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 UTE MOUNTAIN UTE AND JICARILLA APACHE TRIBES
[Corrected Version]

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Oral Argument Requested

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TABLE OF AUTHORITIES

New Mexico Cases:

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A. Like the Navajo Tribe, the Ute Mountain Ute Tribe and the Jicarilla Tribe Want to Break the Limitations Which the U.S. Supreme Court Has Imposed on Implied Reserved Water Rights for Indian Reservations.

[BIC POINTS 1,2,3,4,5; RAISED IN THE LOWER COURT THROUGHOUT THE PROCEEDING]

The Ute Mountain Ute Tribe and the Jicarilla Tribe did not actively participate in the lower court. On appeal, they have filed briefs asking this Court to cast off the limitations which the U.S. Supreme Court has imposed on the quantification of implied reserved water rights for Indian reservations. This is understandable, but not legally permissible.

Like the Navajo tribe, the Ute and Jicarilla tribes would like to obtain as much water as they can get, but the case law from U.S. Supreme Court stands in their way. The Supreme Court has imposed significant restraints on the award of *Winters* rights, such as PIA, minimum needs, and beneficial use. The tribes find these constraints to be unacceptable, so they refuse to acknowledge them.

This appeal presents a tremendous opportunity for these tribes to evade these limitations, because they now have the advantage of a lower court ruling that sidesteps the U.S. Supreme Court. If the Navajos and the Jicarillas and the Ute Mountain Utes can manage to persuade this Court to affirm the ruling

below, then they will have gained an appellate precedent which every Indian tribe can use in other water adjudications in New Mexico. Like the Navajo Nation, the Jicarilla and Ute Mountain tribes are mounting a sustained attack against water law doctrines that have been established by the Supreme Court of the United States.

For reasons that have never been explained, these arguments met with complete success in the lower court. The lower court disregarded federal law and *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194, 861 P.2d 235 ("*Mescalero*") when it awarded 508,000 acre-feet of water to NIIP, an irrigation project which admittedly does not meet the requirements of PIA and beneficial use.

In its rulings, the lower court contravened multiple decisions of the Supreme Court of the United States which set the rules and standards for:

- practicably irrigable acreage (PIA), *Arizona v. California*, 373 U.S. 546 (1963), and *Arizona v. California*, 460 U.S. 605 (1983);
- beneficial use, *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*; and
- minimum needs, *United States v. New Mexico*, 438 U.S. 696 (1978).

- primary versus secondary purpose, *United States v. New Mexico*; *Mimbres Valley Irrigation Co. v. Salopek,* 1977-NMSC-039, 90 N.M. 410, 564 P.2d 615; *Cappaert v. United States*, 426 U.S. 128 (1976);

Under the supremacy clause of the United States Constitution, the lower court was bound to obey these decisions. *DIRECTV, Inc. v. Imburgia*, ___ U.S.___, 136 S. Ct. 463 (2015). The lower court did not.

It is not surprising that Indian tribes intensely dislike these decisions by the U.S. Supreme Court. These decisions do severely limit tribal water claims. These decisions allow much smaller amounts than the expansive interpretation of *Winters* which the tribes have advocated for decades, without success. Nevertheless, Indian tribes are obligated to obey the decisions of the Supreme Court, just as the state courts and the federal government are required to do.

As a state court in New Mexico, the lower court was also bound by another body of law: the decisions issued by the New Mexico Supreme Court and the New Mexico Court of Appeals; the Constitution of New Mexico; and the statutes enacted by the New Mexico Legislature. The laws of New Mexico bind not only the courts, but also all public officials in this state, including the governor, the state engineer, and the attorney general. They all have a duty to obey New Mexico law.

In New Mexico, the controlling case is *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194, 861 P.2d 235 ("*Mescalero*"). This case quantifies reserved water rights for Indian tribes under *Winters* and all of the later cases from the U. S. Supreme Court. Because the trial court and the Court of Appeals decided *Mescalero* during the 1990s, both courts had the benefit of all the federal cases listed above. Applying the PIA standard, former Justice LaFel Oman awarded 13% of the amount claimed by the tribe and the U.S. On appeal, the Court of Appeals modified the priority date, but it affirmed the the PIA award.[1]

Mescalero does nothing more than follow the PIA standard which the U.S. Supreme Court has twice decreed to be the only standard for quantifying winners rights. *Arizona v. California*, 373 U.S. at 600-01; *Arizona v. California*, 460 U.S. at 615-28. See *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 571 (1983) (state courts "have a solemn obligation to follow federal law" in the determination of tribal water rightsin state adjudications).

[1] In those instances where it applies, *Winters* changes priority dates, but not the requirement that water must be put to beneficial use. Indian reserved rights do not have to be based on prior beneficial use, but *Winters* does not depart from the rule that water rights are limited by the amount that can be put to beneficial use. Priority dates are not an issue in this appeal.

