IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; ELECTORS CONCERNED ABOUT ANIMAS WATER; and STEVE CONE,

Plaintiffs/Appellants,

vs.

No. 28,473
Bernalillo County
No. D-202-CV-07-7606

KNME -TV; BOARD OF EDUCATION OF THE ALBUQUERQUE PUBLIC SCHOOLS; REGENTS OF THE UNIVERSITY OF NEW MEXICO; JOHN D'ANTONIO, NEW MEXICO STATE ENGINEER; OFFICE OF THE NEW MEXICO STATE ENGINEER; NEW MEXICO INTERSTATE STREAM COMMISSION; and OFFICE OF THE GOVERNOR OF NEW MEXICO,

Defendants/Appellees.

BRIEF-IN-CHIEF

VICTOR R. MARSHALL & ASSOCIATES, P.C.
Victor R. Marshall, Esq.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
505-332-3793 Fax
Counsel for Appellants

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INTRODUCTION AND OVERVIEW

This is a lawsuit for inspection of government records pursuant to the New Mexico Inspection of Public Records Act ("IPRA"), NMSA 1978, § 14-2-1 through -12. The district court dismissed this lawsuit with prejudice under Rule 1-012(B)(1) and (B)(6), NMRA 2008, without leave to amend. The district court held that the San Juan Agricultural Water Users Association could not maintain an action for inspection of public records under IPRA because its request for public records was filed by the Association's law firm, acting as its agent, rather than by the Association itself. The district court refused to follow the law of agency, whereby the act of an agent – the Association's attorney – is deemed to be the act of the principal – the Association itself. Therefore, in the view of the district court, disregarding the concept of agency, the Association's law firm had requested the public records, not the Association, so the Association could not challenge the defendant's refusal to produce them.

The district court's dismissal of this public records request is legally erroneous in several respects. First, the decision violates the long-established case law in New Mexico on the principles of agency, including binding precedents from the New Mexico Supreme Court such as *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, 45, 428 P.2d 15, 19 (1967) and *Smith v.*

Walcott, 85 N.M. 351, 356, 512 P.2d 679, 684 (1973). These cases clearly held that a person can use an agent to act on its behalf under a statute, and the act of the agent is deemed to be the act of the principal for purposes of the statute. The district court also flatly refused to follow the common law of agency as established in numerous appellate decisions and UJI 13-401 (agent represents the principal; agreement may be oral, written, or implied); 13-402 (acts of agent are attributed to the principal). When the district court refused to apply the common law of agency in construing IPRA, the court also violated NMSA 1978, § 38-1-3, a statute which expressly mandates that the common law shall be the rule of decision in all courts in New Mexico. *See* Point I below.

Second, the district court ruled that the law firm was required to disclose that the law firm was requesting the records because it was acting on behalf of the Association. This is flatly contrary to § 14-2-8(C) of IPRA, which provides that "[n]o person requesting records shall be required to state the reason for inspecting the records." The purpose of this provision is to protect citizens and whistleblowers from possible intimidation or retaliation by the agency. By using an agent or intermediary, citizens can protect themselves from possible retaliation and obstruction by the agency. The district court decision destroys

the protection provided by IPRA, so it will have a chilling effect on citizens, whistleblowers, and the news media. *See* Point II.

Third, the decision violates the stated purpose and policy of IPRA. For no good reason, it constructs a new and unnecessary obstacle to prevent citizens from obtaining information about their government. *See* Point III.

Fourth, the district court erred when it dismissed the complaint with prejudice, preventing the complaint from being amended to add the law firm as an additional plaintiff. The district court formed the opinion that the law suit should have been brought by the law firm, because the law firm was the "requester." This opinion was legally erroneous under the law of agency, but the court could have cured the perceived defect by allowing the law firm to be added as a plaintiff. But the district court slammed the door on this amendment of the complaint, without any explanation. In short, the court's ruling is internally contradictory. The district court ruled that neither the principal nor the agent could sue under IPRA. Furthermore, the unexplained denial of leave to amend is an independent legal error. It was a violation of Rule 15, which provides that leave to amend shall be liberally granted. *See* Point IV.

