V11

ORIGINAL

NO. 18-7398

FILED
DEC 21 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Kerry Kruskal As a pro se PETITIONER

VS

PERTER SPRUNT RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPENT(S)

Petitioner has NOT previously been granted leave to proceed in forma pauperis in any other court

QUESTIONS

1- In this case- Was the district court correct to adversely rule on Sprunt's summery judgment motion when there were so many legitimate contested issues?

2- Was district court allowed to instruct Kruskal to file an amended complaint, (leading Kruskal to believe that she was helping a pro se litigant and) then rule against Kruskal summarily, and then also forbid him from filing a motion to reconsider?

3- Should Kruskal now be allowed bring in additional documents (and arguments) that he was unable to get into the court record when precluded from filing a motion to reconsider. This would include a document in Sprunts possession stating the obligations of the pond. And testimony from the State engineer stating that Kruskal owns Both stored water rights, and surface water rights.

4- Did Kruskal lose his stored water rights (or surface water right) because of issue preclusion from the 2009 case. Does District have to identify where disvssed such that Krvska) can explain context?

5- In the 2009 case- Did Sprunt ever make any arguments to support claims that he owned any (or all) of the stored water rights?

6- In the 2009 case, did district court have the authority to rule on ownership of either stored or surface water rights?

7- In this case- Did Kruskal lose his surface water rights? And if so was it because.....

A) They were not specifically mentioned on the warranty deed?

B) Because Kruskal allegedly did not pay his association ditch fees?

C) The surface water rights were also lost because of issue preclusion from the 2009 case?

8- In this very case, did district court have the authority to rule on ownership of either stored or surface water rights?

9- Was the New Mexico Supreme court allowed to refuse filing the motion to clarify timely signed for on 10/9/2018? And was it OK to "conceal" this from Kruskal until putting it in the mail on 11/20/2018 EX. "C" and "D"

10- Will Sprunt be unjustly enriched when he permits the pond, claiming all the stored water for himself, because the courts have ruled that Kruskal can not contest any such claims.

11- Was the district court correct to rule that Kruakal may no longer represent himself pro se?

12- Was district court correct to allow into evidence documents that have nothing to do with this case, used to sanction Kruskal such that he can no longer represent himself?

13- Was district court correct to sanction Kruskal?

14- Are there special federal, and constitution, laws (and rights) regarding taking away property rights that were not properly followed.

X

LIST OF PARTIES

YES- All parties appear in the caption of the case on the cover page

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and
STATUTE OF RULES

Summary judgment is appropriate when: "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden to show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. The party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor. Clifton v. Craig, 924 F.2d 182, 183 (10th Cir.1991). The nonmoving party "may not rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

"the defendant bears the usual burden of a party moving for summary judgment to show that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir.2004).

"genuine issue as to any material fact" with a "slight doubt" or the "slightest doubt." See, e.g., Bostian v. Aspen Wood Products Corporation, 81 N.M. 152, 464 P.2d 882 (1970); Martin v. Board of Education of City of Albuquerque, 79 N.M. 636, 447 P.2d 516 (1968); Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968); Green v. Manpower, Inc., of
Albuquerque, 81 N.M. 788, 474 P.2d 80 (Ct.App. 1970); Binns v. Schoenbrun, 81 N.M. 489,
468 P.2d 890 (Ct.App. 1970). This equation of terms has resulted in a disregard of the clear language and a departure from the meaning and purpose of Rule 56(c), Rules of Civil Procedure [§ 21-1-1(56) (c), N.M.S.A. 1953 (Repl.Vol. 4, 1970)].

"An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo." Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971.

Summary judgment is a drastic measure not generally favored and is to be used only with extreme caution. Thompson v. Fahey, 94 N.M. 35, 607 P.2d 122 (1980).

Summary judgment is a drastic remedial tool which demands the exercise of caution in its application. Eavenson v. Lewis Means, Inc., 105 N.M. 161, 730 P.2d 464 (1986); Pharmaseal Lab., Inc. v. Goffe. It is not a substitute for trial where material disputed factual issues are shown to exist. Ponce v. Butts, 104 N.M. 280, 720 P.2d 315 (Ct.App. 1986). Where an appeal is taken from an order granting summary judgment, the reviewing court will assess the record in the light most favorable to support a trial on the merits. Eavenson v. Lewis Means, Inc.; North v. Public Serv. Co., 97 N.M. 406, 640 P.2d 512 (Ct.App. 1982).

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New Mexico recognizes that "[i]n any malicious abuse of process claim, the use of process for an illegitimate purpose forms the basis of the tort." Durham v. Guest, 2009-NMSC-007, ¶ 31, 145 N.M. 694, 204 P.3d 19. The purpose of the tort is to discourage the misuse of our judicial system. See id. (explaining that "[w]hen the judicial process is used for an illegitimate purpose such as harassment, extortion, or delay, the party that is subject to the abuse suffers harm, as does the judicial system in general"). The tort is

"disfavored in the law [b]ecause of the potential chilling effect on the right of access to the courts." Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, 766*766 ¶ 19, 142 N.M. 150, 164 P.3d 31(alternation in original) (internal quotation marks and citation omitted).

a trial court has authority to reconsider its judgment, on motion by a party or on its own motion, provided the court does so within thirty days. NMSA 1978, § 39-1-1 (Repl.Pamp.1991); Desjardin v. Albuquerque Nat'l Bank, 93 N.M. 89, 90, 596 P.2d 858, 859 (1979).

39-1-1. [Judgments and decrees; interlocutory orders; period of control over final judgment.]
Any judgment, or decree, except in cases where trial by jury is necessary, may be rendered by the judge of the district court at any place where he may be in this state, and the district courts, except for jury trials, are declared to be at all times in session for all purposes, including the naturalization of aliens. Interlocutory orders may be made by such judge wherever he may be in the state, on notice, where notice is required, which notice, if outside of his district, may be enlarged beyond the statutory notice, for such time as the court shall deem proper. Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof; and, provided further, that the provisions of this section shall not be construed to amend, change, alter or repeal the provisions of Sections 4227 or 4230, Code 1915.
Should Kruskal now be allowed bring in additional documents (and arguments) that he was unable to get into the court record without a motion to reconsider.
This would include a document in Sprunts possession stating the obligations of the pond. And testimony from the State engineer stating that Kruskal owns stored water rights, and certainly surface water rights.

A party opposing a motion for summary judgment is to be given the benefit of all reasonable doubts in determining whether a genuine issue of material fact exists. Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975). Similarly, summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved. Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207 (8th Cir.1976); Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir.1974).

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Application of the doctrine of res judicata, or "claim preclusion," depends upon identity of prior and subsequent actions in four respects: (1) parties or privies, (2) capacity or character of persons for or against whom the claim is made, (3) cause of action, and (4) subject matter. Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982); Adams v. United Steelworkers of Am., AFL-CIO, 97 N.M. 369, 640 P.2d 475 (1982).

Torres v. Village of Capitan, 92 N.M. 64, 68, 582 P.2d 1277, 1281 (1978).
[W]here the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation.
City of Santa Fe v. Velarde, 90 N.M. 444, 446, 564 P.2d 1326, 1328 (1977).
"[f]ederal law and New Mexico law are not divergent on claim preclusion doctrine." Moffat
v. Branch, 2005-NMCA-103, ¶ 11, 138 N.M. 224, 118 P.3d 732.

"The principles of preclusion operate to promote finality in civil disputes by relieving parties of the burdens of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions." Rosette, Inc. v. U.S. Dep't of the Interior,2007-NMCA-136, ¶ 32, 142 N.M. 717, 169 P.3d 704.

