

DISTRICT COURT 
SAN JUAN COUNTY NM
FILED

STATE OF NEW MEXICO
SAN JUAN COUNTY
ELEVENTH JUDICIAL DISTRICT

2019 FEB -5 PM 4: 48

STATE OF NEW MEXICO ex rel.
STATE ENGINEER,

Plaintiff,

CV-75-184
Hon. James J. Wechsler
Judge Presiding

v.

SAN JUAN RIVER STREAM
SYSTEM ADJUDICATION

THE UNITED STATES OF AMERICA, et al.,

Defendants,

v.

THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,

Defendant-Intervenors.

NAME OF PARTY: State of New Mexico

DESCRIPTIVE SUMMARY: The State responds in opposition to motion for voluntary recusal or disqualification for cause and revision of rulings under Rule 1-054(B) filed by Chris Velasquez, Linda Corwin and the San Juan Agricultural Water Users Association.

NUMBER OF PAGES: 9

DATE OF FILING: February 5 , 2019

**STATE'S RESPONSE TO DEFENDANTS' MOTION
FOR VOLUNTARY RECUSAL OR DISQUALIFICATION
FOR CAUSE AND REVISION OF RULINGS UNDER RULE 1-054(B)**

The Plaintiff, State of New Mexico (“the State”) responds to the Defendants’ Chris Velasquez, Linda Corwin and San Juan Agricultural Water Users Association (“SJAWUA”) as follows:

A. Mr. Marshall’s actions in raising a frivolous motion by asking for Judge Wechsler’s disqualification from the subfile adjudication involving the Navajo Nation, are pending before the New Mexico Supreme Court in a disciplinary action. This Court should deny this motion or alternatively, take no action until that Court has issued a final decision in that case.

1. The motion requests that Judge Wechsler voluntarily recuse himself from the entire adjudication of the of the San Juan River Stream System, or alternatively that he be disqualified from the adjudication and all of his rulings in this adjudication. This issue was raised in the Court of Appeals by an emergency motion in the appeal from the District Court’s approval of the Settlement Agreement between the Navajo Nation, the United States, and the State of New Mexico in the Navajo Nation’s subfile, AB-07-1. The Court of Appeals not only denied the motion, but chastised counsel for the Defendants, Victor Marshall, for filing a frivolous motion, sanctioned Mr. Marshall, and ordered the Clerk of the Court to forward its order to the Disciplinary Board of the New Mexico Supreme Court for further action. A panel of hearing officers of the Disciplinary Board held a hearing and agreed with the Court of Appeals. That panel has recommended that Mr. Marshall be indefinitely suspended from the practice of law. Their

recommended decision is pending before the Disciplinary Board and final action by the Supreme Court.

2. Now, Mr. Marshall has refiled the motion to disqualify Judge Wechsler in the general adjudication with little more substantiation for his allegations that Judge Wechsler represented the Navajo Nation in water rights issues while he was an attorney at DNA in 1970-76. This Court should either deny this motion or take no action until the Supreme Court has issued its final decision.

B. The motion fails to evidence any attorney/client relationship between the Navajo Nation and DNA.

3. Not only does the motion fail to demonstrate evidence of an attorney/client relationship between the Navajo Nation and DNA, but the exhibits Defendants rely on show the opposite.

4. Defendants initially assert that the Navajo Nation controlled DNA through its power to select and appoint DNA's Board of Directors, citing DNA's Bylaws, Ex. 1. (Motion, p. 4) A reading of section 104 of DNA's Bylaws, however, shows that of the 19 directors for DNA, 10 were to be elected by the five Agency Committees, two from each Agency. Nine additional directors were to be elected by the preceding 10 directors for their interest and ability to contribute to the purpose of DNA. In addition to these 19 directors, four ex officio directors were to be appointed: two from the Office of Navajo Economic Opportunity, the Chief Justice of the Navajo Tribe, and the Program Director of DNA. These ex

officio directors had no power to vote. (Ex. 1, pp. 2-3) There is no signature page included in the exhibit, but the stamp on the first page of the exhibit shows the Bylaws were recorded September 12, 1967 with the State Corporation Commission of Arizona.

5. There is no indication in the Bylaws that the Navajo Nation had the power to select and appoint the Board of Directors as Defendants allege.

6. Defendants next allege that the mission of DNA was to advance the interests of the Navajo people and the Navajo Nation, citing Peter Iverson, *Dine, a History of the Navajos*, 238 (2002), Ex. 12. That exhibit, however, quotes Executive Director Ted Mitchell, who declared that “[T]he prime objective of the program will be to provide justice for the Navajo who cannot afford to hire a private attorney to advise and represent him” (footnote not included in exhibit).” Mr. Iverson went on to write that “[b]y defending individual Navajo rights, DNA began to take on vested interests and long-standing concerns” Ex. 12, p. 239. The actions of DNA were not popular with local businesses and created problems for the general counsel of the Navajo Nation. He viewed the young DNA attorneys with disdain. *Id.* Counsel was unable to locate any reference in Exhibit 12 that DNA’s mission was to advance the interest of the Navajo Nation.

