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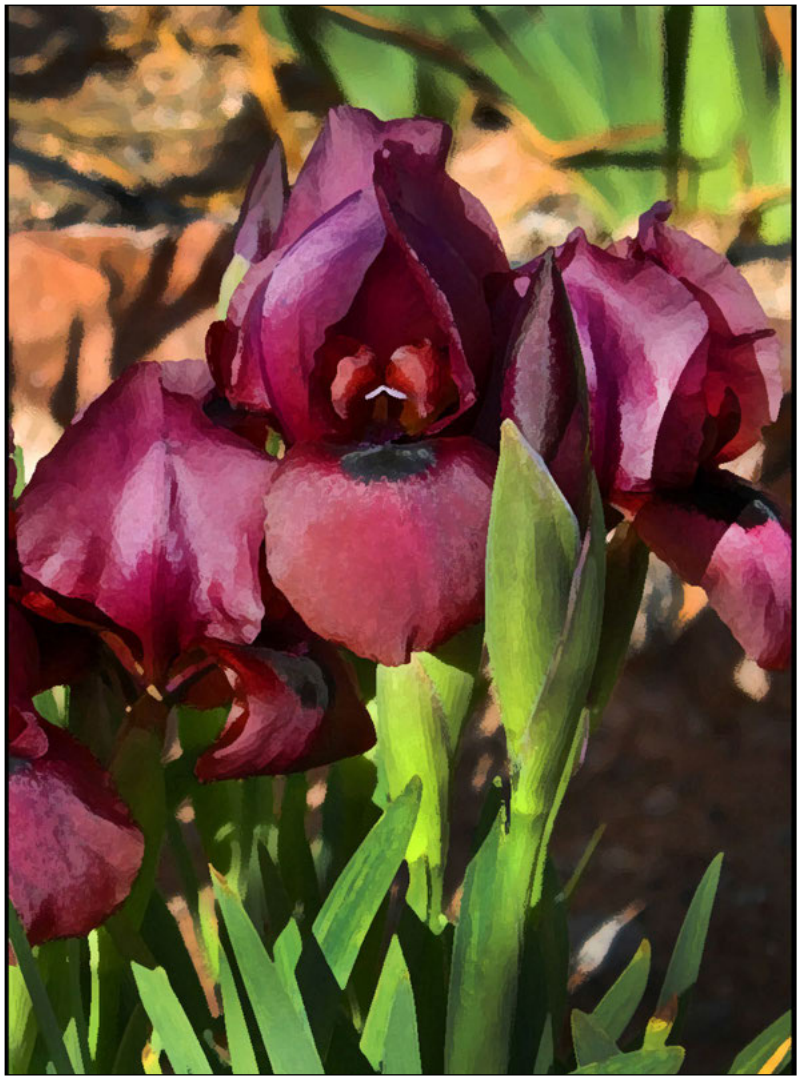

Iris Regalia, by Valerie Fladager (see page 3)

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About Cover Image and Artist: Valerie Fladager photographs a plethora of images that catch her interest and each image selected represents a series of multitude. The best are chosen for their striking design, light and color which she then interprets with digital imaging, pastels or watercolor. Her work has been sold through several galleries and arts and crafts venues. She has taught art and science and is a member of the National League of American Pen Women. Additional work can be viewed at http://valeriefladager.com/. She can also be contacted by email, kvfladager@aol.com.

Notices

Court News

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) cases for the years of 1993 to the end of 2009 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through May 26. Those with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 10 a.m. to 2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Third Judicial District Court

Notice of Mass Reassignment

Gov. Susana Martinez has announced the appointment of Conrad F. Perea to fill the vacancy of Division III of the Third Judicial District Court. Effective April 24, Judge Perea will be assigned to family court cases and domestic violence cases previously assigned to Judge Darren M. Kugler. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from April 24 to excuse Judge Perea.

Seventh Judicial District

Judicial Notice of Vacancy

The Seventh Judicial District Court announces the retirement of Hon. Kevin Sweazea effective May 3. A Judicial Nominating Commission will be convened in Socorro to interview applicants for these vacancies. More information on the application process (including updates regarding the vacancy and news releases) can be found on the Judicial Selection website lawschool.unm.edu/judsel/index.php.

Bernalillo County Metropolitan Court

Investiture of Hon. Renée Torres

The judges and employees of the Bernalillo County Metropolitan Court invite members of the legal community and the public to attend the investiture of the Hon. Renée Torres, Division III at 5:15 p.m., June 1, in the Bernalillo County Metropolitan Court Rotunda. Judges who want to participate in the ceremony, including Tribal Court judges, should bring their robes and report to the First Floor Viewing Room by 5 p.m. Following the ceremony, a reception will be held on the first floor of the Metro Court.

Professionalism Tip

With respect to opposing parties and their counsel:

I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings.

U.S. District Court for the District of New Mexico

Documentary Premier and Black Tie Optional Event

The U.S. District Court for the District of New Mexico and the Bench & Bar Fund Committee invite members of the State Bar to a black tie optional premiere of the documentary "Taming New Mexico." The Bench and Bar Fund and numerous law firms have helped fund the KNME produced film. The event will begin at 5:30 p.m. on May 10 at the Pete V. Domenici United States Courthouse, 333 Lomas Boulevard NW, Albuquerque, New Mexico 87102. There will be heavy hors d'oeuvres. Members of the bar will also be able to receive CLE credit for the event. To R.S.V.P., email Corazon Events at info@corazonevents.com. This year marks the 18th anniversary of the Pete V. Domenici U.S District Courthouse. An optional black tie event was held in 1999 at its opening. The Court and Committee hope this year's event will be as memorable for today's attorneys as it was in 1999.

State Bar News

Attorney Support Groups

- May 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- May 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- June 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need spring cleaning? The Committee on Women seeks gently used, dry cleaned professional clothing donations for their professional clothing closet. Individuals who want to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals who want to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

Intellectual Property Law Section and YLD

Volunteers Needed for Creative Professionals Pro Bono Clinic

New Mexico Lawyers for the Arts and WESST seek volunteer attorneys for a creative professionals pro bono clinic from 10 a.m.-1 p.m. (or any portion thereof) on May 6 at the Santa Fe Business Incubator, located at 3900 Paseo Del Sol in Santa Fe. Attorneys will provide assistance in the following areas: art law, contracts, business law, employment matters, tax law, estate planning and IP law. The clinics are co-sponsored by the IP Law Section and Young Lawyers Division. Continental breakfast will be provided. For more information and to participate, contact Talia Kosh at tk@thebennettlawgroup.com.

Solo and Small Firm Section

May Presentation Features Gov. Susana Martinez

The Solo and Small Firm Section will host Gov. Susana Martinez from noon-1 p.m., May 9, at the State Bar Center in

Albuquerque. Gov. Martinez will speak to State Bar of New Mexico members on any lingering issues from the coming legislative special session and her vision for our state in the remainder of her second term and the future. The Section welcomes all attorneys and judges to its monthly speaker series. The State Bar Center joins the Section in hosting a complimentary luncheon from 1-2 p.m. following Gov. Martinez' presentation. Those interested in attending are encouraged to register as soon as possible by visiting www.nmbar.org/solos. Space is limited and seating will be available on a first come, first served basis.

UNM

Law Library

Hours Through May 13

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Law Alumni/ae Association

15th Annual Law Scholarship Golf Classic

The UNM Law Alumni/ae Association invites members of the legal community to the 15th Annual Law Scholarship Golf Classic presented by US Eagle Federal Credit Union on June 9 at the UNM Championship Golf Course. Proceeds from the Golf Classic benefit the Law School's only full-tuition merit scholarships. Register and learn about visible sponsorship opportunities at goto.unm.edu/golf or contact Melissa Lobato at lobato@law.unm.edu or 505-277-1457.

Call for Nominations

The UNM Law Alumni/ae Association requests nominations for the Distinguished Achievement Awards, recognizing accomplished members of the New Mexico legal community and the new Alumni Promise Award, recognizing an alumnus/a who graduated from the Law School within the last 10 years and has contributed innovative or substantial service to the Law School, its students, or its community. The deadline for all nominations is May 15. To submit nominations, visit lawschool.unm.edu/daad. For more information, contact Melissa Lobato at lobato@law.unm.edu or 505-2771457.

Other Bars

Albuquerque Lawyers Club

May Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its May lunch meeting featuring Bernalillo County District Attorney Raul Torrez. DA Torrez will present "Challenges Facing the Criminal Justice System" at noon, May 3, at Seasons Restaurant in Albuquerque. For more information, email ydennig@Sandia.gov or call 505-844-3558.

National College of Probate Judges

Spring Conference in Santa Fe

The National College of Probate Judges invites members of the State Bar of New Mexico to attend the NCPJ Spring Conference May 17–20 at the Eldorado Hotel in Santa Fe. For more information and to register, visit ncpj.org/2017_spring_conference/.

Women's Bar Association

2017 Henrietta Pettijohn Reception

Join the Women's Bar Association for its annual Henrietta Pettijohn Reception from 6–9:30 p.m., May 4, at Hotel Albuquerque. WBA will honor Judge Wendy York and Shona Zimmerman, Esq., as well as present the 2017 Supporting Women in the Law Award to the University of New Mexico's Office of University Counsel. Hors d'oeuvres will be served and there will be a silent auction with proceeds going to law student bar review scholarships. Tickets are $20 for students, $35 for Women's Bar Association members and $45 for non-members. Visit www.nmwba.org to purchase tickets. On-site childcare will be provided for WBA members. Contact Barbara Koenig at bkoenig617@gmail.com to see if childcare is available.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court

Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar

Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Decision Fatigue: What It Is and How to Reduce It

By Jill Ann Yeagley

You're an experienced law practitioner, juggling many tasks in your practice, making important decisions regarding staffing, time management and client support on a daily (or even hourly basis). You've always prided yourself on being an efficient and effective decision maker, but one day, it all just seems overwhelming. Your colleague advises you an important meeting needs to be rescheduled for later in the week. You freeze. There are so many factors and you don't know where to start. Eventually you impulsively reschedule the meeting for an inopportune time that has negative consequences for all involved. "What is happening to me?" you wonder.

Sound familiar? You're experiencing decision fatigue. But don't worry, it happens to everyone.

Some individuals appear to be naturally proficient decision-makers. But, it turns out that good decision making is not a consistent trait—rather, decision making is a state that vacillates within the same individual on a daily basis. Research shows that no matter how rational and principled one strives to be, an individual simply cannot make decision after decision without experiencing some decision fatigue. This phenomenon distorts the judgment of everyone, professional and nonprofessional, rich and poor. Yet, few people are even aware of it and researchers are just beginning to understand why it occurs and how to counteract it.

Decision fatigue helps explain why normally level-headed individuals make impulsive and poorly considered choices. We are not consciously aware of being tired when decision fatigue is present, but our store of mental energy is disrupted, impeding our ability to process information and exert self-control. Brain scans show that as decision fatigue sets in, activity increases in the nucleus accumbens (the brain's reward center) and decreases in the amygdala, which helps control impulses. These temporary brain changes can lead to:

- Reduced ability to make trade-offs (where two options have positive and negative elements)
- Decision avoidance -"Just give me whatever your special is today."
- Impaired self-regulation (a successful C.E.O. that fails to control impulses in their private life)
- Impulse purchases (the candy bar you grab at the checkout counter)

Retailers have long known that placing sugary snacks near the cash registers results in increased sales, but researchers have only more recently discovered why: the changed brain activity associated with making multiple decisions leaves people more vulnerable to impulse buying and the intake of glucose reverses these brain changes. Multiple experiments confirm that glucose improves people's self-control as well as the quality of their decisions. Although sweets raise glucose levels, the better approach is to consume proteins and other more nutritious foods to maintain a steadier supply of glucose throughout the day.

Studies by social psychologist Roy F. Baumeister show that individuals with the strongest self-control structure their lives to conserve willpower and simplify decision making. Baumeister notes, "They don't schedule endless back-to-back meetings. They avoid temptations like all-you-can-eat buffets, and establish habits that eliminate the mental effort of making choices."[2] Additional techniques from writer and coach, Lori Rochino include[2]:

1. **Make major decisions in the morning** when glucose levels are higher and your mind is clearer. Implement the Most Important Tasks (MIT's) approach and commit to finishing them first.
2. **Choose the simpler option** for lesser priority items of minimal consequence.
3. **Limit your options.** If you have too many, narrow it to three choices at a time.
4. **Go minimalist**—especially with clothing. (Steve Jobs, Barak Obama and Mark Zuckerberg all have a uniform, leaving one less decision to make). If that seems too boring, accessories can be used to to fit your mood or the season.
5. **"Done" beats perfect.** If the task is 80% and it's not at the top of your list of importance, live with it. Otherwise, perfectionism is nothing more than procrastination.
6. **Limit or remove yourself from situations and places that distract** (and require multiple decisions with little payoff). For instance, set a timer for five minutes when you get on social media and stop when the timer goes off. With stores, view window displays but don't go in unless there is a specific item on your list.
7. **If it is not on your "to do" list, make the decision no** – at least for the day. This is where working with a MIT's approach really helps. Remember you can always schedule to address it later.
8. **Make your first decision work.** Once you make your choice, follow it through to the end. If it doesn't work out or there is an emergency, move on to your second choice or reschedule action on it.

Remember, decision fatigue is natural and happens to everyone eventually. By using some of these simple strategies, you can help yourself make the decisions necessary for your career and personal life.

Read more tips from the Judges and Lawyers Assistance Program in the first issue of each month. For more support, visit www.nmbar.org/JLAP.

Endnotes

[1] Baumeister, Roy F, Tierney, John. *Willpower: Rediscovering the Greatest Human Strength*. Penguin Books, London, England, 2012.

[2] Rochino, Lori. *Eight Ways to Combat Decision Fatigue*, The Huffington Post.com, March 4, 2015.

STATE BAR of NEW MEXICO

2017 Annual Meeting– Bench & Bar Conference

Call for Nominations

State Bar of New Mexico 2017 Annual Awards

Nominations are being accepted for the 2017 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2016 or 2017. The awards will be presented July 28 during the 2017 Annual Meeting—Bench and Bar Conference at the Inn of the Mountains Gods in Mescalero. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below. To view the full list of previous recipients, visit www.nmbar.org/Awards.*

Distinguished Bar Service Award-Lawyer

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Hannah B. Best, Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr.

Distinguished Bar Service Award–Nonlawyer

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Tina L. Kelbe, Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman

Justice Pamela B. Minzner* Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Arturo L. Jaramillo, S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

Outstanding Legal Organization or Program Award

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center

Outstanding Young Lawyer of the Year Award

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Denise M. Chanez, Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Lucero Jr.

Robert H. LaFollette* Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Billy K. Burgett, Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Seth D. Montgomery* Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Justice Richard C. Bosson (ret.), Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.)

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 12

Jeffrey Albright (left) and **Bobbie Collins** (right) were recently recognized for their pro bono service during the annual pro bono awards luncheon presented by law firm Lewis Roca Rothgerber Christie LLP. Albright is a partner in the firm's regulatory practice who focuses on water rights, water law, water rights sales and transfers and both state and federal environmental compliance. Collins is an associate in the firm's litigation practice group, focusing on complex civil litigation, real estate and taxation law.

The National Board of Trial Advocacy recently awarded **David C. Serna** a certificate, "Recognizing 30 Years of Certification in Criminal Trial Law." Serna first became board certified in 1986. He has also been selected for each of the past 11 years by Southwest Super Lawyers in the areas of criminal defense, white collar defense, and DWI defense.

Janet Wulf, CPA, has been named executive director at Modrall Sperling. She brings to the position a diversity of experience and a strong track record of administrative management within the legal industry. She is the most recent recipient of the David Award, the highest award given by the Mile High (Denver) Chapter of the Association of Legal Administrators to honor members who have provided long and outstanding service to the industry.

The **New Mexico Women's Bar Association**, a voluntary statewide association open to all attorneys and law school graduates, announces the results of its recent election. Serving as officers for 2017 are President **Barbara Koenig**, Vice-President **Andrea Harris**, Secretary **Sharon Shaheen**, Treasurer **Traci Olivas**, Compliance Officer **Amy Sirignano** and Directors at Large **Michele Huff** and **Lori Martinez**. New board members **Kasey Daniel**, **Lisa Carrillo**, **Leila Hood**, **Heidi Deifel** and **Bobbie Collins** join re-elected board members **Deborah Seligman** and **Aja Brooks** for two year terms. Returning board members are **Peggy Graham**, **Margaret Branch**, **Yasmin Dennig**, **Kate Southard**, **Amie Nelson** and **Amy Glasser**. For more information and to join the NMWBA, visit www.nmwba.org.

The **Center for Civic Values** thanks all of the volunteer judges who helped make this year's Gene Franchini New Mexico High School Mock Trial Competition a success. CCV would also thank the State Bar of New Mexico, the New Mexico Office of the Attorney General, the Bernalillo County District Attorney's Office, the Young Lawyers Division and the Trial Practice Section of the State Bar for their contributions to the competition. **Volcano Vista High School** mock trial team won the state competition and **Animas High School** won the courtroom artist competition. They make up the New Mexico State Champion Team and will be attending the National competition in Hartford, Conn., May 11–13.

The **American Indian Law Center, Inc.**, announces that **Kevin K. Washburn** and **Danielle Her Many Horses** joined the board of directors this year.

Rodey, Dickason, Sloan, Akin & Robb, PA

Southwest Super Lawyers: **Mark K. Adams** (energy and natural resources), **Leslie McCarthy Apodaca** (business litigation), **Rick Beitler** (medical malpractice defense), **Perry E. Bendicksen III** (mergers and acquisitions), **David P. Buchholtz** (securities and corporate finance), **John P. Burton** (real estate), **Denise M. Chanez** (medical malpractice defense), **Jeffrey M. Croasdell** (personal injury defense: products), **Jocelyn C. Drennan** (appellate), **Nelson Franse** (professional liability: defense), **Catherine T. Goldberg** (real estate), **Scott D. Gordon** (employment and labor), **Bruce D. Hall** (alternative dispute resolution), **Paul R. Koller** (personal injury defense: general), **Jeffrey L. Lowry** (employment and labor), **W. Mark Mowery** (medical malpractice defense), **Theresa W. Parrish** (employment and labor), **John N. Patterson** (real estate), **Charles (Kip) Purcell** (appellate), **Edward R. Ricco** (appellate), **Brenda M. Saiz** (Medical malpractice defense), **John P. Salazar** (real estate), **Andrew G. Schultz** (business litigation), **Robert M. St. John** (business litigation), **Thomas L. Stahl** (employment and labor), **Aaron C. Viets** (employment and labor), and **Charles J. Vigil** (employment and labor).

