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1 STATE OF NEW MEXICO  
2 COUNTY OF SAN JUAN  
3 ELEVENTH JUDICIAL DISTRICT COURT

4 STATE OF NEW MEXICO *ex rel.*  
5 NEW MEXICO STATE ENGINEER,  
6 Plaintiff,

v.

D-1116-CV-75-184

7 UNITED STATES OF AMERICA *et al.*,  
8 Defendants.  
9 And

San Juan River Adjudication

UNITED STATES' RESPONSE  
TO MOTION TO RECUSE

10 JICARILLA APACHE TRIBE and  
11 The NAVAJO NATION,  
12 Defendant-Intervenors.

13 **NAME OF PARTY:** United States of America (United States).

14 **CONSULTATION:** N/A.

15 **DESCRIPTIVE SUMMARY:** Response to the San Juan Agricultural Water Users  
16 Association, *et al.*, *Request for Voluntary Recusal; or in the Alternative, Motion for*  
17 *Disqualification for Cause; and Motion for Revision of Orders Under Rule 1-054(B)*  
18 *(January 16, 2019).*

19 **NUMBER OF PAGES:** 9

20 **DATE OF FILING:** February 4, 2019

21 The United States responds to the *Request for Voluntary Recusal; or in the Alternative,*  
22 *Motion for Disqualification for Cause; and Motion for Revision of Orders Under Rule 1-054(B)*  
23 *(January 16, 2019) (Motion to Recuse).* As this Court lacks jurisdiction to address the Motion to  
24 Recuse, the Court should deny the motion without hearing.

### 25 INTRODUCTION

26 On August 16, 2013, this Court issued its *Order Granting the Settlement Motion for*  
*Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation.* Subsequently

1 on November 1, 2013, this Court issued its *Partial Final Judgment and Decree of the Water*  
2 *Rights of the Navajo Nation* and its *Supplemental Partial Final Judgment and Decree of the*  
3 *Water Rights of the Navajo Nation* (collectively these three documents will be referred to as “the  
4 Final Order and Decrees of 2013”).

5 On January 1, 2014, Respondents San Juan Agricultural Water Users Association, *et al.*,  
6 appealed this Court’s Final Order and Decrees of 2013 to the New Mexico Court of Appeals.  
7 Among the challenges Respondents brought to the Court of Appeals were their claims that Judge  
8 Wechsler failed to disclose his previous representation of the Navajo Nation and that Judge  
9 Wechsler should be recused pursuant to NMRA, Rule 21-211. Respondents asked the Court of  
10 Appeals to remove Judge Wechsler from this adjudication and, because of this removal, to vacate  
11 the Final Order and Decrees of 2013. But the New Mexico Court of Appeals bluntly and  
12 rightfully denied Respondents’ motion finding that Judge Wechsler had not represented the  
13 Navajo Nation, that his previous employer (DNA People’s Legal Services, Inc. or “DNA”) was  
14 not an agency or instrumentality of the Navajo Nation, that Judge Wechsler did not have  
15 personal extrajudicial knowledge of the Navajo Nation, and that Respondents’ claim that he had  
16 violated Rule 21–211 was frivolous.<sup>1</sup> The Court of Appeals also rejected Respondents’ other  
17 challenges to Judge Wechsler’s Final Order and Decrees of 2013.

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19 Respondents sought review of the Court of Appeals’ decision in the New Mexico  
20 Supreme Court. The Supreme Court granted *certiori* on some of Respondents’ issues, but denied  
21 *certiori* on Respondents’ claims seeking recusal of Judge Wechsler. In a separate order, the  
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25 <sup>1</sup> Attachment A – *Order Denying Emergency Motion to Enforce Rule 21-211 and Subsequent*  
26 *Motions Filed by Appellants and Order Imposing Sanctions and Awarding Attorney’s Fees* (New Mexico Court of Appeals A-1-CA-33535).

1 Supreme Court denied a motion by Respondents’ counsel, Victor Marshall, seeking reversal of  
2 the Court of Appeals’ order requiring Marshall to pay attorneys’ fees to the United States and the  
3 Navajo Nation as a sanction for his frivolous recusal motion. Respondents’ appeal of the Final  
4 Order and Decrees of 2013 remains pending before the Supreme Court. Neither the Final Order  
5 and Decrees of 2013 nor Respondents’ recusal claims have been remanded back to this Court  
6 from the Court of Appeals.