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Failure to raise a defense of claim will result in the claim not being considered by the court. State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981),

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plaintiff's right of access to the courts is important. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct.App. 1985)

"[I]t is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." General Atomic Co. v. Felter, 434 U.S. 12, 12, 98 S.Ct. 76, 76, 54 L.Ed.2d 199 (1977).

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our system of justice requires that the appearance of complete fairness be present. See Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (N.D.Ga. 1974), aff'd, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974)

a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. See Tumey v. Ohio, 273
U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)
"The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings." Matter of Protest of Miller, 88 N.M. 492, 497, 542 P.2d 1182, 1187 (Ct.App. 1975, cert. denied, 89 N.M. 5, 546 P.2d 70. In Miller, the Court of Appeals stated:
By "procedural due process" we mean the following:
Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking 200*200 to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); and the proceedings looking toward the deprivation must be essentially fair. (Citation omitted.)

Before a procedural due process claim may be asserted, the plaintiff must establish that he was deprived of a legitimate liberty or property interest and that he was not afforded adequate procedural protections in connection with the deprivation. Barreras v. New Mexico Corrections Dep't, 114 N.M. 366, 370, 838 P.2d 983, 987 (1992). The definition of property centers on the concept of entitlement; therefore, interests in government benefits will be recognized as constitutional "property" if the person can be deemed "entitled" to them. 2 Donald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 17.5, at 628 (2d ed. 1992).

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19.26.2.17 CHANGE OF OWNERSHIP: E. Appurtenance: Except as otherwise provided by written contract between the owner of the land and the owner of a ditch, reservoir, or other works for the storage or conveyance of water, all surface waters appropriated for irrigation purposes are appurtenant to the land upon which they are

used by operation of Sections 72-1-2 and 72-5-23 NMSA. No irrigation water right appurtenant to the land irrigated shall be assigned or conveyed apart from the land unless it is expressly severed from the land in the manner provided by law.

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§ 73-3-6. Persons in default in work or payments; right to use of water denied Currentness.

No person, who has after written notice failed or refused to do his work or pay the amount assessed against him in lieu of such work upon the community ditch or acequia, shall be allowed to take or use any water from such community ditch or acequia or lateral thereof, while in default in such payment or failure to do such work.

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Adjudication of water rights in the Taos area are solely with the jurisdiction of the State of New Mexico vs Abeytea, 69-CV-7896 consolidated with 69-DV-7939 Before the US District court for the District of New Mexico.

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Ideal v. Burlington Res. Oil & Gas Co. LP, 2010-NMSC-022, 148 N.M. 228, 233 P.3d 362
All Citations: 148 N.M. 228, 233 P.3d 362, 72 Oil & Gas Rep. 133, 2010 -NMSC- 022

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State ex rel. Martinez v. Kerr-McGee Corp., 1995-NMCA-041, 120 N.M. 118, 898 P.2d 1256
All Citations: 120 N.M. 118, 898 P.2d 1256, 1995 -NMCA- 041

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standard Citation: Carrillo v. Penn Nat'l Gaming, Inc., 172 F. Supp. 3d 1204 (D.N.M. 2016)- All Citations: 172 F.Supp.3d 1204

Whether Plaintiffs' complaint is barred by claim preclusion or issue preclusion is an issue of law. BP Am. Prod. Co. v. Chesapeake Expl., LLC, 747 F.3d 1253, 1259 (10th Cir.2014); Kirby v. Guardian Life Ins. Co., 148 N.M. 106, 231 P.3d 87, 105 (2010). Under the federal full faith and credit statute, I must apply New Mexico law to determine whether claim or issue preclusion bars Plaintiffs' suit. Strickland v. City of Albuquerque, 130 F.3d 1408, 1411 (10th Cir.1997); Hubbert v. City of Moore, Okla., 923 F.2d 769, 772–73 (10th Cir.1991). As the parties seeking to bar Plaintiffs' claims, the Defendants have the burden of establishing that the elements of claim preclusion or issue preclusion have been met. Ullrich v. Blanchard, 142 N.M. 835, 171 P.3d 774, 777 (Ct.App.2007).

[1] *1211 The Race Track Defendants assert that Plaintiffs' complaint must be dismissed by virtue of the application of claim preclusion. 1 Both federal law and New Mexico law are consistent on the four requisite elements that govern claim preclusion. Potter, 342 P.3d at 57. A party asserting the defense of claim preclusion must establish that: "1) there was a final judgment in an earlier action, 2) the earlier judgment was on the merits, 3) the parties in the two suits are the same, and 4) the cause of action is the same in both suits." Id. Claim preclusion does not apply unless the party had a full and fair opportunity to litigate the issue in the prior proceeding. Id. at 59. Claim preclusion bars not only claims that were raised in the prior lawsuit, but also claims that could have been raised. Kirby, 231 P.3d at 105. Plaintiffs contend that the Defendants have not established the first, third and fourth elements of claim preclusion.

[5] [6] Plaintiffs' main argument against the application of claim preclusion concerns the fourth element, whether the cause of action is the same in both cases. Both the Tenth Circuit and the State of New Mexico have adopted the transactional approach to analyzing this issue. Petromanagement Corp. v. Acme–Thomas Joint

Venture, 835 F.2d 1329, 1335–36 (10th Cir.1988); Potter, 342 P.3d at 57. Under this approach, all issues that arise out of a "common nucleus of operative facts" constitute a single cause of action. Potter, 342 P.2d at 57 (quotation omitted). Courts are to identify pragmatically the facts comprising the common nucleus, "considering (1) how they are related in time, space, or origin, (2) whether, taken together, they form a convenient trial unit, and (3) whether their treatment as a single unit conforms to the parties' expectations or business understanding or usage." Id. (quotation omitted).

[10] [11] The Racing Commission, the Boards and the Stewards contend that they are entitled to dismissal by virtue of issue preclusion. The doctrine of issue preclusion fosters judicial economy by preventing the relitigation of "ultimate facts or issues actually and necessarily decided in a prior suit." Shovelin v. Central N.M. Elec. Co-op., 115 N.M. 293, 850 P.2d 996, 1000 (Ct.App.1993) (quotation omitted). Issue preclusion requires proof of four elements: 1) the party against whom issue preclusion is asserted must have been a party or in privity with a party to the prior action; 2) the subject matter of the two cases is different; 3) the ultimate fact or issue was actually litigated in the prior action; and 4) the issue was necessarily determined in the prior litigation. Ullrich, 171 P.3d at 778; DeLisle v. Avallone, 117 N.M. 602, 874 P.2d 1266, 1269 (Ct.App.1994). Issue preclusion does not apply when the ultimate issue in the second case was not litigated or decided in the first case, Ullrich, 171 P.3d at 778, or when it is unclear whether the issue was actually decided, City of Sunland Park v. Macias, 134 N.M. 216, 75 P.3d 816, 821 (Ct.App.2003

XIX

225 P.2d 1007 (1950)
55 N.M. 12

STATE ex rel. BLISS
v.
DORITY et al.

No. 5296.

Supreme Court of New Mexico.

December 22, 1950.

1008 *1008 Caswell S. Neal, Carlsbad, for appellants.

Joseph O. Walton, Special Asst. Atty. Gen., Atwood, Malone & Campbell, Roswell, for appellee.

BRICE, Chief Justice.