Southwest Super Lawyers Rising Stars: **Cristina A. Adams**, **Tyler M. Cuff**, **Margot A. Heflick**, **Todd E. Rinner**, **Shannon M. Sherrell** and **Jessica R. Terrazas**

Modrall, Sperling, Roehl, Harris & Sisk, PA

Southwest Super Lawyers: **Jennifer G. Anderson, Larry P. Ausherman, Martha G. Brown, Stuart R. Butzier, John R. Cooney, Donald A. DeCandia, Timothy L. Fields, Paul M. Fish, Stanley N. Harris, Michelle A. Hernandez, Timothy C. Holm, Emil J. Kiehne, George R. McFall, Margaret L. Meister, Megan T. Muirhead, Jennifer A. Noya, Maria O'Brien, James M. Parker, Marjorie A. Rogers, Ruth M. Schifani, Lynn H. Slade, Walter E. Stern, R. E. Thompson, Douglas R. Vadnais** and **Alex C. Walker**

Southwest Rising Stars: **Daniel Alsup, Deana M. Bennett, Jennifer Bradfute, Emily Chase-Sosnoff, Spencer L. Edelman, Tomas J. Garcia, Jeremy Harrison, Anna Indahl, Mia Kern, Elizabeth A. Martinez, Meghan H. Mead, Nathan Nieman, Tiffany Roach Martin, Christina Sheehan** and **Sarah Stevenson**

Atkinson & Kelsey, PA

Southwest Super Lawyers

Virgina R. Dugan, **Jon A. Feder**, **Thomas C. Montoya** and **Tatiana D. Engelmann**

Pregenzer, Baysinger, Wideman & Sale, PC

Southwest Super Lawyers: **Nell Graham Sale** (estate planning and probate)

Southwest Rising Stars: **Erin E. Wideman** (estate planning and probate)

In Memoriam

Charles Nachman Glass died on Nov. 22, 2016. He is survived by his best friend and wife of 60 years, Sydney; two sons Dr. Louis Glass of Phoenix, Phillip Glass, an instructor at the University of New Mexico; daughter-in-law Dr. Theresa Grebe of Phoenix; and two grandchildren Amanda Helen Glass and Benjamin Karl Glass of Phoenix. Glass was born in Milwaukee, Wis., but moved to Chicago when he was 7 years old when his father, Ben Z. Glass, became executive secretary of District 6, B'nai B'rith, a position he held for more than 30 years. Growing up in Chicago, Glass graduated from Nicholas Senn High School in 1950 and began his college education at Northwestern University in Evanston, III. After two years at Northwestern, he transferred to the University of Illinois at Champaign-Urbana where he met his life mate at Hillel. He graduated *summa cum laude* from UI in 1954 with a bachelor's degree in economics. He continued his post graduate work at the University of Michigan Law School. In 1956, he and Sydney married the day after she graduated from Roosevelt University. Glass passed the Michigan bar exam prior to his graduation from law school under a special provision in Michigan's Korean War Bill. Graduating in June 1957, he began the practice of law in Detroit. On Jan. 3, 1958 his application for a waiver of his 4F status was approved and he was inducted into the U.S. Army as a first lieutenant in the Judge Advocate Corp. He was, under the regulations then in effect, sent to Fort Bening, Georgia for basic training as a Platoon leader. During one night maneuvers class, he asked if there were any snakes in the area. This singled him out (it being a cold winter night and snakes being cold blooded) and he was assigned to White Sands Missile Range. He arrived there and was immediately assigned the job of Range Safety Officer as well as prosecutor, defense counsel and legal aid attorney. He passed the New Mexico bar exam in 1959 and was released from active duty in January 1961.

Robert Riggs Nordhaus died on Dec. 24, 2016, at his home in Washington, D.C. at the age of 79 from complications of prostate cancer. A 1963 graduate of Yale Law School, Nordhaus helped craft much of the groundbreaking federal energy and environmental legislation of the 1970s and served as general counsel of the Department of Energy from 1993 to 1997. The son of a World War II ski trooper, Nordhaus spent his free time skiing the mountains of his native New Mexico, on the hiking trails of Europe and sailing the creeks and inlets of the Chesapeake tidewater region. His friends and family will sorely miss his keen intelligence, sly sense of humor and enormous decency. He is survived by his wife of 52 years, Jean; son Ted; daughter Hannah; and two grandchildren.

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@nmbar.org.

Legal Education

May

5 **Animal Law Section Legislative Roundup 2017**
2.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Lawyer Ethics and Client Development**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Charitable Estate Planning—What Opportunities Am I Missing?**
2.5 G
Live Seminar, Santa Fe
St. Vincent Hospital Foundation
505-913-5209

9 **Undue Influence and Duress in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Taming New Mexico**
1.0 G
Live Seminar
U.S. District Court, District of New Mexico
info@corazonevents.com

12 **Ethics of Co-Counsel and Referral Relationships**
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Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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Center for Legal Education of NMSBF
www.nmbar.org

18 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
www.wilcoxlawnm.com

19 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **NM DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics in Discovery Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Gun Wills and Trusts—and Preventing Executor Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Living with Turmoil in the Oil Patch: What It Means to New Mexico (2016)**
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **27th Annual Appellate Practice Institute (2016)**
6.4 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethics and Artificial Intelligence in Law Practice Software and Tools**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1–3 **2017 Jackrabbit Bar Conference**
7.8 G
Live Seminar, Santa Fe
State Bar of New Mexico
www.nmbar.org/nmstatebar/JBC.aspx

2 **Drafting Employee Handbooks**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Ethics in Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

7 **2017 Ethics in Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Disciplinary Process (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Avoiding Discrimination in the Form I-9 or E-Verify (2017)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues of Social Media and Technology in the Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Supervising Other Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

22 **Lawyer Ethics and Credit Cards**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Decanting and Otherwise Fixing Broken Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Copy That! Copyright Topics Across Diverse Fields (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Best and Worst Practices in Ethics and Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective April 21, 2017

PUBLISHED OPINIONS

No. 34506	2nd Jud Dist Bernalillo CR-12-408, STATE v K LEWIS (affirm)	4/19/2017
No. 34610	6th Jud Dist Grant DM-13-114, C TOMLINSON v D WEATHERFORD (reverse and remand)	4/19/2017
No. 35853	6th Jud Dist Grant DM-13-114, C TOMLINSON v D WEATHERFORD (reverse and remand)	4/19/2017
No. 34146	2nd Jud Dist Bernalillo CR-12-1217, STATE v L SALAS (affirm)	4/20/2017
No. 34381	2nd Jud Dist Bernalillo CR-12-1217, STATE v L SALAS (affirm)	4/20/2017
No. 34875	2nd Jud Dist Bernalillo CR-12-1217, STATE v L SALAS (affirm)	4/20/2017
No. 34876	2nd Jud Dist Bernalillo CR-12-1217, STATE v L SALAS (affirm)	4/20/2017
No. 35472	13th Jud Dist Sandoval JQ-13-11, CYFD v WILLIAM C (affirm)	4/21/2017

UNPUBLISHED OPINIONS

No. 35881	2nd Jud Dist Bernalillo JQ-12-84, CYFD v MANUEL T (affirm)	4/17/2017
No. 34791	AD AD SWB-14-19, CONCERNED CITIZENS v ENVIRONMENT DEPT (affirm)	4/18/2017
No. 35580	5th Jud Dist Eddy CR-15-114, STATE v R GONZALEZ (affirm)	4/18/2017
No. 36046	12th Jud Dist Otero CV-13-98, J BURRELL v S SHIPTON (vacate and remand)	4/18/2017
No. 34953	WCA-13-4004, G DIAZ v WATSON CONSTRUCTION (dismiss)	4/18/2017
No. 35624	11th Jud Dist San Juan CR-14-1242, STATE v D PAGE (affirm)	4/18/2017
No. 36019	5th Jud Dist Chaves CV-15-137, L RENTERIA v ROSWELL LITERACY (affirm)	4/18/2017
No. 35718	1st Jud Dist Santa Fe LR-15-16, CITY OF SANTA FE v G SCHIRMER (affirm)	4/19/2017
No. 35924	12th Jud Dist Otero CR-14-362, STATE v F OCHOA (affirm)	4/19/2017
No. 36010	9th Jud Dist Curry DM-14-302, K DAVIS v D DAVIS (reverse)	4/19/2017
No. 35995	1st Jud Dist Santa Fe DV-16-468, D C DE BACA v B CATANACH (dismiss)	4/19/2017
No. 34727	2nd Jud Dist Bernalillo CV-08-9954, DEUTSCHE v C SLADE (reverse)	4/20/2017
No. 34868	3rd Jud Dist Dona Ana CV-12-2494, A VALLES v C ORTIZ (affirm)	4/20/2017
No. 35345	12th Jud Dist Otero CR-14-16, STATE v B STOTTS (reverse and remand)	4/20/2017
No. 35559	2nd Jud Dist Bernalillo CR-13-3218, STATE v S ANAYA (affirm)	4/20/2017
No. 35846	6th Jud Dist Hidalgo DM-15-6, D TURLEY v T WHETTEN (affirm)	4/20/2017
No. 35372	6th Jud Dist Grant CV-13-299, C BAILEY v R BRASIER (dismiss)	4/20/2017
No. 35900	8th Jud Dist Union LR-6-2, STATE v P HINDS (affirm)	4/20/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated April 20, 2017

Clerk's Certificate of Address and/or Telephone Changes

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective May 3, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Procedure for the Municipal Courts		
8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
Criminal Forms		
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Children's Court Rules and Forms		
10-166	Public inspection and sealing of court records	03/31/2017
Rules of Appellate Procedure		
12-314	Public inspection and sealing of court records	03/31/2017

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

In the Supreme Court of the State of New Mexico

April 24, 2017

No. 17-8300-004

In the Matter of the Amendment of Rule 12-307.2 NMRA of the Rules of Appellate Procedure, Rules 17-202 and -301 NMRA of the Rules Governing Discipline, and Rule 27-104 NMRA of the Rules Governing Review of Judicial Standards Commission Proceedings

Order

WHEREAS, this matter came on for consideration by the Court upon its own motion to implement electronic filing and service in certain proceedings in the Supreme Court through amendments to Rule 12-307.2 NMRA of the Rules of Appellate Procedure, Rules 17-202 and 17-301 NMRA of the Rules Governing Discipline, and Rule 27-104 NMRA of the Rules Governing Review of Judicial Standards Commission Proceedings, and the Court being sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that the amendment of Rules 12-307.2, 17-202, 17-301, and 27-104 NMRA is APPROVED;

IT IS FURTHER ORDERED that voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017, under the above-reference amendments;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective for all cases pending or filed on or after July 1, 2017**; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the *Bar Bulletin* and *New Mexico Rules Annotated*.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of April, 2017.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

Rules of Appellate Procedure

12-307.2. Electronic service and filing of papers.

A. **Definitions.** As used in these rules[:]

(1) "electronic transmission" means email or other transfer of data from computer to computer other than by facsimile transmission; [~~and~~]

(2) "document" includes the electronic representation of pleadings and other papers but does not include a record proper filed under Rule 12-209 NMRA, a transcript filed under Rule 12-211 NMRA, or an exhibit filed under Rule 12-212 NMRA; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by attorneys to file and serve documents by electronic transmission in Supreme Court or Court of Appeals proceedings.

[~~B. **Service by electronic transmission.** Any document required to be served by Paragraph B of Rule 12307 may be served on a party or attorney by electronic transmission of the document if the party or attorney has:~~

~~listed an email address on a paper filed with the court in the action; or~~

~~agreed to be served with papers by email.~~

~~Electronic service is accomplished when the transmission of the paper is successfully completed. If within two (2) days after service by electronic transmission, a party served notifies the sender of the electronic transmission that the paper cannot be read, the paper shall be served by any other method authorized by Rule 12307 designated by the party to be served.~~

~~C. **Service by electronic transmission by the court.** The court may serve any document by electronic transmission to an attorney or party pursuant to Paragraph B of this rule.~~

~~D. **Filing by electronic transmission.** Documents may be filed with the court by electronic transmission in accordance with this rule if:~~

~~(1) the Supreme Court has adopted technical specifications for electronic transmission; and~~

~~(2) the court in which documents are filed by electronic transmission has complied with the technical specification for electronic transmission adopted by the Supreme Court.~~]

B. **Filing by electronic transmission authorized in the Supreme Court only; mandatory registration for attorneys.**

(1) In any proceeding in the Supreme Court, the filing of documents by electronic transmission through the EFS is mandatory for any party represented by an attorney, which includes attorneys who represent themselves. The filing of documents by electronic transmission in the Court of Appeals is not currently authorized.

(2) Self-represented parties are prohibited from filing documents by electronic transmission and shall continue to file documents through the other methods authorized by the Rules of Appellate Procedure.

(3) Parties represented by attorneys shall file documents by electronic transmission even if another party to the action is Self-represented or is exempt from electronic filing under Paragraph M of this rule.

(4) Unless exempted under Paragraph M of this rule, for any case pending or filed in the Supreme Court on or after the effective date of this rule, the following attorneys shall register with the EFS:

(a) any attorney required to file documents by electronic transmission under this rule; and

(b) any attorney who is deemed to have entered an appearance under Rule 12-302(B) NMRA and who has not withdrawn in accordance with Rule 12-302(C) NMRA.

(5) Every registered attorney shall provide a valid, working, and regularly checked email address for the EFS. The Court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Filing fees; no fees charged for use of the EFS; non-electronic payment of docket fees required; dismissal for untimely payment of docket fee.**

(1) Except for the payment of any docket fee required under the Rules of Appellate Procedure, no other fees shall be charged for the filing or service of documents by electronic transmission through the EFS.

(2) Payments currently cannot be accepted by the Supreme Court through the EFS or by other electronic payment methods.

(3) Notwithstanding any other provision in these rules requiring the payment of a docket fee at the time a document is filed, any docket fee required under the Rules of Appellate Procedure for initiating a case in the Supreme Court through the EFS shall be paid by check no later than five (5) days after the attorney is notified through the EFS that the case has been accepted for filing.

(4) A check for payment of a docket fee under this paragraph shall include a notation providing the docket number of the case to which the payment applies.

(5) Failure to timely pay the docket fee as required under Subparagraph (3) of this paragraph may, on the Court's own motion, result in the dismissal of the case without prejudice to a timely motion for reinstatement filed under Subparagraph (6) of this paragraph.

(6) A motion for reinstatement of any case dismissed without prejudice under Subparagraph (5) of this paragraph may be filed within fifteen (15) days after the date of the dismissal order provided that payment of the docket fee is delivered to the Court clerk on or before the date that the motion for reinstatement is submitted for filing through the EFS.

(7) A motion for reinstatement may be granted on a showing of good cause, and any proceeding reinstated under the provisions of this subparagraph shall be deemed initiated on the date that the proceeding was originally filed.

D. **Service by electronic transmission.**

(1) Any document required to be served by Rule 12307(B) NMRA may be served on a party or attorney by electronic transmission of the document if

(a) the attorney for the party to be served has registered with the EFS under this rule or Rule 1-005.2 NMRA;

(b) the party or attorney has agreed to be served with documents by email; or

(c) the party or attorney has listed an email address on a paper filed with the Court.

(2) Documents filed by electronic transmission through the EFS may be served by an attorney through the EFS or may be served through other methods authorized by this rule, Rule 12307 NMRA, or Rule 12307.1 NMRA.

(3) Electronic service is accomplished when the transmission of the document is completed. If within two (2) days after service by electronic transmission, a party served by electronic transmission notifies the sender of the electronic transmission that the document cannot be read, the document shall be served by any other method authorized by Rule 12307 NMRA as designated by the party to be served.

(4) Proof of service by a party or attorney shall be in the form of written acknowledgment of service by the person served, certificate of the attorney making service, or affidavit of any other person and shall state the following:

(a) the name of the person who sent the document;

(b) the date of service and email address of the sender and recipients; and

(c) a statement that the document was served by electronic transmission and that the transmission was successful.

(5) The Court shall serve all written court orders and notices on the parties unless otherwise ordered by the Court. The Court may file documents before serving them on the parties. The Court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule or Rule 1-005.2 NMRA and to any other party or attorney who has agreed to receive documents by electronic transmission or who has listed an email address on a document filed with the Court. For documents served by the Court, proof of service shall be in the form of a certificate of the Court clerk, which shall state the date of service and identify the parties served but need not indicate the method of service. For purposes of Rule 12308(B) NMRA, documents served by the Court shall be deemed served by mail, regardless of the actual manner of service, unless the Court clerk's certificate of service unambiguously states otherwise.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the [~~court~~] Court it will be considered filed on the immediately preceding business day of the [~~court~~] Court. For any questions of timeliness, the time and date registered by the [~~court's~~] Court's computer will be determinative. For purposes of filing by electronic transmission only, notwithstanding rejection of an attempted filing through the EFS or its placement into an error queue for additional processing, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting any filing deadline.

G. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 12302 NMRA. Attorneys filing by electronic transmission thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

(3) All documents filed by electronic transmission that are signed by the Court shall be scanned or otherwise electronically produced so that the original signature is shown.

H. **Format of documents; protected personal identifier information; EFS user guide**. All documents filed by electronic transmission shall be formatted in accordance with the Rules of Appellate Procedure and shall comply with all procedures for protected personal identifier information under Rule 12314 NMRA. The Court may make available a user guide on its website to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the Court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a Self-represented party files a paper document with the Court, the Court clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The Court clerk shall retain such paper documents as long as required by applicable statutes and Court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The Court clerk's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph F of this rule;

(3) the document title;

(4) the name of the EFS service provider;

(5) the email address of the person or entity filing the document; and

(6) the page count of the filed document.

[~~G. **Demand for original.** A party shall have the right to inspect and copy any document that has been filed or served by electronic transmission if the document has a statement signed under oath or affirmation or penalty of perjury.~~

~~H. **Proof of service by electronic transmission.** Proof of service shall be in the form of written acknowledgment of service by the person served, certificate of the clerk of the court or of the attorney making service or affidavit of any other person. It shall state:~~

~~(1) the name of the person who sent the document;~~

~~(2) the date of service and email address of the sender and recipients; and~~

~~(3) a statement that the document was served by electronic transmission and that the transmission was successful.~~]

[~~I~~]K. **Conformed copies.** Upon request of a party, the Court clerk shall stamp additional copies provided by the party of any paper filed by electronic transmission. A filestamped copy of a document filed by electronic transmission can be obtained through the EFS. Certified copies of a document may be obtained from the Court clerk.

L. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

M. **Requests for exemptions from electronic filing requirement.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from the mandatory electronic filing requirements under this rule. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule. An exemption granted under this subparagraph remains in effect for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format with the Court. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The Court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents by electronic transmission without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

[Approved, effective July 1, 1997; as amended by Supreme Court Order No. 068300031, effective January 15, 2007; as amended by Supreme Court Order No. 17-8300-004, effective for all cases pending or filed on or after July 1, 2017.]

Disciplinary Rules

17-202. Registration of attorneys.

A. **Registration statement.**

(1) Within three (3) months of admission to practice in this state, and, thereafter, on or before January 1 of every year,

every attorney admitted to practice in this state shall submit to the state bar and to the clerk of the Supreme Court, on forms provided by the state bar and approved by the Supreme Court, a registration statement setting forth the following:

(a) the attorney's address of record[,];

(b) the street address where client files or other materials related to the attorney's practice are located;

(c) the attorney's telephone number of record;

(d) the attorney's email address of record; and

(e) such other information as the Supreme Court may from time to time direct.

(2) The attorney's "address of record" is the attorney's official address for service of notices, pleadings, papers and information. The "address of record" is a public record and upon request will be provided to any member of the public. The attorney may also maintain a separate address with the state bar for purposes of publications of the state bar and solicitations.

(3) In addition to the annual registration statement, every attorney shall file a supplemental statement with the state bar and with the clerk of the Supreme Court showing any change in the information previously submitted within thirty (30) days of such change. Upon the request of any attorney providing a street address under the provisions of this rule that is not the "address of record," the street address shall not be disclosed to any member of the public.

(4) The attorney's email address of record may be used in the Supreme Court's electronic filing system in accordance with Rule 12-307.2 NMRA for the electronic service of any documents filed in the Supreme Court under the Rules Governing Discipline.

B. **Certificate of compliance.** In order to enable an attorney to demonstrate compliance with the requirements of Paragraph A of this rule, upon request of an attorney, the clerk of the Supreme Court shall issue a certificate of [~~good standing~~] compliance to an attorney who has complied with the annual registration requirements of these rules.

C. **Failure to file.** Any attorney who fails to file the registration statement, or supplement thereto, in accordance with the requirements of Paragraph A of this rule, may be summarily suspended and barred from practicing law in this state until the attorney has complied therewith.