STATEMENT OF THE CASE

Salient facts. Since the district court dismissed the complaint under Rule 12, on appeal all the facts alleged in the complaint are accepted as true, and all the inferences that could be drawn from them. *Schear v. Board of County Comm'rs of Bernalillo County*, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984). Dismissal under Rule 12 is improper if there are any conceivable set of facts that would justify relief. *Environmental Improvement Div. v. Aguayo*, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). Therefore this summary draws on the complaint, and information relating to the complaint that was subsequently discovered.

This case arises from the competing claims to the waters of the San Juan River in northwestern New Mexico, which contains some 60% of the river water in New Mexico. The San Juan Agricultural Water Users Association is a local association consisting of community ditches that use water from the San Juan and supply it to several thousand households, farms and communities in San Juan County. Other users of the San Juan River include the Navajo Nation, the State of New Mexico, the federal government, electric power plants, and industrial and municipal users.

In January 2007, KNME-TV broadcast what purported to be a news documentary entitled "The Water Haulers." In sympathetic terms, the "documentary" described the water needs of certain Navajos in rural areas. The program suggested that their needs would be solved by a proposed water settlement for water from the San Juan River, between the Navajo Nation and the New Mexico Office of the State Engineer. The KNME-TV documentary described the proposed settlement in glowing terms, as a benefit to the entire state, not just the Navajo Nation.

The San Juan Agricultural Water Users Association and many other people believed that KNME's news program was deliberately false and misleading. The program misrepresented or omitted key facts about the proposed San Juan settlement and its impact on non-Indian water users, not only in the San Juan Basin but throughout New Mexico. On June 12, 2007, a request for inspection of public records was served by facsimile and U.S. First Class mail on KNME-TV; Albuquerque Public Schools; the University of New Mexico; the State Engineer and the Office of the State Engineer; the Interstate Stream Commission; and the Office of the Governor, requesting all records relating to "The Water Haulers" program. The request was signed by the undersigned law firm, through Victor R. Marshall.

In response to the inspection request, the OSE, the ISC, the Governor's Office, and UNM produced some records. KNME-TV (a joint venture of UNM and Albuquerque Public Schools) did not directly produce any documents, although UNM stated that it was providing some documents on KNME's behalf. The production of documents was seriously incomplete, so on August 28 the present lawsuit was filed by the San Juan Agricultural Water Users Association, Electors Concerned About Animas Water, and Steve Cone, seeking full production of all documents relating to "The Water Haulers." Steve Cone is a schoolteacher and environmental activist who lives in Farmington, and Electors Concerned About Animas Water is an environmental organization that has opposed the federal Animas-La Plata project. All of these plaintiffs had an interest in compelling full production of all documents that had been requested.

The complaint was based in part on information from the partial production of documents by the defendants.

Although KNME presented "The Water Haulers" as an impartial and independent news program, the records reveal that KNME allowed the Navajo Nation and the State of New Mexico to conceive and dictate the editorial content and viewpoint of the news program, in exchange for

sponsorship payments. Complaint ¶¶ 19, 25-29, 35, 39, 40-46 [R. 5-13]. The tribe and the OSE also used KNME as part of their effort to lobby and influence Congress and the New Mexico Legislature. *Id.* ¶¶ 37, 46 [R.10, 12-13].

In a letter dated March 24, 2006 the State Engineer (the defendant John D'Antonio) wrote to KNME proposing a 26 minute "video documentary" about the need to implement the Navajo water settlement. "It is important to educate PBS viewers who could potentially make a plea for funding to federal congressional representatives or state legislators after hearing this compelling story." "If this program were to be finished by the fall of 2006, it would greatly help with our efforts to lobby federal congressional funding committee members in Washington, DC [and] our efforts to secure state funding as well." *Id.* ¶ 29 [R. 7-8]. The State Engineer enclosed the detailed shooting outline for the video. *Id.* ¶¶ 26, 27 [R. 6-7]. The letter proposes to pay KNME roughly $30,000 for the news program.