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8 In their Motion to Recuse here, Movants appear to be identical to the Respondents who  
9 pursued their motion to recuse before the Court of Appeals and the Supreme Court; certainly,  
10 counsel for Respondents and counsel for Movants is identical. Again, it is alleged that this Court  
11 should be recused from this case pursuant to Rule 21-211. The basis for the Motion to Recuse is,  
12 at its core, identical to the Court of Appeals Motion, namely, that Judge Wechsler had an  
13 attorney-client relationship with the Navajo Nation that justifies both voluntary and mandatory  
14 recusal in this adjudication. And as such, Movants seek the same relief previously sought,  
15 namely, to have Judge Wechsler recused and that all past orders of Judge Wechsler, including  
16 the Final Order and Decrees of 2013, be vacated.

## 17 ARGUMENT

### 18 A. This Court is without jurisdiction over the Motion to Recuse.

19 The Motion to Recuse rests on the propositions that Judge Wechsler should be recused  
20 pursuant to Rule 21-211 and that every order leading up to, and including, the Final Order and  
21 Decrees of 2013, should be vacated. Movants rest on NMRA, Rule 1-054 as the ultimate basis  
22 for this Court vacating its previous decisions by asserting that the Court may do so “at any time  
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1 for any reason.”<sup>2</sup> But Movants’ ignore the fact that this Court is without jurisdiction to  
2 substantively affect any order leading up to, and including, the Final Order and Decrees of 2013.  
3 These matters are and continue to be the subject of exclusive appellate jurisdiction.

4 As an initial matter, Movants ignore the very rule on which they principally rely.

5 Although Movants fixate on text taken out of context, NMRA, Rule 1-054(B) provides in full:

6 When an action presents more than one claim for relief, whether as a claim,  
7 counterclaim, crossclaim, or third-party claim, or when multiple parties are  
8 involved, the court may direct entry of a final judgment as to one or more, but  
9 fewer than all, claims or parties only if the court expressly determines that there is  
10 no just reason for delay. Otherwise, any order or other decision, however  
11 designated, that adjudicates fewer than all the claims or the rights and liabilities of  
fewer than all the parties does not end the action as to any of the claims or parties  
and may be revised at any time before the entry of a judgment adjudicating all the  
claims and all the parties' rights and liabilities.<sup>3</sup>

12 Though ignored by Movants, the first sentence is controlling here. This adjudication is certainly  
13 an action in which “multiple parties are involved” and as it relates to the Navajo Nation water  
14 rights, the Final Order and Decrees of 2013 are certainly “a final judgment as to one or more, but  
15 fewer than all, claims or parties.” In fact, the Final Order and Decrees of 2013 were appealed in  
16 2014 by many, including Movants and all orders leading up to and including the Final Order and  
17 Decrees of 2013 continue today to be the subject of that active appeal.

18 Movants’ fixation on the second sentence of Rule1-054(B) concerning a court’s ability to  
19 revise a non-final order is without rational explanation. Any reasonable reading of Rule1-054(B)  
20 gives this Court no basis to revise any final order associated with ultimate final order and decrees  
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23 <sup>2</sup> *Brief in Support of Voluntary Recusal; or in the Alternative, Motion for Disqualification for*  
24 *Cause; and Motion for Revision of Orders Under Rule 1-054(B)* (January 16, 2019) (Recusal  
Brief) at 2-3.

25 <sup>3</sup> Emphasis added.  
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1 concerning the water rights of a party to this adjudication.

2 Further, Movants ignore well-established New Mexico law that recognizes the exclusive  
3 jurisdiction of the New Mexico courts of appeal once appeal is taken from a final, appealable  
4 order. Generally speaking, “the Trial Court loses jurisdiction of the case upon filing of the notice  
5 of appeal . . . .”<sup>4</sup> This rule is not absolute as it pertains to collateral matters such as setting  
6 costs/attorneys fees, proceedings to enforce judgment, the award of supplemental relief, or fixing  
7 the amount of bond.<sup>5</sup> Nevertheless, the rule is absolute “over those aspects of the case involved  
8 in the appeal.”<sup>6</sup> Thus, the rule is absolute here.