D. **Inactive attorneys.** An attorney who has retired, or is not engaged in practice as provided in Paragraph A of this rule, may petition the Board of Bar Commissioners on forms provided by the state bar that the attorney desires to assume inactive status and to discontinue the practice of law. Upon the receipt of such petition by the Board of Bar Commissioners, the attorney shall no longer be eligible to practice law in any jurisdiction pursuant to the attorney's New Mexico license, except as provided by the Legal Service Provider Limited Law License under Rule 15-301.2 NMRA and as an emeritus attorney as authorized under Rule 24-111 and shall continue to file an annual inactive status registration statement with the state bar. The attorney will be relieved from the payment of the fee imposed by Rule 17203 NMRA, and Rule 17A-003 NMRA, but is required to pay the inactive status fee set by the Board of Bar Commissioners, provided, however, that an emeritus attorney as authorized under Rule 24-111 shall not be required to pay the inactive status fee. Upon the filing of a petition to assume inactive status, the state bar shall notify the Supreme Court of the filing of the petition. Upon receipt of the notice, the Supreme Court shall change the membership status of the attorney on the official roll of attorneys effective as of the date on the petition submitted to the Board of Bar Examiners.

E. **Reinstatement of inactive attorneys.** The inactive attorney may petition for reinstatement on a form prescribed by the Board of Bar Examiners and may be granted reinstatement by the Supreme Court upon recommendation of the Board of Bar Examiners as provided in Rule 15-302(B) and (C) NMRA. A petition for reinstatement shall be granted as a matter of course, unless the Board of Bar Examiners shall determine for good cause that the petition should be denied, in which event the applicant shall have the right to a hearing as provided in Rule 15301 NMRA of the Rules Governing Admission to the Bar. Prior to reinstatement, the Board of Bar Examiners shall inquire of the Disciplinary Board if it knows of any reason why the attorney should not be reinstated.

F. **Service.** The Supreme Court or Disciplinary Board may serve any order, pleading, or other matter on an attorney by mailing or emailing a copy of such order, pleading, or other matter to the attorney at the address of record or email address of record shown on the latest registration statement on file with the Supreme Court and this shall constitute notice as required by these rules.

G. **Applicability of rule.** The provisions of this rule shall not apply to justices of the Supreme Court, judges of the Court of Appeals, district judges, magistrate judges, metropolitan judges, or municipal judges who are prohibited by statute or ordinance from practicing law.

[As amended, effective January 1, 1987; January 1, 1997; November 30, 2004; as amended by Supreme Court Order 06830032, effective January 15, 2007; as amended by Supreme Court Order No. 16-8300-035, effective for status changes on or after December 31, 2016; as amended by Supreme Court Order No. 17-8300-004, effective for all cases pending or filed on or after July 1, 2017.]

Disciplinary Rules

17-301. Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.

A. **Application of rules.** This article governs the procedure in disciplinary proceedings before the New Mexico Supreme Court, the Disciplinary Board and its hearing committees and reviewing officers.

B. **Application of Rules of Civil Procedure and Rules of Appellate Procedure**. Except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by these rules, the Rules of Civil Procedure for the District Courts of New Mexico shall be used in formal disciplinary proceedings. Except where clearly inapplicable to disciplinary proceedings or inconsistent with or otherwise provided for by these rules or by Court order, the Rules of Appellate Procedure shall apply to documents filed in the Supreme Court.

C. **Service.** Except as otherwise provided in these rules, the specification of [~~changes~~] charges, all pleadings, notices, motions, orders, or other papers required to be served may be served on a party unless the party is represented by an attorney in which case service may be upon the attorney. Service upon an

attorney or upon a party shall be made by delivering a copy to the attorney or party[~~or~~], by mailing it to the attorney or party at the address listed on the most recent registration statement filed under Rule 17202 NMRA or by electronic transmission in accordance with Rule 12-307.2 NMRA to the email address of record listed on the most recent registration statement filed under Rule 17-202 NMRA. "Delivering [~~of~~] a copy" [~~within~~] as used in this rule means handing it to the attorney or to the party; leaving it at the attorney's or party's office with the attorney's or party's clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion therein. Service by mail is complete upon mailing and shall constitute notice as required by these rules. Service by electronic transmission is complete as defined by Rule 12-307.2 NMRA.

D. **Proof of service.** Except as otherwise provided in these rules or by order of the Supreme Court or Disciplinary Board, proof of service of any pleading, motion, order, or other paper required to be served shall be made by the certificate of the attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the Disciplinary Board or with the Supreme Court, as appropriate, or endorsed on the pleading, motion, or other paper required to be served.

E. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended by Supreme Court order No.13-8300-045, effective December 31, 2013; as amended by Supreme Court Order No. 17-8300-004, effective for all cases pending or filed on or after July 1, 2017.]

Judicial Standards Commission

27-104. Filing and service.

A. **Filing.** Papers required or permitted to be filed in the Supreme Court shall be filed with the clerk. Filing by mail is not complete until actual receipt. Filing by electronic transmission in accordance with Rule 12-307.2 NMRA is mandatory for all attorneys filing papers under these rules except for judges representing themselves in a proceeding under these rules.

B. **Filing under seal before the conclusion of formal proceedings.** To protect the privileged and confidential nature of proceedings that are pending before the Commission as required by Article VI, Section 32 of the New Mexico Constitution, any papers filed in the Supreme Court before the conclusion of formal proceedings in the Commission shall be automatically sealed from public access and shall not be disclosed to anyone other than Court personnel, the parties to the proceeding, and their counsel, without further order of the Court. For purposes of this paragraph, the conclusion of formal proceedings occurs when the Commission holds an evidentiary hearing and issues findings, conclusions, and a recommendation for removal, retirement, or discipline based on that evidence. Accordingly, petitions for temporary suspension and responses filed pursuant to Rule 27201 NMRA, stipulated petitions for discipline, and any request for interim relief under Paragraph E of Rule 32 of the Judicial Standards Commission Rules filed before conclusion of formal proceedings and submission to the Court of the Commission record pursuant to Article VI, Section 32, are subject to the automatic sealing provisions of this paragraph. The contents, the fact of filing, and any other information about any request for temporary suspension, stipulated discipline, or interim relief shall remain confidential until the Court determines that confidentiality is no longer required and enters an unsealing order on its own initiative or grants a motion to unseal pursuant to Paragraph I of Rule 12-314 NMRA. The Clerk of the Court shall open the case with the Commission's assigned inquiry number as the style of the case and docket pleadings only as sealed pleadings. Any papers filed under the provisions of this paragraph shall be clearly labeled "Filed Under Seal". In the event the Court rejects the stipulated discipline or denies the request for interim relief, the documents under seal shall be returned to the Commission and shall not become public record. Any other requests to seal papers filed with the Court shall be governed by the provisions of Rule 12-314 NMRA of the Rules of Appellate Procedure. Any person or entity who knowingly discloses any material obtained from a court record sealed pursuant to this rule may be held in contempt or subject to other sanctions as the Court deems appropriate.

C. **Service of all papers required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall be served by the party on all other parties to the proceeding. Service shall be upon the attorney of record of the party to be served or upon the party if the party has no attorney. Service may be made by either personal service or by mail. Except for service upon a judge who is self-represented, service by electronic transmission is also permitted in accordance with the requirements of Rule 12-307.2 NMRA. Service shall be made at or before the time of filing the paper in the Supreme Court.

D. **Service on incompetent persons.** If there is an issue of the mental competency of a judge who is not represented by counsel, service shall be made upon a guardian ad litem appointed to represent the judge in the proceedings.

E. **Proof of service.** Proof of service, in the form of written acknowledgment of the party to be served or certificate of the clerk of the court or of the attorney making service, or affidavit of any other person, shall state the name and address of counsel on whom service has been made, or the name and address of the party if the party has no attorney. Such proof of service shall be filed with the papers filed or immediately after service is effected. [Approved, effective April 17, 1996; as amended by Supreme Court Order 098300022, effective September 4, 2009; as amended by Supreme Court Order No. 11-8300-026, effective May 4, 2011; as amended by Supreme Court Order No. 17-8300-004, effective for all cases pending or filed on or after July 1, 2017.]

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-007

No. S-1-SC-34287 (filed June 16, 2016)

HAMAATSA, INC., a New Mexico not-for-profit corporation,
Plaintiff-Respondent,
v.
PUEBLO OF SAN FELIPE, a federally recognized Indian tribe,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
JOHN F. DAVIS, District Judge

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Opinion

Barbara J. Vigil, Justice

I. INTRODUCTION

{1} The Pueblo of San Felipe (Pueblo) appeals from an opinion of the New Mexico Court of Appeals declining to extend the Pueblo, an Indian tribe, immunity from suit. Because it is settled federal law that sovereign Indian tribes enjoy immunity from suit in state and federal court—absent waiver or abrogation by Congress—we reverse the Court of Appeals with instructions for the district court to dismiss the suit for lack of subject matter jurisdiction.

II. BACKGROUND

{2} Hamaatsa, Inc. (Hamaatsa) is a nonprofit New Mexico corporation that owns land in Sandoval County. Adjacent to Hamaatsa's property is land owned in fee by the Pueblo, a federally recognized Indian tribe organized under the Indian Reorganization Act, 25 U.S.C. § 476 (2012). The Bureau of Land Management (BLM) conveyed to the Pueblo, in fee simple, the land at issue on December 13, 2001. The property, albeit adjacent and contiguous with reservation land, is not yet held in trust by the federal government as part of the Pueblo's reservation. The United States Department of the Interior, Bureau of Indian Affairs (BIA), awaits resolution of the instant dispute prior to taking the fee-simple parcel into trust. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 11, n.3, 310 P.3d 631, *cert. granted*, 2013-NMCERT-009 (No. 34,287, Sept. 20, 2013) (citing *Hamaatsa, Inc. v. Sw. Reg'l Dir.*, 55 IBIA 132, 132-33 (2012)).

{3} In its 2001 conveyance to the Pueblo, "the BLM reserved 'an easement and right-of-way over, across, and upon a strip of land 40 feet wide along the existing road . . . identified in NMNM 95818, for the full use as a road by the United States for public purposes.' " Such roads are variously called "932 Roads" or "R.S. 2477 Roads,"[1] and throughout this opinion we refer to the NMNM 95818 easement as "Northern R.S. 2477." On September 19, 2002, the BLM purported to quitclaim its interest in the Northern R.S. 2477 to the Pueblo. Access to Northern R.S. 2477 forms the basis of Hamaatsa's December 30, 2010, complaint against the Pueblo.

[1]Referencing a statutory mechanism for creating public roads, Rev. Stat. 2477, Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 [hereinafter R.S. 2477].

{4} Hamaatsa uses Northern R.S. 2477 on the Pueblo's property to access its land. In August 2009 Hamaatsa received a letter from the then Governor of the Pueblo stating that Hamaatsa had no legal right of access across the Pueblo's property and that Hamaatsa's use of Northern R.S. 2477 was a trespass. Hamaatsa continued to use the road and filed suit requesting that the district court declare that the Pueblo cannot so restrict Hamaatsa's use of the road.

{5} Specifically, Hamaatsa's complaint alleges that the land over which Northern R.S. 2477 traversed was owned by the BLM since at least 1906 and the road was constructed and used by the public from at least 1935 until the date of Hamaatsa's complaint. Further, Northern R.S. 2477 was used by Hamaatsa and its predecessors in interest to access its property, and has been a public road that vested in the public as a state highway under R.S. 2477 when it was not retained by the United States since at least 1935. Given the aforementioned quitclaim deed, the Pueblo argues that there is no public road across its property that Hamaatsa may lawfully access. The Pueblo further claims that Northern R.S. 2477 is but one point of access to Hamaatsa's property.

{6} The Pueblo filed a motion to dismiss Hamaatsa's complaint pursuant to Rule 1-012(B)(1) NMRA, asserting that its sovereign immunity deprived the district court of subject matter jurisdiction. After a hearing on the motion to dismiss the district court denied the Pueblo's motion, reasoning that the action was an *in rem* proceeding not seeking damages, to which sovereign immunity was no bar. The district court granted the Pueblo leave to seek an interlocutory appeal which was then granted by the Court of Appeals on July 5, 2011. The district court stayed all proceedings pending resolution of the appeal.

{7} By a July 23, 2013, opinion the Court of Appeals affirmed the district court. *Hamaatsa,* 2013-NMCA-094, ¶ 1. Though, seeing "no reason to address the issue of in rem versus in personam," the majority refused to recognize tribal sovereign immunity for different reasons. *Id*. ¶ 10. It instead focused on the fact that "the Pueblo offered no evidence of any property or governance interests whatsoever in the road or that the road, concededly a state public road, would threaten or otherwise affect its sovereignty." *Id*. ¶ 11. Noting further that the Pueblo did not present any proof that "a district court's declaration . . . [that the road is public] would in any way undermine the Pueblo's sovereignty or sovereign authority, infringe on any right of the Pueblo to govern itself or control its internal relations, or otherwise adversely affect its governmental, property, or treasury interests," *id.*, the Court of Appeals held that without such evidence there was "no justifiable basis on which the Pueblo can draw immunity from inherent sovereignty," *id*. ¶ 13.

{8} The Court of Appeals additionally held that "the issue in this case is a matter of state law, over which the district court has jurisdiction," *id.* ¶ 14, based on the fact that " '[w]hether an easement—a public road at that—exists across land held in fee simple is clearly an issue of state law,' " *id*. ¶ 14 (quoting *Jicarilla Apache Tribe v. Bd. of Cty. Comm'rs*, 1994-NMSC-104, ¶¶ 10-19, 118 N.M. 550, 883 P.2d 136) (alteration in original). The opinion reasoned that "to permit a sovereign immunity bar at this facial attack [Rule 1-012(B)] stage of the proceedings would mean that, based on nothing more than the bare assertion of sovereign immunity," a pueblo could acquire land anywhere in New Mexico, subject to a public road, and "immediately deny the motoring public and all neighboring property owners access." *Id*. ¶ 16. The Court of Appeals went on to cite several United States Supreme Court cases it claimed imply that tribes should no longer be protected by sovereign immunity, including *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (*Potawatomi I*), 498 U.S. 505, 514 (1991) (Stevens, J., concurring) (stating that the "doctrine of sovereign immunity is founded upon an anachronistic fiction"), and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757-58 (1998) (providing that "[t]he rationale . . . [for sovereign immunity] can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"). *Hamaatsa*, 2013-NMCA-094, ¶¶ 17-19. Ultimately, the majority of the Court of Appeals panel concluded that *Kiowa* "read fully, should stimulate analysts to reasonably view the case now before this Court as one beyond the periphery of immunity, requiring affirmance of the district court's denial of the Pueblo's motion to dismiss." *Hamaatsa*, 2013-NMCA-094, ¶ 19. The Court of Appeals did just that, affirming the district court's denial of the Pueblo's motion to dismiss. *Id*. ¶ 22.

{9} A dissenting view opined that the Pueblo's motion to dismiss should have been granted based on sovereign immunity. *Id*. ¶ 24 (Wechsler, J., dissenting). Apart from its analysis of the merits, the dissent disagreed with the majority's "discussion of: (1) *Kiowa* . . ., (2) cases that do not involve tribal sovereign immunity, (3) the equities of the case, and (4) the timing of the Pueblo's motion." *Hamaatsa*, 2013-NMCA-094, ¶ 25 (Wechsler, J., dissenting).

{10} The dissent first noted that "tribal sovereign immunity is a matter of federal law and is not subject to diminution by the state." *Id*. ¶ 26 (Wechsler, J., dissenting) (citation omitted). It acknowledged that "there are issues concerning the scope of tribal sovereign immunity when tribes . . . engage in activities that extend beyond the original purpose of the doctrine to safeguard tribal self-governance." *Id*. ¶ 27 (Wechsler, J., dissenting) (citation omitted). However, while the United States Supreme Court in *Kiowa* noted its misgivings toward the doctrine, the dissent noted that *Kiowa* nonetheless applied sovereign immunity. *Hamaatsa*, 2013-NMCA-094, ¶ 27 (Wechsler, J., dissenting) (citing *Kiowa*, 523 U.S. at 756-60). And, because *Kiowa* applied sovereign immunity for tribal activity occurring off-reservation, much like the activity at issue in the instant case, the dissent determined that the Court of Appeals was "not in a position to act differently." *Hamaatsa*, 2013-NMCA-094, ¶ 27 (Wechsler, J., dissenting).

{11} Next, the dissent disagreed with the majority's application of cases involving tribal sovereign authority, as distinguished from tribal sovereign immunity. *Id*. ¶¶ 28-29 (Wechsler, J., dissenting). It highlighted that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id*. ¶ 29 (Wechsler, J., dissenting) (quoting *Kiowa*, 523 U.S. at 755). Thus, "cases involving a tribe bringing suit to preclude a municipality from imposing taxes or other local laws 'do not explore the boundaries of a tribe's *sovereign immunity* from suit[, and r]ather, they explore a tribe's *sovereign authority* over purchased lands.' " *Hamaatsa*, 2013-NMCA-094, ¶ 29 (Wechsler, J., dissenting) (alteration in original) (quoting *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶ 18, 149 N.M. 234, 247 P.3d 1119).

{12} Third, the dissent pointed out that " 'sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation[, and,] it presents a pure jurisdictional question.' " *Id.* ¶ 30 (Wechsler,

J., dissenting) (alteration in original) (quoting *Armijo*, 2011-NMCA-006, ¶ 13). Although the dissent agreed that Hamaatsa presented a strong equitable argument, it reiterated that this argument "is not relevant to the jurisdictional question before us." *Hamaatsa*, 2013-NMCA-094, ¶ 30 (Wechsler, J., dissenting).

{13} Fourth, the dissent asserted that the timing of the Pueblo's assertion of sovereign immunity in its motion to dismiss is irrelevant. *Id*. ¶ 31 (Wechsler, J., dissenting). It noted that "an assertion that tribal sovereign immunity requires dismissal of a lawsuit is generally raised in a [Rule 1-012(B)(1)] motion," and that "[a] motion under Rule 1-012(B) shall be made before pleading if a further pleading is permitted." *Hamaatsa*, 2013-NMCA-094, ¶ 31 (Wechsler, J., dissenting) (internal quotation marks and citations omitted). It therefore concluded that "the Pueblo's motion was properly before the district court." *Id*. (Wechsler, J., dissenting).

{14} Next, the dissent reached the merits of the Pueblo's motion. *Id*. ¶ 32 (Wechsler, J., dissenting). Analyzing the merits in the terms the district court used in denying the Pueblo's motion, the dissent concluded that the complaint presented an *in rem* proceeding under its modern definition, being an action directed "not *against* the property per se, but rather at resolving the interests, claims, titles, and rights in that propert[y, a]nd it is persons—as individuals, governments, corporations—who possess those interests." *Id*. ¶ 34 (Wechsler, J., dissenting) (quoting *State v. Nunez*, 2000-NMSC-013, ¶ 78, 129 N.M. 63, 2 P.3d 264) (internal quotation marks omitted). Unlike the district court, the dissent concluded that the Pueblo was protected by sovereign immunity because "the doctrine of sovereign tribal immunity applies to an in rem proceeding involving tribally owned property." *Hamaatsa*, 2013-NMCA-094, ¶ 44 (Wechsler, J., dissenting); *see also Oneida Indian Nation of N.Y. v. Madison Cty.* (*Oneida I*), 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("It is of no moment that the . . . suit at issue here is *in rem* . . . [w]hat is relevant is that the [c]ounty is attempting to bring suit against the tribe."), *aff'd by* 605 F.3d 149 (2d Cir. 2010) (*Oneida II*), *vacated and remanded on other grounds by Madison Cty., N.Y. v. Oneida Indian Nation of N.Y.* (*Oneida III*), 562 U.S. 42 (2011) (per curiam).