Subsequent documents reveal that KNME agreed to present the viewpoint of the OSE and the tribe. KNME used the outline provided by the State Engineer as the basis for the "documentary." KNME also provided "a

fine cut of the program" for review and input by the tribe and the OSE prior to a final edit. *Id.* ¶ 29 [R. 7-8].

"The Water Haulers" was broadcast in January 2007, during KNME's time schedule for New Mexico public affairs programming. KNME posted "The Water Haulers" program on its website, and added a link called "get involved," with information on how to lobby Congress and the State Legislature in favor of the settlement. *Id.* ¶ 37 [R. 10]. The State Engineer and the Navajo tribe also cited "The Water Haulers" to Congress and the State Legislature as objective proof showing the imperative need for the settlement. *Id.* ¶ 46 [R. 12-13].

All of these actions are plain violations of the PBS rules that are supposed to protect the journalistic integrity of public television. *Id.* ¶ 40 [R. 11]. "The Water Haulers" was a deliberate journalistic fraud on the public, perpetrated by KNME in exchange for money from the State of New Mexico and the Navajo tribe. *Id.* ¶ 47 [R. 13]. KNME did not disclose that it presented the content and story line proposed by the State and the tribe in exchange for money, and it violated the most basic principles of journalism – neutrality, objectivity, and independence. *Id.* ¶ 39 [R. 11]. "The Water Haulers" is a very effective piece of political propaganda, because it

masquerades as news reporting from a trusted, impartial, and objective source – public television. *Id.* ¶ 37 [R. 10]. KNME passed off the program as a bona fide news broadcast, when in substance the program was a "paid infomercial," or "paid political advertisement." Even private for-profit television stations have rules prohibiting this practice. *Id.* ¶ 47 [R. 13]. The defendants' journalistic fraud should be a real concern to every viewer of public television and every taxpayer, because it realizes the worst fears about public broadcasting – that the government will use taxpayer funds to broadcast government propaganda disguised as independent journalism. *Id.* ¶ 57 [R. 13-14].

This journalistic fraud also presents a mortal threat to the survival of New Mexico as a viable place to live. According to the best available information, the proposed Navajo settlement would give 33.6% of all the surface water in New Mexico to satisfy the claims of roughly 45,000 Navajo tribal members who live on the reservation in New Mexico. New Mexico is desperately short of water, and if one third of the river water in the entire state is given to the Navajo tribe, the settlement will create a water crisis for the other 1.9 million people in this state. *Id.* ¶ 44 [R. 12]. Furthermore, the proposed Navajo settlement would charge all this water to New Mexico's

share of the Colorado River under the Colorado River Compact of 1922 (NMSA 1978, § 72-15-5) and the Upper Colorado River Basin Compact of 1948 (NMSA 1978, § 72-15-26). The proposed settlement would allow the tribe to export the water by leasing it to users in other states (Arizona, Nevada, and California), so the water would not actually be used in New Mexico. If this happens, it threatens the environmental and economic future of the entire state, because the State depends on the San Juan River to supply water to the Rio Grande, through the San Juan Project. Thus it is no exaggeration to say that the future of this State is hanging in the balance on uncovering the real truth about the subjects raised in "The Water Haulers." Thus this case presents issues of core importance under the First Amendment , the New Mexico Constitution, and the Inspection of Public Records Act.

Court proceedings. Some months after the lawsuit was filed, on or about November 15, 2007, UNM produced some additional documents, but far less than the documents that had been requested in June. With that production in November, the defendants claimed for the first time that some of their documents were exempt from disclosure due to "countervailing public policy" or a "thought processes" privilege. The incomplete production in June had proved embarrassing to the defendants, and resulted in a front page article

in The Albuquerque Journal. Thus, the defendants in November raised a variety of objections for the very first time, demonstrating that they were determined to resist disclosure by every available means. For example, the agencies made the sweeping and novel claim that they were entitled to withhold any documents that revealed their "thought processes." (One would certainly hope that government actions involve "thought processes," at least to some degree, but that is not a defense under IPRA.)