The State of New Mexico, upon relation of its State Engineer John H. Bliss, brought separate suits against Bert Troy Dority, Loman Wiley and S.A. Lanning, Jr., the purpose of which was to enjoin the respective defendants from unlawfully using for irrigating lands, waters drawn from what is known as the Roswell Artesian Basin, and the valley fill above it, which plaintiff asserts under Ch. 131, N.M.L. 1931, 1941 Comp. § 77-1101 et seq., are subject to appropriation as provided therein.

1009 These three suits were consolidated in the district court for all purposes and are *1009 here on appeal from a decree of the district court enjoining each of the defendants from using unappropriated water for the irrigation of land, in violation of the New Mexico statutes.

Defendants' lands are situated in Chaves County, New Mexico, and are located within the external boundaries of two underground water sources, one of which is an artesian basin lying between confining strata, the waters of which are commonly referred to as artesian water; and the other, plaintiff asserts, is an underground reservoir or lake in the valley fill overlying such artesian basin, the waters of which are commonly referred to as shallow ground water. About 45,000 acres are irrigated from shallow ground water and 55,000 acres from artesian water.

Each of the defendants, Lanning and Dority, is the owner of a permit authorizing him to use water for irrigating a portion of his lands; but the plaintiff asserts that the defendant Dority is irrigating 96.7 acres of land illegally, in that he has not been granted the right to so use the water; that the defendant Wiley was in like manner illegally using water to irrigate 48.7 acres of land; and the defendant Lanning was illegally using water to irrigate 120 acres. The defendants admit that they have been using, and will continue to use, the water without a permit unless enjoined from so doing. They deny that their use of it is in violation of law. The principal contention is that the New Mexico statutes providing for the appropriation of sub-surface water is unconstitutional upon several grounds stated.

The statutes of New Mexico declaring that the artesian and shallow ground water from which defendants obtained the water to irrigate their land belongs to the public and providing for their appropriation for beneficial use, are as follows:

"The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use." Sec. 77-1101, N.M.Sts. 1941.

"Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act." Sec. 77-1102, N.M.Sts. 1941.

"Any person, firm or corporation desiring to appropriate for irrigation or industrial uses any of the waters described in this act shall make application to the state engineer in a form to be prescribed by him in which said applicant shall designate the particular underground stream, channel, artesian basin, reservoir or lake from which water is proposed to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the amount of water applied for, the use for which it is desired and if the

proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof. (Then follows a provision for the publication of notice of any objections to granting the permit, a provision that such application should be granted if there are any waters subject to appropriation, and the manner of hearing protests on such application, if any.)" Sec. 77-1103, N.M.Sts. 1941.

"Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof." Sec. 77-1104, N.M.Sts. 1941.

"Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act described, by application of waters therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. (Then follows provision for verification of the declaration, and the recording thereof.)" Sec. 77-1105, N.M.Sts.1941.

1010 *1010 "Declarations heretofore filed in substantial compliance with section 5 (§ 77-1105) hereof shall be recognized as of the same force and effect as if filed after the taking effect of this act." Sec. 77-1106, N.M.Sts. 1941.

"The decision of the state engineer shall be final in all cases unless appeal be taken to the district court within thirty (30) days after his decision as provided by section 151-173 of the 1929 New Mexico Statutes Annotated (§ 77-601)." Sec. 77-1110, N.M. Sts. 1941.

"The state engineer is hereby given the power and it is made his duty to formulate rules and regulations for the purpose of carrying out the provisions of act, which rules and regulations shall be printed and made available for distribution to all applicants." Sec. 77-1111, N.M.Sts. 1941.

"Any person using or appropriating water without a permit, contrary to the provisions of section 1 of chapter 70, of the New Mexico Session Laws of 1943, designated as section 77-1103 of the New Mexico Statutes, 1941, Annotated; or who changes the location of his well or use of the water except as provided and permitted by section 77-1107 of said New Mexico Statutes, 1941, Annotated; or who appropriates to his own use without a permit from the state engineer forfeited water or water rights under the provisions of section 77-1108 of said New Mexico Statutes, 1941, Annotated, shall be guilty of a misdemeanor and, on conviction thereof in any court of competent jurisdiction, shall be punished * * *." Laws 1943, Ch. 70, Sec. 2; Laws 1947, Ch. 21, Sec. 1, Sec. 77-1112, N.M.Sts. 1941.

The appellants' first contention is stated as follows: "The State Engineer of New Mexico has no right to maintain these actions by way of injunction against these defendants, such right not having been conferred upon him by law, and the State Engineer has not been given authority by law to maintain such an action in the name of the state upon the relation of the State Engineer."

These suits were styled "The State of New Mexico on the Relation of John H. Bliss, State Engineer" as plaintiff. The contention is that this official was not authorized by any law to bring these suits.

The answer is that the suits were not brought by the State Engineer, but by the Attorney General of the state acting through his assistant, and by special counsel employed in the cases.

If there is an error in that part of the title reading, "On the Relation of John H. Bliss, State Engineer" then it will be treated as surplusage.

The public waters of this state are owned by the state as trustee for the people, Murphy v. Kerr, D.C., 296 F. 536; and it is authorized to institute suits to protect the public waters against unlawful use, or to bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the general public welfare, 49 A.J., `States, Territories & Dependencies', Sec. 80. The Attorney General is given specific authority "to prosecute and defend all causes in the Supreme Court in which the state is a party or interested. To prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor." Sec. 3-302, N.M.Sts. 1941.

XXI

The State Engineer has no personal interest in this suit, and it is brought by the Attorney General in behalf of the state alone, as its pleadings indicate. The words "on the relation of John H. Bliss, State Engineer" will be treated as surplusage if necessary. People ex rel. Clark v. Milk Producers Ass'n, 60 Cal. App. 439, 212 P. 957; People ex rel. Warfield v. Sutter Street Ry. Co., 117 Cal. 604, 49 P. 736. The district court recognized the State of New Mexico as the party plaintiff, entitled to prosecute these suits, and so we conclude.

Appellants' Point II is as follows: "State Engineer has no jurisdiction over underground waters under 1907 water code and no authority has been granted him to declare or define underground water basin or regulate issuance of permits in such
1011 district until such time as water area has *1011 been defined and determined by adjudication suit brought by state engineer under statutes relating to adjudication of water rights."

We will assume for the purposes of this case that the 1907 water code, Ch. 49, N.M.L. 1907, and amendments, has no application to underground waters, but see El Paso & R.I. Ry. Co., 36 N.M. 94, 8 P.2d 1064. The Act of 1931 provides that "The waters of underground streams, channels, artesian basins, reservoirs or lakes, having *reasonably ascertainable boundaries,* are hereby declared to be public waters and to belong to the public, etc." 1941 Comp. § 77-1101. It is these waters over which the State Engineer is given jurisdiction. There is no provision in the law that requires an adjudication in court to define or determine the area or boundaries of any of the described waters before the statutory jurisdiction of the State Engineer becomes effective.

It has been assumed by the State Engineer that he had jurisdiction to determine the outer boundaries of such bodies of water since the passage of the 1931 act. This jurisdiction is implicit in the act. We recognized it in the Peters case, infra; and we stated in Yeo v. Tweedy, 34 N.M. 611, 286 P. 970, 976, construing the same provision in a prior act: "* * * Whether the state engineer shall have jurisdiction over such waters is, however, a matter for legislative determination. He will have such jurisdiction as the statute gives him. Vanderwork v. Hewes and Dean [15 N.M. 439, 110 P. 567], supra. Before he can assume jurisdiction over underground bodies he must find that they have boundaries reasonably ascertained by scientific investigations, or by surface indications."

