. The opinion never mentions the key

point in *Clark* – preserving the legislature's constitutional authority to make the law.

5. Compacts are settlements. The answer briefs contend that the Richardson-Navajo agreement is not a compact because it is a settlement of litigation. The argument is legally erroneous, because compacts themselves are settlements. *Clark*. The answer briefs try to create a false dichotomy between compacts and settlements, when in reality compacts are settlements of disputes between states, or between states and tribes. Compacts are "legislative means" to settle disputes. *Clark* ¶ 34.

When Governor Gary Johnson signed the casino compacts in *Clark*, he was attempting to settle pending and threatened litigation by the tribes. At the time, the tribes were suing the State of New Mexico and Governor Bruce King to force the State to enter into a state-tribal compact. *Ponca Tribe, Pueblo of Sandia et al v. Bruce King, State of New Mexico, et al.*, 37 F.3d 1422 (10th Cir. 1994). Even if the tribal-state dispute is in the courts, the constitutional analysis in *Clark* still applies.

The OSE answer brief claims that obeying *Clark* would impede settlements in water adjudications around the state. This is not so, because the vast majority of settlements are not affected by *Clark*. Most settlement

agreements do not attempt to change the laws in New Mexico, or create new law, or infringe the constitutional authority of the legislature. If officials in the executive branch stay within their assigned task – faithfully executing the laws as they exist – then the problem does not arise. The problem only arises when a governor – be it Gary Johnson or Bill Richardson or Susana Martinez – tries to settle litigation by signing away powers which the Constitution reserves to the legislature.

6. The courts have the authority to adjudicate water rights, and all other kinds of rights. But courts are obligated to obey state and federal laws when they do so.

The answer briefs point out that the courts have the power to decide water disputes and adjudicate water rights. There is no doubt about that, because courts have authority to decide cases of all kinds, water or otherwise, if the parties have properly been brought before the court.[1] But it does not follow that courts have the authority to violate existing laws, or to ignore controlling precedents.

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[1] In this case the vast majority of water rights owners on the San Juan were never brought before the court. See *Mullane*, *Mennonite*, etc., discussed elsewhere.

The courts of New Mexico decide cases of every variety. In so doing the courts must enforce the laws as they find them, not as they might wish them to be. In this instance the lower court was required to obey the decisions of the United States Supreme Court on Indian water rights; the decisions of the New Mexico appellate courts on water rights; the New Mexico Constitution on water rights; *Clark v. Johnson*; and the water statutes enacted by the legislature. Instead, the lower court wishfully preferred the approach espoused in *Gila V*, although the lower court was not empowered to do so by federal or state law.

Courts cannot approve settlement agreements that violate statutes and case law. And they cannot approve invalid agreements by public officials. The lower court initially followed these principles of law, at least in theory, when it required the settling parties to prove that their settlement was consistent with existing laws. The settlement is clearly inconsistent with *Arizona v. California*; *U.S. v. New Mexico*; *Mescalero*, et al. Yet the opinion ignores those cases.

7. Unilateral actions by the federal government cannot create a tribal state compact. The answer briefs argue that unilateral action by the federal government can create an agreement which is binding on the state in perpetuity. *Clark* rejected this argument at ¶ 44. So did the Tenth Circuit in

Pueblo of Santa Ana and *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535 (10th Cir. 1997).

In *Santa Ana*, the United States (the Department of Justice, Attorney General Janet Reno, and U.S. Attorney John Kelly) took the position that the tribes needed a compact validly enacted by the New Mexico Legislature. In this case, the federal attorneys are contradicting the position of the United States in *Santa Ana* and *Jicarilla*.

In *Clark* and *Santa Ana*, there were much stronger arguments for unilateral federal action than there are in the present case. In the area of gambling, IGRA mostly preempts state control, whereas federal water law largely defers to state control. See section 8 of the 1902 Reclamation Act; the McCarran Act; *California v. U.S.*; and *Tarrant* (interstate compacts shall not be interpreted to surrender state control over water within the state's boundaries).

The OSE makes the strange argument that the tribal gambling compact infringed on "an area directly regulated by the Legislature," whereas the tribal water compact does not. **[OSEAB to Legislators 14]** In truth, the legislature has always directly regulated water within the state, in much greater detail than gambling. This can be seen by comparing the sheer size of the statutes on water, as compared with the statutes on gambling before it was legalized.