As part of their resistance to IPRA disclosure, the defendants had filed a motion to dismiss under Rule 12(B)(1) and (B)(6) [R. 67-71], arguing that none of the plaintiffs could bring suit under IPRA because the records had been requested by Victor R. Marshall (a natural person) or Victor R. Marshall and Associates, P.C. (a professional corporation and law firm), not by the plaintiffs. Defendants argued that IPRA requires a lawsuit to be brought by the person requesting the records, and that a person cannot use an attorney or agent to request the records without disclosing the client or principal for whom the attorney or agent is acting.

The plaintiffs responded with an uncontroverted affidavit [R. 88-90] from Mr. Marshall explaining that his law firm was acting as attorney for the Association when it requested the records. Plaintiffs argued that, under the

long-established law of agency, the action of an agent (including an attorney) is deemed to be the act of the principal, so the record request is deemed to have been made by the Association. Furthermore, the law firm was not required to disclose that it was acting for the Association, because § 14-2-8(C) states that "no person requesting records shall be required to state the reason for inspecting the records." If a law firm is required to identify its client, it is being forced to disclose the reason for the records request.

The New Mexico Foundation for Open Government ("FOG") participated as *amicus* in support of plaintiffs [R. 128-38; Tr. 35-40]. FOG pointed out that the defendants' position would create serious obstacles to news gathering by the news media or nonprofit organizations, because reporters and investigators for the media sometimes file inspection requests using their own names and addresses, without revealing that they are working for a newspaper or television station, in order to avoid disclosing the nature of the investigation and tipping off the suspects. In a similar fashion, a whistleblower who works for the government might use someone else to obtain public records, in order to avoid retaliation.

The district court ruled in favor of the defendants, holding that a plaintiff cannot bring an IPRA lawsuit to enforce an inspection request which has been

made by its attorney or agent. The Court was of the opinion that IPRA should not be read in conjunction with the common law of agency, and that the law of agency does not apply under IPRA. Further, the district court was of the opinion that an agent or attorney must disclose to the public agency the identity of the principal or client, notwithstanding § 14-2-8(C).

Additionally, the district court refused to allow a first amended complaint that would add the law firm as an additional party plaintiff. It dismissed the complaint with prejudice, without leave to amend. The plaintiffs had indicated that they would add the law firm as an additional plaintiff to moot the defendants' argument if the court adopted it [Tr. 31]. Without any explanation, the district court refused to allow amendment of the complaint. In short, the district court ruled that neither the principal nor the agent-requester could file suit under IPRA.

ARGUMENT

I. By refusing to follow the common law of agency, the district court violated controlling precedents from the New Mexico appellate courts; the Uniform Jury Instructions; and § 38-1-3.

The district court ruling is legally erroneous, because it simply ignores the entire law of agency, including numerous precedents from the appellate courts. The decision also disregards the undisputed fact that the Association

used the undersigned law firm as its attorney and agent to make the records request.

Under the common law of New Mexico, including numerous cases from the appellate courts, the rule of law is that the acts of an agent are deemed to be the acts of the principal. This rule of law operates so frequently that the courts have prepared Uniform Jury Instructions on this point. *See* UJI 13-401 (agent represents the principal; agreement may be oral, written, or implied); 13- 402 (acts of agent are attributed to the principal); 13-409 (a corporation can only act through its officers and employees). *See also* the numerous judicial cases on agency cited in the UJI, Chapter 4, Agency; Respondeat Superior, Introduction, at 43, including but not limited to *Tabet v. Campbell*, 101 N.M. 334, 681 P.2d 1111 (1984); *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 103, 654 P.2d 548, 556 (1982); *Turley v. State*, 96 N.M. 579, 581, 633 P.2d 687, 689 (1981) ("[I]n order to determine that a right conferred by statute must be exercised personally, and cannot be delegated to an agent, the statute must either expressly or by necessary implication prevent an agent from acting.") (emphasis added).