{15} Finally, the Court of Appeals' dissent asserted that the Pueblo should enjoy sovereign immunity regardless of the type of relief requested by the complaint, be it monetary, declaratory, or injunctive. *Hamaatsa*, 2013-NMCA-094, ¶ 51 (Wechsler, J., dissenting) ("[T]ribal sovereign immunity applies to actions for declaratory and injunctive relief to the same extent that it applies to an action for damages." (citations omitted)). The dissent concluded that the district court should have granted the Pueblo's motion to dismiss based on its sovereign immunity. *Id*. ¶ 56 (Wechsler, J., dissenting).

{16} The Pueblo petitioned this Court for a writ of certiorari. We granted certiorari to resolve whether the Pueblo is immune from Hamaatsa's suit as a sovereign tribal nation, whether the Court of Appeals incorrectly relied on considerations of equity and fairness in considering the Pueblo's immunity from suit, and whether the Court of Appeals misapplied Rule 1-012(B) with respect to the Pueblo's motion to dismiss on sovereign immunity grounds. In this opinion, then, we address first whether the Pueblo is entitled to sovereign immunity from suit; second, whether considerations of equity in light of the nature of a claim should override that protection, requiring us to clarify the distinction between sovereign authority and sovereign immunity; and last, whether a motion to dismiss at this stage of the proceedings is the proper means for asserting the defense of sovereign immunity. For the reasons that follow, we hold that under federal law the Pueblo is immune from suit, absent a waiver of its immunity or congressional authorization of the suit—regardless of the nature of the claim giving rise to the dispute—and can assert its immunity by a Rule 1-012(B)(1) motion to dismiss. We vacate the opinion of the Court of Appeals and remand the case to the district court for dismissal of the Pueblo from Hamaatsa's suit in accordance with this opinion.

III. STANDARD OF REVIEW

{17} "In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews de novo." *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668 (citations omitted); *see also Martinez v. Cities of Gold Casino*, 2009-NMCA-087, ¶ 22, 146 N.M. 735, 215 P.3d 44 ("We review de novo the legal question of whether an Indian tribe . . . possesses sovereign immunity."), *cert. denied*, 2009-NMCERT-007 (No. 31,757, Jul. 15, 2009) (citation omitted).

IV. DISCUSSION

A. Indian Tribes Are Subject to Suit Only Where the Tribe Waives Its Immunity or Congress Explicitly Authorizes Suit

{18} Before discussing whether the Pueblo was entitled to immunity from this lawsuit, it is important to highlight the historical context from which the doctrine of tribal sovereign immunity arose. "Long before the formation of the United States, [t]ribes 'were self-governing sovereign political communities.' " *Michigan v. Bay Mills Indian Cmty.* (*Bay Mills*), ___ U.S. ___, 134 S. Ct. 2024, 2040 (2014) (Sotomayor, J., concurring) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). It is a long held principle that any sovereign has the power to determine the jurisdiction of its own courts, and when it comes to the jurisdiction over a sovereign in a second sovereign's courts, it is generally the law of the second sovereign that governs. *See Kiowa*, 523 U.S. at 760-61 (Stevens, J., dissenting). And, because the tribes were not a party to the Constitutional Convention at which sovereign States mutually ceded aspects of their sovereignty in becoming the United States, the United States Supreme Court has held firm to the canon that tribes thus retain their sovereignty in a fashion distinct from that of the States. *See, e.g.*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (explaining that at the Constitutional Convention there was a "surrender of immunity from suit by sister States," and that "it would be absurd to suggest that the tribes [similarly] surrendered immunity in a convention to which they were not even parties" (citation omitted)). In recognition of as much, tribes retain most of their sovereign powers as is consistent with the controlling federal law, which is generally intended to serve the purpose of promoting tribal economic development and self-sufficiency. *See Kiowa*, 523 U.S. at 757.

{19} Thus, we must acknowledge that "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.' " *Bay Mills*, 134 S. Ct. at 2030 (quoting *Potawatomi I*, 498 U.S. at 509). They retain a unique status as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Yet, as domestic dependent nations, tribes are subject to plenary control by Congress. *Id*. (citations omitted); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (explaining that commerce and treaty clauses, and structure of Constitu-

tion, are basis for "plenary and exclusive" power of Congress); *see generally* F. Cohen, Handbook of Federal Indian Law § 5.01, pp. 383-91 (2012). "Thus, unless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks and citation omitted).

{20} One aspect of traditional sovereignty—thereby retained by tribes, and subject only to congressional abrogation—is common-law immunity from suit. *Santa Clara Pueblo*, 436 U.S. at 58 ("[W]ithout congressional authorization, the Indian nations are exempt from suit." (internal quotation marks and citation omitted)). That immunity, as the United States Supreme Court explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). In light of its import, a tribe's immunity—as a corollary of its sovereignty—can only be qualified by express congressional mandate or waiver. *Bay Mills*, 134 S. Ct. at 2030-31.

{21} Tribal sovereign immunity is the maxim, subject only to the power of a tribe to waive the immunity or Congress's plenary power to regulate the tribes. *Id.*; *Kiowa*, 523 U.S. at 759-60. As a matter of federal law, then, the doctrine of sovereign immunity is protected from an individual state's attempt to abridge or redefine its scope. *Kiowa*, 523 U.S. at 756 ("So tribal immunity is a matter of federal law and is not subject to diminution by the States." (citations omitted)); *Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7.

{22} As stated, the unequivocal precedent of the United States Supreme Court declares only two exceptions to tribal sovereign immunity—the tribes's waiver of immunity or congressional authorization—neither of which exists in the instant case. The Pueblo has chosen not to waive its immunity and affirmatively invokes it as a shield from Hamaatsa's claim. Nor has Congress authorized this type of suit against the Pueblo. Thus, we hold firm to existing federal precedent granting the Pueblo, as a sovereign Indian tribe, immunity from Hamaatsa's suit in state court.

{23} We do pause to note, though, that in some circumstances tribal officers will not enjoy the same immunity from suit as does the tribe itself. *Santa Clara Pueblo*, 436 U.S. at 59 (citing *Ex parte Young*, 209 U.S. 123, 132 (1908)). Under *Ex Parte Young*, "[a] federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4232 (3d ed. 2007) (footnotes omitted). Tribal sovereign immunity is distinct from the Eleventh Amendment's protection of states, but the same rule applies with respect to state and tribal officers. *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008). Tribal officers are not immune from suit in federal court where a "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted).

{24} Although neither waiver nor congressional abrogation exists in the instant case, our analysis does not end here because Hamaatsa further urges this Court to recognize an exception to the doctrine of sovereign immunity in matters pertaining to the public's use and access to public roads located on fee-owned tribal lands without tribal interference. We refrain from carving out such a novel exception because the immunity enjoyed by tribes under federal law is not subject to such diminution. While we reject Hamaatsa's request, we consider it prudent to address the equitable and procedural arguments raised by the parties, as well as the approach taken on these issues by the district court and the majority and dissenting opinions of the Court of Appeals.

B. Proposed Exceptions to the Pueblo's Sovereign Immunity From Suit

{25} Hamaatsa asks this Court to deny the Pueblo's right to sovereign immunity on equitable grounds, stemming from the unfairness that could result from the Pueblo's interference with the public's use of Northern R.S. 2477. Hamaatsa makes these arguments under the premise that its action lies *in rem* as opposed to *in personam*, and that it seeks declaratory relief against the Pueblo, opposed to monetary damages. Courts time and again have sought to alleviate similar claims of inequity resulting from the imposition of sovereign immunity, particularly given the modern increase in tribal land ownership and involvement in the commercial economy. *See, e.g.*, *Hamaatsa*, 2013-NMCA-094, ¶ 19. Such equitable considerations in fact formed the impetus of the Court of Appeals' rationale in denying the Pueblo immunity in state court. But, in doing so, it improperly conflated two interrelated but distinct doctrines—tribal sovereign authority and sovereign immunity. Because unequivocal federal precedent establishes otherwise, it is incumbent upon this Court to first clarify the important distinctions between those two doctrines.

i. Sovereign Authority

{26} Tribal sovereign authority and tribal sovereign immunity are distinct doctrines with different origins and purposes. *Oneida II*, 605 F.3d at 156, *vacated and remanded*, 562 U.S. 42 (2011). Tribal sovereign authority concerns the extent to which a tribe may exercise jurisdictional authority over lands the tribe owns to the exclusion of state jurisdiction. *See id.* Generally, a state has the authority to tax or regulate—i.e., apply state substantive law to—tribal activities occurring within the state and outside reservation lands, as well as to tax or regulate nonmembers activity on Indian fee-owned and reservation lands. *Kiowa*, 523 U.S. at 755 ("We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country."); *Potawatomi I*, 498 U.S. at 515 (holding that Oklahoma may tax cigarette sales by a tribe's store to nonmembers.). And, conversely, a tribe—as a unique entity possessing attributes of sovereignty over both its members and territory—may regulate its own members, and its fee-owned and reservation lands, to the extent necessary to protect tribal self-government and internal relations. *Montana v. United States*, 450 U.S. 544, 564 (1981) ("Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." (citations omitted)). Thus, tribal sovereign authority, the power of a tribe to exert what is necessary to protect self-governance and establish relations amongst its members to the exclusion of state regulation, is inherently distinct from the notion of tribal sovereign immunity—the plenary right to be free from having to answer a suit. As stated by the United States Supreme Court in *Kiowa*, "[t]here is

a difference between the right to demand compliance with state laws and the means available to enforce them." 523 U.S. at 755 (citation omitted). That is, just because a state may, for example, tax cigarette sales by a tribe's store to nonmembers, such authority to tax or regulate has no bearing on the tribe's ultimate immunity from a suit to collect unpaid state taxes. *See Potawatomi I*, 498 U.S. at 512-14.

{27} By excepting the Pueblo from the protections of sovereign immunity the Court of Appeals majority conflated the distinct doctrines of sovereign authority and sovereign immunity. *See Hamaatsa*, 2013-NMCA-094, ¶ 14 (discussing cases regarding tribal power to regulate in the context of its analysis of tribal sovereign immunity). In so doing, it supports its reasoning that the Pueblo was not immune from jurisdiction in the district court by citation to case law that instead concerns an Indian tribe's regulatory and adjudicatory jurisdiction over both its fee-owned and reservation land. *See id.* Its conclusion—essentially that an Indian tribe cannot exercise jurisdiction over conduct on a public roadway crossing land owned in fee by the tribe, and thus the tribe cannot be immune from relevant suit—is at odds with aforementioned controlling federal precedent. "To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. Thus, when it comes to the Pueblo's immunity from the instant suit, *Kiowa* and its progeny control. We now turn to Hamaatsa's remaining arguments, which we reject, because they in part rely upon that improper conflation of sovereign authority and immunity.

ii. *In Rem*

{28} Hamaatsa argued in the district court, as it does now, that due to the *in rem* nature of these proceedings the Pueblo may not invoke its sovereign immunity. The district court denied the Pueblo's motion to dismiss based in part on that argument. However, in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims. We hold that regardless of whether Hamaatsa asserts claims that lie *in rem* or *in personam*, its action against the Pueblo is barred in accordance with federal law. Because tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether Hamaatsa's claim is asserted *in rem* or *in personam*. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) ("Tribal sovereign immunity is a matter of subject matter jurisdiction . . . ." (internal quotation marks and citation omitted)).

{29} Hamaatsa primarily relies on the United States Supreme Court's holding, in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation* (*Yakima*), that the county had authority to tax land owned in fee by the tribe because the county's jurisdiction is "*in rem* rather than *in personam*." 502 U.S. 251, 265 (1992). That case, though, concerned the county's authority "to tax certain 'fee patent' parcels of land, located within the Yakima Reservation"—and not, as Hamaatsa argues, the tribe's amenability to suit in court based on a concept of an *in rem* exception to immunity. *See Cayuga Indian Nation of N.Y. v. Seneca Cty., N.Y.* (*Cayuga*), 890 F. Supp. 2d 240, 247-48 (W.D.N.Y. 2012), *aff'd*, 761 F.3d 218 (2d Cir. 2014). *Yakima*, involving a tribe's sovereign authority, does not govern the instant dispute.

{30} While, as Hamaatsa argues, some state courts have explicitly carved out exceptions to tribal sovereign immunity for *in rem* actions, *see Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 385 (Wash. 1996); *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002-ND-83, ¶ 20, we conclude the United States Supreme Court's opinion in *Bay Mills*—decided subsequent to all cases cited by Hamaatsa—unequivocally bars us from carving out a similar exception. In *Bay Mills* the United States Supreme Court held "we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." 134 S. Ct. at 2030-31 (alteration in original) (quoting *Kiowa*, 523 U.S. at 756). The Second Circuit, for example, understood this avowedly broad pronouncement to require it to refuse to draw novel exceptions to tribal sovereign immunity, such as a distinction between "*in rem* and *in personam* proceedings." *Cayuga*, 761 F.3d at 221 (citing *Bay Mills*, 134 S. Ct. at 2031; *The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."). We choose to follow the Second Circuit, and thereby refuse to recognize an exception to tribal sovereign immunity for *in rem* proceedings in light of the United States Supreme Court's holding in *Bay Mills*. And, since we hold that Hamaatsa's suit is nonetheless barred as a matter of federal law, we need not analyze whether the instant suit constitutes an *in rem* or *in personam* suit. *Contra Hamaatsa*, 2013-NMCA-094, ¶ 32 (Wechsler, J., dissenting).

iii. Type of Relief

{31} The district court also denied the Pueblo's motion to dismiss in part because it found that tribal sovereign immunity was inapplicable to a complaint that did not seek monetary damages. Hamaatsa, pursuing declaratory relief, thus renews that argument here before this Court. We disagree, and instead hold that tribal sovereign immunity is a wholesale bar to suit against a tribe in New Mexico for any relief—be it monetary, declaratory, or injunctive. As a matter of federal law, suit being brought against an Indian tribe is the prerequisite for invocation of the doctrine. *See Bay Mills*, 134 S. Ct. at 2030-31. This conclusion is compatible with the majority of federal courts having occasion to consider this generally undisputed principle of tribal sovereign immunity. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 59 (discussing whether Santa Clara Pueblo had waived its immunity, and holding that "[n]othing on the face of Title I of the [Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for *injunctive or declaratory relief*" (emphasis added)); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) ("Tribal sovereign immunity . . . extends to suits for injunctive or declaratory relief." (citation omitted)); *Citizen Band Potawatomi Indian Tribe of Okla. v. Okla. Tax Comm'n* (*Potawatomi II*), 969 F.2d 943, 948 (10th Cir. 1992) (holding the tribe immune from injunctive relief action); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (noting that tribal immunity "extends to suits for declaratory and injunctive relief" (citation omitted)). The Court of Appeals, similarly, has applied tribal sovereign immunity as a bar in suits seeking non-monetary relief. *Armijo*, 2011-NMCA-006, ¶¶ 1, 5 (holding that the Pueblo of Laguna's immunity from suit barred Armijo's actions against it seeking declaratory relief to quiet title to land).

{32} Hamaatsa still urges this Court to hold otherwise, against the weight of federal precedent. We decline to follow its alternative conclusion emanating from a line of cases from the Fifth Circuit holding that tribal sovereign immunity should be relegated to suits for monetary relief. *See Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d

567, 572 (5th Cir. 2001) (holding that "the district court erroneously concluded that the [t]ribe was entitled to sovereign immunity against the oil companies' claims for equitable relief"); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999) (reasoning that "tribal immunity did not support [a district court's] order dismissing the actions seeking declaratory and injunctive relief"); *see also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 299 n.74 (E.D.N.Y. 2008) (following the Fifth Circuit and distinguishing *Kiowa* by noting that it addressed sovereign immunity from damages actions and not from injunctive relief), *vacated on other grounds*, 686 F.3d 133 (2d Cir. 2012). We reject the rationale propounded by Hamaatsa and adopted in the Fifth Circuit because it is not in accordance with the weight of federal precedent. We consider the arguments made by Hamaatsa to be based upon inferences too tenuous to apply in the instant case and to further conflate the doctrines of sovereign authority and sovereign immunity.

{33} In *TTEA* the Fifth Circuit concluded that since *Kiowa* involved a contracts action for money damages, its broad approval of the doctrine of tribal sovereign immunity in that case ought be relegated to its facts. 181 F.3d at 680-81. The Fifth Circuit relied on this logic once again in *Comstock Oil & Gas*, refusing to apply tribal sovereign immunity as a bar to actions brought for declaratory or injunctive relief. 261 F.3d at 572. We are unpersuaded. An exception to tribal sovereign immunity for equitable or declaratory relief cannot be squared with the more persuasive opinion in *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir.1998). In that case the Tenth Circuit held that a plaintiff's "action [against a tribe] seeking a declaratory judgment that certain tribal water rights were not partitioned" was barred by sovereign immunity. *Id.* at 1262-65. The Tenth Circuit also discussed the tribe's sovereign immunity from other claims made by the Ute Distribution Corporation (UDC), and held that an action by UDC against a tribe for equitable relief was barred by sovereign immunity. *Id*. The Tenth Circuit again rejected a plaintiff's argument to apply a non-monetary relief exception to tribal sovereign immunity in *In re Mayes*, 294 B.R. 145, 154-55 (B.A.P. 10th Cir. 2003). In *Mayes* the appellant argued that since he merely sought declaratory relief, sovereign immunity did not apply. *Id.* at 154. Holding instead that the "[a]ppellant's 'form of relief' argument [was] without merit" because "the nature of the relief sought is irrelevant to the question whether the suit is barred by sovereign immunity," the Tenth Circuit again declined to create an equitable or declaratory relief exception similar to that created by the Fifth Circuit. *Id.* at 155 (citation omitted).

{34} In furtherance of its argument, Hamaatsa advocates for the rationale of a dissenting opinion by Justice Stevens in *Kiowa* claiming that the majority's opinion did not extend to a suit for equitable relief. *See Kiowa*, 523 U.S. at 763-64 (Stevens, J., dissenting). The Tenth Circuit rejected, upon remand, that very same argument after it was made by Justice Stevens in a concurring opinion in *Potawatomi I*, 498 U.S. at 515 (Stevens, J., concurring). *Potawatomi II*, 969 F.2d at 948 n.5. The Tenth Circuit stated that "[w]hile Justice Stevens suggested that 'a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief,' this view was not shared by any other member of the Court and was implicitly rejected [by] the majority . . . ." *Id*. (citation omitted). As such, the Tenth Circuit held that "to the extent [the appellant] asks us to adopt Justice Stevens' position, we reject it." *Id.*

{35} Hamaatsa additionally points to case law governing the inapposite doctrine of sovereign authority in support of an exception to tribal sovereign immunity for non-monetary relief. Citing *City of Sherrill, N.Y. v. Oneida Nation of N.Y.* (*Sherrill*), 544 U.S. 197 (2005), Hamaatsa argues that a claim against a tribe seeking equitable relief is available in spite of sovereign immunity. *Sherrill* does not stand for this proposition. *Sherrill* dealt with the sovereign authority of the Oneida Nation, in a suit brought by the Oneida Nation, as it relates to immunity from property taxation in the contexts of either reservation or fee-owned lands. *Id.* at 211 ("Because the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, [the Oneida Indian Nation] maintained that the properties are exempt from taxation, and accordingly refused to pay the assessed property taxes."). Hamaatsa, in relying on the logic of a subsequent federal district court opinion, points to a cryptic footnote in *Sherrill* which it argues creates an exception to tribal sovereign immunity for equitable relief. *See New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007), *vacated and remanded by* 686 F.3d 133. The *Sherrill* footnote reads "[t]he dissent suggests that, compatibly with today's decision, the [t]ribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. . . . We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Sherrill*, 544 U.S. at 214, n.7 (citation omitted). Yet, the saga of the *Sherrill* litigation did not end there—instead, following *Sherrill*'s order of remand, there were numerous opinions issued back and forth between the Second Circuit and the United States Supreme Court on the issues of sovereign authority and immunity that ultimately culminated in the United States Supreme Court ordering the Second Circuit, per curiam, to determine "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes." *Oneida III*, 562 U.S. at 42 (per curiam). In response, the Second Circuit determined that where the Oneida Nation

> had prevailed on the issue of tribal sovereign immunity from suit before both the district court and this Court, [it] now assures us, as it did the Supreme Court, that it will no longer invoke the doctrine of tribal sovereign immunity from suit as a basis for preventing the Counties from enforcing property taxes through tax sale or foreclosure.