7. Defendants next equate defending Navajo sovereignty with representation of the Navajo Nation. (Motion, p. 6) However, there is nothing in

the article, "*DNA is Defending Tribal Sovereignty (The Rainbow)*," (Ex. 3) that indicates anything other than that DNA was representing a client, a Cheyenne, whose wife was a Navajo and who lived on the Reservation. The State of Arizona was seeking to extradite the client to Oklahoma. Ted Mitchell filed a writ of *habeas corpus*, arguing that only the Navajo Tribe had jurisdiction to extradite Indians from the Reservation. Nor does anything in "*Navajo Tribe Will Fight for Water Rights*," (Ex. 7) an article in the Navajo Times, even mention DNA. Defendants equate, without any support, cases with possible broad applicability to Navajo members to representing the Navajo Nation. While a case may affect more than one individual in a group, that fact does not mean that the attorney representing the plaintiff represents the entire group.

8. The next supposition that the Defendants allege as proof of an attorney/client relationship between the Navajo Nation and DNA is that because the Advisory Committee is an executive committee of the Navajo Tribal Council, the tribal government therefore not only controlled DNA, but also had an attorney/client relationship with DNA. These two propositions have no logical connection. As the Defendants point out, there was a battle between the Navajo government and DNA, centering around the expulsion of DNA's executive director, Ted Mitchell. *See Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969)

(exclusion of nonmember from reservation lacked due process, abridged of freedom of speech, and constituted unlawful bill of attainder). CONCLUSION?

9. Defendants point to five exhibits to support their conclusion of an attorney/client relationship (Motion, pp. 9-10):

a. Exhibit 2 is a memorandum regarding the Navajo Nation's water rights in the Colorado River Basin. This memorandum is not signed or dated. It says "prepared by DNA" at p. 23, but it was a document of the University of New Mexico Law School. There is no indication who prepared it, who it was prepared for, or for what purpose. At his deposition, Judge Wechsler was asked if this was a legal memorandum prepared by DNA for the Tribal Council regarding the Tribe's water rights in the San Juan Basin. Judge Wechsler asked if Mr. Marshall's attorney could direct him to something that says this was prepared for the Tribal Council. Counsel responded, "Well, if I can I will." (Ex. 18, p. 139) He did not.

b. Exhibit 4 is a copy of a 1969 DNA newsletter. Again, no author is identified. It appears to be the opinion of the author as to what the United States Supreme Court ruled in 1908 regarding the Tribe's right to use water on the Reservation.

c. Exhibit 7 is a copy of the Navajo Times from June, 1971 with an article about a meeting between Navajo leaders, Bureau of Indian Affairs ("BIA")

officials, and the Navajo Nation's general counsel about water rights in the Colorado and San Juan Rivers. There is no mention of DNA.

d. Ex. 9: witness testimony before the Senate Judiciary Committee. Attached to the testimony is an article by Ben Hanley written while he was a third-year law student that expresses "solely [his] own views," requesting an inventory of Indian water rights. (p. 737, 747) An Appendix regarding Navajo Water Rights in the Colorado River Basin prepared by Daniel Macmeekin is also attached. This is a copy of a paper originally prepared in August of 1969 by Theodore Mitchell, Michael Gross and Daniel Macmeekin and revised by Macmeekin in 1971 opposing construction of the Navajo Generating Station. (p. 781, n. 119) The publication is not identified.

e. Exhibit 8 is a copy of the Navajo Times from October, 1971 with an article about a presentation made by Bob Hilgendorf, attorney for DNA, in the American Indian Seminar Series at the San Juan Community College, about the conflict of interest between the BIA, as trustee for the Navajo Nation, and the Bureau of Reclamation, in charge of developing water resources.

10. None of these documents provide a basis for finding an attorney/client relationship between the Navajo Nation and DNA. In fact, as Judge Wechsler testified, not only was he not aware of any relationship between the Navajo Nation

and DNA, but in fact, the Tribe was an adverse party in cases they had at DNA.
(Ex. 18, Wechsler Dep., p. 84)

11. Regardless of the efforts made by Defendants to manufacture an attorney/client relationship between DNA and the Navajo Nation, the documents presented have failed to establish any such relationship. Defendants have presented no authority for their allegation that DNA was controlled by the Navajo Nation. Defendants show no instance that DNA represented the Navajo Nation. The most that has been shown is that individual attorneys for DNA were vocal about Indian water rights and prepared scholarly articles and spoke about Native American water rights. This is not sufficient to create an attorney/client relationship.

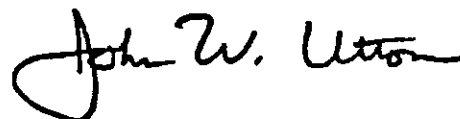
For these reasons, the Plaintiff, State of New Mexico, respectfully requests that this Court deny the Defendants' motion for voluntary recusal or disqualification of Judge James Wechsler and revision of rulings or orders filed in this case.

Respectfully submitted, this 5th day of October 2012.

STATE OF NEW MEXICO



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CERTIFICATE OF SERVICE

I certify that on this 5th day of February 2019, I caused an electronic copy of the above to be served by e-mail to all counsel on the electronic service list for D-1116-CV-7500184.

/s/ Arianne Singer