The jurisdiction of the engineer to determine the boundaries of such waters has been recognized by a recent act of the legislature. "It shall be unlawful for any person, firm or corporation to drill or to begin the drilling of a well for water from an underground stream, channel, artesian basin, reservoir or lake (hereinafter referred to as `underground source') the boundaries of which have been determined and proclaimed by the State Engineer of New Mexico to be reasonably ascertainable, without a valid, existing license for the drilling of such wells issued by the State Engineer of New Mexico in accordance with the provisions of this act, and the rules and regulations promulgated by him in pursuance hereof." Ch. 178, Sec. 1, N.M.L. 1949.

A legislative act which requires an officer to determine facts upon which his jurisdiction depends, does not grant either legislative, Panama Refining Co. v. Ryan et al., 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, or judicial authority to such officer, Mutual Film Corp. v. Industrial Comm., 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552; Rainey, Supt. of Banks v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148. And see 11 A.J., Constitutional Law, Secs. 235 et seq.

The State Engineer has the jurisdiction and authority to determine the boundaries of any of the underground waters declared to be public waters, and no judicial determination is necessary to the jurisdiction given him by the laws in question.

No right to the use of water from such sources was obtained by its use by defendants in violation of law, nor can it be. The statutory manner of securing such rights is exclusive. Pecos Valley Artesian Cons. District v. Peters, 50 N.M. 165, 173 P.2d 490. We so held as to the irrigation law of 1907 in Harkey v. Smith, 31 N.M. 521, 247 P. 550. The same legal principles apply here.

The principal question raised is whether the Act of 1931, which we have quoted, that declared the ownership of the waters in question to be in the public, violates the 14th Amendment to the Constitution of the United States and Sec. 18 of Art. 2 of the Constitution of New Mexico, in that it authorizes the state to deprive its citizens and others of their property without due process of law, and denies them the equal protection of the laws; and violates Sec. 20 of Art. 2 of the Constitution of New Mexico in that it authorizes the taking of private property for public use without just compensation.

1012 The whole argument is based on the assumption that the water described in Sec. *1012 1 of the Act of 1931 belongs to the owners of the overlying land. Each of the defendants claims that the underground water under his land is his property acquired through mesne conveyances from the United States, beginning with the patent from the Government and that such

patent and mesne conveyances transferred to him the water underlying the land conveyed. In other words, that the common law, or at least the law of correlative rights in such waters, is the law of this state.

Without going into unnecessary detail and without referring to the many cases cited by the parties to this suit, we state that the patents from the United States to public lands issued after 1866, and particularly those issued after the Desert Land Act of 1877, 43 U.S.C.A. § 321 et seq., conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the Act. The substance of the contention of each of the appellants is that he has a vested interest in the title to the water under his lands, to the center of the earth, of which he cannot be deprived by any legislative act.

This question was settled by this court in Yeo v. Tweedy, supra. It was held in that case that the title to the water described in Sec. 1 of the 1931 Act belonged to the public and was subject to appropriation for beneficial uses. We do not deem it necessary to go into this question extensively again, but because of decisions of this and other courts on the question since Yeo v. Tweedy, which was decided April 16, 1930, we will review them.

It was stated in Yeo v. Tweedy that Sec. 1 of Ch. 182, N.M.L. 1927, almost identical with the 1931 Act, had always been the law in this jurisdiction. Whether this is correct or not, it is of little importance, as the waters involved in this suit were reserved for the people of New Mexico, to be disposed of under its laws and the decisions of its courts, by an act of the United States Congress of 1877. This act was known as the Desert Land Act and is as follows: "Section 321. It shall be lawful for any citizen of the United States, or any person of requisite age `who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: Provided, however, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: *Provided,* That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form." Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377, Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096.

We construed this Act as it applied to surface water in State Game Comm. v. Red River Valley Co., 51 N.M. 207, 182 P.2d
1013 421, 460, in our opinions on motion for rehearing and second motion for rehearing. *1013 The title to underground waters was not involved in that case but the reasoning applies here, as will be shown later in this opinion.

"In neither case was the `ownership' of water involved. So far as I am informed no court has ever held that lands granted by a United States patent carried title to running water passing through them. In these states in which the common law of riparian rights is in force, the patents of the United States conveyed to the grantee `no property in the water itself, but a simple usufruct while it passes along.' United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690, 19 S.Ct. 770, 775, 43 L.Ed. 1136. Likewise, patents to land in the arid states have never been held to convey as property the running water on the granted land.

"But we need not trouble ourselves about the question of the ownership of water in running streams on public lands. Appellee's patent was dated April 20, 1877, after the Desert Land Act (Act of March 3, 1877, 19 Stat. 377, 43 U.S.C.A. § 321 et seq.) had become effective. Assuming that the appellee's title is from the United States, unaffected by any previous Mexican grant, the title to the flowing water was not included in the conveyance; for by the Desert Land Act, `* * * if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately.' Ickes, Sec'y v. Fox [66 App.D.C. 128, 85 F.2d 294], supra. Appellee obtained no title to water or to its use by virtue of the patent from the United States.

XXIII

* * * * * *

"Regarding the acts of Congress recognizing the right to the use of water in streams and lakes on public lands, it was further stated in California-Oregon Power Co. v. Beaver, etc. Co. [295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356], supra:

"`The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain. * * *

"`If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result.' * * *

"`* * * The fair construction of the provision now under review (Act of 1877) is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * *

"`Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," * * * the full power of choice must remain with the state.'

* * * * * *

"I do not doubt but that the water of non-navigable streams had been severed from the public domain of the arid west long before the passage of the desert land act of 1877, by prior acts of Congress as well as by the government's recognition of the customs, laws and court decisions of the western states in relation thereto as intimated in the Ickes Case, and in California-Oregon Co. v. Beaver, etc. Co., supra. If appellee has any fishing rights in the Conchas Lake, it is only by virtue of
1014 the statute of 1876 adopting the common law as the *1014 rule of practice and decision in this jurisdiction."

The case of California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S.Ct. 725, 726, 79 L.Ed. 1356, from the State of Oregon, was decided in 1935, five years after our decision in the Yeo case. The Supreme Court said: "The sole claim is based upon the common-law rights of a riparian proprietor, which petitioner says attached to the lands when the patent was issued to its first predecessor in title." This is the exact claim here, except as to the nature of the water involved. Portions of the opinions in this case were quoted in the Red River Company case, and like that case it involved running water on the surface of the earth, but we call specific attention to the Desert Land Act of 1877 which, among other things provided for the disposition of unappropriated water as follows: "* * * and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The question here is as to the intention of Congress in using the following language: "* * * together with the water of all lakes, rivers, *and other sources of water supply* * * *." Does this include the water dedicated to public use by the Act of 1931? It was the intention of Congress in using the words "other sources of water supply" to cover all water that could be used and appropriated for beneficial use under the laws of the state where the land is located.

As we feel that the Power Company case is decisive here, we quote a considerable portion of that opinion, as follows:

"The question with which we are here primarily concerned is whether — in the light of pertinent history, of the conditions which existed in the arid and semiarid land states, of the practice and attitude of the federal government, and of the congressional legislation prior to 1885 — the homestead patent in question carried with it as part of the granted estate the

common-law rights which attach to riparian proprietorship. If the answer be in the negative, it will be unnecessary to consider the second question decided by the court below.

"For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253, [U.S.C. title 43, Sec. 661, 43 U.S.C.A. § 661], the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. * * *

"This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, supra. * * * Section 9 of that act provides that:

"`Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed. * * *'

"This provision was `rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its
1015 continued *1015 use, than the establishment of a new one.' * * * And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude, the Act of July 9, 1870, c. 235, § 17, 16 Stat. 217, 218, [U.S.C. title 30, Sec. 52, 30 U.S.C.A. § 52] amending the Act of 1866, provided that: `* * * all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.'