The OSE also attempts to distinguish this case from *Clark* by pointing out the rather obvious fact that this tribal-state compact deals with water, rather than gambling. **[OSEAB to Legislators 12-14]** This is a distinction without a difference, especially since *Clark* lists water compacts as examples of agreements that must be approved by the legislature.

B. Section 72-14-3 Explicitly Requires All Interstate Stream Agreements To Be Submitted to the Legislature for Final Approval.

[BIC POINT 7; AMICUS BRIEF BY LEGISLATORS; RAISED IN LOWER COURT RP 12254; NEVER ADDRESSED BY LOWER COURT]

Quite apart from the case law in *Clark* and *Santa Ana*, there is a specific statute that requires all interstate water compacts to be submitted to the legislature for final approval. § 72-14-3 reads as follows:

> That said commission [the Interstate Stream 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, <u>subject, in all cases, to final approval by the legislature of New Mexico</u> . . . .

To evade the plain meaning of the statute, the answer briefs make two arguments that have no merit.

First, the settling parties incorrectly claim that this point was not raised in the court below. That is simply wrong: the acequias raised this point on October 19, 2012. As part of their counterclaim, the acequias quoted the full

text of § 72-14-3, with the above language underlined, as one of the laws violated by the proposed agreement. **[RP 12254]** The lower court refused to allow the counterclaim, so the court never addressed § 72-14-3.

Second, the OSE argues that the statute only applies to water compacts with another state ("interstate water compacts"), as distinguished from compacts with a tribe. This is a purely semantic argument which is untenable after *Clark*, which treats tribal compacts the same as interstate water compacts.

Moreover, the Indian Water Rights Settlement Act of 2005 specifies that the Interstate Stream Commission will administer the disbursement of funds for water settlements with Indian tribes. So it is difficult to argue that tribal water agreements are excluded from the ISC statutes like § 72-14-3.

C. The Navajo Settlement Does Not Comply with § 72-1-11 Because It Does Not Settle All of the Tribe's Water Claims. It Appears That State Agencies May Have Been Spending Money from the Fund in Violation of the Law.

[BIC POINT 8; AMICUS BRIEF BY LEGISLATORS; NOT RAISED IN LOWER COURT; NOT DISCLOSED BY THE SETTLING PARTIES; NOT ADDRESSED BY LOWER COURT]

In their answer briefs, the settling parties admit their proposed settlement does not settle all of the Navajo Tribe's water claims. The Navajo settlement does not meet the requirements of § 72-1-11(C)(1) because it does

not settle Navajo claims against the Rio Grande and Little Colorado. [2] The Indian Water Rights Settlement Act of 2005 requires that a water settlement with a tribe must settle all of the tribe's water claims. The purpose of the statute is evident: to require a comprehensive settlement of all claims, in order to buy peace permanently and eliminate future disputes and legal fees.

The settling parties offer no explanation why they ignored the statute. This statute was passed in 2005, during the Richardson administration, so the OSE and the Navajo Nation were probably involved in drafting it. After the statute was passed, they failed to comply with it. This is a very serious matter, because it appears that state agencies have been spending money in violation of the 2005 statute.

It is possible that the Navajo Nation refused to relinquish its claims to the Rio Grande and the Little Colorado during the negotiations, so the negotiators decided to ignore the statute. Then state officials obtained and spent state money, without telling the legislature – or the courts – that the Navajo settlement did not comply with the 2005 statute. This is a very serious

[2] The Navajo claims against the Rio Grande and the Little Colorado will be quite large. The Navajo Nation and U.S. will assert implied reserved water claims that are not constrained by PIA, or beneficial use, or minimum needs, relying on the lower court ruling in this case.

matter, because money appropriated by the legislature must be spent according to statute. *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001.

Nonetheless, the settling parties ask this Court to overlook this apparent illegality, because the acequias failed to discover it in time to raise it in the District Court. The acequias concede that they were not aware of this particular issue until they started additional research for this appeal. The appellate rules deal with this situation. Rule 12-216 allows a question to be raised for the first time on appeal if it involves a question of general public interest, or fundamental error or fundamental rights of a party. Rule 12-216(B)(1) and (2).

The more important question is, why did the settling parties fail to disclose this issue to the legislature and the lower court? It was the duty of the governor and the OSE and the attorney general and the Interstate Stream Commission to negotiate a settlement which complied with the 2005 statute. They did not.

After that, the settling parties compounded the problem when they incorrectly represented to the lower court and to the legislature that the settlement complied with all existing laws. It did not.