Oneida Indian Nation of N.Y. v. Madison Cty. (*Oneida IV*), 665 F.3d 408, 425 (2d Cir. 2011). Thus, while recognizing that "[t]here may well be, as the Counties urge, remaining disagreements as to whether the [Oneida Indian Nation] possessed tribal sovereign immunity from suit at the time that these cases were before the district court and then on appeal to us in the first instance," the Second Circuit did not go as far as to confirm that the *Sherrill* footnote created an exception to sovereign immunity for non-monetary relief. *Oneida IV*, 665 F.3d at 425. The United States Supreme Court denied a petition for certiorari, ending the litigation relevant to the instant suit based on a waiver of—and not an exception to—sovereign immunity. *Oneida IV*, 665 F.3d 408, *cert denied*, 134 S. Ct. 1582 (2014). We conclude, given the relative weight of authority counseling against this exception—and the unequivocal command of the United States Supreme Court in *Kiowa* and *Bay Mills* that tribal sovereign immunity bars suit

absent abrogation or waiver—the rationale of *Sherrill* is best confined to the doctrine of sovereign authority. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2031 ("[United States Supreme Court precedents] had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to 'defer' to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct." (citation omitted)). Thus, we choose not to recognize such an exception in New Mexico at this time, as it is unsupported by federal law.

iv. Further Equitable Considerations

{36} Again, underlying the Court of Appeals reasoning in its majority opinion is an appeal to giving greater weight to "the practical effects of the application of sovereign immunity." *Hamaatsa*, 2013-NMCA-094, ¶ 15. As such, the Court of Appeals based its opinion in part on the equitable ground that the legal and practical effect of sovereign immunity in the instant dispute would be to deprive Hamaatsa of legal recourse. *See id.* ¶ 30 (Wechsler, J., dissenting). Sovereign immunity, though, is not discretionary—it is a threshold jurisdictional consideration. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.* (*Puyallup*), 433 U.S. 165, 172 (1977). No matter the equities of a given situation, sovereign immunity presents a pure jurisdictional bar to suit. *See Armijo*, 2011-NMCA-006, ¶ 13. In a case where tribal sovereign immunity is properly invoked, as a matter of federal law, that must be the end of all proceedings against a tribe. *See Puyallup*, 433 U.S. at 172. Unless and until Congress chooses to abrogate tribal sovereign immunity in the context of public road adjudication of this sort, we must respect the interests served by tribal sovereign immunity and order the suit be dismissed.

{37} We commiserate with the less-than-ideal situation Hamaatsa now finds itself in—and note that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa*, 523 U.S. at 758. Yet, venerable interests are served by adhering to the doctrine of tribal sovereign immunity. *See Ho-Chunk Nation*, 512 F.3d at 928 ("Tribal sovereign immunity is a necessary corollary to Indian sovereignty and self-governance[.]" (internal quotation marks and citation omitted)). And those interests have resulted in a doctrine that has persisted for over a century. *Bay Mills*, 134 S. Ct. at 2040 (Sotomayor, J., concurring). By virtue of maintaining tribal sovereignty Congress gives deference to the fact that tribes "have not given up their full sovereignty," thereby respecting the dignity of the place tribes occupy in our system of governance. *Id.* at 2040, 2042 (Sotomayor, J., concurring). Through immunity, the federal government also comes nearer to accomplishing its goal of "render[ing] tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding." *Id.* at 2043 (Sotomayor, J., concurring) (citing 25 U.S.C. § 2702(1) (providing Congress' purpose for enacting the Indian Gaming Regulatory Act as creating "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments")). The beneficial impact of tribal sovereign immunity in advancing the welfare and self-sufficiency of Indian tribes demands its application in all cases where Congress does not otherwise provide.

C. Sovereign Immunity is Properly Raised by Motion to Dismiss

{38} The Court of Appeals reasoned that because the Pueblo admitted that the facts of Hamaatsa's allegations were true for the purposes of its motion to dismiss, a resolution of the Pueblo's tribal-sovereign-immunity defense was inequitable and improper at that stage of the proceedings. *See Hamaatsa*, 2013-NMCA-094, ¶ 10. We hold that the concessions made by the Pueblo for the purposes of filing its motion to dismiss are of no moment in the context of tribal sovereign immunity.

{39} "Tribal sovereign immunity is a matter of subject matter jurisdiction which can be challenged in a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d. 1299, 1301 (D.N.M. 2009); *see also Kiowa*, 523 U.S. at 754; *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001); *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1113 (Colo. 2010) (en banc) ("We conclude that tribal sovereign immunity bears a substantial enough likeness to subject matter jurisdiction to be treated as such for procedural purposes. Consequently, the tribal entities properly raised their claim of tribal sovereign immunity in a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction."). We conclude the same logic holds true in New Mexico's state courts, and that tribal sovereign immunity is properly raised in a Rule 1-012(B) motion to dismiss. *See Cash Advance & Preferred Cash Loans*, 242 P.3d at 1113 ("Our determination accords with the fact that, irrespective of whether all courts find that tribal sovereign immunity is precisely a question of subject matter jurisdiction, the claim is generally raised in a rule 12(b)(1) motion, pursuant either to federal or state rules of civil procedure."); *see also Kiowa*, 523 U.S. at 754; *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Bales*, 606 F. Supp. 2d at 1301.

{40} Rather than waiting until the later stages of litigation, the instant stage of the proceedings is the proper time, and a Rule 1-012(B) motion to dismiss the proper means, for asserting tribal sovereign immunity from suit. In fact, it is precisely the proper means necessary to ensure that the benefits of immunity are maintained. As a sovereign immune from suit, a tribe must be able to quickly and efficiently invoke the protections of sovereign immunity in order to avoid costly and time-consuming litigation. Tribal sovereign immunity from suit is more than a mere defense to liability—it is immunity from *suit*, which is effectively lost if such a case is erroneously permitted to proceed through trial. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007). We conclude that the Pueblo properly raised its tribal sovereign immunity at this stage of the proceedings by Rule 1-012(B) motion to dismiss, and that the Court of Appeals erred in concluding otherwise.

V. CONCLUSION

{41} Unless and until Congress abrogates tribal immunity in relevant fashion our hands are tied by controlling federal law. It is not within the province of the New Mexico Supreme Court's authority to abridge the federal doctrine of tribal sovereign immunity. Because the Pueblo is immune from Hamaatsa's suit, we reverse the Court of Appeals and instruct the district court to enter an order dismissing Hamaatsa's suit.

{42} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice

Certiorari Granted, January 27, 2017, No. S-1-SC-36225

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-018

Nos. 34,581 & 34,918 (Consolidated) (filed November 21, 2016)

ENDURO OPERATING LLC,
Plaintiff-Appellant,
v.
ECHO PRODUCTION, INC.; TALUS, INC.; TWIN MONTANA, INC.; CIMARRON RIVER INVESTMENTS, LLC; CMW INTERESTS, INC.; D2 RESOURCES, LLC; ELGER EXPLORATION, INC.; PLAINS PRODUCTION, INC.; SOLIS ENERGY, LLC; THE ALLAR COMPANY; KEN SELIGMAN; and W. GLEN STREET, JR.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
LISA B. RILEY, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} Today, we clarify our opinion in *Johnson v. Yates Petroleum Corp.*, 1999-NMCA-066, 127 N.M. 355, 981 P.2d 288, as to the import of our observation in that case that "any activities in preparation for, or incidental to, drilling a well are sufficient" to satisfy a contract term requiring that drilling of a well be "commenced." *Id.* ¶ 11. That observation is *obiter dicta* and so broad a standard as to have invited misinterpretation. In *Johnson*, subsequent discussion of the issue enunciated many specific activities of physical, operational significance that, in combination, qualified as commencing drilling operations. These activities were further qualified by numerous citations to case law, as we discuss herein. By these standards, we evaluate whether activities undertaken by a party in this case satisfy a "commencement clause" in a joint operating agreement (JOA) based on a standard form used by the American Association of Petroleum Landmen.[1] We determine that actions undertaken by that party, Echo Production, Inc. (Echo), were insufficient in this case to constitute "commencement." Our opinion reverses the summary judgment in Echo's favor, which Plaintiff Enduro Operating LLC (Enduro) appeals.

{2} Enduro filed suit against Echo, asserting that Echo did not commence operations per the JOA, to which both are parties, Echo was therefore required to resubmit a proposal, yet failed to do so. The parties filed cross-motions for summary judgment regarding whether Echo satisfied the "commencement" requirement in the JOA. The district court granted Echo's motion for summary judgment and denied Enduro's motions for summary judgment. The district court also granted Echo's motion to exclude the testimony of Enduro's expert witness. Enduro appeals, asserting the district court erred in granting Echo's motions. We agree with Enduro that Echo did not commence operations within the required time period as required by the JOA. Because we reverse the district court's denial of summary judgment to Enduro, we need not reach the issue of whether the district court properly excluded the testimony of Enduro's expert witness. We therefore reverse the district court's order and remand for proceedings consistent with this opinion.

I. BACKGROUND

{3} On April 25, 2006, Echo entered into the JOA for development of an oil and gas property with a number of parties including ConocoPhillips (Conoco) as non-operator. This case is concerned with actions taken under the JOA to develop a new well (Well 6H) in Eddy County. Article VI of the JOA required that a party to the JOA who desired to drill a well—in this case Echo—provide written notice of its proposed operation to the other JOA parties. The notified parties had thirty days from the notice to elect to participate or decline participation in the proposed operation.[2]

[1]Specifically for this case, A.A.P.L. Form 610-1982.

[2]The precise language of the JOA provides, "Should any party hereto desire to drill any well . . . or to rework, deepen or plug back a dry hole drilled at the joint expense of all parties or a well jointly owned by all the parties and not then producing in paying quantities, the party desiring to drill, rework, deepen or plug back such a well shall give the other parties written notice of the proposed operation, specifying the work to be performed, the location, proposed depth, objective formation and the estimated cost of the operation. The parties receiving such a notice shall have thirty (30) days after receipt of the notice within which to notify the party... *(cont. on next page)*

Parties who declined to participate were then deemed "non-consent" parties.[3] After delivering a written proposal, and allowing thirty days for parties to decide on their actions, Article VI.B.2 required that the proposing party "actually commence the proposed operation and complete it with due diligence" within ninety days after the expiration of the thirty-day notice period.[4] In this opinion, the total amount of time from notice to commencement of drilling is referred to as "the 120-day period."

{4} If Echo failed to commence drilling operations by the end of the period, the proposal would fail, and all parties to the JOA would be returned to the status they had prior to the proposal's circulation. If Echo chose to proceed with that well again, Echo would be required to resubmit another proposal to all interested parties. At that point, Enduro would have an opportunity to become a consenting interest capable of receiving proceeds of the well from the time it began producing. Echo drilled and finished the well after the 120-day period without ever resubmitting a proposal, which Enduro believes was improper under the JOA.

{5} Echo sent its proposal to drill Well 6H to the working interest owners on December 1, 2010. Conoco received Echo's proposal, and elected not to participate on December 28, 2010, thus becoming a non-consent party. Enduro subsequently purchased Conoco's interest in Well 6H subject to its non-consent status.

{6} As more thoroughly discussed below, the well was not drilled within the 120-day period, although Echo continued operations related to drilling Well 6H past the 120-day period from its initial notice, and eventually drilled a producing well.

{7} Enduro brought suit against Echo and the other working interest owners for breach of contract, trespass, conversion, violations of the New Mexico Oil and Gas Proceeds Payment Act, and declaratory relief.[5] Enduro asserted that Echo failed to "commence" operations and was therefore required to resubmit the proposal, thereby providing Enduro an opportunity to consent to Echo's proposal and receive proceeds from the well. Enduro based its claims on the language in Article IV of the JOA that provides, "if the actual operation has not been commenced within the time provided . . . and if any party hereto still desires to conduct said operation, written notice proposing same must be resubmitted to the other parties . . . as if no prior proposal had been made." Only Enduro and Echo remain as parties in the proceedings on appeal.

{8} Litigation ensued, and Enduro and Echo filed a series of motions. Enduro filed three separate motions for partial summary judgment. The first motion is not at issue in this appeal.[6] Enduro's second motion for partial summary judgment asserted that without having obtained the appropriate drilling permit prior to the expiration of the 120-day deadline, Echo could not legally have commenced drilling operations. The district court denied this motion. Enduro's third motion for partial summary judgment asserted that Echo's actions during the 120-day period did not constitute the actual commencement of operations required by the JOA.

{9} Echo filed a motion for summary judgment, asserting that the undisputed facts established that it had commenced Well 6H during the 120-day period and completed the well with due diligence, entitling it to judgment as a matter of law. Echo also filed a motion to exclude the testimony of Phillip T. Brewer, who Enduro sought to qualify as an expert in the area of custom and usage of the oil and gas industry in southeast New Mexico, specifically.

{10} The district court held a hearing on these motions, during which it granted Echo's motion to exclude Brewer's testimony. The court later issued a letter decision denying Enduro's first two motions for partial summary judgment and granting Echo's third such motion for summary judgment. Enduro appeals the district court's grant of summary judgment to Echo as well as its exclusion of its expert Brewer's testimony.

II. DISCUSSION

A. Summary Judgment—Commencement

1. Summary Judgment Standard on Appeal

{11} Summary judgment is appropriate where the movant is entitled to judgment as a matter of law and there is no genuine issue as to any material facts. Rule 1-056(C) NMRA. In other words, if the facts are not in dispute and only the legal effect of those facts is left to be determined, summary judgment is proper. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 29, 121 N.M. 710, 917 P.2d 1382. "Where cross-motions for summary judgment are presented on the basis of a common legal issue, this Court may reverse both the grant of one party's motion and the denial of the opposing party's cross-motion and award judgment on the cross-motion." *Grisham v. Allstate Ins. Co.*, 1999-NMCA-153, ¶ 2, 128 N.M. 340, 992 P.2d 891. "We resolve all reasonable inferences in favor of the party opposing summary judgment, and we view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in the light most favorable to a trial on the merits." *Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, ¶ 16, 363 P.3d 1197 (internal quotation marks and citation omitted). Our courts disfavor summary judgment and view it as a drastic remedy that should be used with great caution. *Id.*

{12} "Where the [district] court's grant of summary judgment is founded on a mistake of law, the case should be remanded so that the issues may be resolved through application of correct law." *Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997-NMSC-042, ¶ 9, 123 N.M. 767, 945 P.2d 985. On appeal, neither party argues that genuine issues of material fact exist. The dates and extent of Echo's activities to drill the well are not in

[3] *(cont. from previous page)* ...wishing to do the work whether they elect to participate in the cost of the proposed operation. . . . Failure of a party receiving such notice to reply within the period above fixed shall constitute an election by that party not to participate in the cost of the proposed operation."

[3]Non-consent parties relinquished their interest in the Well 6H and the consenting parties were entitled to receive the non-consenting party's share of proceeds.

[4]The exact language of the JOA states the following: "If any party receiving such notice as provided in Article VI.B.1 or VII.D.1 . . . elects not to participate in the proposed operation, then, in order to be entitled to the benefits of this Article, the party or parties giving the notice and such other parties as shall elect to participate in the operation shall, within ninety (90) days after the expiration of the notice period of thirty (30) days . . . actually commence the proposed operation and complete it with due diligence."

[5]Enduro later amended its complaint, dropping its trespass claim.

[6]Enduro requested partial summary judgment arguing that Echo was not entitled to use an exculpatory clause in the JOA.

dispute. Rather, the parties' argument is based in the legal effect of those facts; we therefore review the district court's orders regarding the summary judgment motions de novo. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, ¶ 4, 136 N.M. 211, 96 P.3d 336.

2. Actual Commencement of Drilling Activities

{13} The central issue in this appeal is whether Echo's actions preparing to drill Well 6H were enough to demonstrate that it "actually commence[d] the proposed operation and complete[d] it with due diligence" within the 120-day period. We must first look to what actions Echo took to commence operations.

a. Action Taken

{14} The parties agree on the following facts. The JOA dated April 25, 2006, governs the parties' conduct in this case. On November 29 and 30, 2010, Echo worked with Joe Janica, a geological engineer, to survey and stake Well 6H's location. On December 1, 2010, Echo submitted a proposal to all working interest owners, pursuant to the procedures set forth in the JOA, in which it proposed to drill Well 6H. The 120-day period ended April 2, 2011.

{15} Conoco was an interest owner at the time the proposal was distributed, and it elected to not participate pursuant to the JOA on December 28, 2010. Enduro then purchased Conoco's non-consent interest. Echo applied for a drilling permit that the New Mexico Oil Conservation Division received on March 31, 2011. The permit was approved on April 13, 2011. The parties agree that the relevant 120-day period ended April 2, 2011. We consider only actions taken up to that point in our consideration of whether Echo commenced drilling activities within the 120-day period.

{16} In support of its motion, Echo proffered evidence that in order to complete the required permits, they conducted surveys, staked the site, designed a closed loop system, and obtained a drilling procedure, spud program, and casing program. The road to the site was pre-existing at the time of the survey, prior to the proposal. In early March 2011, Echo communicated with John Thoma, a geologist, regarding the design and engineering of a lateral for Well 6H.[7] Echo contracted to build a drill pad on April 29, 2011, and entered into a drilling contract with JW Drilling, Inc. on March 14, 2011, to commence on May 20, 2011. The well was spudded on May 25, 2011, fracked from July 5 through 7, and began production on August 5, 2011.

3. Legal Standard for Commencement

{17} The parties are also in agreement that *Johnson* is the most applicable New Mexico authority on this issue. They differ, however, on its interpretation and the effect that it has on the facts of this case. Echo contends that the district court reached the correct result, focusing on the language of *Johnson* that suggests "*any* activities in preparation for, or incidental to, drilling a well are sufficient" to reach the conclusion that it commenced drilling under the JOA. 1999-NMCA-066, ¶ 11 (emphasis added). Enduro, on the other hand, insists that *Johnson* stands for the proposition that the existence of *meaningful* on-site activity is determinative to the issue of commencement. *Johnson* fairly gives both impressions; we need to clarify our position.

{18} In *Johnson*, this Court looked at the propriety of summary judgment granted for failure to diligently continue to prosecute drilling operations rather than initiate new operations as in this case. *Id.* ¶ 8. The lease in that case required the commencement and prosecution of drilling operations, to completion of a well without cessation for a certain time period. *Id.* ¶ 5. The actions taken by the operator during that time period included staking and surveying the location and filing and receiving a drilling permit. *Id.* ¶ 7. There was also an agreement with a contractor, a bulldozer on location, and efforts made to clear brush and level the well location within the time period. *Id.* We framed the issue as a determination of whether those actions were sufficient to demonstrate commencement of drilling operations. *Id.* ¶ 11. Reasoning that most courts "have been ready to find the commencement of operations . . . where only the most modest preparations for drilling have been made[,]" *id.* (internal quotation marks and citation omitted)," we noted that "it appears that any activities in preparation for, or incidental to, drilling a well are sufficient." *Id.* Using this standard, this Court held that the steps taken in *Johnson* were sufficient to constitute commencement of drilling activities, reversing the district court's grant of summary judgment. *Id.* ¶ 13.

