IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellee,

v.

San Juan County
James J. Wechsler, Presiding Judge
CV 75-184
AB-07-1, Navajo Inter Se
Ct. App. No. 33,439

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; B SQUARE RANCH, LLC et al.; and MCCARTY TRUST ET AL.,

Defendanta-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

DOCKETING STATEMENT OF SAN JUAN COMMUNITY DITCHES AND ACEQUIAS AND THEIR MEMBERS

PART I: PRELIMINARY INFORMATION

A. Introduction

Without conducting a trial, the district court awarded more than 600,000 acre-feet of water from the San Juan River to the Navajo Nation. This is more than 6 times the amount of water used by the Albuquerque metropolitan area, and twice as much as the City of Phoenix.

The district court rejected the rule of law that water must be put to beneficial use. Beneficial use is required by Section 8 of the Reclamation Act of 1902, Pub. L. 57-161, 32 Stat. 388, 390 (Jun. 17, 1902); *Winters v. United States*, 207 U.S. 564 (1908); New Mexico's 1912 Constitution as approved by Congress as a condition of New Mexico's admission to the union, N.M. Const. art. XVI, § 2; Section 4 of the Colorado River Storage Act, Pub. L. 84-485, 70 Stat. 105 (Apr. 11, 1956); *Arizona v. California*, 373 U.S. 545, 557 n.23 (1963); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, ¶¶ 48-73, 116 N.M. 194, 861 P.2d 235 ("*Mescalero")*; *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34, 1142, 1144 (10th Cir. 1981). In violation of these controlling authorities, the district court adopted a "homeland" concept as espoused by the Arizona Supreme Court in *In re General Adjudication of All Rights To Use Water in Gila River System & Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila River V*").

This theory is contrary to the above authorities, including *Mescalero*. The "homeland" theory has been rejected by the federal courts, see *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005).

The district court based its "homeland" award on a projected population of 203,935 in the year 2110, a century from now. This demographic estimate deliberately excluded the most recent census data, from 2010. The 2010 census shows that only 42,127 Native Americans lived on the reservation in New Mexico in 2010, a decrease from the 2000 census. The district court refused to consider the United States' own census data, which shows that the reservation population is shrinking rather than growing.

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

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

The district court refused to allow the community ditch defendants to file an answer and counterclaim under the Rules of Civil Procedure. It dismissed those pleadings without addressing the legal and factual issues in

them. See Part II below. The district court granted summary judgment on all issues of fact or law in favor of the Navajo Nation, the US, and the OSE.

The district court judgment violates *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562 and *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), 104 F.3d 1546, 1553-54 (10th Cir. 1997) (governor has no authority to bind the State of New Mexico to a tribal compact without a statute enacting the terms of the compact). The proposed settlement agreement is a tripartite compact between the Navajo Nation, the United States, and the State of New Mexico, which requires enactment by all three sovereigns. Every compact must be enacted into law by a statute passed by the legislature. *Clark*, ¶¶ 39-40. The New Mexico Legislature has not enacted this proposed compact into law, so it is a nullity. *Clark*, ¶¶ 45, 49, 50. It makes no difference that Congress or the Secretary of Interior has approved the settlement agreement. *Clark*, ¶ 44; *Pueblo of Santa Ana*, 104 F.3d at 1553-54.

NMSA 1978, § 72-14-3 requires the Interstate Stream Commission to submit proposed water compacts to the Legislature for final approval. The ISC has failed to do this.

B. Nature of the proceeding

The "Partial Final Judgment" and the "Supplemental Partial Final Judgment" were filed on November 1, 2013. Appellants filed a timely notice of appeal on December 2, 2013.

The proceedings were tape recorded.

C. Statement of issues on appeal and how they arose

The plaintiffs in this case are the Navajo Nation, the United States, and the New Mexico Office of the State Engineer, hereafter "the NN, US, and OSE" or "plaintiffs." They filed a so-called "expedited inter se" case against all the water users in the San Juan Basin, asking for an award of more than 600,000 acre-feet of water from the San Juan River Basin in northwest New Mexico.

The appellants include the San Juan Agricultural Water Users Association, an association that represents more than 20 community ditches and acequias on the San Juan River. These community ditches and acequias supply water to farmers, homes, industry, and towns like Farmington, Aztec, and Bloomfield. The appellants include more than 8,000 water rights owners in the San Juan Basin. Most of them hold water rights that have already been adjudicated in the Echo Ditch Decree, *Echo Ditch Co. v. McDermott Ditch Co.*,

Judgment (N.M. 1st Jud. Dist., San Juan Co. Apr. 8, 1948). Their water rights are impaired by the 2013 judgments.

On October 19, 2012, the community ditches filed their answer, objections, and counterclaim to the claims of the NN, US, and OSE. On October 29, 2013, community ditches filed their "amended and supplemental answer, objections, and counterclaim," which added issues that had been litigated by the parties during the course of the proceedings. The district court refused to allow community ditches the right to file either answer or counterclaim.

The issues presented by this appeal include all of the issues set forth in the answer and counterclaim, because the district court did not allow the defendants to file an answer and counterclaim under Rules 1-012 and 1-013 of the Rules of Civil Procedure. The district court did not address most of the legal and factual issues raised by the defendants. The lower court disposed of them with a footnote, with no analysis or explanation:

> If the Court has not specifically addressed any of the Non-Settling Parties' arguments, the Court concludes that they either do not raise a genuine issue of material fact or do not justify relief as a matter of law.

On those issues which the district court did address in some fashion, it granted summary judgment for the plaintiffs under Rule 1-056. The court did not hear testimony or conduct a trial on any issue.

D. Standard of review

This appellate court decides the issues of law in this case *de novo*, without deference to the lower court's rulings on the New Mexico Constitution, state and federal statutes, and controlling case law.

With regard to the disallowed answer-counterclaim, the applicable standard of review is the standard applicable to dismissal of claims on the pleadings under Rule 1-012. The allegations in the counterclaim are taken as true, and all legal and factual inferences are drawn in favor of community ditch defendant counterclaimants.

With respect to the summary judgment granted by the lower court, the appellate courts look to see if there are any disputed issues of fact. On appeal, the burden is on the party who won summary judgment to demonstrate the absence of a genuine issue of material fact. *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation and Revenue*, 2006-NMCA-050, 139 N.M. 498.

F. List of authorities for each issue

Many but not all of the controlling authorities are set forth in the text of the disallowed answer-counterclaim, Part II below, and in Part III. As part of the answer-counterclaim, the acequias filed highlighted text of the applicable constitutional provisions and statutes, entitled "EXCERPT OF LAWS VIOLATED BY THE PROPOSED AGREEMENT." Appellants will file this document as part of this docketing statement if the court wishes to review it. However, the document is 101 pages long when formatted per the Rules of Appellate Procedure.

PART II: ISSUES OF FACT AND LAW RAISED BY THE DISALLOWED ANSWER-COUNTERCLAIM

A. Statement of the case, with summary of the facts and law

The pertinent facts and controlling law are summarized in the answer-counterclaim filed by the community ditch defendants. Because the answer-counterclaim was dismissed on the pleadings, the facts alleged by the community ditches are taken as true, and all factual inferences are drawn in favor of the appellants.

This appeal encompasses all of the issues of law and fact that are related to this disallowed pleading.

[Note: This amended and supplemental answer-counterclaim was filed on October 29, 2013. This amended pleading is identical to the original answer-counterclaim that was filed on October 19, 2012, except for the insertion of additional paragraphs 173a through 173s. These paragraphs deal with issues that surfaced during the proceedings after the original pleading.]

AMENDED AND SUPPLEMENTAL ANSWER, OBJECTIONS, AND COUNTERCLAIM BY COMMUNITY DITCH DEFENDANT-COUNTERCLAIMANTS

1. For their answer, objections, and counterclaim, the community ditch defendant-counterclaimants allege and state:

2. PART A: THE DEFENDANT-COUNTERCLAIMANTS DENY THE ALLEGATIONS MADE BY THE PLAINTIFFS

3. In this case, Case No. AB-07-1, the plaintiff-settling parties [the Navajo Nation, the United States, and the New Mexico Office of the State Engineer, hereafter "the plaintiffs"] have sued the defendant-counterclaimants and others, seeking to establish the relative rights of the Navajo Nation to the surface and groundwater in the San Juan River Basin in New Mexico, as against all of the other water owners and users in the Basin. The plaintiffs' claims are set forth in a statement of claims filed by the United States on December 29, 2010, and in documents filed in support thereof.

4. In this case, the plaintiffs are asking this court to approve a proposed conditional agreement which they negotiated among themselves, and to make that proposed agreement binding upon and superior to the rights of defendants. This proposed agreement is set forth in various documents which include: the settlement agreement, signed variously on December 10 and 17, 2010; proposed decrees and supplemental decrees which the plaintiffs are asking the court to enter as judgments; and it is subject to the Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111–11, title X, subtitle B, which imposes certain conditions, prohibitions, and restrictions which must be considered as part of the agreement. Hereafter the overall agreement (including the proposed decrees) is referred to as "the proposed agreement."