"The effect of these acts is not limited to rights acquired before 1866. *They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use,* as recognized by *local rules and customs, and the legislation and judicial decisions* of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain. * * *

"If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a proviso to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

"`* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.' [Chap. 107, 19 Stat. at L. 377, U.S.C. title 43, Sec. 321, 43 U.S.C.A. § 321.]

* * * * * *

"That body (the Congress) thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a

complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. * * * Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend `Great American Desert,' which was spread in large letters across the face of the old maps of the far west.

"In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert land entrymen, but `the water of all lakes, rivers, and *other sources of water supply* upon the public lands and not navigable' were to remain `free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public
1016 domain, not *theretofore appropriated, from the land itself.* From that premise, it follows *1016 that a patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

"* * * The opinion, dealing with the question of riparian rights, said that it was within the power of any state to change the common-law rule and permit the appropriation of the flowing waters for any purposes it deemed wise. Whether a territory had the same power the court did not then decide. Two limitations of state power were suggested: First, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow, so far, at least, as might be necessary for the beneficial use of the government property; and, second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought that by the acts of 1866 and 1877 `Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow,' and that `the obvious purpose of congress was to give its assent, so far as the public lands were concerned, *to any system,* although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries.'

* * * * * *

"The Supreme Court of Oregon in Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728, held that the legal effect of the language already quoted from the Desert Land Act was to dedicate to the public all interest, *riparian or otherwise, in the waters of the public domain,* and to abrogate the common-law rule in respect of riparian rights as to all lands settled upon or entered after March 3, 1877. The supplemental opinion which deals with the subject beginning [51 Or.] at page 382 [98 P. 1083] is well reasoned, and we think reaches the right conclusion. * * *

* * * * * *

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision (Act of 1877) now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved *for the use of the public under the laws of the states and territories named.* The words that the water of all sources of water supply upon the public lands and not navigable `shall remain and be held free for the appropriation and use of the public' are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein * * *.

* * * * * *

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, *if not before,* all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in

each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The Desert Land Act provided that all waters *upon* the public lands (except navigable waters) were to remain * * * free for the appropriation and use of the public. It was not intended to be taken literally that such waters must be upon the surface of the earth to be subject to such use. Waters of underground rivers with defined banks have always been subject to appropriation. We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used
1017 *1017 beneficially by the public, as provided by the laws of the arid states. No interest in such waters was conveyed by a United States patent. The United States Supreme Court has always looked to the laws and decisions of the state courts to determine the extent to which the authority of the state over such water had been exercised. Howard v. Perrin, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374; Snake Creek Mining & Tunnel Co. v. Midway Irr. Co., 260 U.S. 596, 67 L.Ed. 423. The Supreme Court of Utah has changed its theory of the law of appropriation several times, but the United States Supreme Court follows its latest decision. See the Snake Creek Case.

After different conclusions as to the status of artesian water, the Supreme Court of Utah in Riordan v. Westwood, Utah, 203 P.2d 922, 926, stated that until 1935 its decisions treated the water of artesian basins as percolating water and as such the ownership went to the owner of the ground where such water was located and was not considered to be subject to appropriation; but that in Glover v. Utah Oil Refining Co., 62 Utah 174, 218 P. 955, 31 A.L.R. 900, it had concluded differently and that the doctrine of percolating waters and correlative rights had no application to artesian basins such as were involved in that case; that such waters were subject to appropriation and the doctrine that "the first in time is the first in right" governed. The history of the law of artesian wells and underground waters in that state is gone into in an exhaustive opinion, with the conclusion that such water is subject to appropriation and that one who went on another's land and drilled a well for artesian water was not precluded from applying for an appropriation of such water.

Under the laws of Idaho the law of "first in time is first in right" in applying subterranean waters to a beneficial use, is approved in Hinton v. Little, 50 Idaho 371, 296 P. 582. It was held in the case of Maricopa County, etc., Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, that underground water was not subject to appropriation *under the laws of Arizona.*

In the state of California the doctrine of correlative rights is in force. The following cases are of interest, although they have no application here: Orchard v. Cecil F. White Ranches, Cal. App., 217 P.2d 143; City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17; Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 76 P.2d 681. This doctrine seems to have been established by the decisions of the courts of California, the first of which is Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236.

We hold that under the Federal law and that of New Mexico the waters described in Sec. 1 of the Act of 1931 are subject to appropriation under that Act.

Defendants attack the statute of 1931 as being vague and uncertain to the extent that it does not meet the requirements of the due process clause of the Federal and State Constitutions. It is asserted that the standard by which the public character of underground water is determined, i.e., those "having reasonably ascertainable boundaries" is not sufficiently certain to meet this test of constitutionality when applied to newly developed underground sources. Defendants admit that the south, east and west boundaries of the Roswell basin not only are ascertainable but have been ascertained. Their lands lie toward the south end of the basin, and there are hundreds of wells to the north. For all practical purposes the north boundary is located at or beyond the location of the wells furtherest north.

In the enactment of statutes reasonable precision is required. Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty. But absolute or mathematical certainty is not required in the framing of a statute. State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220, L.R.A. 1918B, 945; State v. Northwest Poultry & Egg Co., 203 Minn. 438, 281 N.W. 753. "The use of such terms as `reasonable' or `unreasonable' in
1018 defining standards of conduct or in prescribing charges, allowances and the like, * * * have been held not to render a *1018 statute invalid for uncertainty and indefiniteness." 50 Am.Jur. Statutes, Sec. 473.

In the case of Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 587, 76 L.Ed. 1167, the Supreme Court of the United States had under consideration a Texas statute which was attacked for uncertainty because in regulating the use of highways by trucks it used the words "shortest practicable route" and other allegedly vague expressions. In holding the statute valid the Supreme Court said: "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas

which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it."

The word "reasonably" is defined "In a reasonable manner, moderately; tolerably; sufficiently." (Webster's International Dict.). The legislature knew that the exact meanderings of the boundaries of any underground body of water could not be determined. The qualifying word "reasonably" was used in the sense of "sufficiently". The boundaries must be sufficiently ascertainable for the purposes of the act. Of course there is difficulty involved in determining such boundaries. But we are of the opinion that three boundaries having been established and that the other necessarily exists, that the defendants who are within the boundaries cannot complain, even though the other could only be established by the unnecessary drilling of wells for such purpose. For all practical purposes, the boundaries have been sufficiently established by the State Engineer, and that is all that the law requires.

The Act of 1931 has been in effect for 19 years during all of which time it has been applied in the administration of underground water sources throughout New Mexico. Eight such sources are now administered by the State Engineer.

There are about one million acres of irrigated land in New Mexico and nearly one-third, or about 300,000 acres are irrigated from wells based upon water rights issued under the Act of 1931. There are about 100,000 acres irrigated from the Roswell basin, of the value of nearly $25,000,000. Titles to this property are involved, and any decision affecting them adversely would be disastrous to the economy of the state.

It would be anomalous indeed if this court, after such a history of successful application of the statute should now determine that it is void for vagueness and uncertainty. The statute is not void for the reasons stated.

It is asserted that "the operation of said law by the State Engineer has been discriminatory, arbitrary and unlawful and has operated to deny the defendants the equal protection of laws and to result in special privileges being extended to others similarly situated."