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10 By wrongly invoking Rule 1-054(B), the Motion to Recuse seeks to vacate the Final  
11 Order and Decrees of 2013 and those orders leading up to the Final Order and Decrees of 2013.  
12 These are “final orders” as contemplated by the rule and this Court may not simply vacate them  
13 “at any time for any reason.” Moreover, this Court is without jurisdiction to do so as these orders  
14 have been the subject of appellate review for the last five years and today continue to be  
15 reviewed by the New Mexico Supreme Court.

16 Finally, the very allegation that Judge Wechsler should voluntarily recuse himself or be  
17 recused for cause has been part of Movants’ ongoing appellate challenge to the Final Order and  
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21 <sup>4</sup> *Wagner Land & Inv. Co. v. Halderman*, 1972-NMSC-019, 83 N.M. 628, 630, 495 P.2d 1075,  
1077.

22 <sup>5</sup> *Kelly Inn No. 102 v. Kapnison*, 1992-NMSC-005, 113 N.M. 231, 241 – 243, 824 P.2d 1033,  
1043 – 1045.

23 <sup>6</sup> *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, 139 N.M. 625, 627, 136 P.3d 1035, 1037 (quoting  
24 *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)  
25 (*per curiam*) (emphasis by the New Mexico Court of Appeals original), superseded by rule on  
26 other grounds as stated in *Hatfield v. Bd. of County Comm'rs*, 52 F.3d 858, 861 (10th Cir.1995).

1 Decrees of 2013. And as explained above, the New Mexico Court of Appeals found Movants’  
2 Rule 21-211 challenge to be “frivolous.”<sup>7</sup> Nevertheless, this entire matter including that  
3 concerning any demand for Judge Wechsler to recuse himself remains squarely an “aspect[] of  
4 the case involved in the appeal.”<sup>8</sup> Thus, Judge Wechsler’s recusal, like the requested relief to  
5 vacate orders leading up to and including the Final Order and Decrees of 2013 is a matter over  
6 which this Court is without jurisdiction.

7 The Motion to Recuse should be denied.

8 **B. To the extent that this Court addresses the substance of any allegation that Judge**  
9 **Wechsler should be recused pursuant to Rule 21-211, the Motion to Recuse is**  
10 **without basis.**<sup>9</sup>

11 The brief in support of the Motion to Recuse begins and ends seeking complete vacature  
12 of all orders issued by Judge Wechsler up to and including the Final Order and Decrees of  
13 2013.<sup>10</sup> As stated above, these are the subject of an ongoing appeal that Movants, in part,  
14 initiated and that is currently before the New Mexico Supreme Court. In the body of their brief,  
15 Movants spend most of their effort to complain that Judge Wechsler be recused, either  
16 voluntarily or for cause, pursuant to Rule 21-211. Fundamentally, Movants assert that Judge  
17 Wechsler’s prior employment with DNA in the early 1970’s requires recusal. Movants variously  
18 allege that DNA was an “instrumentality” of and “controlled by the Navajo Nation” and that  
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21 <sup>7</sup> Attachment A at 3, ¶ 8.

22 <sup>8</sup> Quoting *Murken*, 136 P.3d at 1037.

23 <sup>9</sup> The United States joins in the arguments presented in the Navajo Nation’s Response to the  
24 Motion to Recuse at section B(2) concerning whether any basis exists for recusal under Rule 21-  
211. The United States takes no position on the Nation’s request for sanctions and attorney fees.

25 <sup>10</sup> *E.g.*, Recusal Brief at 2-3 and at 26, Part E.  
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1 Judge Wechsler had an “attorney/client relationship” with the Navajo Nation.<sup>11</sup>

2 Just as they did before the New Mexico Court of Appeals, Movants incorrectly contend  
3 that DNA was an agency of the Navajo Nation and that Judge Wechsler had an attorney/client  
4 relationship with the Navajo Nation. As set out in the Navajo Nation’s Response, and as  
5 confirmed by the IRS Form 990 posted on DNA’s website, DNA was not and is not an agency of  
6 the Navajo Nation. Rather, DNA is a 501(c)(3) tax-exempt organization funded primarily by the  
7 Legal Services Corporation. Thus, as the Court of Appeals has already determined, the  
8 fundamental premise of the Motion to Recuse is false.