5. **General denial.** Pursuant to Rule 1-008, NMRA, defendants generally deny all the averments made by the plaintiffs in their statement of claims and supporting documents, except that defendants state that this court has jurisdiction over the plaintiffs. A few of the averments in plaintiffs' statement of claims might possibly be true in some unknown part, but such averments are not separately designated; defendants do not have knowledge or information sufficient to form a belief as to the truth or falsity of such averments; and the statement of claims and supporting materials are so

voluminous that it is not practicable to admit or deny each averment contained therein.

6. **Strict proof.** Defendants demand that plaintiffs produce strict proof of every averment in support of their claims, and of every element necessary to establish their cause of action against defendants, in accordance with the New Mexico Rules of Civil Procedure and Rules of Evidence, and subject to discovery, cross examination, refutation and rebuttal, and presentation of contrary evidence by the defendants. The assertions in the statement of claims and supporting documents set forth plaintiffs' contentions, but they do not qualify as admissible evidence.

7. The plaintiffs must demonstrate that the proposed decrees and proposed agreement are "fair, adequate, and reasonable, and consistent with the public interest and applicable law." Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof, at 1 (Feb. 3, 2012). The plaintiffs cannot do so, for the reasons set forth in this pleading.

8. All of the allegations of the counterclaim are re-alleged and incorporated by reference as an integral part of defendant-counterclaimants' answer and objections, as though fully set forth herein.

9. **PART B: THE PROPOSED AGREEMENT IS INCONSISTENT WITH NUMEROUS STATE AND FEDERAL LAWS**

10. The court cannot approve the proposed agreement because it is "inconsistent . . . with applicable law." On its face, and as it would operate if approved, the proposed agreement is contrary to numerous state and federal laws. For the convenience of the court, some, but not all, of these laws are set forth in Exhibit 1, attached and incorporated hereto.

11. The proposed agreement is null and void because state officials lacked the legal authority under state law to approve or sign it. The state officials were acting *ultra vires* and outside their legal authority. Neither the Governor nor the Attorney General has legal authority to sign away, convey or encumber water which constitutionally belongs to the public, not to the government.

12. **B1: The proposed agreement violates Article XVI, Sections 2 and 3 of the New Mexico Constitution, whereby the waters of New Mexico belong to the public through prior appropriation and beneficial use. In 1911 the United States approved and ratified these constitutional water rules as part of New Mexico's admission to the Union, in order to eliminate any judicial implication of reserved water rights under the *Winters* decision in 1907.**

13. The proposed agreement violates Article XVI, Section 2 of the Constitution of the State of New Mexico, as approved and ratified by Congress

as part of New Mexico's admission to the Union in 1912. That Section provides:

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

[all emphases added.]

14. The proposed agreement also violates Article XVI, Section 3 of the New Mexico Constitution, as approved and ratified by the United States as part of New Mexico's admission to the Union in 1912. That Section provides:

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

15. By approving these strict rules requiring prior appropriation and beneficial use, the United States and New Mexico intended to, and did, eliminate the possibility that a court might create federal reserved water rights by judicial implication for Indian reservations in New Mexico, as the courts had done in Montana in the 1908 case of *Winters v. United States*, 207 U.S. 564 (1908).

16. In *Winters*, the United States Supreme Court had upheld a District Court finding that the United States actually intended to reserve 5000 miners'

inches of water from the Milk River in Montana for use by the downsized Fort Belknap Indian Reservation. This water supply had been cut off by upstream users. The Supreme Court agreed with the District Court that, even though there was no express reservation of water, congressional intent to reserve water for this Reservation could fairly be implied by the court from all the pertinent facts, concerning the geography of the Fort Belknap Reservation and its creation and downsizing. As the court said,

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

207 U.S. at 576.

17. Although such a judicial implication may be permissible and appropriate under certain factual circumstances, such as those in *Winters*, it creates chaos in the allocation of water where water is scarce. In a prior appropriation state, when a court implies a federal reservation of water rights for an Indian reservation, with a priority dating back to the establishment of the reservation, such a ruling undermines state laws on prior appropriation and beneficial use. Therefore, to exclude any such judicial implication, as part of New Mexico's admission to statehood in 1912, New Mexico and the federal government agreed to explicit constitutional provisions making prior

appropriation and beneficial use the rule of law in New Mexico, without exception.

18. If New Mexico and the United States had intended to reserve water for Indian reservations within the state, they would have said so during the statehood process. And the United States would not have approved the provisions of Article XVI.

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

20. One of the elected delegates to the constitutional convention was Stephen B. Davis, Jr., a lawyer from Las Vegas. Exhibit 2. Mr. Davis was a recognized expert on water law. Ira G. Clark, *Water in New Mexico: A History of Its Management and Use*, at 224 (1987). He later became a justice of the New Mexico Supreme Court and served as New Mexico's delegate on the commission that negotiated and wrote the Colorado River Compact, discussed below.

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

22. The proposed constitution was approved by the voters at an election on January 21, 1911.

23. The proposed constitution was then submitted to Congress for review and approval under the Enabling Act. Congressional approval was

delayed by a manuever to tie the admission of Arizona to the admission of New Mexico. And Congress disapproved the a provision which allowed amendment of the New Mexico Constitution by a majority of voters. Congress rewrote the amendment provision and by joint resolution of August 21, 1911, 37 Stat. 39, Congress authorized the admission of New Mexico "into the union upon an equal footing with the original states," provided that voters approved the congressional amendment.

24. Congress did not change the water provisions in Article XVI. It agreed to and approved those provisions as written, without amendment.

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

26. Sections 2 and 3 of Article XVI are specific to New Mexico, because they explicitly impose prior appropriation and beneficial use as constitutional rules, and they were approved by the United States after the *Winters* decision in 1907. Arizona was also admitted in 1912, but its constitution contains no provisions on prior appropriation and beneficial use.

In many states such rules are left to statutes, which do not require congressional approval.

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

28. These explicit provisions, approved by the United States, override any contrary or inconsistent rules which might be implied by a court. By approving the New Mexico Constitution, the United States intended to abrogate *Winters* in New Mexico, and to negate any implication of federal reserved rights for Native Americans within New Mexico, and to adopt prior appropriation and beneficial use as "the basis, the measure, and the limit of the right to the use of water" in New Mexico.

29. By approving Article XVI, Congress decided and agreed that the acquisition of water for Navajos, if that ever became necessary, would be accomplished through prior appropriation and beneficial use, just like other users, not by backdated implication.

30. In fact, the Navajo Nation has acquired substantial water rights by prior appropriation and beneficial use. (The amount, yet to be quantified, is much smaller than the implied amounts claimed by the Navajos or the amounts that would be awarded by the proposed agreement. And the priority dates of those amounts are based on the particular dates of actual appropriation and beneficial use.)

31. Additionally, the Navajo Nation and the United States can acquire additional water for the Reservation in the future through actual appropriation and beneficial use, on an equal basis with non-Navajo users.

32. Additionally, the Navajo Nation and the United States can buy water rights from other users if they believe more water is needed to meet the minimum needs of the Reservation.

33. Additionally, the Navajo Nation has substantial water sources within the Reservation which can be developed by the Navajo Nation and the United States.

34. Additionally, the water needs of the Navajo Nation can be met in part by water conservation methods.

35. Therefore, there is no need for an implication by necessity as in *Winters*, because the Navajo Nation and the United States have at least five other ways of meeting the water needs of the Reservation in New Mexico.

36. The federal approval of the specific provisions of Article XVI carries out a more general policy of federal deference to state water laws in arid states. With very rare exceptions, the United States has not preempted the water laws and procedures of the respective Western states. In furtherance of federal deference to state water laws, the United States has waived its sovereign immunity and the quasi-sovereign immunity of Indian tribes, so that federal water claims can be adjudicated in state court, in compliance with state law. McCarran Amendment, 43 U.S.C. § 666.

37. *Inter alia*, the proposed agreement is invalid because it would sign away water

(a) which belongs to the public, not to the Navajo Nation, or the United States, or the State of New Mexico;

(b) which has never been appropriated by any of the plaintiffs, by taking it from a stream;

(c) which has never been put to beneficial use by any of the plaintiffs;

(d) which was not appropriated by Navajos before other users; and

(e) which was not appropriated in accordance with the procedures and substantive rules in New Mexico's water laws.

38. *Inter alia*, the proposed agreement violates Sections 2 and 3 because it would give the Navajo Nation water which they have never put to beneficial use, and in amounts far in excess of the beneficial use limitation.

39. The proposed agreement also violates Article XVI, Section 1 of the New Mexico Constitution, which provides as follows:

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

40. Many of the defendant-counterclaimants have water rights which are protected by Article XVI, Section 1, but the proposed agreement would infringe those pre-existing rights.

41. The proposed agreement, if approved, would violate the equal footing doctrine, whereby states are admitted to the Union on an equal footing with other states. It would also violate the federal statehood statutes for New Mexico: the Enabling Act, 36 Stat. 557; and the Resolution of Admission, 37 Stat. 39; and the Proclamation Admitting New Mexico as a State, 37 Stat. 1723. The proposed agreement would give approximately one-third of all the

stream water in New Mexico to the Navajo Tribe, thus depriving New Mexico of a major benefit of its statehood.