To evade the plain meaning of § 72-1-11, the OSE staff have invented an after-the-fact argument that the statute is limited to the water claims which the tribe has actually asserted in a pending statutory stream system adjudication under § 72-4-15. **[OSEAB to Legislators 1, 10, 21]** However, the text of the statute says no such thing. The statute does not mention stream system adjudications at all, and it operates independently of them. (This is a good thing, because the State of New Mexico has made almost no progress on stream adjudications during the 100 years since statehood.)

The statute encourage tribes to settle all of their water without litigation, but the OSE staff interpretation would defeat this objective. The OSE staff interpretation would also defeat the expressed purpose of the statute, which is to promote global settlements of all water claims, rather than piecemeal settlements. And the OSE staff interpretation would rule out the use of § 72-1-11 for funding the Aamodt and Taos (Abeyta) settlements, because those settlements occurred in federal court, not in a statutory stream system adjudication.

Then the OSE staffers make an argument that is even more brazen. The OSE contends that 2005 act and subsequent appropriations constitute "legislative approval" sufficient to satisfy *Clark v. Johnson*, even though the

Navajo settlement does not meet the 2005 statute and the statutory conditions for later funding. **[OSEAB to Legislators 21-22]** In essence, the OSE is arguing that the settling parties managed to fool the legislators long enough to obtain and spend public money for an unauthorized purpose.

D. The Settlement Changes the Law Governing Stream Water in New Mexico Contrary To *California v. U.S.*; Section 8 of the Reclamation Act; Article XVI of the N. M. Constitution; *Luna Irrigation*; and § 72-5-17.

[BIC POINTS 17, 18; RAISED IN LOWER COURT RP 12198]

In their answer briefs, the settling parties confirm that they have agreed among themselves to operate the San Juan River like a private pipeline. According to the settling parties, they will prevent the parciantes on the acequias from taking water from the river to meet their senior rights that were adjudicated in the Echo Decree, so that the water can be taken by junior users who have been favored with a federal storage contract. As the lower court acknowledged in its decision, "independent administration of direct flow and storage rights can result in releases to fulfill junior storage rights when no water is available [under a storage contract] to fulfill senior direct flow rights." **[RP 33774]**

This arrangement was worked out by the settling parties behind closed doors, at the expense of the acequias and the parciantes. In practice, this back

room agreement nullifies their senior adjudicated priority rights that were supposedly protected by the settlement. The agreement violates the express terms of Article XVI of the New Mexico Constitution, as ratified and approved by Congress.

The settling parties confirm in their answer briefs that they will not follow the decision of the New Mexico Supreme Court in *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, 80 N.M. 515, 458 P.2d 590. *Luna* holds that the water flowing in a natural stream is subject to prior appropriation, even if the water was once stored in a reservoir. The holding in *Luna* necessarily follows from the plain text of N.M. Const. art. XVI, §§ 1-3. Congress reviewed and approved these sections on water rights in the Enabling Act. Therefore these provisions also have the force of federal law, in addition to state law. Under the Constitution as approved by Congress, waters flowing in a natural watercourse belong to the public, and priority of appropriation should give the better right. The governor, the attorney general, and the state engineer have no authority to abolish these rights by contract.

The agreement is also inconsistent with federal law set out in the Reclamation Act and *California v. United States*, 438 U.S. 645 (1978).

> [The Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water. . . .

> First, . . . the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law. . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

Id. at 664, 665, 667, 675.

Unlike the law in some other states, New Mexico case law recognizes that water may be captured and impounded for private use, but then water resumes its character as public property once its flows are released back into the natural watercourse. The appellees rely on paragraph 11(a) of the NIIP Act **[OSEAB 27]**, but that paragraph only applies to waters while they are stored in the reservoir, not when they are released back into the watercourse, where they are public waters which are available for appropriation in strict order of priority date.

The settling parties cite cases from other states, like Colorado, but none govern in New Mexico. First, New Mexico has a constitutional rule of strict prior appropriation, which means it cannot be changed by statute. Second, *Luna* recognizes the reality that waters released from storage are co-mingled with other waters which have never been stored. And there is no way to differentiate them. On the San Juan River, Animas River waters have never

been stored, and they commingle with the waters released from Navajo Reservoir on the San Juan main stem. Third, Navajo Reservoir impounds and stores every drop of water that comes down the main stem of the San Juan, at least temporarily. Whenever a dam is built across a river, it stores all the water. However, impoundment alone does not destroy the public character of the water. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421; *Ickes v. Fox*, 85 F.2d 294 (App. D.C. 1936), *aff'd*, 300 U.S. 82 (1937).