The trial court found as a fact "That the State Engineer has not discriminated against any of the parties hereto in his administration of the underground water law, either in so far as it affects the shallow water basin or the artesian basin with which these suits are concerned." This finding is supported by substantial evidence. The operation of the Act by the State Engineer denies the defendants no constitutional right.

It is said that "by said act, no method of determining the boundaries of a district is set forth and defined, and no rules relating thereto have been provided by the Legislature or by regulations of the State Engineer, and no method in the determination of such boundaries is afforded or has been afforded which provides due process of law to these defendants."

The defendants admit that the East, South and West boundaries have been determined, and the evidence is conclusive that
1019 they are within the boundaries of the Roswell Artesian basin and the overlying *1019 valley fill. For all practical purposes the boundaries of the basins have been ascertained. No specific rule for determining the boundaries is required.

It is said that the valley fill is not a reservoir or lake, and therefore is not within Sec. 1 of the Act; that "no one ever heard of a lake or reservoir with a sloping water table." One definition of a reservoir is "A place where water is collected and kept for use when wanted." (Webster). Whether the water table "slopes" we need not determine. We will assume that the law of gravitation will take care of that. We know that the valley fill is a reservoir from which billions of gallons of water are pumped to irrigate annually 45,000 acres of land, so it must be collected there; and the legislature aptly called such containers of water, reservoirs or lakes. The case of Maricopa County v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, is not in point. It was held in that case that the laws of Arizona for the appropriation of water for irrigation had application to surface water only. And see Howard v. Perrin, supra.

There is another consideration which requires the affirmance of the trial court's decree. The decision of Yeo v. Tweedy, supra, has become a rule of property. In the nineteen years since that decision it may be assumed that many thousands of acres of the one hundred thousand irrigated with water from the Roswell Artesian basin and the valley fill have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved, and the water rights to which would be injured or destroyed if Yeo v. Tweedy is overruled. Whether it stated the correct rule of law (and we are of

the opinion that it did), it is now a rule of property that we will not disturb. On this question plaintiff cites the following cases, which support our conclusion: In re Lewis' Will, 41 N.M. 522, 71 P.2d 1032; Baca v. Chavez, 32 N.M. 210, 252 P. 987; Duncan v. Brown, 18 N.M. 579, 139 P. 140; Smith v. McDonald, 42 Cal. 484.

The parties have stipulated in this court to facts that show all lands of defendants involved here were patented after March 1877, the date of the Desert Land Act; and before the Act of 1931. We have concluded that the water involved was reserved, on or before the date the Desert Land Act became effective, to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter, by authority of the state statutes, even though passed after the date of the patents to the lands of the defendants. The patents to defendants' lands carried no right to the use of water, except as to that actually applied to the reclaiming of land under the Desert Land Act, and not thereafter abandoned. All other water belonged to the State as trustee for the public.

Other questions are raised but all are obviously without merit or are determined by our decision on other questions.

The decree of the district court is affirmed, and it is so ordered.

LUJAN, SADLER, McGHEE and COMPTON, JJ., concur.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below

YES- For cases from the **state courts**
which is thought to be "unpublished"

REQUEST FOR (MINOR) CLARIFICATION
of ORDER 9/25/2018
Returned- Not filed.

District Court 8/30/2017
ORDER GRANTING DEFENDANTS PETER SPRUNT'S SECOND MOTION TO DISMISS AND ENTRY OF SANCTIONS AGAINST KERRY KRUSKAL

New Mexico Appellate Court 6/25/2018
MEMORANDUM OPINION

Mew Mexico Supreme Court
ORDER
9/25/2018

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 11257(a).

The date on which the highest state court decided my case was ORDER 9/25/2018

REASONS FOR GRANTING THE WRIT

Kruskal is attempting to get the FBI involved because the New Mexico courts are corrupt.

Kruskal attempted to get some desperately needed "credibility" by telling the FBI that his father Martin Kruskal https://en.wikipedia.org/wiki/Martin_David_Kruskal was head of applied math at Princeton University for 40 or 50 years, and received the presidential award from Clinton.

Kruskal reminded the FBI that when Michael Dreeben first applied for his position with the justice department, Michael Dreeben gave the FBI Kerry Kruskal's name as a character reference. Reversing the coordinates, Kruskal asked the FBI to call Dreeben as a character reference.

1- The district court erred when it instructed Kruskal to file an amended complaint, and then denied it summarily when there were so many issues that were legitimately contested. And then sanctioned Kruskal such that he could not file a motion to reconsider, denying Kruskal of due process. And then also sanctioned Kruskal such that he can no longer defend himself pro se.

2- The court erred when it ruled that Kruskal lost stored water rights (and/or surface water right) because of issue preclusion from the 2009 case. Especially because Sprunt, never ask the judge to rule on any ownership of water rights.

3- The district court erred in ruling issue preclusion because- In the 2009 case, the district court was not asked to determine how the stored water would be divided between Kruskal and Sprunt.

In fact, the district court had no authority to rule on ownership of water rights.

4- In this case- the court erred in taking away Kruskal's surface water rights. And the upper New Mexico courts erred in denying Kruskal's motion requesting findings of fact and conclusions of law. It certainly appears that Kruskal lost surface water rights, but Kruskal has to guess which legal theory the district court is relying on. Kruskal will attempt to defend all of the possible theories that he can think of. Is it because....

A) Surface water rights were not specifically mentioned on the warranty deed?

B) Because Kruskal allegedly did not pay his association ditch fees?

C) The surface water rights were also somehow lost because of issue preclusion from the 2009 case?

5- In this very case, the district court erred because it has no authority to rule on ownership of either stored, nor surface water rights?

6-- The New Mexico Supreme court erred when it refused to file the motion to clarify timely signed for on 10/9/2018? And further "conceal" this decision not to file until 11/20/2018 This put Kruskal under fantastic pressure to timely file this motion. EX. "C" and "D"

7-- Sprunt will be unjustly enriched when he permits the pond, claiming all the stored water for himself, because the courts have ruled that Kruskal can not contest any

such claims.

8- The district erred when it allowed documents into evidence, that have nothing to do with this case, used to sanction Kruskal such that he can no longer represent himself.

9- The district court erred because there are special federal, and constitution, laws (and rights) regarding taking away property rights that were not properly followed.

10- Kruskal has been trying to demonstrate that the legal system in New Mexico is corrupt. Unfortunately, no one wants to properly look into this claim. It appears that it is easier to believe that Kruskal is either a sore loser, or simply delusional.

Kruskal goes into detail in Supreme Court case #18-5200

STATEMENT OF CASE

STATE OF NEW MEXICO
COUNTY OF TAOS
EIGHTH JUDICIAL DISTRICT COURT

KERRY KRUSKAL,
Plaintiff,

v. Cause No. D-820-CV-201600093

PETER SPRUNT,
Defendant.

Now comes Plaintiff, Kerry Kruskal, Pro Se.

See Survey (not to scale)-- EXHIBIT "A"

1- Decades ago, as a young man, in order to get water to his challenged property, (The "orchard"), Seth Brown constructed a pond on land owned by his aunt. See Exhibit "A" (Tract 1-B) This same land is now owned by Peter Sprunt. Once a month, Kruskal floods the orchard, and then leaves the pond full. Both surface, and stored water rights, pass through the pond, and then through an expensive underground irrigation system. Conservatively, there is 125,000 gallons of stored water available 24/7 for the next 30 days. Kruskal floods the orchard as much as he diesires, and refills each month. This water can both flood the organic farm, or be sent to each individual fruit tree spicket.