42. **B2: The proposed agreement violates the 1922 Colorado River Compact.**

43. The Colorado River Compact was negotiated in 1922, by a commission chaired by Herbert Hoover, who later became president of the United States. *See* Exhibit 1. New Mexico was represented on the commission by Stephen B. Davis Jr., who was a justice of the New Mexico Supreme Court and a recognized expert on water law. *See* Exhibit 2. Justice Davis had also been a draftsman and cosigner of New Mexico's 1912 Constitution, with its special constitutional provisions on prior appropriation and beneficial use. Those principles were reaffirmed and ratified by the signatory states and the United States in the 1922 compact.

44. The 1922 Colorado River Compact refused to recognize any priority water rights, express or implied, for Native Americans in the Colorado Basin. The Compact left it to the United States to supply water to Native Americans if that became necessary in the future.

45. The proposed agreement is contrary to Article III of the Colorado River Compact, which adopts the principle of beneficial use as the basis for,

and the limitation on, the apportionment of the Colorado River. (*See* Article III of the Compact – "beneficial consumptive use.")

46. The proposed agreement is contrary to Article IV(b) of the Colorado River Compact, which makes the use of water for the generation of electrical power subservient to "the use and consumption of such water for agricultural and domestic purposes." The proposed agreement would allow the use of water for generation of electric power which would "interfere with or prevent use" for the dominant agricultural and domestic purposes. To comply with the Colorado River Compact, the court must add such a provision to the proposed agreement, or reject the proposed agreement as it was submitted.

47. The proposed agreement is contrary to Article VII of the Colorado River Compact, which states that nothing in the compact shall affect "the obligations of the United States of America to Indian tribes." The compacting parties, including the United States, agreed and compacted that the obligation, if any, to provide water to Indian tribes was placed on the United States, not upon the signatory states. Herbert Hoover called Article VII, "the wild Indian article," and said that the water rights of Native Americans were "negligible." James Lawrence Powell, *Dead Pool: Lake Powell, Global Warming, and the Future*

of Water in the West, at 69 (2008). The drafters of the compact dismissed Native Americans "with a terse disclaimer" [Article VII] and disregarded "the water needs of the nearly sixty thousand Indians residing in the [Colorado] basin in the 1920s." Norris Hundley, Jr., *Water and the West: The Colorado River Compact and the Politics of Water in the American West*, at 80, 334 (2d ed. 2009).

48. If the parties to the 1922 Compact had intended to reserve any water for Native Americans, they would have said so. If the United States had attempted to reserve water for Indian reservations in the basins, the negotiations would have failed. And Congress would not have allowed a reservation of water for tribes in the Colorado River Basin.

49. Instead, the U.S. and the states agreed that the minimal water needs would be satisfied by taking water from the river under the laws of the respective states. In New Mexico, this means by appropriating water under the strict rules of prior appropriation and beneficial use, which Congress had already approved in the 1912 Constitution.

50. The proposed agreement therefore violates Article VII of the Colorado River Compact, because it shifts this obligation from the United States to the State of New Mexico, and because it takes waters which the

Compact expressly reserves for the State of New Mexico, not the United States or Indian tribes.

51. The proposed agreement is contrary to Article VIII of the Colorado River Compact. Article VIII provides that "[p]resent perfected rights to the beneficial use of waters on the Colorado river system are unimpaired by this compact." The proposed agreement would violate the Colorado River Compact by impairing those rights, some of which belong to defendant-counterclaimants.

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

53. The proposed agreement violates Article VI of the Colorado River Compact. The proposed agreement is an attempt to sidestep the requirements for dealing with claims or controversies without the appointment of special commissions, and without ratification or direct legislative action by the legislatures of New Mexico and other interested states.

54. The proposed agreement is invalid because it is an attempt to change the Colorado River Compact without obtaining the unanimous consent of all the signatories through amendment of the compacting statutes by each state and Congress.

55. **B3: The proposed agreement violates the 1948 Upper Colorado River Basin Compact.**

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

57. The proposed agreement violates Article XV(a) of the Upper Colorado River Basin Compact, which provides that

> (a) Subject to the provisions of the Colorado River Compact and of this compact, water of the upper Colorado river system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and

> domestic purposes and shall not interfere with or prevent use for such dominant purposes.

58. The proposed agreement would allow the use of water for generation of electric power which would "interfere with or prevent use" for the dominant agricultural and domestic purposes. To comply with the Upper Basin Compact, the court must add such a provision to the proposed agreement, or reject the proposed agreement as submitted.

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

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

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

61. The proposed agreement would relinquish, forfeit, and abandon some 608,000 acre feet of New Mexico's share of the Colorado River to the United States and the Navajo Nation, in violation of Article XVI.

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

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

64. If there is any award of water to the Navajo Nation, the award cannot be charged solely to New Mexico's share of the Colorado River. The Navajo Nation is located in three states (Arizona, New Mexico, and Utah),

and located in the Upper and Lower Basins of the Colorado River. Therefore, if any water is awarded to the Navajo Nation, it must be apportioned under the two compacts as between Arizona, New Mexico, and Utah, and as between the Upper and Lower Basins.

65. **B4: The proposed agreement is contrary to *United States v. New Mexico*, 438 U.S. 696 (1978) and *Mimbres Valley Irrigation Co. v. Salopek,* 90 N.M. 410, 564 P.2d 615 (1977).**

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

> While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert, supra*, at 141, 96 S.Ct., at 2071. See *Arizona v. California, supra*, at 600-601, 83 S.Ct., at 1497-1498; *District Court for Eagle County, supra*, at 523, 91 S.Ct., at 1001. Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and

> because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. See *California v. United States*, 438 U.S., at 653-670, 678-679, 98 S.Ct., at 2990-2998, 3002-3003. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. 696, 700-02 (1978) (emphasis added), affirming *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 411, 564 P.2d 615, 616 (1977), which cites *Cappaert v. United States*, 426 U.S. 128, 139, 141 (1976).

67. **B5: The proposed agreement violates *New Mexico ex rel. Martinez v. City of Law Vegas*, 135 N.M. 375, 89 P.3d 47 (2004).**

68. In *Martinez* the New Mexico Supreme Court ruled that the pueblo rights doctrine is inconsistent with prior appropriation. The Supreme Court relied upon and applied the provisions of Article XVI of the New Mexico

Constitution, discussed above. The same analysis applies to the Navajo claims.

69. The pueblos, unlike the Navajos, have been irrigating from rivers for a long time, so they have substantial water rights under the strict rules of prior appropriation and beneficial use, with a very early priority. Unfortunately, these rights have not yet been adjudicated.

70. **B6: The implied reservation of water for the Navajo Nation would be unfair to other tribes which have actually appropriated water and put it to beneficial use since time immemorial.**

71. The proposed agreement is unfair to the other Indian tribes and pueblos in New Mexico. It is unfair because it is an attempt to grab a major share of the water in this state before the other Indian tribes have an opportunity to secure their rights.

72. **B7: The proposed agreement violates *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995).**

73. The proposed agreement is an attempt to create a compact with an Indian tribe without passage of a statute by the New Mexico Legislature. Therefore it violates *State ex rel. Clark v. Johnson*. The proposed agreement is also an amendment of the Colorado River Compact and the Upper Colorado River Basin Compact. A compact or amendment thereto requires the passage

of a statute by the Legislature, subject to veto by the Governor. The court must reject the proposed agreement because it has not been ratified and enacted by statute passed by the Legislature, and signed into law by the Governor.

74. **B8: The proposed agreement violates the McCarran Amendment.**

75. The proposed agreement effectively deprives the State of New Mexico of the right to administer the San Juan River in accordance with state laws under the McCarran Amendment.

76. No ground water rights are subject to *Winters* doctrine priority and the proposed settlement illegally attempts to claim ground water rights under that doctrine. *In re The General Adjudication of All Rights To Use Water in the Big Horn River System,* 753 P.2d 76, 100 (Wyo. 1988), *aff'd*, *Wyoming v. United States*, 492 U.S. 406, *reh'g denied*, *Wyoming v. United States*, 492 U.S. 938 (1989).

77. The Navajo Nation's water rights are not entitled to a blanket 1868 priority date, because many of the reservation lands were not reserved until after 1868.

78. The Navajo Nation has waived its water rights.

79. The United States can grant storage rights, but it has no legal authority to grant water rights in New Mexico. The storage projects authorized in the 1955 legislation do not create water rights.

80. The proposed agreement is inconsistent with *State ex rel. State Engineer v. Commissioner of Public Lands*, 2009-NMCA-004, 145 N.M. 433, 200 P.3d 86, which holds that the United States did not impliedly reserve water when it expressly reserved lands for schools in New Mexico.

81. **The *Winters* gloss.** The plaintiffs misread *Winters* and subsequent cases. They gloss over the actual holding in *Winters* and the cases which purport to interpret *Winters.* There is no such thing as "The *Winters* Doctrine," only a variety of cases which reach wildly inconsistent results, based on very different facts, with differing legal theories. *See United States v. New Mexico, supra* (the contours of the so-called "implied-reservation-of -water" remain unspecified). The *Winters* gloss decisions are distinguishable and not binding on this court.