It is remarkable that the lower court opinion only mentions *Mescalero* concerning priority dates, but not PIA. The OSE answer briefs do not even mention *Mescalero* at all. The Ute Mountain brief cites *Mescalero*, but not its ruling on PIA. **[UTUMAB 16, 23]** The Jicarilla answer brief cites *Mescalero* on priority dates, at 4, but not quantification.

The tribes and the lower court were not free to pick the part of *Mescalero* which they like – priority dates – while they reject the part that applies to this case – PIA.

The tribes met with an unexpected success in the lower court. They persuaded the court to jettison the PIA standard and *Mescalero* in favor of the nebulous approach advocated by the Arizona Supreme Court in *In re General Adjudication [of the] Gila River*, 35 P.3d 68 (Ariz. 2001) (*Gila V*). *Gila V* rejects PIA as the basis for quantifying Indian reserved rights. In the process, the Arizona Supreme Court expressly also cited and rejected *Mescalero*. However the lower court was required to follow *Mescalero*, even though it preferred the *Gila V* approach.

B. In *Winters* Cases, the Amount of Water Demanded by The United States Is Not Admissible as Probative Evidence.

[BIC POINTS 26, 31; RAISED IN LOWER COURT RP 1386]

As evidence to support the settlement, the U.S. and Navajo Nation argued that they could have made a demand for more than a million acre-feet. The lower court gave great weight to this factor in deciding to deny a trial and grant summary judgment. **[RP 33749-813]**

This is plain legal error, because a party can demand whatever it wants in litigation, but the demand has no probative value. A demand is not proof. See Rule 1-008(A) (a complaint shall not contain a demand for damages in any specific monetary amount). A large demand cannot be admitted as evidence on summary judgment, nor can it eliminate the need for trial on disputed facts. In this case, the U.S. and Navajo Nation used it as an excuse to avoid their burden to prove their case on the merits, with admissible evidence. See **[NNAB 26]**: courts do not decide the merits of the case or resolve legal questions.

Winters and *Mescalero* illustrate the wisdom of the rule that the amount demanded by the U.S. is not proof. In *Winters* the United States demanded 10,000 miner's inches [120 cubic inches per second] to meet the needs of the reservation, but the trial court only awarded 5,000 miner's inches [60 CFS],

only half the amount demanded. 143 F. 740. The Supreme Court affirmed the award of 5,000 miners inches.

In *Mescalero* the United States and the Mescalero tribe claimed 17,750.4 acre-feet under the PIA standard. Former Justice LaFel Oman, sitting *pro tem*, conducted a trial. After working through the evidence and weighing the credibility of witnesses, Justice Oman awarded 2,322.4 acre-feet, 13% of the amount demanded. *Mescalero*.

The lower court ruling creates a tremendous incentive for tribes to exaggerate their *Winters* claims. If left intact, this incorrect ruling will prejudice local water users and the State of New Mexico in every water adjudication yet to come.

C. The Lower Court Abandoned the Requirement of Proof by a Preponderance of the Evidence for Tribal Water Claims. Instead the Court Granted Summary Judgment, Without a Trial, Based on Speculation About What the Tribe Might or Might Not Have Proved at a Hypothetical Trial That Will Never Be Held.

[BIC POINT 26]

The Utes and Jicarillas would like this court to affirm the lower court ruling because it excuses tribes from proving their *Winters* claims at trial.

In order to summarily award judgment to the Navajo Nation, without a trial, the lower court abandoned the preponderance of the evidence standard

along with the rules on summary judgment. As the court admitted, it dispensed with the technical requirements for summary judgment. **[RP 33761]**

As a replacement for evidence, the lower court substituted conjecture and speculation about a hypothetical trial which was never held, and never will be. At **[RP 33776]**, the court framed the question 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?"

There are multiple layers of speculation contained in this formulation. For example:

- *What is* "*a reasonable basis"*? In cases where the evidence is disputed, there is a reasonable basis to decide in favor of one party, and also a reasonable basis to decide in favor of the other party. That is why trials are necessary – to decide which party has proved its case by a preponderance of the evidence.

- "to *conclude* that"? The word "conclude" seems to mean a conclusion of law, rather than a finding of fact after trial.

● "*potential*"? Potential means "1. Capable of being but not yet in existence; latent or undeveloped: a potential problem; a substance with many potential uses." *American Heritage Dictionary*. It means "possibly true in the future, but not true now" *MacMillan Dictionary*, "potentially". The word "potential" denotes possiblity, but not probability: "He bought a lottery ticket, so he is a potential winner."

● "*claim*"? Any litigant can make a claim, but a claim is not proof.

● "*could be secured"*? "Could" denotes that something is possible but it suggests less force or certainty than "can". www.merriam-webster.com/dictionary.

● "*at trial*"? What trial? There was no trial. The lower court cancelled the trial before the parties even had the opportunity to list their witnesses and exhibits.

But what about the hypothetical trial that *could* have occurred, but never did? Who testified at this trial? What exhibits were offered and admitted? What lawyers participated? Did the court follow the rules of evidence and procedure? Did the court follow its concept of "*a reasonable basis*", which allows a quantum of proof by less than a preponderance? On the law, did the court have a change of heart and decide to follow the PIA requirement in

Arizona v. California? The parties and this Court are left to speculate endlessly about what *could* have happened at the trial that never happened.