4. Echo Did Not "Actually Commence"

{19} As noted, the parties pull different standards from *Johnson* to be applied in this case. Echo suggests that we implement a standard for commencement that is satisfied where there has been "minimal activity on the premises," while Enduro suggests that "meaningful on-site activity" may suffice. Without explicitly adopting either of these standards, we can affirmatively state that Echo's actions during the relevant 120-day period do not satisfy the indicia of commencement that existed in *Johnson*. Here, as in *Johnson*, the well location was surveyed and staked, and steps were taken to apply for the necessary permits. In this case, however, the only additional step taken during the relevant period was to enter into a contract with a drilling company. No on-site activity occurred other than the survey and staking Echo completed before the proposal date. Echo's permit application was not approved within the 120-day period. In contrast, the proposing party in *Johnson* obtained approval of the necessary permits, moved heavy equipment onto the well site, and took steps to clear brush and level the ground at the well location.

{20} Citing 3 Eugene Kuntz, *A Treatise on the Law of Oil and Gas*, § 32.3(b), at 76 (1989), Echo notes that for commencement to occur, "some act performed on the land itself" is required. And the cases cited by *Johnson* appear to support this statement. For example, *Petersen v. Robinson Oil & Gas Co.*, 356 S.W.2d 217 (Tex. Civ. App. 1962), enunciated a standard given the facts in that case:

> The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of this clause of the lease.

Id. at 220 (internal quotation marks and citation omitted).

[7]Although Echo asserts that this consultation lasted from December 2010 until Well 6H was completed, the evidence proffered in support of Haggart's affidavit is dated March 6, 2011.

{21} In *Oelze v. Key Drilling, Inc.*, the driller had obtained a drilling permit, staked the well location, leveled a well site, and dug slush pits. 481 N.E.2d 801, 802 (Ill. App. Ct. 1985). *D'lo Royalties, Inc. v. Shell Oil Co.* dealt with "diligence" more than the other cases, but held that preliminary site work that proceeded with diligence as well as actual diligence in starting actual drilling, along with paying a "shut-in" royalty payment was sufficient to constitute commencement of drilling. 389 F. Supp. 538, 548-49 (S.D. Miss. 1975). The conclusion we reach here is, we believe, implied by *Johnson*'s use of these cases in concert with 3 Kuntz, *supra*, § 32.3(b), at 76.

{22} Two facts in particular weigh heavily in our determination in this case—the lack of any on-site activity and Echo's failure to obtain—or even apply for until two days before expiration of the 120-day period—approved permits during the 120-day period. Though it did spend two days surveying and staking the Well 6H location—the only on-site activity it accomplished—it did so prior to sending out the proposal that triggered the 120-day period. The fact that Echo had no approved permit to drill prior to the end of the 120-day period is also important to our determination in this case. 19.15.14 NMAC was created in order to "require an operator to obtain a permit *prior to commencing* drilling[.]" 19.15.14.6 NMAC (emphasis added). It would have been contrary to the rule for Echo to commence drilling prior to approval of the permit. As such, it follows that to conclude Echo's actions were adequate to constitute commencement of drilling would be to condone Echo's commencing to drill an unauthorized, unpermitted well.

{23} Echo argues that in this day of lateral drilling, fracking, and "more complex engineering design and preparation than in the days when drilling a well meant simply erecting a derrick and boring a vertical hole[,]" changed circumstances demand a reconsideration of what constitutes preparing for drilling. Echo emphasizes the "back-room" work required to get a well underway and characterizes Enduro's position as asserting that only activities on the ground count toward commencement of drilling. We disagree with that characterization and with the proposition Echo advances. First, we note that the only material change in the language of A.A.P.L. Form 610 with regard to commencement since 1977 has been to extend what was a sixty-day period for commencement to ninety days following the notice period, both reflected in the agreement used in this case, and as amended in 1989. *See Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶¶ 3, 15 nn.1 & 2, 123 N.M. 526, 943 P.2d 560 (quoting language from A.A.P.L. Form 610-1977 and -1989). A.A.P.L. Form 610 is an unambiguous contract, and it is not for the courts to change contract language for the benefit of one party to the detriment of another. *Nearburg*, 1997-NMCA-069, ¶ 23. No changes in the industry have resulted in any change to the form language of the contract since 1982, including 1997 when we decided *Nearburg*, through to the present case. This consideration, paired with the lack of any on-site activity during the 120-day period, leads us to conclude that it is no new interpretation of the contract form by which we hold that Echo's on-site actions were not meaningful and cannot seriously be characterized as minimal.[8]

{24} In *Johnson*, the drilling party "staked and surveyed the location, applied for and received a permit to drill the well, and began preparing and building the well location prior to the expiration of the primary term." 1999-NMCA-066, ¶ 12, Accordingly, we adopted the view that completing some and undertaking other on-site actions ancillary to actual drilling can, in some situations, be adequate to amount to commencement. *Id.* We have no quarrel with that proposition.

{25} It is unclear from the record what standard the district court applied in this case when reaching its conclusion. *See George v. Caton*, 1979-NMCA-028, ¶ 6, 93 N.M. 370, 600 P.2d 822 (noting that while a district court is not required to state its reasons or make findings, findings are permissible and often helpful for appellate review). It appears, however, that the district court read the language in *Johnson* quite literally that *any* activity is sufficient to constitute commencement. Through this reading, the district court disregarded the utter lack of any on-site activity during the 120-day period in this case. Consequently, we believe that a literal interpretation of "any," resulted in too liberal a standard and disregarded how removed the actions taken by Echo in this case might be from actual drilling.[9] We instead believe the correct standard to be applied in this case, more reasonably drawn from *Johnson*, is that undertaking meaningful on-site actions ancillary to actual drilling can, under some circumstances, amount to commencement, but each case requires an individual analysis of the actions taken by the proposed driller. For the reasons that follow, we do not regard the facts and circumstances in this case as such that Echo's actions can be characterized as "commencement" as required by the JOA.

{26} While the facts of this case are only somewhat similar to those of *Johnson*, they are very similar to the facts of *Valence Operating Co. v. Anadarko Petroleum Corp.*, 303 S.W.3d 435 (Tex. App. 2010). Echo disparages *Valence*, insinuating that *Nearburg* did not agree with its analysis and that this Court rejects Texas oil and gas law decisions. We note three problems with Echo's contention. First, the quotation Echo uses ("We do not agree with the [Texas] Court's analysis[.]") substituted "Texas" for the true case cited (*Hamilton v. Texas Oil & Gas Corp.*, 648 S.W.2d 316 (Tex. App. 1982)). Nowhere in *Nearburg* is *Valence* cited. *See Nearburg*, 1997-NMCA-069, ¶ 10. Second, although Echo does not think that *Peterson* makes sense in today's world, as we pointed out above, this Court relied in *Johnson* on the very Texas case Echo did not cite, namely *Hamilton*, for the standard of commencement that it enunciated. Last, *Nearburg* had nothing at all to do with what actions fulfill the commencement clause. While we realize Echo's need to emphasize the quality of its "back-room" preparation—preparations specifically rejected by *Valence* as sufficient to find "commencement" of drilling operations—these generic and inapposite quotations are misleading. Echo's argument that "nothing" in *Johnson* indicates that Echo's

[8]Because we conclude that Echo did not commence the proposed operation within the time period specified in the JOA, we need not address the issue of whether it completed the well with due diligence.

[9]Echo attempts to make a distinction between the "drilling operations" referenced in *Johnson* and "proposed operation" referenced in the JOA. Contrary to Echo's assertion that the JOA "omits any reference to drilling," the JOA includes a desire "to drill, rework, . . . deepen or plug back" as actions that could constitute a "proposed operation." Echo does not actually assert that the act to be commenced in this case is anything other than the drilling of a new well. We therefore find any distinction that Echo attempts to draw between the terms to be unpersuasive.

efforts should not be considered the commencement of operations is belied by the fact that while the operators in *Johnson* and in *Valence* obtained a permit to drill, Echo never did. *Valence* is specific about the effect of relying on "back-room" preparatory activity to substitute for failure to engage in on-site preparations to commence drilling a well. 303 S.W.3d at 441. It does not constitute the "commencement" of drilling activities.

{27} In *Valence*, the Texas court of appeals was asked to interpret a non-consent provision in a joint operating agreement that was virtually identical to the one in this case. *Id.* at 438-39. That non-consent provision set forth the same time period for *Valence*, the non-operator, to "actually commence work on the proposed operation" as Echo had under the JOA here. *Id.* at 439-40 (internal quotation marks omitted). During the relevant time period, the appellant obtained a topographic map of the well locations and a preliminary list of instruments, staked the well location, held meetings regarding how to build on the well location, prepared cost estimates, and got the necessary drilling permits. *Id.* at 440. All other work, including building roads, restaking the well location, signing drilling contracts, and actual drilling, were done outside of the time period prescribed by the joint operating agreement. *Id.* The Texas court acknowledged that actual drilling is not necessary to comply with an obligation to commence drilling operations and preparatory activities are usually sufficient in that regard. *Id.* It went on, however, to characterize the appellant's activities as "back[-]room preparations," noting that no on-site activity except that preliminary staking had occurred, and concluded that such preliminary activities alone were insufficient to constitute the actual commencement of work under the joint operating agreement as a matter of law. *Id.* at 441.

{28} The facts of this case are much the same as those presented in *Valence*, except that rather than obtain the necessary drilling permits prior to the expiration of the deadline, Echo signed a drilling contract instead and applied for a permit in the waning days of the 120-day period. Neither case contains facts in which any on-site activity occurred, other than preliminary staking. In *Valence*, the non-operator at least obtained drilling permits for all wells prior to the expiration of the deadline, making it at least possible that drilling could take place. We find the reasoning in that case persuasive and consistent with *Johnson*.

{29} It appears that the district court read the language in *Johnson* quite literally to hold that *any* activity is sufficient to constitute commencement; a standard with which we disagree. The lack of any on-site activity during the 120-day period in this case, as a matter of law, cannot support summary judgment based upon Echo having "commenced" drilling operations. "Back-room" preparations, engineering plans, and especially obtaining drilling permits are important, but the emphasis of time limits in the JOA is to timely undertake the process by which a well is spud, which is a physical event occurring on the well site. Allowing "any" preparations to count as commencement of drilling, however removed those actions are from on-site preparations for drilling, is a mistake. We instead believe the correct standard to be applied in this case, drawn from *Johnson* and other authorities cited above, is that undertaking on-site actions that may be ancillary to actual drilling, to an extent that meaningfully demonstrates a diligent intent to undertake actual drilling within the time limit of the commencement clause, will be satisfactory to fulfill the operator's obligations. Further, under most circumstances that meaningful progress would also include having a drilling permit in hand. By this measure, the facts and circumstances in this case are not such that Echo's actions can be characterized as "commencement" as required by the JOA, and indeed they fail as a matter of law. We accordingly reverse the summary judgment granted by the district court, and remand for entry of summary judgment for Enduro on its motion that maintained Echo had not commenced drilling operations as required.

B. Attorney's Fees

{30} Enduro also raises issues on appeal pertaining to the district court's award of attorney's fees. Because our disposition of the issues above alters the grounds on which attorney's fees were awarded, we decline to address the issue of attorney's fees in this appeal.

III. CONCLUSION

{31} Having determined that the district court misinterpreted *Johnson* to reach an incorrect result, and that Echo's progress to "actual commencement" of drilling was insufficient as a matter of law to satisfy the JOA's requirements, we conclude that judgment as a matter of law was proper, but that Enduro is the prevailing party. We therefore reverse the district court and remand for further proceedings consistent with this opinion.

{32} IT IS SO ORDERED.
RODERICK T. KENNEDY, Judge

WE CONCUR:
LINDA M. VANZI, Judge
J. MILES HANISEE, Judge

Certiorari Denied, January 12, 2017, No. S-1-SC-36235

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-019

Nos. 34,226 and 34,461 (Consolidated) (filed November 22, 2016)

DARREL ALLRED, ROBERT ALLRED, JOHN ALLRED, BRUCE ALLRED, and DWAYNE ALLRED,
Plaintiffs-Appellees,
v.
NEW MEXICO DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY
KEVIN R. SWEAZEA, District Judge

PETE V. DOMENICI, JR.
DOMENICI LAW FIRM, P.C.
Albuquerque, New Mexico
for Appellees

CODY R. ROGERS
LUKE A. SALGANEK
MILLER STRATVERT P.A.
Las Cruces, New Mexico
for Appellant

Opinion

James J. Wechsler, Judge

{1} Appellant New Mexico Department of Transportation appeals the district court's finding of contempt and award of judicial sanctions in the amount of $408,764. Appellant also appeals the district court's award of attorney fees and costs in the amount of $54,301.41. With respect to the district court's finding of contempt, Appellant argues that the district court lacked subject matter jurisdiction or, in the alternative, erroneously interpreted a "settlement agreement" between the parties. Because we conclude that a portion of the "settlement agreement" was an enforceable injunctive order, which was appropriately interpreted by the district court, these arguments lack merit. Appellant additionally argues that the district court's (1) finding of contempt was not supported by substantial evidence or was invalidated by evidentiary error, (2) award of judicial sanctions was not supported by substantial evidence or resulted from an abuse of discretion, and (3) calculation of damages was erroneous. We decline to accept these arguments except with respect to the district court's calculation of damages, to which we apply a $15,000 reduction.

{2} As to Appellant's appeal of the district court's award of attorney fees and costs, our review of Appellant's brief in chief and reply brief reveals insufficient discussion and legal analysis from which to formulate an opinion. As such, we consider these issues to be abandoned.

BACKGROUND

{3} Appellees Darrel, Robert, John, Bruce, and Dwayne Allred own and operate a farming and livestock operation on lands adjacent to Whitewater Creek in Glenwood, New Mexico. The Whitewater Creek Bridge (the Bridge) spans U.S. Highway 180. Appellant constructed and maintains the Bridge. Since its reconstruction in 1981, sediment aggradation has occurred at and about the Bridge. This sediment aggradation resulted in an increased risk of flooding over time. Because of this increased risk, on June 17, 2011 Appellees filed this action for negligence, inverse condemnation, injunctive relief, and damages.

{4} During the pendency of the litigation, Appellees requested and were granted a preliminary injunction related to the maintenance of the Whitewater Creek bed (the Creek bed). The preliminary injunction required that Appellant (1) update its pre-construction notice (PCN); (2) provide the updated biological assessment and environmental analysis as required by the United States Army Corps of Engineers (ACE) or the United States Fish and Wildlife Service; (3) submit a construction plan to ACE, including a subsequent maintenance plan sufficient to put the Creek bed and the Bridge in compliance with the 1981 design standards; and (4) undertake the maintenance operation and promptly prosecute the maintenance to completion within thirty days of ACE approval of the updated PCN. The preliminary injunction further required that Appellant regularly maintain the Creek bed in accordance with the PCN.

{5} ACE approved the updated PCN, and Appellant began maintenance on the Creek bed on March 14, 2012. This maintenance progressed until a dispute related to the construction specifications halted progress. On April 12, 2012, the parties entered court-ordered mediation. This mediation resulted in an agreement in principle as to the terms of a permanent maintenance plan, which the parties referred to as a permanent injunction.

{6} On December 10-11, 2012, the parties signed a Settlement Agreement and Mutual Release (Settlement Agreement). The Settlement Agreement outlined the Terms of Settlement as (1) the entry of a Stipulated Permanent Injunction Order (Permanent Injunction) and (2) dismissal of the lawsuit by "execut[ion of] the attached Stipulated Motion of Voluntary Dismissal With Prejudice." The Settlement Agreement additionally contained an arbitration provision triggered by the failure of "any party . . . to perform any of the promises made in this [a]greement[.]"

{7} On January 18, 2013, the district court ordered entry of the Permanent Injunction, which detailed the parties' rights and obligations with respect to the maintenance plan. The Permanent Injunction contained a "maintenance trigger" that required Appellant to undertake maintenance efforts "when the average distance between sediment accumulations to the low chord of the [B]ridge is [seven] feet." Additionally, the Permanent Injunction detailed the scope of Appellant's maintenance obligation and described circumstances under which the Permanent Injunction could require amendment and protocol for such amendment. Finally, the Permanent Injunction provided that "[t]he terms set forth herein resolve all pending issues related to the injunctive relief requested by the [Appellees]. Title and compensation issues between the [p]arties shall be disposed of and resolved through a separate simultaneously executed settlement agreement and release."

{8} On February 25, 2013, the parties jointly filed a Motion for Entry of Stipulated Permanent Injunction and Voluntary Dismissal With Prejudice of All Remaining Claims and Counterclaims (Motion for Entry and Voluntary Dismissal). The motion stated, in pertinent part,

> The Parties notify this [c]ourt that they have entered a Stipulated Permanent Injunction that details a maintenance plan for [Whitewater] Creek, above, below and under the U.S. 180 bridge in Glenwood, New Mexico, Catron County as detailed therein.

The Parties further notify this [c]ourt that they have settled the remaining disputes between them in the underlying lawsuit and pursuant to Rule 1-041(A)(1)(b) [NMRA], hereby stipulate to the voluntary dismissal with prejudice of all claims and counterclaims, known or unknown, raised in this lawsuit or that could have been raised, against the Parties.

{9} On February 27, 2013, the district court entered its Order of Dismissal With Prejudice of All Remaining Claims (Order of Dismissal), which stated, in pertinent part,

> THIS MATTER having come before the [c]ourt upon the Parties' notice of entry of Stipulated Permanent Injunction detailing a maintenance plan on Whitewater Creek as detailed therein, and further notice of settlement of the remaining disputes between them in the underlying lawsuit, and stipulation to the voluntary dismissal with prejudice of all claims and counterclaims, known or unknown, raised in this lawsuit or that could have been raised by the Parties;
>
> The [c]ourt being otherwise fully advised in the premises FINDS that the stipulation is well-taken and is hereby GRANTED. All claims and counterclaims raised or that could have been raised by the Parties in this lawsuit are dismissed with prejudice upon the entry of this [c]ourt's Order, and each party shall bear its own fees and costs.

{10} On July 28, 2013, Appellees notified Appellant that sediment levels in the Creek bed required maintenance. Beginning on August 2, 2013, Appellant dispatched employees to remove sediment from the Creek bed in accordance with the Permanent Injunction. For the majority of the time between August 2, 2013 and approximately August 26, 2013, Appellant assigned two employees to the project. Appellee Darrel Allred used his bulldozer to assist these employees for approximately one hundred fifty hours during the month of August. On approximately August 26, 2013, Appellant determined that a heavy equipment crew was required to complete the project and ordered its employees to discontinue their maintenance efforts. This discontinuation was premature and left the Creek bed out of compliance with the terms of the Permanent Injunction. The heavy equipment crew was scheduled to arrive at Whitewater Creek on September 16, 2013. During the intervening weeks, several rain events deposited additional sediment in the Creek bed.

{11} On the night of September 14, 2013, a substantial rain event occurred, causing storm water to flow down Whitewater Creek and, ultimately, to overtop the Bridge and flow through Appellees' property downstream from the Bridge. Additionally, storm water backed up at the Bridge and overtopped the upstream dikes on both sides of Whitewater Creek, causing damage to the dikes themselves, as well as irrigated fields, irrigation systems, and crops.

{12} On September 17, 2013, Appellees filed a Verified Motion to Enforce Permanent Injunction For Relief for Violation of Permanent Injunction (Verified Motion to Enforce). This motion requested an emergency hearing "to determine and order appropriate remedial actions [Appellant] must take, and grant any further relief the [c]ourt deems justice requires." In the weeks between the filing of the motion and the emergency hearing on October 9, 2013, Appellant reentered the Creek bed and removed sediment in accordance with the Permanent Injunction.