82. PART C: THE PROPOSED AGREEMENT VIOLATES THE WATER CODE

83. The court cannot approve the proposed settlement because it is not supported by a valid hydrographic survey in violation of NMSA 1978, §§ 72-

4-13, -15, and-17. The proposed agreement adjudicates the San Juan River without a proper hydrographic survey.

84. The so-called hydrographic survey submitted by the plaintiffs is legally and factually invalid, because it is not based on new fieldwork or field surveys; because it does not cover the entire San Juan River system in New Mexico, even though the proposed decree takes more than all of the remaining water in the river system and impacts every water user on every part of the system; and because the so-called survey was prepared by the United States and the Navajo Nation, who are adverse parties seeking to maximize the claims of the Navajo Nation to the detriment of non-Navajo users. Although the state engineer is authorized to cooperate with federal authorities, he cannot delegate his statutory duty to prepare an objective and independent hydrographic survey to the United States, because the United States is acting as a fiduciary for the Navajo Nation.

85. Most of the information in the purported hydrographic survey was assembled by lawyer advocates for the United States and the Navajo Nation. That information is unscientific, not verified, and incorrect. That information does not meet the standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

86. The procedures advocated by the plaintiffs for approving the proposed agreement are in violation of *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 196, 344 P.2d 943, 945 (1959) (there can be no adjudication of relative rights "until hydrographic surveys thereon have been completed and all parties impleaded").

87. Using a spurious notion of "expedited inter se," the plaintiffs have proposed procedures for litigating the proposed settlement which violate the Rules of Civil Procedure; procedural due process of law; substantive due process of law; N.M. Const. art. II, § 18; N.M. Const. art. IV, § 34; NMSA 1978 §§ 72-4-13, -15, -17; and *Reynolds v. Sharp*.

88. The proposed agreement cannot be approved because the Interstate Stream Commission, the State Engineer, and the Water Trust Board have not prepared and implemented a comprehensive state water plan as required by NMSA 1978, § 72-14-3.1. The proposed agreement would give approximately 1/3 of all the river water in New Mexico to the Navajo Nation without a comprehensive plan, public input, or consideration of the factors set forth in the statute. There has been no consideration of the impact this agreement would have on the 2,000,000 citizens of New Mexico; other Indian tribes; the environment; and the economy of this state.

89. The proposed agreement violates *State ex rel. Reynolds v. Luna Irrigation Co.*, 80 N.M. 515, 458 P.2d 590 (1969) , which holds that water released from storage reservoirs into public streams is not subject to private ownership, but rather is subject to diversion and use by priority date. *See in particular* section 9 of the agreement.

90. The Navajo Nation and the United States have violated NMSA 1978, § 72-8-4, which prohibits the unauthorized use of water to which another person is entitled, and the willful waste of water to the detriment of others or the public.

91. The proposed agreement violates NMSA 1978, § 72-8-5, because it authorizes the diversion of water from the San Juan River to places outside the San Juan River basin, to the detriment of valid and subsisting prior appropriators, including the defendant- counterclaimants.

92. The proposed agreement is inconsistent with the Echo Ditch Decree, and would impair water rights which were decreed by the court. The State of New Mexico is bound by the Echo Ditch Decree as a matter of *res judicata* and collateral estoppel.

93. **PART D: THE NAVAJO NATION AND THE U.S. DO NOT HAVE VALID PERMITS FOR THE WATER IN THE PROPOSED AGREEMENT**

94. The proposed agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or consumption of water in accordance with New Mexico law. They applied for various permits, but those applications were never published as required by New Mexico law. Those applications were not approved by the State Engineer in accordance with the mandatory procedures and standards set forth in New Mexico's water code. Some of the applications were merely endorsed as received by the State Engineer.

95. The files relating to these applications cannot be relied upon as accurate or complete, because the OSA has no system for ensuring the integrity, accuracy and completeness of those files. For many years the files have been open to anyone who insisted on looking at them, without any system to prevent persons from destroying, altering, or adding documents in the file.

96. *Inter alia*, the plaintiffs have never complied with the application and permit requirements set forth in NMSA 1978, §§ 72-5-1, -2, -3, -4 (publication), -5, -6, -7, -21, -31. *See* Exhibit 1.

97. In particular, the plaintiffs did not publish notice of the applications as required by § 72-5-4, so that objections or protests could be

filed under § 72-5-5. Upon information and belief, the plaintiffs may have colluded to evade publication, so that they could incorrectly claim that the river was fully appropriated by virtue of the applications, and so that they could deprive other water users of proper notice and the right to challenge the applications.

98. Because the procedures in §§ 72-5-1, *et seq*. were not followed, the Navajo Nation and the U.S. are not entitled to a 1955 priority date. The last sentence of § 72-5-4 specifically governs this situation, as follows:

> In case of failure to file satisfactory proof of publication in accordance with the rules within the time required, the application shall be treated as an original application filed on the date of receipt of proofs of publication in proper form.

99. Furthermore, the actions or inactions of the plaintiffs prevented other users from obtaining *de novo* judicial review as guaranteed by Article XVI, Section 5 of the New Mexico Constitution, and NMSA 1978, § 72-7-1.

100. **PART E: NIIP IS A WASTE OF WATER, NOT A BENEFICIAL USE**

101. All of the water used for NIIP is wasted. Decades of actual experience have proved that NIIP is not practicably irrigable acreage (PIA). *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d. 235 (Ct. App. 1993).

102. As a matter of geography, there are a variety of factors which combined to make NIIP impracticable for irrigation. Inter alia, the lands occupied by NIIP are not practicable for irrigation because they are too high in vertical elevation above the San Juan River. Irrigating NIIP requires pumping large volumes of water up a vertical lift of hundreds of feet, plus an additional lift to the highest parts of NIIP, plus pumping into elevated water tanks. A single acre-foot of water weighs over two million seven hundred thousand pounds (2,700,720 lbs.), so it is impracticable to lift large amounts of water for irrigation.

103. The lands occupied by NIIP are too far from the San Juan River in horizontal terms. NIIP requires 50 miles of canals, 12.8 miles of tunnels, 7.1 miles of siphons, 340 miles of pipe laterals, and 200 miles of collector drains. The cost of building and maintaining this infrastructure makes the project uneconomic, in addition to the cost of lifting the water.

104. The climate at NIIP makes it impracticable for sustained irrigation at reasonable cost. The growing season is short. The acreage is exposed to high winds. The evaporation rates are high.

105. The soil at NIIP is poor, sandy, and low on natural nutrients.

106. NIIP has high percolation rates, so much of the water is lost rather than being captured by the crops.

107. Because NIIP is far from the river, both vertically and horizontally, there is very little return surface flow or recharge of the river or underground water in the alluvium in the river valley.

108. NIIP is geographically isolated. It is distant from major markets, population centers, interstate highways, and railroads. Therefore, transportation costs are high, which increases NIIPs costs and reduces the prices which buyers will pay for its products.

109. Upon information and belief, the actual costs of NIIP have always been greater than its revenues, since inception and annually. Upon information and belief, the real costs and expenses for NIIP are greater than the revenues which it can generate.

110. NIIP has never been an economically viable irrigation project, so it is a waste of money as well as water. The federal money spent to subsidize NIIP would be better spent elsewhere on the Reservation.

111. As to lands located in the river valley, some of that acreage might qualify as PIA. However, for these valleys lands, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are

not supported by the facts. The river valley claims are grossly excessive, i.e. the claims for the Hogback-Cudei and Fruitland-Cambridge projects.

112. Most of the NIIP lands are not located within the original Reservation.

113. **PART F: THERE IS NOT ENOUGH WATER IN THE COLORADO RIVER SYSTEM**

114. There is not adequate water supply available in the San Juan Basin pursuant to New Mexico's allocation under the two compacts governing the Colorado River to meet the water requirements of the proposed agreement as required under the Northwestern New Mexico Rural Water Projects Act (the Settlement Act) and state law. Pub. L. 111-11, title X, subtitle B, 123 Stat. 1400-01 (2010); NMSA 1978, § 72-4-13.

115. The 2007 BOR hydrographic determination was not based on sound science. It was constructed by advocates of the proposed agreement in order to reach a desired conclusion. It was assembled by government employees or contractors who would have been in jeopardy if they had reached any other conclusion. It was not reached by disinterested and objective scientists with no stake in the issue, using all of the best available data and objective scientific methods. It does not meet *Daubert* standards.

116. The hydrographic determination is incorrect because it is based in part on the availablity of water from the downsized Animas La Plata project. It is the contrary to the ruling in *San Juan Water Commission v. D'Antonio*, No. D-1116-CV-2008-1699, Order (Aug. 16, 2011).

117. The hydrographic determination is incorrect because it overestimates the current and future water supply in the Colorado River system. It ignores the best available scientific data on global warming and its effects on the Southwest United States.