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10 Moreover, even if DNA *were* an agency of the Navajo Nation or if DNA somehow  
11 represented the Navajo Nation as a client during Judge Wechsler’s tenure there – which is not the  
12 case – that still would not require voluntary recusal under Rule 21-211. As the New Mexico  
13 Court of Appeals has explained, the decision whether to voluntarily enter a recusal is committed  
14 to the sound discretion of the trial judge.<sup>12</sup> Further, and contrary to Movants’ argument,  
15 “[v]oluntary recusal is reserved for compelling constitutional, statutory, or ethical reasons  
16 because a judge has a duty to sit where not disqualified which is equally as strong as the duty to  
17 not sit where disqualified.”<sup>13</sup> NMRA, Rule 21-211(A) provides that a judge “shall disqualify  
18 himself or herself in any proceeding in which the judge’s impartiality might reasonably be  
19 questioned . . . .” A judge’s impartiality cannot reasonably be questioned on the basis of the  
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22 <sup>11</sup> *E.g. id.* at 4, 7, and 18.

23 <sup>12</sup> *Roybal v. Morris*, 1983-NMCA-101, ¶ 7, 100 N.M. 305, 308, 66 P.2d 1100 (citations omitted).

24 <sup>13</sup> *State v. Trujillo*, 2009-NMCA-128, ¶ 11, 147 N.M. 334, 336–37, 222 P.3d 1040 (quoting *State*  
25 *v. Hernandez*, 1993-NMSC-007, 115 N.M. 6, 20, 846 P.2d 312).

1 judge's (alleged) representation of a party in *unrelated matters* where that (alleged)  
2 representation ended *over 35 years ago*. Movants have not identified any authority for such an  
3 extreme reading of Rule 21-211. And the Rule's specific examples of the kinds of prior legal  
4 activities that give rise to a duty to recuse all involve participation in *the same legal matter*.  
5 Specifically, Rule 21-211(A)(5)(a) requires recusal where a judge "served as a lawyer *in the*  
6 *matter in controversy*, or was associated with a lawyer who participated substantially as a lawyer  
7 *in the matter* during such association."<sup>14</sup> Likewise, 21-211(A)(5)(b) requires recusal where the  
8 judge previously "participated personally and substantially as a lawyer or public official  
9 *concerning the proceeding*."<sup>15</sup> And 21-211(A)(5)(c) and (d) require recusal where the judge "was  
10 a material witness concerning *the matter*" or "previously presided over *the matter* in another  
11 court."<sup>16</sup> Thus, even if Movants' allegations were true, the connections they allege between this  
12 case and Judge Wechsler's past legal work are simply too remote and attenuated to raise a  
13 reasonable basis for questioning Judge Wechsler's impartiality here.

## 15 CONCLUSION

16 For the reasons set out above and the additional reasons set out in the Navajo Nation's  
17 Response, the Motion to Recuse should be denied.

18 Dated: February 4, 2019

Respectfully submitted,

19 By /s/ Andrew "Guss" Guarino  
20 Andrew "Guss" Guarino, Trial Attorney  
21 Indian Resources Section  
22 Environment and Nat'l Resources Division  
United States Department of Justice

23 <sup>14</sup> Emphasis added.

24 <sup>15</sup> Emphasis added.

25 <sup>16</sup> Emphasis added.