Unlike some other states, New Mexico requires the operator of a reservoir to make unused storage capacity available as a public trustee for downstream water users. § 72-5-17. The purpose of the statute is make sure that reservoir operators do not get to pick and choose who gets water in times of scarcity, in derogation of senior rights. The statute also recognizes that it is environmentally and economically efficient to let downstream water users utilize otherwise unused storage capacity behind a dam that has already been built. There is almost no additional cost for using the storage, which is vital in times of drought.

Consider the situation that occurs almost every year in late summer, when the crops are growing and the river is running low. The San Juan water

users have senior water rights adjudicated by the Echo Decree, and they desperately need to use their water to keep their crops growing in July, August and September. The settlement decree deprives senior water users of their right to take water from the river in order of priority. Instead, the decree would force senior owners to stop taking water from the river even when they have unused water rights for the current irrigation season, in order to supply junior water rights that have a BOR permit. In other words, the settlement forces senior irrigators to watch their crops die in the fields, while they watch water roll down the river to supply junior rights. This is absolutely contrary to the prior appropriation clause in New Mexico Constitution, approved by Congress. Governor Richardson and the state engineer had no legal authority to agree to the abolition of priority rights, because no executive officer has the power to agree to unconstitutional actions.

The lower court opinion never explains how this aspect of the agreement could be "fair and reasonable".

Fortunately, there is a constructive solution to this problem, using § 72-5-17, *City of Raton v. Vermejo Conservancy Dist.*, 1984-NMSC-037, 101 N.M. 95, 678 P.2d 1170, and *California v. U.S.* Section 72-5-17 requires reservoir owners to act as public trustees for downstream users, by storing water in the unused

part of the reservoirs, to be released to fulfill senior rights. In *City of Raton*, Judge (later Justice) Stanley Frost crafted a solution like this in his decree, and it was upheld on appeal. New Mexico's water authorities have the right to impose conditions like this on federal projects within the state. *California v. U.S.*, 438 U.S. at 700-01.

The statutory solution is fair, equitable, reasonable, and easy to implement on the San Juan River. During the last half of the irrigation season, Navajo Reservoir almost always has hundreds of thousands of acre-feet in storage space that is not being used, because the reservoir has been drawn down earlier in the year.

The Richardson-Navajo agreement gives lip service to the concept by purportedly allowing a mere 12,000 acre-feet of storage. This is a trivial amount, which will be used up in a few days of drought. Furthermore, these storage rights are illusory, because the settlement was carefully written so that this storage right is not available when the water is needed most. When the water stored in Navajo Reservoir drops below 1,000,000 acre-feet, local storage rights no longer exist. **[RP 858]** This makes no sense. When water levels drop below 1,000,000 acre-feet, Navajo Reservoir has a huge amount of unused storage space, but local irrigators get no storage at all.

The SJWC asks a good question: "If stored water is not protected from diversion by others, why would anyone invest the millions of dollars needed to build a reservoir or pay to store water in an existing reservoir?" The answer is: so that the reservoir can be used to store enough water to supply both senior and junior water rights during the dry months.

E. Under *Sporhase* (1982) and *City of El Paso v. Reynolds* (1983, 1984), the Navajo Tribe and Other Tribes Have the Right To Export Water to Other States. The Lower Court Erred by Opining Otherwise.

[BIC POINT 28; RAISED IN THE LOWER COURT, RP 12203-05]

The settlement agreement was craftily written to create the illusion that the Navajos cannot export the water to other states. The lower court believed that the settlement prohibits water exports, and found this to be a major reason to approve the agreement, but the court was misled on the law.

Section 17(g) of the agreement says that the Navajos must apply to the New Mexico State Engineer for a permit to export water, but section 17(g) does not say what happens after that. If the state engineer denied a permit to export water, the Navajo Nation water is an article of interstate commerce, so water awarded to the Navajo Nation can be exported to other states, including Arizona and Utah, where the Nation is also located. 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 first *El Paso* case holds that the New Mexico State Engineer cannot withhold a permit in order to prevent the water from leaving the state. The second *El Paso* case holds that the engineer cannot impose discriminatory conditions on the export of water.

If the court had allowed the counterclaim and conducted a trial, it would have learned that the Navajo Nation claims the right to export any water awarded by the decree. Stanley Pollock, counsel for the Navajo Nation, stated the Navajo position to The Farmington Daily Times in May of 2011. **[RP 12203]** The acequias agree with the Navajo Nation, because this is a settled point of law.