118. The hydrographic determination adopts a defective and inconsistent method for calculating evaporation.

119. The hydrographic determination does not make allowance for the other demands on the Colorado River system, including but not limited to demands by the federal government itself for Indian tribes, endangered species, forests, etc.

120. To the extent that the United States claims water for endangered species or other purposes, and that water flows downstream out of New Mexico, that water must be charged to other states or to the United States, but not to New Mexico's share of the Colorado River under the two compacts.

121. PART G: THE PROPOSED AGREEMENT DOES NOT PROHIBIT THE NAVAJOS FROM EXPORTING THE WATER TO OTHER STATES

122. The plaintiffs assert that the proposed agreement should be approved because the agreement prohibits the Navajos from exporting the agreement water without the consent of the State Engineer. This assertion is false. The agreement is clearly drafted to create the illusion that the Navajos cannot export the water to other states. 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 it does not say what happens after that. Water is an article of interstate commerce, so if this court awards water to the Navajos, then that water can be exported to another state. *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983 and *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984). The State Engineer cannot withhold his consent in order to prevent the water from leaving the state.

123. The Navajo Nation takes the position that, if it were awarded water by this court through approval of the proposed agreement, the Navajo Nation would have the right to export that water at a later time, although it has no present intentions to do so. Stanley Pollock stated the Navajo position to The Farmington Daily Times in May of 2011.

124. The previous State Engineer (John D'Antonio) unequivocally stated on many occasions that the settlement agreement prohibited the Navajos from exporting water to other states. So did Esteban Lopez, director of the Interstate Stream Commission. However, during testimony before the Senate Conservation Committee of the New Mexico Legislature on January 31, 2012, Mr. Lopez changed his position, and conceded that the Navajos did have the right to export water which they might be awarded under the agreement, subject to some regulation by the State Engineer.

125. The anti-export provisions of the settlement agreement are deceptive and illusory. They do not prevent the export of water.

126. Therefore, in order to obtain this major benefit for the State of New Mexico, as claimed by the proponents of the agreement, both the agreement and the federal legislation have to be amended. Any prohibitions or restrictions on the export of water must be spelled out in a revised federal statue, because restrictions on interstate commerce can only be imposed by Congress in the exercise of its powers under the Commerce Clause. State statutes cannot impose such restrictions, as the State of New Mexico found out in the *City of El Paso* cases.

127. The amounts of water in the proposed agreement are so excessive that the water cannot possibly be put to beneficial use on the reservation in New Mexico. Instead, in its present form, the proposed agreement is written so that the Navajos could export the water and sell it to non-Indian users in other states, for use off the reservation. This is not authorized by *Winters*.

128. The proposed agreement would allow the Navajos to export the water simply by leaving it in the San Juan River, so that it flows down to Utah, Arizona, Nevada, and California, through Lake Powell and Lake Meade. The Navajo Nation could sell the water to non-Indians for use off the reservation, which is contrary to the purpose of *Winters*. For example, the Navajo Nation could sell the water to the City of Las Vegas, Nevada, or Phoenix, Tucson, Los Angeles, Beverly Hills, or San Diego. The water could be conveyed to those cities using existing water systems and aqueducts which draw from the Colorado River, like the Central Arizona Project and the Colorado River Aqueduct to Southern California. *See* Exhibit 3 – Map of Colorado River System.

129. **PART H: THE CONDITIONS FOR THE PROPOSED SETTLEMENT HAVE NOT BEEN MET**

130. The proposed Navajo "settlement" under review in this proceeding is not a final completed settlement. It is only a "conditional

settlement," meaning that there is no settlement unless and until several conditions are met. Court approval is only one of several conditions; there are others, such as: a scientific hydrographic determination that there is enough water in the Colorado River system; funding by the State of New Mexico (which has been ceased); future funding by Congress; and construction of the Navajo Gallup pipeline by way of Window Rock, Arizona. These express conditions have not been met, and are not likely to be met.

131. *Inter alia*, the proposed Navajo "settlement" requires a $50,000,000 contribution by the State of New Mexico to the cost of the settlement, including the proposed Navajo-Gallup pipeline.

132. However, the 2012 New Mexico Legislature conducted several hearings about the proposed Navajo settlement. The Legislature then decided to eliminate any further state funding for the settlement. The OSE and ISC had requested $15.4 million in capital outlay funding for Indian settlements (Navajo, Taos, Aamodt), but the Legislature eliminated the funding entirely from its final budget.

133. Hearings on the proposed Navajo "settlement" were conducted by the House Agriculture and Water Resources Committee; the House Energy

and Natural Resources Committee; the Senate Finance Committee; and the Senate Conservation Committee.

134. These other conditions, such as the completion of the Navajo-Gallup pipeline, must also be fulfilled before the "settlement" would become final and effective, sometime in the year 2025 or later. The elimination of state funding for the settlement raises the very real possibility that the proposed "settlement" will fail by its own terms, regardless of whether the court rejects or approves it. This should be considered in connection with the scheduling and management of this case, and the amount of scarce resources which the court and the parties should devote to it.

135. *Inter alia*, section 10603(c)(1) of the Northwestern New Mexico Rural Water Projects Act (Pub. L. No. 111-11, title X, subtitle B) requires the Navajo Nation to settle their water claims in the lower basin of the Colorado River and the Little Colorado River Basin in Arizona, before the Navajo Nation receives any water for use in Arizona. The federal legislation provides as follows:

> (c) Conditions for Use in Arizona-
> (1) REQUIREMENTS-Project water shall not be delivered for use by any community of the Nation located in the State of Arizona under subsection (b)(2)(D) until--

> (A) the Nation and the State of Arizona have entered into a water rights settlement agreement approved by an Act of Congress that settles and waives the Nation's claims to water in the Lower Basin and the Little Colorado River Basin in the State of Arizona, including those of the United States on the Nation's behalf;

On July 5, 2012, the Navajo Nation Council voted to reject the proposed settlement of its claims to the Little Colorado River in Arizona. The proposed agreement had been negotiated by Mr. Stanley Pollock and others on behalf of the tribe, but the tribe's governing body rejected it.

136. As a result, there is no settlement of the tribe's claims to the Little Colorado River in Arizona, as required by the federal legislation. Additionally, there is no settlement of the tribe's Lower Basin claims to the main stem of the Colorado River in Arizona. Nor is there a settlement of the tribe's claims to the Colorado River in Utah. Thus at present, these specific conditions of the proposed settlement have failed, by their own terms. The failure of settlement conditions like these might render the Court's disapproval or approval a moot issue.

137. **PART I: THE PROPOSED AGREEMENT IS UNFAIR, ONE-SIDED, ILLUSORY, UNENFORCEABLE, AND NOT IN THE PUBLIC INTEREST**

138. The San Juan River contains 60% of all the stream surface water in New Mexico. This is the best available estimate, as the OSE seems to have no real idea of the aggregate stream water in New Mexico.

139. The San Juan River is bigger than the Rio Grande River, the Pecos River, and the Gila River, combined.

140. The proposed Richardson-Navajo deal would give 56% of the San Juan River to the Navajos, which is equal to 33.6% of all the stream water in New Mexico.

141. The Navajos would get 606,000 acre-feet of water per year, which is more than 6 times the amount of water diverted by the City of Albuquerque. In 2008, Albuquerque drew 98,225 acre feet of water (mostly from wells) to serve a population of 538,586 people. The proposed deal would give the Navajo Nation twice as much water as the City of Phoenix. Phoenix receives 305,577 acre-feet to serve an estimated population of 1,566,190 people. (These figures come from a Pacific Institute study: Michael J. Cohen, "Municipal Deliveries of Colorado River Basin Water," June 2011, available at www.pacinst.org/reports/co_river_municipal_deliveries/.)

142. The proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico.

143. Upon information and belief, according to the 2010 census, there are approximately 42,000 Native Americans living on the Reservation. It is not known how many of these Native Americans are members of the Navajo Tribe.

144. Upon information and belief, fewer than 40,000 Navajo tribal members live on the reservation in New Mexico.

145. Upon information and belief, the population on the reservation is decreasing, not increasing.

146. The foregoing facts are stated upon information and belief, because the Navajo Nation and the United States have refused to comply with discovery requests and court orders for the production of reliable population figures.

147. Even if *Winters* applied, which it does not, the amount of water needed for the minimal needs of 40,000 people is much smaller that the amounts in the proposed agreement.

148. Those water needs can and must be satisfied by alternative means, such as: past and future acquisition of water rights by prior appropriation and beneficial use; purchase or lease of water from others; development of water resources within the Reservation; and conservation measures.

149. The proposed agreement violates Article XVI, Section 5 of the New Mexico Constitution, as adopted November 7, 1997, because the proposed agreement does not preserve *de novo* judicial fact review and fact finding. Under the proposed agreement, the Navajo Nation and the United States have not agreed to judicial review in state district court of any decision by a state agency. Therefore, the proposed agreement as written would allow the Navajo Nation and the United States to assert sovereign immunity and ignore any decision by the State Engineer or a state court, or any challenge by an aggrieved water user.