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*Attorney for the United States of America*

**CERTIFICATE OF SERVICE**

I certify that I have caused a copy of the above to be served by E-mail to all Counsel on the Electronic Service List for D-1116-CV-7500184, on February 4, 2019.  
/s/ Andrew "Guss" Guarino  
Andrew "Guss" Guarino

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

  
Mark Reynolds

2 **STATE OF NEW MEXICO, ex rel.**  
3 **STATE ENGINEER,**

4 **Plaintiff-Appellee,**

5  
6 **v.**

**A-1-CA-33535**  
**San Juan County**  
**D-1116-CV-1975-00184**

7  
8 **UNITED STATES OF AMERICA,**

9 **Defendant-Appellee,**

10  
11 **v.**

12 **NAVAJO NATION,**

13 **Defendant/Intervenor-Appellee,**

14  
15 **v.**

16 **SAN JUAN AGRICULTURAL WATER USERS**  
17 **ASSOCIATION; HAMMOND CONSERVANCY**  
18 **DISTRICT; BLOOMFIELD IRRIGATION**  
19 **DISTRICT; VARIOUS DITCHES AND VARIOUS**  
20 **MEMBERS THEREOF,**

21 **Defendants-Appellants.**

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24 **ORDER DENYING EMERGENCY MOTION**  
25 **TO ENFORCE RULE 21-211 AND**  
26 **SUBSEQUENT MOTIONS FILED BY APPELLANTS AND**  
27 **ORDER IMPOSING SANCTIONS AND**  
28 **AWARDING ATTORNEY'S FEES**

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THIS MATTER is before this Court upon Appellants' "Emergency Motion to Enforce Rule 21-211" filed on February 26, 2018. After due consideration of the motion, brief in support, and Appellees' responses thereto, the Court concludes as follows:

1. Appellants' statement in the motion that Judge Wechsler represented the Navajo Nation is void of any factual foundation.

2. Appellants' statement in the motion that DNA Legal Services is "an agency and instrumentality of the Navajo Nation" is void of any factual foundation.

3. Appellants' statement in the motion that Judge Wechsler has "personal extrajudicial knowledge from living on the reservation" that biased him in favor of the Navajo Nation is void of any factual foundation.

4. Appellants' contention that Judge Wechsler violated Rule 21-211 NMRA is frivolous.

5. When an attorney files a motion with this Court, that attorney is inherently representing to the Court that there is good ground to support the motion.

6. Basic inquiry and simple investigation would or should have informed

1 Appellants' counsel, Victor R. Marshall, that the motion was without factual  
2 foundation. Appellants' motion itself states that it was filed after only a  
3 "preliminary but incomplete investigation."  
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5 7. By filing a frivolous motion, Mr. Marshall has needlessly caused this  
6 Court and the parties to expend resources and in so doing has violated the Rules  
7 of Professional Conduct. Further, and more troubling, Mr. Marshall has  
8 attempted to discredit a judge with absolutely no basis for doing so.  
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11 8. This Court has inherent authority to impose sanctions and award  
12 attorney's fees to protect its judicial process against improper and frivolous  
13 actions.  
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15 9. Appellants have also filed, on March 26, 2018, a Motion for Leave to  
16 File a Reply Brief, a Motion for Disclosure of Ex Parte Communications, and  
17 a Motion for Disclosure and Discovery Concerning Disqualification. There is  
18 no merit to any of those motions.  
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21 IT IS THEREFORE ORDERED that Appellants' emergency motion to  
22 enforce Rule 21-211 is DENIED.  
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24 IT IS FURTHERED ORDERED that Appellants' Motion for Leave to  
25 File a Reply Brief, Motion for Disclosure of Ex Parte Communications, and  
26 Motion for Disclosure and Discovery Concerning Disqualification are DENIED.  
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1 IT IS FURTHER ORDERED that Appellant's attorney, Victor R.  
2 Marshall, is HEREBY SANCTIONED and shall pay the costs and attorney's  
3 fees incurred by the other parties in responding to the Emergency Motion to  
4 Enforce Rule 21-211. Any party seeking to recover costs and attorney's fees shall  
5 file with this Court an affidavit setting forth those costs and fees within 15 days  
6 of the date of this Order.  
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9 IT IS FURTHER ORDERED that the Clerk of the Court is directed to  
10 forward this Order to the Disciplinary Board of the New Mexico Supreme Court  
11 for any action it sees fit.  
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16 LINDA M. VANZI, Chief Judge

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19 J. MILES HANISEE, Judge

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22 BRUCE D. BLACK, Judge Pro Tem