2- It is uncontested that when Brown constructed the pond, Brown placed a deed restriction on his aunts land. This restriction states that the stored water in the pond is

reserved for the Orchard. It is also uncontested that Sprunt has a signed document stating the obligations of the pond. Kruskal has never requested production of this important document because (contrary to Sprunt's claim, and contrary to the court findings) Sprunt has never asked any judicial body to rule on ownership of the stored water rights in the pond. In fact- Sprunt "incorrectly" argued that there is no such thing as stored water rights. It was his argument that as long as he fills the pond with his surface water rights, then he is allowed to use his own surface water rights any time he later desires, as if it is stored water.

In the 2009 case, Sprunt admitted that the stored water was reserved for the orchard. But he claimed that it did not say the word "exclusively", and therefore he could use some of the water as long as the pond was filled using his own surface water.

3- In 2009, Sprunt attempted to steel stored water out of the pond, and use it on an entirely different property (Exhibit "A" tract II-A and part of tract II-B)) that he later acquired. Sprunt did not own this property at the time that he originally purchased the pond. It may be important to note that this property never had any claim to the any of stored water rights. This is conservation land, and even the conservation trust denies owning any stored water rights. Sprunt never claimed that this land owned any stored water rights.

4- Kruskal asked the state engineer to prevent Sprunt from taking stored water from the pond. State Engineer, Steve Mastovitch , told Kruskal that (although the state did not care) the pond had never actually been permitted. Until now, Kruskal had always

assumed that the pond had been adjudicated, and that Kruskal owned the stored water rights. Mastovitch explained that, "There are perhaps as many as 2,000 UN-authorized ponds in the state". Mastovitch further explained that they were too busy to get involved, at this time. The state advised Kruskal to take Sprunt to district court. Mastovitch explained that the New Mexico courts did not have the authority to rule on ownership of either stored water rights, nor surface water rights, but that the case would still succeed because, "It is hard to imagine that any judge would allow Sprunt to take water out of an UN-authorized pond." Especially when the land (that Sprunt was improperly irrigating) has no claim to any stored water, and has never before even used any stored water from the pond.

The state engineer informed Kruskal about the threory stated in APPENDIX "I". And basee on this knowledge, Kruskal never intended (nor expected) to ask district court to rule on these issue.

Point of interest. Sprunt (and the previous owner) did sometimes irrigate the conservation land with water that passed through the pond. But that was only on the day that he was allowed to use his surface water rights. And this water merely passed through. It did not lower the level of the pond.

4- In the 2009 lawsuit, Kruskal filed suit against Sprunt asking the court to find that Sprunt could not take "stored" water out of the pond. Kruskal did not ask the court to rule on Percentage ownership of any stored water rights. And neither did Sprunt.

5- At some point, Kruskal's attorney, Alan Maestas (unfortunately) dropped the case, Accepting Sprunts motion for summery judgment. Kruskal was horrified.

On 9/15/2011, Maestas wrote to Kruskal

Water rights are NOT determined by Courts- water rights is determined by the State Engineer!

The State court has absolutely no ability to adjudicate water rights - Any water right adjudication occurs in Federal Court (as to the agency, acequia, etc) and then by the State Engineer about the allocation of the water from any particular source.

And on 8/10/2011 Maestas Wrote

Kerry,
I did NOT make a settlement without you- I merely conceded what we were going to lose. As I explained to Dwight, the Judgment needs to have an agreement about how water from the pond will be used- shared or whatever. That is still open.

Maestas certainly blundered. Thus Kruskal no longer has the right to stop Sprunt from taking water "some of the water" out of the pond. But it matters not. The State refuses to allow Sprunt to take even one drop of stored water.

Kruskal actually agrees with Maestas,; The district court does not have authority to rule on ownership of any water rights. But because of this present silly ruling, which has been accepted by the upper courts, Kruskal expects that Maestas is now has financial exposure because apparently the New Mexico courts have ruled that Maestas blundered a lot worse than he actually blundered.

Maestas did blunder. But not to the extend of issue preclusion. Even with the blunder, the courts did not rule that Sprunt owned any (and certainly not all) of the stored water. Kruskal believes that Kruskal is Now be entitled to triple damages from Maestas because Dwight Thompson (an unauthorized attorney) and Santiago Chavez (a disbarred

attorney) each spent over 30 hours working as attorneys on this 2009 case. Maestas knew nothing about the case. But when he suddenly realized that he was supposed to be in court, he freaked out. Maestas did not have time to educate himself.
The work had been done by unauthorized attorneys.

Kruskal does not think it fair that Maestas (and the two UN-authorized attorneys) should be punished (On summery judgment) for bad advice that was Not actually all that bad. IE- As Maestas wrote in the emails, the courts really did not have authority to rule on ownership of any water rights. And besides. Kruskal does not even want, and has never wanted, financial compensation. Kruskal just wants his legitimate surface (and stored) water rights. This is a very "emotional" parcel of land.
Kruskal wants his water rights much more than even triple the appraised damages.
Besides- just getting all of his stored water rights is what would be most fair and equitable.

6- The state engineers position was not altered by this "presently upheld" adverse district court decision. Although Maestas "threw in the towel", Kruskal still effectively won the case. The state engineer informed Sprunt that (despite the court order) Sprunt was not allowed to use any stored water from the pond. Sprunt immediately dismantled his fancy above ground spray irrigation system.

7- Although it may now appear, to the district court court, as if Sprunt was granted all the stored water rights, and Kruskal lost all of his, after examining the maps, the state engineer still believes that Kruskal owns surface water rights, and all of the stored water

rights. And the state is prepared to testify as such. If the state had not so strongly taken this position, agreeing with the maestas emails, Kruskal would have tried to get Maestas to correct things at the time of the adverse decision.

8- Only because of Sprunt's brash attempt to take stored water, that did not belong to him, to irrigate land that had no claim to any stored water, out of the UN-authorized pond, the state has broken precedent. For 40 years they had not cared that the pond was not "technically" permitted. But because of the law suit, they gave Sprunt an ultimatum; Sprunt must now document the pond, or in the alternative, Sprunt must fill it in.

9- Sprunt has refused to comply. The state now refuses to change ownership for any surface water rights that pass through the undocumented pond. And the state will not allow Kruskal to use surface water, nor the stored water. That is- until Sprunt either fills in the pond, or gets a permit that will make it compliant. Presently Sprunt does not care. His water rights have already been transferred into his name. Kruskal's have not.

10- It is uncontested that the orchard has been using surface (ditch) water rights (and ALL the stored water rights) through the pond, and the irrigation system for over 4 decades. Filling in the pond would leave Kruskal without a reasonable means to get his adjudicated surface water rights (not to mention stored water) to the orchard.

11- It is uncontested (or until now it was) that; The state will immediately provide Kruskal with a change of ownership for surface water rights, (and stored water rights) if and when, Sprunt documents the pond. Kruskal filed a timely clarification motion to the New Mexico Supreme court on 10/9/2018. Exhibit "B" and "C"

Kruskal explained that he did not agree with the New Mexico upper court finding

that Kruskal lost his stored water rights; pointing out that no one will show him where these issues were in front of a judicial body. And no one will show Kruskal where this issue was discussed. But at least Kruskal understood why this faulty finding was made.

Kruskal complained that he did not even understand why he had lost his surface water rights. And Kruskal asked for an explanation. Although it was timely filed, the New Mexio supreme court would not allow it to be filed, See exhibits "C" and "D". The New Mexico supreme court has never clearly stated if, nor why, Kruskal actually lost his surface water rights. In order to play it safe, Kruskal is going to respond to all the possible reasons that he can imagine for this "impossible" and "corrupt" adverse decision.