150. The court cannot approve the proposed agreement because, as currently written, the agreement cannot be enforced. The agreement does not contain a waiver of sovereign immunity by the Navajo Nation, or by the United States. And the agreement is drafted so that this court would lose its jurisdiction under the McCarran Amendment, if the court were to approve the agreement. Therefore, the defendant-counterclaimants and others would have

no ability to enforce the agreement, no ability to protect their rights, and no effective remedies if the Navajo Nation or the United States breach the proposed agreement, or if they violate state and federal laws which apply to the San Juan River. Likewise, the State of New Mexico and the State Engineer would have no effective remedies if the Navajo Nation or the United States breached the agreement or other applicable laws. Without comprehensive and perpetual waivers of sovereign immunity by the Navajo Nation and the United States, the entire proposed agreement is illusory and unenforceable.

151. The proposed agreement is not a settlement in any real sense, because it does not buy peace. And it does not bring certainty to the river. It simply spawns a whole new set of disputes, on top of all the other uncertainties which already affect the San Juan River. The proposed agreement is so inconsistent, incomplete, contradictory, and contrary to many laws, that it would lead to endless controversies and litigation over its meaning and interpretation, with no effective judicial forum for deciding all the disputes spawned by the agreement.

152. The proposed agreement is not a comprehensive settlement, because it does not settle other Navajo water claims in New Mexico, such as

the Tribe's claims to the Little Colorado River. And it does not settle the Tribe's claims in Arizona and Utah, which could affect New Mexico through the operation of the two Colorado River compacts. Any settlement should be a global settlement.

153. The operation of the shortage sharing provisions under the Settlement Agreement is illusory and provides no protection for non-Indian users in the San Juan Basin.

154. The proposed agreement is not the product of good faith, arms length negotiations. The plaintiffs negotiated among themselves behind closed doors and in secret, over water which does not belong to any of them. They did not include the defendant-counterclaimants and other water users in good faith negotiations.

155. The proposed agreement should be rejected because it would result in the unjust enrichment of the Navajo Nation and persons to whom the Navajo Nation would transfer or lease the water, at the expense of the defendant-counterclaimants and other water users in New Mexico, including water users on the Rio Grande, which is supplied with San Juan River water via the San Juan Chama project. *See* Exhibit 3.

156. The proposed agreement does not contain adequate protections for the present and future use of the San Juan Chama project.

157. The proposed agreement should be rejected because it is inequitable.

158. The court lacks jurisdiction over many indispensable parties, because the plaintiffs deliberately refused to use the best available sources for identifying and serving water users in the San Juan Basin. The community ditch defendant-counterclaimants offered to provide their mailing lists to the plaintiffs, free of charge, but plaintiffs refused to use them. Attempted service of process by publication is not a substitute for making diligent efforts to locate and serve defendants who can be identified and located by name and address.

159. **PART J: THE DEFENDANT-COUNTERCLAIMANTS ADOPT AND INCORPORATE THE PRELIMINARY OBJECTIONS FILED BY OTHER DEFENDANTS**

160. The defendant-counterclaimants have joined in the preliminary objections filed by the San Juan Water Commission, the Cities of Aztec and Bloomfield, and Gary Horner. Those objections are adopted and incorporated herein, as though fully set forth herein.

161. **PART K: THE DEFENDANT-COUNTERCLAIMANTS ADOPT AND INCORPORATE THE OBJECTIONS FILED BY THE STATE OF NEW**

MEXICO AGAINST THE UTE MOUNTAIN UTE WATER CLAIM, BECAUSE THOSE OBJECTIONS ALSO APPLY TO THE NAVAJO WATER CLAIM

162. In the main San Juan case, No.75-184, the State of New Mexico filed an answer against the claims of the Ute Mountain Ute Tribe. *See* State of New Mexico's Answer to Restatement of the Claim of the Ute Mountain Ute Tribe (Feb. 28, 2008). The matters raised by the State of New Mexico against the Ute water claim are well-taken, and they also apply to the claims of the Navajo Tribe. These defenses and objections are therefore adopted and asserted by defendant-counterclaimants in this case as well. In the following paragraphs, hereby adopted by the community ditch defendant-counterclaimants as their own, the State of New Mexico's defenses are marked with an asterix and quoted verbatim, with modifications shown in brackets.

163. *Claim of a federal reserved water right to operate a power plant in New Mexico is not feasible or justifiable under either federal or state law. The rights of the Tribe recognizable in this matter are limited to the quantity of the Tribe's historic and existing beneficial uses on its lands in New Mexico.

164. *The claimed water use is not required to fulfill the purposes of the reservation and is not necessary for the establishment of a permanent homeland for the Tribe.

165. *The federal reserved water rights claimed are not tailored to the reservation's minimal need, and the claimed uses are not justified by the Tribe's history, culture, geography and natural resources, economic base, past water use and present and projected population in New Mexico.

166. *Together with the quantity of water available to the Tribe within the [States of Arizona and Utah], the Tribe's historic and existing beneficial uses in New Mexico constitute an amount of water sufficient to fulfill the purposes of the reservation and to establish a permanent homeland within the reservation situated in both states.

167. *The Tribe is barred and estopped from making claims for additional and future uses for the Navajo Reservation that were settled and compromised, including by, but not limited to, the legislation authorizing Navajo Dam.

168. *Any federal reserved rights the Tribe may have to divert and use water are limited to such manners and quantities as are necessary to accomplish the primary purpose of the reservation.

169. *The Tribe's right to divert and use groundwater is limited to existing and historic use as allowed under the laws of the State of New Mexico.

170. *No right the Tribe may have to divert and use waters of the State ofNew Mexico may have a priority earlier than: 1) the date the water was first put to beneficial use; or 2) establishment [or expansion] of the reservation in New Mexico.

171. *No federal reserved right the Tribe may have to divert and use the waters of the State of New Mexico includes the right to use, lease, market or otherwise authorize use by others of the water off the Tribe's reservation in New Mexico.

172. *The claims of the Tribe are limited to federal reserved claims, and the Tribe is not entitled to make any aboriginal or other claims to the use of water in New Mexico.

173. *Administration of any water right quantified to the Tribe shall be under New Mexico state law and by the State of New Mexico, pursuant to the McCarran Amendment, 43 U.S.C. 666.

AMENDED AND SUPPLEMENTAL ALLEGATIONS

173a. NIIP is not practicably irrigable acreage (PIA). The U.S. and the Navajo Nation and the OSE did not dispute this fact during summary judgment proceedings. They stated, admitted, and stipulated several times to the court and the defendants that they were not making any claim for NIIP

based upon PIA. They did not allege in their statement of claim that NIIP is PIA. They presented no evidence to prove that NIIP is PIA. They presented no testimony from any witness who claimed or opined that NIIP is PIA. See ¶¶ 100-12 above.

173b. Section 8 of the 1902 Reclamation Act provides that "beneficial use shall be the basis, the measure and the limit of the right to use water." Section 8 of the Reclamation Act applies to and is incorporated into the 1956 Colorado River Storage Project Act and the 1962 NIIP Act. Section 8 was also carried verbatim into the New Mexico 1907 Water Code and 1911-12 New Mexico Constitution. In short, the governing federal and state laws have never wavered from the rule that "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." This rule of law applies to *Winters* claims. It applies to every one of the projects authorized by Congress, including NIIP. And no federal or state agency has the legal authority to depart from the beneficial use requirement. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34, 1142, 1144 (10th Cir. 1981).

173c. NIIP-NAPI is located outside the boundaries of the 1868 Navajo Reservation, so it is not entitled to an 1868 priority.

173d. Large parts of NIIP are located outside the current boundaries of the Navajo Reservation, and therefore are not entitled to any federal reserved water rights.

173e. There are no OSE permits for any of the water claimed by the Navajo Nation. During the course of these proceedings the OSE and U.S. and Navajo Nation admitted that their notices of intent (NOI) or applications for permits were never published as required by law.

173f. By authorizing construction of NIIP, Congress did not create, grant, or recognize any water rights for the Navajo Nation. Section 13(c) of the 1962 NIIP Act states:

> No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act, and Congress does not by its enactment, construe or interpret any provision of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, or the Mexican Water Treaty or subject the United States to, or approve or disapprove any interpretation of, said compacts, statutes, or treaty, anything in this Act to the contrary notwithstanding.

Pub. L. No. 87-483, 76 Stat. 96, 101 (Jun. 13, 1962). In the NIIP Act itself Congress expressly stated that the statute shall not create water rights for the Navajo Nation. Furthermore, Congress expressly stated that the NIIP statute

shall not prejudice the rights of other users, such as the Community Ditches and their members, who have water rights which were adjudicated by this court in the 1948 Echo Ditch Decree, prior to the 1962 NIIP Act.

173g. The proposed compact violates NMSA 1978, § 72-14-3 because the Interstate Stream Commission has not submitted it to the New Mexico Legislature for enactment. The statute authorizes the ISC to negotiate interstate water compacts with other states, but not to enter into them. Any proposed compact negotiated by the ISC is "subject, in all cases, to final approval by the legislature of New Mexico." The Navajo agreement was signed by the Governor and the Attorney General, neither of whom have authority to bind the State of New Mexico to a compact unless the Legislature has enacted a statute. See *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562. The authority of the ISC is limited to negotiating a proposed compact and sending it to the Legislature to be enacted or modified or rejected.