{13} At the October 9, 2013 hearing, Appellees clarified that they were no longer seeking emergency relief but hoped to "move[] this matter forward in the direction of some appropriate sanction for violation of the [Permanent Injunction] order." After attorney argument and testimony, the district court ruled that Appellant "violated the stipulated [Permanent Injunction] order by failing to diligently pursue maintenance until completion[.]" Appellees were given leave to petition the district court for damages and sanctions—the appropriateness of which was to be determined at a subsequent hearing on the issues of liability, causation, and damages. Neither of the parties raised the issue of subject matter jurisdiction in the pre-hearing briefing or at the hearing. On November 8, 2013, Appellant filed a motion to reconsider, which argued, generally, that its conduct did not violate the Permanent Injunction. This motion was denied.

{14} On November 21, 2013, Appellees filed a petition for sanctions and damages for Appellant's violation of the Permanent Injunction. The petition alleged that Appellant was liable for damages to Appellees' property. The district court scheduled a motion hearing on June 25-26, 2014 and set a June 1, 2014 discovery deadline.

{15} During discovery, the pending hearing was rescheduled for July 24-25, 2014. On July 21, 2014, counsel for Appellant sent a letter to the district court and counsel for Appellees asserting that, effective February 27, 2013, the district court lacked subject matter jurisdiction over the case. This letter posited that an entry of voluntary dismissal "terminates a case, leaving the district court without jurisdiction to take[] any further action in the case." The letter additionally posited that, per the Settlement Agreement, arbitration was the appropriate forum for resolving Appellees' claims. Following a telephonic hearing related to the letter, Appellant filed motions (1) to enforce the Settlement Agreement and dismissal (Motion to Enforce) and (2) to vacate (Motion to Vacate) the pending hearing for lack of subject matter jurisdiction. The Motion to Enforce focused on the interplay between the Settlement Agreement, its arbitration provision, and the Permanent Injunction. The Motion to Vacate expressly asserted that the district court lacked subject matter jurisdiction over Appellees' claims following the parties' voluntary dismissal.

{16} At the outset of the July 24, 2014 hearing, the district court considered the merits of the Motion to Enforce and the Motion to Vacate. The central issues were (1) whether the Settlement Agreement incorporated the Permanent Injunction such that Appellees' claims were subject to arbitration and (2) if the Permanent Injunction was incorporated, did Appellant's failure to timely assert its right to arbitrate constitute a waiver. The district court ruled in favor of Appellees, specifically concluding that "it does not appear that the provisions of the injunction are subsumed within the requirement of arbitration." The district court did not rule,

nor did Appellant orally raise, the effect of the stipulated voluntary dismissal on the district court's subject matter jurisdiction.

{17} During the hearing, Appellees presented testimony and evidence on topics including: (1) the September 14, 2013 flood event; (2) damage to personal property; and (3) the cost to repair such damage. Appellees offered expert witness testimony by Walter L. Niccoli, which described the likely sequence of events on September 14, 2013 and the causal relationship between Appellant's violation of the Permanent Injunction and damages suffered by Appellees. As a counterpoint to Niccoli's testimony, Appellant intended to introduce expert witness testimony by John Wallace. However, the district court excluded Wallace's testimony as a sanction for discovery violations. After this ruling, Appellant moved to strike Niccoli's testimony. This motion was granted in part with respect to testimony related to sediment aggradation in the Creek bed.

{18} The district court concluded that it had jurisdiction over the motions before it, including Appellees' Petition for Sanctions, under Article VI, Section 13 of the New Mexico Constitution. The district court ruled that (1) Appellant's violation of the Permanent Injunction constituted contempt, (2) a causal relationship existed between Appellant's violation of the Permanent Injunction and Appellees' damages, and (3) Appellees suffered damages in the amount of $408,764. The district court ordered sanctions in the form of compensatory damages in the amount of $408,764. The parties also litigated attorney fees and costs, which resulted in an award to Appellees in the amount of $54,301.41.

{19} Appellant timely filed notice of appeal of the district court's ruling on the merits and its award of attorney fees and costs. These appeals were consolidated by order of this Court.

SUBJECT MATTER JURISDICTION

{20} "Subject matter jurisdiction is the power to adjudicate the general questions involved in the claim[.]" *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576. As a general rule, a court has subject matter jurisdiction over claims that "fall[] within the general scope of authority conferred upon such court by the constitution or statute." *Id.* (internal quotation marks and citation omitted). A judgment entered by a court lacking subject matter jurisdiction has no legal effect. *See State v. Patten*, 1937-NMSC-034, ¶ 11, 41 N.M. 395, 69 P.2d 931 ("There are three jurisdictional essentials necessary to the validity of every judgment, to wit, jurisdiction of parties, jurisdiction of the subject matter, and power or authority to decide the particular matters presented, and the lack of [any] is fatal to the judgment[.]" (emphasis, internal quotation marks, and citations omitted)). The issue of subject matter jurisdiction cannot be waived and may be raised at any time, including on appeal to this Court. *Becenti v. Becenti*, 2004-NMCA-091, ¶ 13, 136 N.M. 124, 94 P.3d 867. We review claims related to subject matter jurisdiction de novo. *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 8, 139 N.M. 625, 136 P.3d 1035.

{21} Rule 1-041(A) NMRA provides for the voluntary dismissal of a claim brought in a New Mexico district court. The rule states, in pertinent part, "an action may be dismissed by the plaintiff . . . by filing a stipulation of dismissal signed by all parties who have appeared generally in the action." Rule 1-041(A)(1)(b). The effect of such a dismissal "leaves a situation, so far as procedures therein are concerned, the same as though the suit had never been brought; and upon such voluntary dismissal, all prior proceedings and orders in the case are vitiated and annulled, and jurisdiction of the court is immediately terminated." *McCuistion v. McCuistion*, 1963-NMSC-144, ¶ 9, 73 N.M. 27, 385 P.2d 357.

{22} Appellant's central argument on appeal is that the Permanent Injunction was subject to the parties' Rule 1-041 voluntary dismissal and, therefore, was unenforceable by the district court. Under *McCuistion*, Appellant's argument would prevail if the Permanent Injunction was subject to the Order of Dismissal entered by the district court. For the reasons discussed below, however, we conclude that it was not.

The District Court's Order of Dismissal

{23} A judgment "must be certain and unequivocal" such that it "dispose[s] of the matters at issue between the parties that they . . . will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined[.]" *Hollingsworth v. Hicks*, 1953-NMSC-045, ¶ 26, 57 N.M. 336, 258 P.2d 724 (internal quotation marks and citation omitted). While appellate courts draw certain distinctions between stipulated judgments and judgments on the merits, no such distinctions apply when construing a judgment's intended effect. *Compare id.* ¶ 30 (construing a judgment on the merits), *with Mundy & Mundy, Inc. v. Adams*, 1979-NMSC-084, ¶ 20, 93 N.M. 534, 602 P.2d 1021 (construing a stipulated judgment). When a judgment is "clear and unambiguous . . . [i]t must stand and be enforced as it speaks." *Parks v. Parks*, 1978-NMSC-008, ¶ 20, 91 N.M. 369, 574 P.2d 588. However, if "the meaning is obscure, doubtful, or ambiguous, the judgment, pleadings, and entire record may always be resorted to for the purpose of aiding in the construction thereof." *Hollingsworth*, 1953-NMSC-045, ¶ 30. Our goal in construing an ambiguous judgment is "to determine the intention and meaning of the author[.]" *Id.* ¶ 31. Stipulations incorporated into a court's judgment are "construed liberally to give effect to the intent of the parties." *Parks*, 1978-NMSC-008, ¶¶ 15-16.

{24} As discussed above, the Order of Dismissal resulted from the parties' Motion for Entry and Voluntary Dismissal. The Order of Dismissal separately detailed the parties' agreement as to (1) a maintenance plan for Whitewater Creek, by way of the Permanent Injunction; (2) settlement of the remaining disputes in the underlying lawsuit; and (3) "voluntary dismissal with prejudice of all claims and counterclaims . . . raised in th[e] lawsuit[.]" The Order of Dismissal did not expressly reserve authority to the district court to enforce the Permanent Injunction. However, the Permanent Injunction itself implies ongoing enforcement authority, stating,

> The Parties recognize that if regulatory changes or conditions are unilaterally implemented by any controlling state or federal agency that impacts the ability of [Appellant] to comply with the terms of this Order, the Parties recognize [Appellant] will need to comply with those regulatory requirements[.] . . . In the event there is not agreement between the Parties that regulatory changes or conditions were unilaterally implemented by any controlling state or federal agency that impacts the ability of [Appellant] to comply with the terms of this Order, [Appellant] must request and obtain modification to the permanent injunction.
>
> The Parties recognize that if site conditions change such that [Appellant's] ability to comply with the terms of this Order

> is impacted, [Appellant] will advise the principal [Appellee] Darrel Allred of such changes. In the event there is not agreement between the Parties that site conditions change such that [Appellant's] ability to comply with the terms of this Order is impacted, [Appellant] must request and obtain modification to the permanent injunction.

{25} Appellees argue that the parties did not, in dismissing all remaining claims, intend to limit the district court's enforcement power with respect to the Permanent Injunction. Appellant argues that the Motion for Entry and Voluntary Dismissal indicated the parties' intent to terminate the district court's jurisdiction over the Permanent Injunction. The Order of Dismissal does not clearly indicate which of these positions was intended by the parties' stipulated dismissal of "all remaining claims." This ambiguity requires that we look to the entire record to construe the judgment. *Parks*, 1978-NMSC-008, ¶ 16; *Hollingsworth*, 1953-NMSC-045, ¶ 30.

{26} The Permanent Injunction itself is particularly illuminating as to the intent of the parties. First, the district court entered the Permanent Injunction on January 18, 2013—more than six weeks before its entry of the Order of Dismissal, which dismissed "all remaining claims." Additionally, the Permanent Injunction contemplated the possibility that regulatory or site condition changes could impact Appellant's ability to comply with its maintenance obligations. It also contemplated disagreement between the parties, such that Appellant "must request and obtain modification to the [Permanent Injunction]." The Permanent Injunction did not expressly indicate to which entity such a request was to be made. However, because the district court entered the Permanent Injunction on January 18, 2013 and no alternate forum was indicated on that date, the obvious implication is that any request for modification would be made to the district court. The power to modify the Permanent Injunction implies ongoing enforcement authority.

{27} Generally speaking, the inclusion of an express reservation or repudiation of ongoing judicial enforcement authority within an order of dismissal limits the need for such analysis. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994) (discussing the retention of judicial authority by the consent of the parties over settlement agreements that result in voluntary dismissal). However, having conducted the analysis, we conclude that the Permanent Injunction was not subject to the Order of Dismissal. Therefore, the district court retained authority to enforce the Permanent Injunction and had subject matter jurisdiction over Appellees' Verified Motion to Enforce.

THE PERMANENT INJUNCTION

{28} In the alternative, Appellant asserts numerous errors by the district court in interpreting or construing the Permanent Injunction, including: (1) that the Settlement Agreement and the Permanent Injunction functioned as a contract between the parties, such that claims arising from a violation of the Permanent Injunction were subject to arbitration; (2) that the district court improperly reformed the Permanent Injunction by adding and omitting terms; and (3) that the district court erroneously concluded that Appellant violated the Permanent Injunction. To the extent that our analysis requires, we review questions of contractual interpretation de novo. *Thompson v. Potter*, 2012-NMCA-014, ¶ 12, 268 P.3d 57.

The Nature of the Permanent Injunction

{29} As a general rule, a stipulated judgment "is not considered to be a judicial determination, but a contract between the parties[.]" *Williams v. Crutcher*, 2013-NMCA-044, ¶ 8, 298 P.3d 1184. However, discussing this general rule in *Pope v. Gap, Inc.*, this Court clarified that stipulated judgments have characteristics of both judgments and contracts. *See* 1998-NMCA-103, ¶ 22, 125 N.M. 376, 961 P.2d 1283 ("[A consent judgment] is similar to a judgment because it is entered and enforceable as a judgment; however, it is like a contract because its terms and conditions are reached by the mutual agreement of the parties."). Inasmuch as *Williams*' statement of our general rule would subject the Permanent Injunction to a pure contract law analysis, the injunctive relief granted in this particular case is distinguishable from the general rule.

{30} *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (per curiam), cited by this Court in *Pope*, is instructive. In that case, the attorney general filed a complaint against the city of Miami (the City) and the Fraternal Order of Police (FOP) for discriminating against certain protected classes of individuals in violation of the Fourteenth Amendment and federal law. *City of Miami*, 664 F.2d at 436. The complaint sought both temporary and permanent injunctive relief. *Id.* Post-complaint negotiations resulted in a proposed consent decree that was signed by both the United States and the City. *Id.* at 438. The district court approved and entered the consent decree over objections by the FOP. *Id.* Shortly thereafter, the FOP filed a motion to vacate the consent decree, which the district court granted. *Id.* After a hearing, the United States and the City submitted a modified consent decree. *Id.* at 439. The district court entered the modified consent decree over continued objection by the FOP, finding that "the decree does not violate the contractual relationship between [the parties and] . . . [t]he consent reached is constitutionally valid." *Id.* (internal quotation marks omitted). The modified consent decree included language stating that the defendants "are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against [the protected classes.]" *Id.* (internal quotation marks omitted). The FOP appealed the entry of the consent decree. *Id.*

{31} In discussing the principles underlying consent decrees, the Fifth Circuit stated,

> When presented with a proposed consent decree, the court's duty is akin, but not identical to its responsibility in approving settlements of class actions, stockholders' derivative suits, and proposed compromises of claims in bankruptcy. In these situations, the requisite court approval is merely the ratification of a compromise. The court must ascertain only that the settlement is "fair, adequate and reasonable."
>
> Because th[is] consent decree does not merely validate a compromise but, *by virtue of its injunctive provisions*, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not *put the court's sanction on and power behind* a decree that violates Constitution, statute, or jurisprudence.

Id. at 441 (emphasis added) (footnotes omitted).

{32} The judicial process outlined in *City of Miami* is more analogous to the

current case than *Williams* or other New Mexico appellate cases that define stipulated or consent judgments as contractual in nature. *See, e.g.*, *Owen v. Burn Constr. Co.*, 1977-NMSC-029, 90 N.M. 297, 563 P.2d 91 (discussing a stipulated judgment arising from the settlement of claims for property damage); *State ex rel. State Highway Comm'n v. Clark*, 1968-NMSC-057, 79 N.M. 29, 439 P.2d 547 (discussing a stipulated judgment arising from the settlement of eminent domain proceedings); *La Luz Cmty. Ditch Co. v. Town of Alamogordo*, 1929-NMSC-044, 34 N.M. 127, 279 P. 72 (discussing a stipulated judgment arising from the settlement of claims related to water rights); *Williams*, 2013-NMCA-044 (discussing a stipulated judgment arising from the settlement of claims related to trust distributions).

{33} In *Owen*, for example, the defendant was employed by a municipal redevelopment agency to demolish a hotel adjacent to the plaintiffs' restaurant. 1977-NMSC-029, ¶ 2. During the demolition, the defendant's negligence caused the hotel to fall onto and destroy the restaurant. *Id.* The plaintiffs reached a settlement with the agency to compensate them for the value of the lot. *Id.* ¶ 3. The terms of the settlement were entered as a judgment by the district court. *Id.* The plaintiffs then filed a lawsuit against the defendant for damages to the physical structure. *Id.* ¶ 4.

{34} In this context, the stipulated judgment, which memorialized the settlement agreement between the plaintiffs and the agency, was more like a contract than a judgment. The plaintiffs and the agency determined, among themselves, the value of the lot. After payment of the stipulated amount, the plaintiffs and the agency had no additional rights or obligations with respect to the other. The district court unquestionably had no ongoing enforcement obligations. As such, the district court's role was, as described in Appellant's brief in chief, "ministerial."

{35} The stipulated judgment in *Owen* is simply not analogous to that in the current case. On June 17, 2011, Appellees filed a complaint alleging negligence and requesting injunctive relief related to Appellant's maintenance obligation at the Bridge. Appellees' request for injunctive relief specifically requested that the district court "requir[e Appellant] to immediately begin restoring the Whitewater Creek Bridge to 1981 design standards[.]" After an evidentiary hearing, the district court issued a preliminary injunction, ordering Appellant to "submit to the ACE a construction notice with a specific plan for immediate maintenance of the Whitewater Creek and the Bridge" including "a subsequent maintenance plan that is sufficient to put the [C]reek bed and [the] Bridge in compliance with the 1981 design standards of the Bridge." The preliminary injunction additionally provided that regular creek bed maintenance "shall be undertaken" until further order of the court.

{36} Appellant argues on appeal that the Permanent Injunction is contractual in nature because it resulted from negotiations between the parties. However, the preliminary injunction proceedings demonstrate that the district court contemplated the equities involved with granting injunctive relief long before entering the Permanent Injunction. Additionally, the terms of the Permanent Injunction—particularly those related to ongoing maintenance requirements placed on Appellant—comport with the legal rationale supporting injunctive relief. *See Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611, 995 P.2d 1053 ("In determining whether to grant injunctive relief, a [district] court must consider a number of factors and balance the equities and hardships. Some of these factors include: (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the interests of third parties; (4) the practicability of granting and enforcing the order; and (5) the relative hardship likely to result to the defendant if granted and to the plaintiff if denied." (internal quotation marks and citations omitted)). Given this procedural history, the district court's role in entering the Permanent Injunction was more than ministerial.

{37} Despite being the product of a stipulation between the parties, the Permanent Injunction is a judgment of the district court and not merely a memorialization of a contractual agreement. Because the Permanent Injunction is a judgment, it is enforceable by the district court and not subject to the arbitration clause contained within the Settlement Agreement. *See* NMSA 1978, § 39-1-5 (1850-1851) ("It shall be the duty of the judge of any court to cause judgment, sentence or decree of the court to be carried into effect, according to law.").

Interpretation of the Permanent Injunction

A. Terms

{38} Appellant additionally argues that the district court erroneously interpreted the Permanent Injunction by "adding terms not agreed upon by the parties, and omitting terms specifically agreed to by the parties." Because Appellant's argument is premised upon its claim that the Permanent Injunction is a contract, it is, to a degree, inapplicable. However, we apply similar principles in construing contracts and judgments. *See Owen*, 1977-NMSC-029, ¶ 14 ("The rules to be followed in arriving at the meaning of judgments and decrees are not dissimilar to those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change or even to construe its meaning."). We therefore review de novo whether the district court's interpretation of the Permanent Injunction resulted in a reformation of the judgment.

{39} On October 9, 2013, the district court held a hearing on Appellees' Verified Motion to Enforce. After taking testimony related to Appellant's maintenance efforts between August 2, 2013 and approximately August 28, 2013, the district court ruled that Appellant "violated the stipulated permanent injunction order by failing to diligently pursue maintenance until completion[.]"

{40} The Permanent Injunction states, in pertinent part, that "[c]ontinuing maintenance required under the PCN shall be performed in conformance with the maintenance plan . . . and shall be diligently pursued until completion recognizing that, *force majeure*, regulatory restrictions, and conditions provided for upon approval of [Appellant's] PCN, or otherwise, will ultimately dictate [Appellant's] maintenance time frames." Appellant argues that the district court's interpretation (1) erroneously established timeliness and resource allocation requirements for the project and (2) ignored provisions that provided Appellant with discretion over maintenance time frames.