12- It is undisputed that Sprunt represented that the orchard came with surface water rights from the ditch, and the stored water rights that the orchard had exclusively been using for 40 years. The Only Thing that is still disputed is whether or not the warranty deed "itself" is one of the devices used to represent that water rights were transferred to Kruskal at the time of the warranty deed.

SEE APPENDIX G and H and I

14- Having said this, it is obvious that Kruskal did actually get his water rights through the warranty deed.

15- Effectively admitting that Kruskal does in fact still own surface water rights, Opposing council argues that Kruskal can not prevail in this case because Kruskal has unclean hands for not paying his Acequia Association fees. If Kruskal did not have surface water rights, he would never owe any such fees.

16- Kruskal has never been sent any written notice. There is no evidence that Kruskal owes the association any money. The state has not filed suit to take away either

of the water rights associated with the orchard.

17- It is uncontested that in both cases, District court had no jurisdiction regarding ownership of water rights.

18- Without water rights, the land is "worthless" dry land. Fruit trees are dead, and dying. The raspberries and asparagus are dead. Kruskal can no longer operate his extensive organic farm. An adverse ruling will severely diminished the land value.

Kruskal does not want damages. Kruskal just wants his water rights. In this case, Kruskal origionally filed a complaint to compel Sprunt to make the pond compliant.

The district court ruled against Kruskal summarily, explaining that only the State Engineer could force Sprunt to make the pond compliant. (At this point, if given an opportunity to do so, the state has now agreed to do this) But the court stated from the bench that the case was dismissed without prejudice, and the court instructed Kruskal to file an amended complaint asking for damages.Oppsoing council was **terribly agitated,** and tried to argue that the case should be dismissed with prejudice. **At the time, Kruskal thought that the judge was helping a pro se litigant.**

With hindsight, Kruskal now realizes that using hand signals, the district judge effectively told opposing council not to interfere because she know what she was doing. Kruskal **dutifully** filed his first amended complaint. But now Kruskal "feels" that the judge was "setting him up".

The court ruled against Kruskal summarily, and instructed the clerks not to file any additional motions. Thus Kruskal could not file a motion to reconsider. Kruskal could not get the state engineer testimony into the record.

Kruskal should not have lost summarily. There are numerous legitimately contested issues. Settling Kruskal up, and then ruling against Kruskal summarily was not enough for this court. This court further prohibited Kruskal from getting any additional

arguments, or additional documentary evidence, into the record, and ruled that Kruskal can no longer represent himself.

APPENDIX A and B and C and D and E and F

For example; in paragraph 7 of the 8/30/2017, opposing council claims that his court exhibits 2 and 3 (not included here) contain evidence that the ownership of stored water rights were litigated in the previous case. But look at it carefully. You will see that it is Sprunts position that there is no stored water right from the pond. This clearly demonstrates that ownership of water rights was never actually discussed. Sprunt claims that there are no stored water rights in the pond, and there is no such thing as stored water rights, and he never asked any judicial body to rule that he owned any stored water rights- (which he claimed di not exist) Thus, Sprunt could NOT have have been awarded any stored water rights.

In the 2009 case- Ownership of water rights was simply never an issue to be ruled on. This is especially horrific because water rights are property rights. There are state and federal (and constitutional) laws protecting individuals from losing property rights without careful scrutiny. **SEE APPENDIX M**

25- This court erred when it found that even if Sprunt later permits the pond, or not, either way, Kruskal still can not file any new legal action involving loss of water rights, nor for the lost use of the pond, nor the loss of the irrigation system. The pond raises the water level so high that Kruskal easily irrigates the entire property. Without the pond, even surface irrigation would be nearly impossible.

MORE ON OWNERSHIP OF STORED WATER RIGHTS

26- Kruskal argues that even if the decision from the 2009 case did give Sprunt stored water rights (which Kruskal strenuously contests) it must have simultaneously also given some of the stored water rights to Kruskal's orchard. The effect of such a decision would not preclude damages from loss of stored water. It would only somewhat reduce the amount of damage that Kruskal can claim.

27- Whatever the court ruled on in the 2009 case, it certainly had nothing to do with taking away any of Kruskal's water rights. And it certainly had nothing to do with granting Sprunt any stored water rights. If it did, the state would not be telling Sprunt that he can not have any stored water, at all, from the pond. And the state would not now be so eager to testify that Kruskal owns both surface and stored water rights.
And if the courts had really ruled that Sprunt owned the stored water rights, Sprunt would not have dismantled his irrigation system.

Again. The district court disagreed

28- This court erred when it effectively found that Plaintiff cannot assert a claim to stored water rights because of issue preclusion from the 2009 Lawsuit. Judge Paternoster never made a finding involving ownership of any water rights.

APPENDIX J and K

29- The district court erred when it applied issue preclusion. The previous (2009) law suit had absolutely nothing at all to with ownership of water rights. Defendants have not met the burden of establishing that the elements of claim preclusion or issue preclusion

have been met.

APPENDIX L

30- The district court has not sited any authority, thus, this court erred when it found that this court is allowed to use the findings in other Kruskal civil cases that have absolutely nothing to do with the issues involved in this case to determine that Kruskal may not be allowed to ever sue Sprunt again for damages (or anything else) associated with use of his stored water rights, nor surface water rights, nor loss of irrigation accessories. Especially when there was no testimony about this issue. The district court also erred in finding that Kruskal can not automatically represent himself pro se. The court unilaterally found that Kruksal had been involved in 30 law suits, but did not take the time to notice that most are "routine things" like quiet title suits filed by Kruskal. Or quiet title suits filed by Kruskal's neighbors. Law suites that Kruskal never even responded to.

31- The Court erred when it dismissed Plaintiff's claims and entered sanctions to bar him from asserting claims in the future. Imagine that Sprunt now suddenly decides to permit the pond. Kruskal will not be allowed to sue for his stored water rights, and therefore Sprunt will be unjustly enriched when he (falsely) claims all the stored water for himself.The state engineer still shows that Kruskal own surface water rights. And (not counting this ruling) the state engineer still believes that Kruskal owns all the stored water rights. And if there were a hearing, the state engineers office will testify to this. At

this moment, Kruskal has no way to get his adjudicated surface water rights. But even if Sprunt suddenly permits the pond. With this crazy ruling, Sprunt can simply disconnect Kruskal's irrigation system. Kruskal will still not be allowed to sue Sprunt.

44- The district court erred when it made findings about Kruskals character. It is not allowed to consider outside civil claims that have nothing to do with the case presently in front of the court. If there had been a jury, Kruskal would have had these claims removed from the record. The court erred in using this information to sanction Kruskal.

32- This court erred when it effectively found that; Although this court acknowledges that normally every case is heard on its own merits, and that prior unrelated matters should not be considered. And although no testimony was presented regarding Kruskal in any way. This court effectively found that it is allowed to consider civil cases that are entirely unrelated to this case, and use those unrelated cases to help rule on this case, and to impose sanctions on Kruskal.

33- The district court erred in not allowing Kruskal to continue with his claim for damages, knowing that Kruskal has agreed to drop the case if Sprunt will simply agree to permit the pond.

34- Plaintiff requests that the US supreme court reverse the new Mexico court decisions, and send this case back such that Kruskal can prove his monetary damages. Kruskal agrees to give Sprunt a reasonable amount of time to permit the pond, and thus avoid having to pay any damages AT ALL for Kruskals lost water rights.

In fact, the state ahs now agreed to compell Sprunt to permit the pond, and Kruskal agrees not to continue with the law suit, as long as Sprunt complies with these demands from tehs tate engineer.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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