173h. *Clark* holds that every proposed compact with another state or an Indian tribe must be enacted into law by a statute. In a unanimous opinion by Justice Minzner, this Court held that a governor does not have the constitutional authority to bind the State of New Mexico to a compact with an

Indian tribe without a statute. The New Mexico Legislature has not passed, and the Governor has not signed, a bill enacting the Navajo water compact into law. Therefore the Navajo water agreement is a nullity, just like the tribal gambling compacts signed by Governor Gary Johnson. Accordingly, there is nothing for this court to approve or disapprove.

173i. It makes no difference that the United States Congress has authorized the Navajo water compact, because the New Mexico Legislature has not. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553-54 (10th Cir. 1997). The Tenth Circuit agreed with the analysis and result in *Clark*. The Tenth Circuit ruled that state law determines the procedures by which a state may validly enter into a compact. Because Governor Johnson lacked authority under New Mexico law to sign a tribal gambling compact, the compact was void even though it had been approved by federal statute and the Secretary of the Interior.

173j. The US, NN, and OSE assert that, even if the Navajo Nation has no federal reserved water rights, it can obtain water for NIIP and other uses through its storage contracts with the BOR. Their argument, if accepted, would obliterate the concept of federal reserved rights under *Winters*,

and the doctrines of beneficial use and prior appropriation, and all state water laws.

173k. The agreement violates NMSA 1978, § 72-5-17. That stature requires the BOR to act as a public trustee to allow storage by third parties in Navajo Reservoir. Navajo Reservoir has several hundred thousand acre-feet of unused storage capacity which must be made available to the community ditches and others.

173l. The US, NN, and OSE contend that the San Juan River can be operated like a private pipeline, contrary to *State ex rel. Reynolds v. Luna Irrigation Co.*, 80 N.M. 515, 458 P.2d 590 (1969), and the public waters doctrine in Article XVI, Section 2 and 3 of the New Mexico Constitution.

173m. On December 12, 2012, the Department of the Interior and BOR released their "Colorado River Basin Water Supply and Demand Study." This latest study shows that the 2007 hydrologic determination is incorrect.

173n. The December 2012 BOR study and the June 2013 data from the Colorado Basin River Forecast Center demonstrate that there is not enough water to accommodate the Navajo water claims along with all the

other claims on the San Juan River within New Mexico's share of the Colorado River system.

173o. The US, NN, and OSE violate the McCarran Amendment by repudiating the court's jurisdiction and authority to hear challenges to actions by the US and the NN. This repudiation of the court's jurisdiction is sufficient reason, by itself, to reject the proposed settlement and decree.

173p. The proposed settlement would eliminate the federal buyback of 11,000 acre-feet to partially offset the Jicarilla Settlement. This prejudices the community ditches and other users. And it is a switch from the Jicarilla Settlement that was presented to Judge Frost.

173q. Section 17 D of the proposed decree unconstitutionally infringes the jurisdiction and fact-finding authority of the judiciary; and the rights of non-signing parties to due process with independent fact-finding by real judges; and the constitutional right of *de novo* fact-finding guaranteed by Article XVI, Section 5, enacted by the people in 1967. Section 17 D also violates the federal and state constitutions because it is an attempt to partially subjugate non-Navajo citizens to the sovereignty of the Navajo Nation.

173r. The proposed settlement violates the legal rule, *nemo dat quod non habet*, literally meaning "no one gives what he doesn't have." The

water in the San Juan River belongs to the public, not to Governor Richardson or any other governor. Governor Richardson had no legal authority to convey that water to anyone.

173s. The Navajo-Gallup pipeline is illusory.

174. **PART L: COUNTERCLAIM**

175. For their counterclaims against each of the plaintiffs, defendant-counterclaimants allege and state:

176. These counterclaims are compulsory under Rule 1-013(A), NMRA. The counterclaims arise out of the same transactions or occurrences that are the subject matter of the plaintiffs claims, and do not require for their adjudication the presence of absent third parties of whom the court cannot acquire jurisdiction. The court has jurisdiction over the Navajo Nation, the United States, and the New Mexico State Engineer by virtue of the McCarran Amendment.

177. Furthermore, the plaintiffs have subjected themselves to the jurisdiction of the court by filing this case in this court against defendants.

178. Defendant-counterclaimants also assert their counterclaims as a permissive counterclaim under Rule 1-013(B), NMRA.

179. All the allegations and averments of the answer and objections are re-alleged and incorporated as an integral part of this counterclaim, as though fully set forth herein.

180. The defendant-counterclaimants have water rights in the San Juan River Basin which are superior to the water rights claimed by the Navajo Nation, except for those water rights which the Navajo Nation acquired through actual prior appropriation and beneficial use in compliance with all of the laws cited in this pleading. Those rights have yet to be quantified and prioritized by the court, but those rights are not entitled to a blanket 1868 priority. For the reasons stated above, the proposed agreement is illegal, not supported by the facts, and not fair, adequate, and reasonable, and consistent with the public interest and applicable law.

181. **PART M: PRAYER FOR RELIEF**

182. WHEREFORE, the community ditch defendant-counterclaimants respectfully ask the court:

183. To disapprove the proposed agreement in its present form, indicating some of the reasons why the proposed agreement is legally and factually defective, and why it does not meet the standards set by the court in

its Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof;

184. To order the plaintiffs and the defendants to begin good faith negotiations towards a comprehensive settlement of the Navajo and United States claims in the San Juan Basin, such negotiations should include all significant stakeholders;

185. To apply and enforce Article XVI of the New Mexico Constitution; the federal statehood statutes for New Mexico; the Colorado River Compact; the Upper Colorado River Basin Compact; the New Mexico water code; the cases cited herein; and the applicable laws shown on Exhibit 1;

186. To proceed to quantify and prioritize the Navajo and United States claims to the San Juan River, relative to the community ditch defendant-counterclaimants;

187. To enjoin the plaintiffs from impairing or interfering with the water rights of the community ditch defendant-counterclaimants;

188. To order the plaintiffs to administer and operate the San Juan River system to provide sufficient "wet" water to satisfy the water rights of the community ditch defendant- counterclaimants without diminution while this case, and Case No. 75-184 are pending. This includes but is not limited to:

the operation of Navajo dam, the Animas-La Plata project, NIIP, the Hogback-Cudei project, the Fruitland-Cambridge project, and the administration of the river by the State Engineer and Interstate Stream Commission;

189. To order the State Engineer to prepare a hydrographic survey of the San Juan River system, which is complete, current, and objective, using persons who are not advocates or fiduciaries for the Navajo Nation or other tribes;

190. To order the United States to prepare a new hydrographic determination on a sound scientific basis using the best and most current scientific data and methodologies. This process should include input and comments from the defendants which shall be given good faith objective consideration by the United States;

191. To order the State Engineer and the Interstate Stream Commission to prepare a comprehensive state water plan as required by NMSA 1978, § 72-14-13.1, and to submit it to the court, no later than December 31, 2014; and

192. To grant such other legal and equitable relief as may be appropriate, including damages, injunctive relief, declaratory relief, and costs and attorney fees.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall
Victor R. Marshall
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2013, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: wrnavajointerse@nmcourts.gov.

/s/ Victor R. Marshall
Victor R. Marshall, Esq.

PART III: ISSUES ARISING DURING THE COURSE OF PROCEEDINGS

The court decided the procedures and schedules for the case against the defendants before the defendants were joined as parties, so the defendants

were given no opportunity to be heard on these issues. They had no opportunity to be heard in a meaningful way, at a meaningful time, which is the essence of due process. The basic elements of due process are notice and an opportunity to be heard at a meaningful time. *Sandia v. Rivera*, 2002-NMCA-057, ¶¶ 12 and 17, 132 N.M. 201 ("Due process requires prompt notice with 'the opportunity to be heard at a meaningful time and in a meaningful manner.'") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *State ex rel. Children, Youth and Families Dep't v. In re Ruth Anne E.*, 1999-NMCA-035, ¶ 17, 126 N.M. 670; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The lower court deprived the defendants of due process, and their rights under the Rules of Civil Procedure and Evidence.

Judicial due process includes the right to compel evidence through discovery, to confront and controvert the evidence, and to subpoena and cross examine witnesses. *In re Miller*, 1975-NMCA-116, 88 N.M. 492.

Judicial due process also includes the right to an impartial decision-maker. *In re Murchison*, 349 U.S. 133, 136 (1955). Due process ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not

predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring)).

For almost 10 years, the district court refused to hear any objections from water owners about the proposed settlement. During that time, the court listened only to one side of the case: it allowed the government to explain the advantages of the settlement, while prohibiting the defendants from explaining the defects in the settlement.