{41} Appellant's timeliness and resource allocation argument is predicated on its claim that "[t]he unambiguous language of the [Permanent Injunction] requires only that [Appellant] 'diligently pursue maintenance until completion.'" Appellant asserts that the district court's interpretation reformed the Permanent Injunction to "include specific requirements . . . such as 'continuous' pursuit of maintenance, time frames for completion, prioritization of maintenance, size of crew, or equipment used[.]" We disagree. Our review of the record indicates that the district court

simply emphasized that the "judgment requires prosecution diligently *to completion*." (Emphasis added.) Appellant never completed the required maintenance prior to discontinuing its efforts on or about August 28, 2013. "[W]here the language of a judgment or decree is clear and unambiguous, . . . [i]t must stand and be enforced as it speaks." *Hollingsworth*, 1953-NMSC-045, ¶ 30. The district court's ruling that Appellant violated the Permanent Injunction by failing to complete its maintenance obligation did not constitute a reformation of the Permanent Injunction by the district court.

{42} Appellant's second argument—that it had broad discretion over maintenance time frames—is in two parts and is predicated upon acknowledgment in the Permanent Injunction that certain conditions will "dictate [Appellant's] maintenance time frames." These conditions are "*force majeure*, regulatory restrictions, and conditions provided for upon approval of [Appellant's] PCN, or otherwise[.]"

{43} Appellant argues that the "or otherwise" clause is an "important area[] of discretion given to [Appellant] by the [Permanent Injunction]" and that the district court's interpretation of the "or otherwise" clause rendered it "mere surplusage[.]" We disagree. Our reading of the "or otherwise" clause in the context of the entire document indicates that it does not stand alone, but that it instead modifies the immediately preceding phrase, which itself refers back to an earlier provision related to pending regulatory approval.[1] Given this conclusion, it is Appellant's reading—that the "or otherwise" clause provided seemingly unlimited discretion over maintenance time frames and resource allocation—that renders certain preceding language meaningless. *Cf. Bank of N.M. v. Sholer*, 1984-NMSC-118, ¶ 6, 102 N.M. 78, 691 P.2d 465 ("A contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract.").

{44} Appellant additionally argues that monsoonal rains and increased sediment accumulation related to the Whitewater-Baldy Complex fire constituted a *force majeure* excusing compliance with the Permanent Injunction. After taking testimony and evidence, the district court ruled that the physical conditions at and around the Bridge did not constitute a *force majeure* such that Appellant's duty to perform was excused. This conclusion, however unsatisfactory to Appellant, resulted from the district court's analysis of the *force majeure* clause and does not constitute a reformation of the Permanent Injunction by the district court.

B. Causation

{45} Appellant's final argument in this regard asserts that the district court's conclusion that a causal relationship exists between Appellant's violation of the Permanent Injunction and damages suffered by Appellees is not supported by substantial evidence. In conducting such review, "[w]e are deferential to facts found by the district court, but we review conclusions of law de novo." *Benavidez v. Benavidez*, 2006-NMCA-138, ¶ 21, 140 N.M. 637, 145 P.3d 117. As part of its argument, Appellant claims that the district court erroneously excluded its expert witness. We review the admission of expert testimony for an abuse of discretion. *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 27, 123 N.M. 353, 940 P.2d 459.

1. Admission of Expert Testimony

{46} Appellant, citing various case law, asserts that the district court improperly struck its expert witness, John Wallace. Our review of the record does not support Appellant's position.

{47} Rule 1-026 NMRA governs civil discovery, including the admission of expert witness testimony. With respect to expert witness disclosures, the rule provides, in pertinent part,

> A party may through interrogatories and requests for production discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Rule 1-026(B)(6)(a). A failure to make such disclosures is sufficient grounds to exclude expert witness testimony. *See* Rule 1-037(B)(2)(b) NMRA (providing "if a party fails to obey an order under Rule 1-026 . . . , the court in which the action is pending may . . . prohibit[] that party from introducing designated matters in evidence"); *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶¶ 13, 16, 131 N.M. 317, 35 P.3d 972 (holding that "lesser sanctions," including the exclusion of witnesses, "may be applied to *any* failure to comply with discovery orders" (internal quotation marks and citation omitted)).

{48} During discovery, Appellees propounded interrogatories and requests for production on Appellant, including at least one related to expert witnesses. In response, Appellant named Wallace as its expert witness. Appellant's answer to the interrogatory did not provide information concerning Wallace's opinions, the grounds for those opinions, or the facts, documents, and other information upon which Wallace relied in forming his opinions. Appellant did not provide Appellees with Wallace's expert report.

{49} Appellees requested supplementation of Appellant's response to its interrogatories, including "review [of] the opinions and materials Mr. Wallace relied upon in making any expert opinions he intends to offer at [the scheduled] hearing[.]" In the absence of written discovery, Appellees noticed a deposition for Wallace on July 2, 2014. This notice was accompanied by a letter requesting alternate dates if the noticed date presented a scheduling conflict. On June 29, 2014, Appellant notified Appellees of a conflict with the noticed deposition. Appellees indicated availability on July 3, 2014, but they also indicated that additional delays were unacceptable given the proximity to trial. In their response, Appellees reiterated their request for supplementation of discovery materials. Appellant failed to supplement and instead filed a motion for a protective order related to Wallace's noticed deposition and a motion to stay proceedings. Both parties subsequently filed motions in limine to exclude the other's expert witness. The district court declined to address Appellant's motion to stay proceedings due to its untimeliness and reserved its ruling on the motions in limine until the witnesses were called at trial.

[1]Paragraph two of the Permanent Injunction states, in pertinent part, "[Appellant] will submit to the [ACE] a [PCN] addressing its subsequent maintenance and re-vegetation plan, the scope of which is to read, as much as practicable, as consistent with Exhibit B, as attached, and shall be made pursuant to the terms and conditions set forth below, *subject to approval* of the [ACE], *or as otherwise* directed by regulatory agencies thereto." (Emphasis added). We read this sentence to contemplate additional regulatory action, potentially affecting Appellant's ability to comply with its maintenance obligation under the Permanent Injunction.

{50} Appellant called Wallace to testify and elicited his expert qualifications on direct examination. At the outset of Wallace's substantive testimony, Appellees objected and moved to exclude Wallace due to alleged discovery violations. After oral argument by the parties, the district court sustained Appellees' objection, ruling that the "Rule [1-0]26 disclosure was inadequate" because it included "no facts and no opinions . . . in [the] disclosure and there is no report that can be referred to instead." Appellant filed a Motion to Reconsider and Offer of Proof (Motion to Reconsider), which the district court denied.

{51} Rule 1-037(B) bestows authority on the district court to grant and enforce sanctions for discovery violations. Given Appellant's conduct during the discovery process, the district court did not abuse its discretion by excluding Wallace's expert testimony. Applying the same rationale, the district court also did not abuse its discretion by denying Appellant's Motion to Reconsider.

2. Substantial Evidence of Causation

{52} The district court ruled that Appellant's failure to comply with the Permanent Injunction resulted in storm water overtopping both the Bridge and the upstream dikes, "caus[ing] serious damage to [Appellees'] property." Causation is a prerequisite for an award of civil damages, including damages predicated upon a finding of civil contempt. *See El Paso Prod. Co. v. PWG P'ship*, 1993-NMSC-075, ¶ 31, 116 N.M. 583, 866 P.2d 311 ("We hold that once a plaintiff satisfies his [or her] burden of proving violation of a court order, proximate cause, and damages, he or she is entitled to judgment for recovery of those damages."). Appellant argues that this ruling was not supported by substantial evidence or, in the alternative, that lay witness testimony is insufficient to support a finding of causation in the context of flooding. *But see Moore v. Associated Material & Supply Co.*, 948 P.2d 652, 662 (Kan. 1997) ("[W]itnesses who have long been familiar with the flooding patterns of an area are competent to form an opinion as to the cause of flooding."). Appellant's secondary argument was not preserved and is, therefore, not considered by this Court. *See Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 ("[T]heories, defenses, or other objections will not be considered when raised for the first time on appeal.").

{53} In support of their claims, Appellees offered expert witness testimony by Niccoli. During discovery, Appellees disclosed Niccoli's expert report, which stated, in pertinent part,

> [M]y opinion is that the Bridge did not have adequate capacity to pass the flow from the Event. Because the Bridge did not have the capacity, it resulted in the flood waters backing up behind the Bridge, damaging or destroying upstream flood containment structures (e.g., dikes), and the flood waters jumping the channel. Had [Appellant] completed [its] maintenance duties on September 5[], 2013, the Event would have passed beneath the Bridge and [would] not have caused the damage[.]

After Niccoli's testimony, Appellant argued that his expert report and answers to interrogatories failed to adequately disclose his theory as to causation. The district court struck certain portions of Niccoli's testimony related to sediment aggradation, but the extent to which this ruling limited Niccoli's testimony is unclear to this Court. Despite passing reference to the district court's ruling in its appellate briefing, Appellant does not provide record citation to the portions of Niccoli's testimony that were struck by the district court or comprehensive analysis of the effect of this evidentiary ruling on our substantial evidence review. *See* Rule 12-213(A)(4) NMRA (requiring the appellant to provide citations to the record proper in support of each argument); *Fenner v. Fenner*, 1987-NMCA-066, ¶ 28, 106 N.M. 36, 738 P.2d 908 (holding that this Court need not consider arguments raised on appeal that are unsupported by citation to the record and transcript).

{54} We view Niccoli's expert witness report, quoted above and properly disclosed pursuant to Rule 1-026(B)(6)(a), to provide sufficient notice as to the substance of Niccoli's opinion testimony—that Appellant's failure to complete its maintenance obligation caused (1) a backup of water at the Bridge, (2) storm water to jump the channel upstream and downstream from the Bridge, and (3) damage to Appellees' property. Inasmuch as Niccoli offered testimony consistent with this disclosed theory, it was not subject to the district court's order to strike. An example of such testimony includes:

> Appellees' Counsel: So, do you have an opinion as to how that stream was reacting upstream when the water began topping the Bridge and then topped it a little more and then the tree actually impacted the Bridge? What was going on back upstream?
>
> Niccoli: Back upstream, because again the maintenance hadn't occurred, the stream channel was raised, five thousand CFS coming through here. I think Mr. Allred keeps his dikes at about six to nine feet deep, again matching the part down here. So, this only had about two or three feet of clearance that night. There's probably only about three feet of clearance upstream also and there wouldn't be enough capacity in the channel and it probably came up to the level of the dike. As soon as it got to the level of the dike, it started overtopping and the erosive forces would have moved the dike away and caused flooding of the field.
>
> Appellees' Counsel: What about flooding of the pond?
>
> Niccoli: The pond also. . . . There's two things that probably happened at the pond. One which could have been the backup of the water from the plugging of the Bridge loosening the dikes toward the center and into that. And then also this pond here is also on the bend in the river, so the maximum forces are going to be on that outside. So with the stream level raised up due to the lack of maintenance, that water would have wanted to force its way around this corner to the northeast of the upper pond and would have again loosened the dike. And it did obviously loosen it up and water flowed into there.
>
> Appellees' Counsel: And then what happened below the Bridge to what we call the lower pond or the fencing around the lower pond?
>
> Niccoli: Sure. . . . When the water flowed over the top of the [Bridge] and spread out along the road . . . the stream . . . flowed through the property.

{55} Comments by the district court indicate that its ruling as to causation was informed by both lay and expert witness testimony. With respect to Niccoli's testimony, it stated that

> [the] expert testimony from [Appellees'] expert is, unequivocally, had the cleaning been done . . . the waters would have stayed in the bounds of the creek . . . and would not have overtopped the levees[.] . . . There was also testimony that when the water overtopped the Bridge, it started going on the northwest side of the road, and that that is what caused damage in that area[.]

{56} Based on Niccoli's testimony alone, substantial evidence supported the existence of a causal relationship between Appellant's violation of the Permanent Injunction and damages suffered by Appellees. Appellant's argument in this regard is not well-taken.

CIVIL CONTEMPT SANCTIONS

{57} Appellant's final substantive arguments relate to the district court's award of civil contempt sanctions. Appellant first argues that substantial evidence did not support this award. As noted above, in reviewing whether substantial evidence exists to support a district court's ruling, we defer to the factual findings of the district court but review the application of those facts to the law de novo. *Benavidez*, 2006-NMCA-138, ¶ 21. Additionally, our appellate courts view the evidence and draw all reasonable inferences in the light most favorable to the findings of the district court. *Cave v. Cave*, 1970-NMSC-113, ¶ 4, 81 N.M. 797, 474 P.2d 480. Second, Appellant argues that compensatory sanctions were not an appropriate remedy because neither party prevailed in the underlying litigation. This Court reviews a district court's determination that a party prevailed at trial for an abuse of discretion. *Mayeux v. Winder*, 2006-NMCA-028, ¶ 41, 139 N.M. 235, 131 P.3d 85. We address Appellant's arguments in turn.

{58} "The elements necessary for a finding of civil contempt are: (1) knowledge of the court's order, and (2) an ability to comply." *In re Hooker*, 1980-NMSC-109, ¶ 4, 94 N.M. 798, 617 P.2d 1313. Although periodically discussed in our appellate opinions, neither willfulness nor intent is an element of civil contempt. *Spear v. McDermott*, 1996-NMCA-048, ¶ 41, 121 N.M. 609, 916 P.2d 228. As such, Appellant's argument that the district court's characterization of Appellant's conduct as a "willful decision" requires that we consider "willfulness" as an element of civil contempt is misplaced.

{59} Appellant does not contest that it had knowledge of the Permanent Injunction. Appellant does, however, argue that "[t]here was no evidence presented to the district court to suggest that . . . [Appellant] ever had the ability to comply with the [Permanent Injunction.]" In support of this argument, Appellant states, without citation to the record, that "[a]ll the evidence presented to [the] district court . . . demonstrated that although [Appellant] was attempting to comply with the [Permanent Injunction], continuing issues regarding the availability of manpower and equipment, coupled with weather, delayed compliance." *See* Rule 12-213(A)(4) (requiring the appellant to provide citations to the record proper in support of each argument).

{60} This argument, which advances Appellant's theory that it was unable to comply with the Permanent Injunction, improperly shifts the burden of proof from Appellant to Appellees. *See Spear*, 1996-NMCA-048, ¶ 31 ("[T]he contemnor has the burden of proof concerning inability to comply with a court order. . . . [T]his burden extends to the self-inducement issue; that is, the contemnor has the burden of proving not only that it [was] impossible for him to comply, but that he did not create the impossibility." (citation omitted)). Whatever the evidence was at trial, it clearly did not impress upon the district court that circumstances related to weather and resource allocation created a situation in which Appellant was unable to comply. Additionally, Appellant did not request that the district court make such a finding in its proposed findings of fact and conclusions of law. The district court expressly concluded that "[Appellant's] decision not to allocate sufficient resources . . . and [its] decision to not continuously prosecute the maintenance . . . was a deliberate, conscious decision[.]" This factual finding indicates that neither weather nor a lack of available resources created a situation in which Appellant was unable to comply with the Permanent Injunction. We defer to the factual findings of the district court.

{61} Appellant had the burden of proving that it was unable to comply with the Permanent Injunction. Its attempt to shift that burden of proof to Appellees, necessitating that Appellees prove that Appellant was able to comply, is misplaced and constitutes a mischaracterization of our civil contempt jurisprudence.

{62} Appellant's "prevailing party" argument correctly articulates our general rule that "compensatory sanctions [are] only available if petitioner wins the action in the original [law]suit." *Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 28, 111 N.M. 319, 805 P.2d 88. However, its claim that the parties' entry into the Settlement Agreement and voluntary dismissal of the underlying case resulted in a circumstance in which neither party "won" in the underlying case is not compelling.

{63} The prevailing party in litigation is "[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." *Mayeux*, 2006-NMCA-028, ¶ 41 (internal quotation marks and citation omitted). As discussed above, the district court entered an enforceable judgment, in the form of the Permanent Injunction, on January 18, 2013. The Permanent Injunction imposed mandatory maintenance obligations on Appellant, as requested in the initial complaint and granted in the district court's preliminary injunction. The entry of the Permanent Injunction was "the main issue" in the underlying lawsuit. *Id.* Because Appellees' claims arose from a violation of the Permanent Injunction, the district court did not abuse its discretion in concluding that compensatory sanctions were an appropriate remedy for contempt.

CALCULATION OF DAMAGES

{64} Finally, Appellant claims that the district court erred in its calculation of damages. The district court ruled that Appellees were entitled to recover actual losses in the amount of $408,764. Appellant argues on appeal that the appropriate method to calculate damages to real property "is the difference between the value of the property immediately before the occurrence and immediately after." *See* UJI 13-1819 NMRA ("You shall determine what was the value of the property immediately before the occurrence and immediately after the occurrence. The difference between these two figures is the legal measure of damages to real property."). We believe that Appellant's argument is largely misplaced.

{65} As a general rule, the remedy for civil contempt is "[j]udicial sanctions . . . to compensate the complainant for losses sustained." *State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, ¶ 10, 74 N.M. 201, 392 P.2d 347. The losses sustained by Appellees, as indicated by the district court's findings of fact and conclusions of law, were to personal property and improvements,

including crops, livestock, irrigation systems, flood control structures, and fences. *See Branch v. Walker*, 1952-NMSC-080, ¶ 7, 56 N.M. 594, 247 P.2d 172 (describing "farming implements, livestock and . . . crops" as personal property). The appropriate method for calculating damages to personal property is the cost of repair. *See* UJI 13-1813 NMRA ("In determining [personal] property damages, if any, you may award the reasonable expense of necessary repairs to the property which was damaged.").[2]

{66} However, the district court also awarded compensatory sanctions in the amount of $15,000 for work performed by Appellees prior to September 14, 2013. Work performed by Appellees prior to the date on which they suffered damages cannot be included as part of "the reasonable expense of necessary repairs to the property which was damaged." *Id.* While Appellees may be entitled to reimbursement or payment for this work, they must attempt such recovery under an alternate legal theory.

{67} Appellees suffered damages to personal property in the amount of $393,764. As such, we affirm this portion of the award in Appellees' favor. We reverse the district court's award of $15,000 for work performed by Appellees prior to September 14, 2013. To the extent that Appellant offered additional arguments related to statutory limitations on damages in its docketing statement, these arguments are not developed on appeal and are not considered by this Court. *See State v. White*, 1994-NMCA-084, ¶ 1, 118 N.M. 225, 880 P.2d 322 ("Issues raised at earlier stages of the appeal but not briefed are deemed abandoned.").

ATTORNEY FEES AND COSTS

{68} Appellant filed a separate notice of appeal related to the district court's order denying its objection to Appellees' attorney fees affidavit and cost bill. Appellant filed a docketing statement addressing these issues. The background section of Appellant's brief in chief includes discussion of the district court's award of attorney fees and costs. This section generally asserts Appellant's claims that the district court erred by (1) awarding costs designated as non-recoverable by Rule 1-054(D)(3) NMRA, (2) awarding attorney fees for clerical work, and (3) failing to reduce expert witness fees. However, neither the brief in chief nor the reply brief offers any legal argument on these topics. Given the filing of a separate notice of appeal and docketing statement, and discussion in the background section of the brief in chief, we are unclear whether this omission was intentional or inadvertent. Regardless, Appellant has abandoned these issues on appeal. *See White*, 1994-NMCA-084, ¶ 1.

CONCLUSION

{69} For the foregoing reasons, we affirm in part but reduce the award of civil contempt damages in favor of Appellees to $393,764.

{70} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
JONATHAN B. SUTIN, Judge

[2]UJI 13-1817 NMRA articulates an alternative method for calculating damages to personal property. However, neither party offered any testimony or evidence as to the diminution of value to Appellees' personal property. Therefore, we utilize UJI 13-1813 in our analysis.

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Anyone having any knowledge about wills prepared for either or both Mark Randall Farmer and/or Marcella Jane Farmer please contact Kevin D. Hammar or Sarah Turner at (505) 266-8787 or khammar@abqlawnm.com or sturner@abqlawnm.com .

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