D. *Nemo Dat* and the Brooklyn Bridge.

[BIC POINT 31; RAISED DURING THE SUMMARY JUDGMENT HEARING]

The lower court awarded more 600,000 acre-feet without ever requiring the U.S. and Navajo Nation to prove that they had any legal right to this water. [See Acequias' Reply to NN and US, which poses the question "What is the legal basis for the water rights claimed by the Navajo Nation?]

In its haste to approve the Richardson-Navajo agreement without a trial, the lower court overlooked the doctrine of *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).

The Latin phrase may not be familiar but the concept is. In modern parlance, it's called "the Brooklyn Bridge". Suppose three parties get together and negotiate an elaborate settlement that one of them owns 56% of the Brooklyn Bridge. The settling parties come to court and tell the court that they

have negotiated for years over the ownership of the Bridge. They point to their settlement contract, and argue that the law strongly encourages settlement. And then they ask the court to approve their settlement by issuing a decree quieting title to 56% ownership of the Brooklyn Bridge.

The plaintiffs' settlement contract does not make it so. Their contract is meaningless, except as a scam, unless one of the parties possesses good title to the Brooklyn Bridge. Hence the figure of speech, "selling someone the Brooklyn Bridge", which is a more modern way of expressing the ancient Latin maxim.

The New Mexico Supreme Court court recently applied the Brooklyn Bridge rule in *Deutsche Bank v. Johnny Lance Johnston*, 2016-NMSC-013, ¶ 22, to illustrate that Deutsche Bank had no right to foreclose on a house. Justice Chavez added a footnote to illustrate the Brooklyn Bridge doctrine.

> If the seller is not the person entitled to foreclose, the foreclosure sale is no different from a sale of the Brooklyn Bridge. Accordingly, the foreclosure sale purchaser has no ability to transfer title to the property, no matter [his or] her equities, because [he or] she lacks title, just like the hapless buyer of the Brooklyn Bridge.

Deutsche Bank, ¶ 22 n.3 (quoting Levitin, 63 Duke L.J. 637, 646).

Call it *nemo dat* or "Brooklyn Bridge", the same legal rule applies to this case. The settling parties are asking this Court to quiet title to roughly 56% of

the San Juan River, but they have never proved that they have a right to 600,00 acre-feet, or any other amount of water. By chanting "settlement", the settling parties managed to beg the underlying question, which is whether they have any right to any water from the San Juan River. In particular, the record showed that they failed to prove that they were entitled to 508,000 acre-feet for NIIP. Their water claim for NIIP failed when they admitted that NIIP is not PIA.

However, the tribes prevailed because they convinced the lower court that it was not allowed to consider the merits of the Navajo claim, and not allowed to resolve questions of law. **[NNAB 26]**

E. The Agreement Eliminates the Authority of the State Engineer and the State Court over Indian Uses and Diversions on the San Juan River.

[BIC POINT 19; RAISED IN LOWER COURT RP 914-19]

Prior to the agreement, the state engineer had the legal authority to regulate all diversions of water within New Mexico, including diversions by the Navajo tribe. The agreement destroys that regulatory authority. Section 17 provides that the Navajo Nation, not the OSE, shall have authority to administer the diversion and uses of water awarded by the decree. The Navajo Nation is given the authority to "measure, distribute, administer and regulate

the use of water" under the decree, **[RP 915]**. The OSE admits it is now limited to "monitoring" and "consulting" with the Navajo tribe, which will exercise the actual authority over the water uses. The OSE has given up the ability even to monitor water uses, because the agreement prohibits it from installing water meters. RP The state engineer is reduced to accepting whatever figures the Navajo Nation chooses to give him, or not.

The agreement also infringes the authority of the state judiciary over the San Juan River. Under the agreement, Navajo Nation could shift its point of diversion anywhere along the San Juan River, no matter what damage that does to non-Indian users. Section 17(c) allows the Navajo tribe to change the purpose and place of use without the approval of the state engineer. The tribe is only required to consult with the state engineer "on proposed changes and potential impairment," **[RP 916]**. The agreement forces non-Indians to go to a yet to be created Navajo administrative tribunal, rather than the state District Court. It destroys their constitutional right to *de novo* decision making in state courts, N.M. Const. art. XVI, § 5. The state courts would have no jurisdiction because the tribes and the United States would assert sovereign immunity. On the issue of sovereign immunity, the U.S. and the Navajo Nation are deliberately misleading the court by pointing to the waiver of sovereign

immunity for state court water adjudications under the McCarran amendment, 43 U.S.C. § 666. The agreement is cleverly drafted so that the state courts would lose their existing jurisdiction under the McCarran Amendment. **[RP 875-76, in particular sections 13.1, 13.3, 13.4]** If this Court affirms the judgment below, then the tribe will assert tribal immunity. They will claim that the McCarran waiver no longer applies, because their rights have already been adjudicated by the state court.

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.

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