Remarkably, the lower court opinion never addresses *Sporhase* or the two *El Paso* cases.

F. There Are No Water Permits for NIIP.

[BIC POINT 27; RAISED IN LOWER COURT AND ADMITTED BY OSE RP 16988, 17436 ; NEVER ADDRESSED IN LOWER COURT OPINION]

The Navajo Tribe and U.S. contend that they hold water rights by virtue of Permit Nos. 2849, 2883, 3215 issued by the state engineer. **[NNAB 13, 22]**

These alleged permits do not exist. In responses to interrogatories, the OSE admitted that the applications for these permits were never published. **[RP 16988, 17436]** The state engineer cannot approve and issue a permit without requiring the applicant to publish notice of his application, so that other water users and interested parties are given notice and an opportunity to contest the application. § 72-5-4.

The OSE files show no record of any action by the state engineer beyond the initial receipt. No notice was ever published, no hearings were ever held, and no approval was ever issued.

Even if the permits had been issued, it is well established that water permits issued by the state engineer do not create water rights. *Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232. Even though a water user might have an OSE permit, his rights can still be challenged by other water users in an inter se proceeding.[3]

[3] In this inter se, the court destroyed the acequias' right to challenge the Navajo water rights by refusing to allow the acequias' counterclaim.

G. The Navajo Nation Submitted Falsified Population Projections, and Then Persuaded the Court To Accept the False Data While Excluding the Actual 2010 Census Data.

[BIC POINT 16; RAISED IN LOWER COURT RP 14478-83]

The answer briefs admit what the record clearly shows:

(1) According to the 2010 census, the population on the reservation shrank from 175,232 in 2000 to 169,321 in 2010. **[RP13219, 17775]**

(2) When Dr. Gretchen Greene made her projections of Indian population in the year 2110, she excluded the most recent 2010 census data from her projections. Her affidavit did not disclose that she had excluded the 2010 census. **[RP 15542]**

(3) Her affidavit incorrectly stated that her opinion was based on the best data available at the time of the report. **[RP 15542]**

To excuse this deception, the answer briefs claim that the final 2010 census figures were not available to Dr. Greene. This is simply untrue. Dr. Greene's report was filed with the court on April 17, 2013, **[RP 15537-48]**, more than 2 years after the release of the final figures in March 2011. www.census.gov/newsroom/releases/archives/ 2010_census/cb11-cn123.

The Navajo Nation contends that the projected population only relates to the Navajo claim for domestic and industrial uses, but this is not true under

the *Gila V* approach that the Tribe persuaded the lower court to adopt. Under *Gila V*, future Native American population is a key factor for quantifying *Winters* rights.[4]

H. All *Ex Parte* Contacts Between a Judge and a Litigant Must Be Disclosed on the Record.

[BIC POINTS 23, 24; RAISED IN LOWER COURT RP 18028-31; NEVER ADDRESSED BY THE LOWER COURT]

At page 61 of its Answer Brief, the OSE argues that *ex parte* contacts between the judge and OSE staffers can be ignored, because the Brief In Chief does not specifically identify the time, place, and participants in these *ex parte* conversations. This is because the court and the OSE failed to disclose the *ex parte* conversation as required by Rule 21-209(A)(1)(b). If *ex parte* conversations occur, they must be promptly disclosed on the record, so that the other parties have an opportunity to respond.

[4] On this issue *Gila V* flatly contradicts *Arizona v. California*, which holds that "How many Indians there will be [in the future] and what their future needs will be can only be guessed." 373 U.S. at 601.

I. The Lower Court Abolished the Legal Requirement for Good-Faith, Arms-Length Negotiations.

[BIC POINT 25; RP 33765]

At the beginning of the case, the lower court made a correct ruling on good faith. It placed the burden on the settling parties to prove that the agreement was the product of good-faith, arms-length negotiations. **[RP 9842]**

However, in its final decision, the lower court abolished the good-faith requirement in order to approve the settlement. It held that the settling parties "had the sole obligation to negotiate the Settlement Agreement among themselves." **[RP 33765]** This ruling gives the court's blessing to bad-faith dealing by the three governments in all future water adjudications. The three governments can and will exclude local water owners from their backroom negotiations, while they negotiate in secret how to impair senior and junior water rights on the river. Backroom negotiations are much easier when they use other people's water rights as bargaining chips, when those people aren't in the room.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, a true and correct copy of the foregoing was served on counsel for the *amici*, appellees, and the appellants by email.

/s/ Victor R. Marshall
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