In September of 2007, the water judge proposed to go visit the Animas-LaPlata Project and hear a presentation by the Bureau of Reclamation. The undersigned counsel pointed out that this would be improper, because the water owners along the San Juan had not yet been joined as parties. Therefore water owners would be deprived of due process, and their opportunity to hire counsel, and their opportunity to participate in a judicial viewing of a project which is a major part of this litigation. *American Family Mut. Ins. Co. v. Shannon*, 356 N.W.2d 175, 177 (Wis. 1984); *Travis v. Preston*, 643 N.W. 2d 235, 242 (Mich. Ct. App. 2002) ("An unauthorized view by the finder of fact is misconduct.") (quoting *Vanden Bosch v. Consumers Power Co.*, 224 N.W.2d 900 (Mich. Ct. App. 1974)); *State v. Eckard*, 2002 WL 1357788 (Ohio Ct. App.

2002); Annotation, *Prejudicial Effect of Unauthorized View by Jury in Civil Case of Scene of Accident or Premises in Question*, 11 A.L.R.3d 918 (1965). The District Court imposed severe sanctions on counsel for raising this issue. It also entered an order forbidding any party from raising due process concerns. (Undersigned counsel reserves the right to raise this issue on his own behalf by writ or separate appeal, because the sanctions are still in effect.)

In October of 2007, the Association asked to conduct discovery concerning the hydrologic determination prepared by the US, the NN, and OSE, because the Association had reason to believe that the hydrographic determination was being manipulated to reach an unscientific predetermined conclusion. The court denied the motion. The Association was not allowed to pursue discovery until June 1, 2012, and by this time the government said that it had erased the emails about the hydrographic determination, and was unable to locate the paper records. The government said that some of the paper records might possibly be found somewhere in a government document repository located in an underground salt mine in Kansas.

For service of process, the community ditch defendants contacted the US, the NN, and OSE and offered to provide current address lists for water owners on the various ditches, at their own expense. The OSE, NN, and US

refused this offer. They insisted on using outdated and incomplete lists prepared by persons who no longer worked at the agencies. This is a deliberate and calculated violation of due process and the Rules of Civil Procedure. As a result, many water owners on the San Juan did not get actual notice of the claims against them. This is a violation of *Uhden v. New Mexico Oil Conservation Comm'n*, 1991-NMSC-089, ¶ 12, 112 N.M. 528 ("[W]hen the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements.").

The court entered an order requiring counsel for the community ditches to obtain a signed attorney contract from every individual water owner, contrary to *George v. Caton*, 1979-NMCA-028, ¶ 24, 93 N.M. 370 and *Holland v. Lawless*, 1981-NMCA-004, ¶ 5, 95 N.M. 490. This order deprived thousands of water owners of legal representation in this proceeding, since it is estimated that there are more than 10,000 individual water owners along the San Juan River.

An attorney-client relationship can be, and often is, formed without a written contract signed by the client and the law firm. The law does not

require a written signed contract; except for contingency fee arrangements. *See* Rule 16-105(C) NMRA.

A ditch or acequia has authority to represent itself and its members in legal proceedings. *La Luz Community Ditch Co. v. Town of Alamogordo*, 1929-NMSC-044, 34 N.M. 127; *Pecos Valley Artesian Conservancy Dist. v. Peters*, 1945-NMSC-029, 50 N.M. 165; *State ex rel. Reynolds v. Lewis*, 1973-NMSC-035, ¶ 33, 84 N.M. 768.

Under the common law of agency, the ditches also have authority to act as an agent for their members. A written contract of agency is not required. Restatement (Third) of Agency § 1.03 (2006). In this case the ditches have acted as agents for their individual members, in arranging legal representation for them.

By statute and case law, unincorporated associations have the authority to bring and defend lawsuits on behalf of their members. NMSA 1978, § 53-10-5 (1937); *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1152 (D.N.M. 1999), *rev'd on other grounds*, 248 F.3d 1277 (10th Cir. 2001); *National Trust for Historic Preservation v. City of Albuquerque*, 1994-NMCA-057, ¶ 13, 117 N.M. 590.

An attorney has the authority to take any action authorized or required by law on behalf of his clients, and such action is deemed to be the action of the clients themselves. *San Juan Agricultural Water Users Association v. KNME-TV*, 2011-NMSC-011, ¶ 36, 150 N.M. 44, 257 P.3d 884; *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 1967-NMSC-089, 78 N.M. 41; *Resolution Trust Corp. v. Ferri*, 1995-NMSC-55, ¶ 19, 120 N.M. 320 ("general rule of attorney-as-agent"); *Padilla v. Estate of Griego*, 1992-NMCA-021, ¶ 17, 113 N.M. 660 ("each party is deemed bound by the act of his lawyer-agent") (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962)).

The court fined counsel $500 for trying to represent individual water owners, even though these water owners had paid assessments through their acequia to hire him. (Undersigned counsel reserves the right to challenge these actions in separate proceedings.)

The lower court refused to require the NN, US, or OSE to file proper pleadings as required by Rule 1-007 and Rule 1-008. As a result, the defendants were deprived of the protections afforded by those rules. Defendants never received a concise statement setting out the legal and factual bases for the Navajo water claims.

The district court refused to allow the defendants to file an answer and counterclaim under Rules 1-007, 1-008, and 1-013. The lower court disallowed the community ditch counterclaim, even though it was a compulsory counterclaim under Rule 1-013(A), because it arises out of the same subject matter as the Navajo claim. The community ditches sought relief in their counterclaim to protect their water rights, but the district court refused to hear any claim for relief against the NN, US and OSE.

The lower court refused to follow the procedural and evidentiary requirements for summary judgment under Rule 1-056. Opinion at 13: "The Court will therefore address the substance of the dispositive motions and will not address objections directed to the technical, as opposed to the substantive, requirements of Rule 1-056."

The district court weighed the probative value and credibility of the evidence on both sides, such as the conflicting evidence about the present Navajo population at present and far in the future, in the year 2110. The court resolved the disputed issues of fact for the NN, US and OSE, in violation of Rule 1-012 and Rule 1-056.

The lower court repeatedly allowed evidence from the government which was not admissible under the Rules of Evidence. The court excluded all

the admissible evidence offered by the defendants, e.g. the 2010 census data. And it weighed the defendants' evidence, contrary to Rule 1-012 and Rule 1-056.

The court refused to allow water owners to testify from their personal experience and observation about the San Juan River and local agriculture.

The district court refused to follow *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, 80 N.M. 515. The district court also refused to follow N.M. Const. art. XVI, § 2 and NMSA 1978, § 72-1-1: all unappropriated water flowing in natural streams belongs to the public.

Under the Endangered Species Act, 16 U.S.C. §§ 1531-44, the federal government claims the right to require New Mexico to deliver more than 700,000 acre-feet of instream flow down the San Juan River to Bluff, Utah, for the protection of endangered species like the Razorback Sucker (*Xyrauchen texanus*). No one knows how New Mexico would be able to provide 600,000 acre feet of diversion to the Navajo Nation, and 700,000 acre-feet of instream flow to Utah for endangered species, and still have water left over for local consumption.

The district court ruled that it was irrelevant whether the San Juan River has insufficient water to supply non-Navajo claims. This final ruling

contradicted its earlier order that impacts on non-Navajo water users must be considered. The ruling is unprecedented; it has no support in the statutes or cases. For example, there is a very real possibility that towns like Farmington could have their water supplies cut off in dry years, but the court decided that this was irrelevant.

The district court engaged in *ex parte* communications with the OSE, which is an adversary to the defendants in this case. Although *ex parte* contacts are allowed in rare circumstances, *ex parte* contacts undermine public trust in the judiciary, and they are unnecessary. Compare Rule 1-071.4 with Rules 21-209, 21-200, 21-102, 21-202, 21-204(C), and 21-211.

Even where *ex parte* communications with a judge are allowed, those communications must be disclosed on the record. Those disclosures have not been made in this case.

The court changed the procedural rules during the San Juan water adjudication. The provision of the New Mexico Constitution that no act of a legislature shall change the rules of procedure in any pending case applies to court rules as well as to legislation. N.M. Const. art. IV, § 34; *State v. DeBaca*, 1977-NMCA-089, 90 N.M. 806; *Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-040, 137 N.M. 310, *cert. denied*, 137 N.M. 454.

Article VI, section 15 of the New Mexico Constitution allows only retired judges, court of appeals judges, or justices to be appointed as a judge pro tem. Judge Wechsler is not a retired judge.

Judge Wechsler is an active judge on the New Mexico Court of Appeals, which makes it awkward and difficult for his colleagues on the Court of Appeals to sit in judgment on his actions as a judge pro tem. This is one of the reasons why the New Mexico Constitution limits pro tem appointments to retired judges. This situation raises a possible appearance of impropriety under the Code of Judicial Conduct. *Cf.* Rule 21-211(A)(5)(d).

PART IV: JOINDER IN ISSUES RAISED BY OTHER DEFENDANTS

The community acequias join in the issues and authorities raised by the other appellants in their docketing statements, including the B Square parties; Gary Horner; and the McCarty parties. To avoid repetition, the community ditches adopt those issues and authorities without repeating them here.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: wrnavajointerse@nmcourts.gov and to the filing list referred to in the Notice of Amended Service List filed February 25, 2013.

/s/ Victor R. Marshall
Victor R. Marshall, Esq.