However, at the urging of the defendant state agencies, notwithstanding the UJI and the large body of precedent on this issue, the district court refused

to apply the basic rules of agency to the IPRA statute. For purposes of the IPRA statute, the court ruled that the request by the Association's agent/attorney would not be considered as a request by the Association, and therefore the Association could not sue under the statute to obtain the records. This ruling violates squarely violates *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. at 45, 428 P.2d at 19, where the Supreme Court held that a person can use an agent to take action under a statute, even where the agent is not the person specifically identified in the statute. In that case, several water owners in the Portales area formed the Coldwater Cattle Company to act as their agent in obtaining permits from the State Engineer under New Mexico's water statutes. The district court refused to allow the water owners to use an agent to act on their behalf in applying for permits undoing the statute. On appeal, the Supreme Court reversed the district court ruling:

> It is suggested by appellees that under the language of this act only the owners of a water right can make or prosecute applications for a supplemental well and as a consequence an agent is excluded from performing any of the required acts. With this suggestion we do not agree.
>
> It is a general rule, subject, however, to certain exceptions, not applicable here, that an agency may be created for the performance of any lawful act, including acts done under the authority of a statute. I Mechem on Agency, 2nd Ed., § 80. In order to

> determine that a right conferred by statute shall only be exercised personally and cannot be delegated to an agent something must be found in the Act by express enactment or necessary implication which prevents an agent from acting. *State ex rel. Hansen v. Schall*, 126 Conn. 536, 12 A.2d 767 (1940); *Mansfield v. Scully*, 129 Conn. 494, 29 A.2d 444 (1942); *Ludwig v. Cory*, 158 Ind. 582, 64 N.E. 14 (1902); I Mechem on Agency, 2nd Ed., § 125, n.21.
>
> There is nothing in the language of the acts as we read them which would expressly or impliedly prevent an agent of the owners of water rights from filing and prosecuting applications for the drilling of supplemental wells in behalf of the owners. We see no basis for holding that the procedural acts required of the owner of a water right under § 75-11-7 (supra) and § 75-11-25 (supra) cannot be performed by an agent for the owner.
>
> The clear intendment of these statutes is to provide a procedure for determining whether proposed changes injuriously affect the rights of others, *Clodfelter v. Reynolds*, 68 N.M. 61, 358 P.2d 626 (1961); not to limit the right of water right owners in changing the point of diversion to act only in person and not through a designated agency. Compare *Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771, 777 (1966); *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 24 Colo. App. 496, 135 P. 981 (1913).
>
> [W]e hold that the owner of a water right may delegate the function of filing and prosecuting such applications . . . .

The district court in this case committed the same error that was committed in *Coldwater Cattle*, by refusing to read the statute in conjunction

with the common law rules of the agency. When the statute identifies a person, that person may act through an agent, whose action shall be deemed that of the principal, unless the statute specifically excludes the use of an agent. In *Coldwater Cattle*, the application was made by an agent for the water owners, not the water owners themselves, but the applications would nonetheless be valid under the statute, and treated as the application of each owner. Likewise, in this case the application for public documents was made by an agent for the Association, not the Association personally, but the application is nonetheless valid under IPRA, and treated as the application of the Association.

The district court ruling also contradicts subsequent Supreme Court cases that have followed *Coldwater Cattle*. In *Smith v. Walcott*, 85 N.M. at 356, 512 P.2d at 684, the Supreme Court reaffirmed that "an agency may be created for the performance of any lawful act, including acts done under the authority of a statute"). In *Turley v. State*, 96 N.M. at 581, 633 P.2d at 689, the Supreme Court reversed the Court of Appeals when it failed to apply the rules of agency to a statute requiring a permit from the state archaeologist for excavations. The statute provided that "nothing in this section shall . . . require such owner to obtain a permit for personal excavation on his own

land." Since the statute referred to "personal excavation on his own land," the state argued that the landowner must personally operate any excavating equipment, or obtain a permit for a non-owner operator. The Supreme Court disagreed:

> The State's interpretation would reject the application of the law of agency to these facts. It is an elementary principle of law that a person may do anything through an agent that he may lawfully do personally, unless public policy or some agreement requires personal performance. *Smith v. Walcott*, 85 N.M. 351, 512 P.2d 679 (1973); *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, 428 P.2d 15 (1967); 3 Am. Jur. 2d, *Agency* § 20 (1962); Restatement (Second) of Agency § 17 (1958). Furthermore, in order to determine that a right conferred by statute must be exercised personally and cannot be delegated to an agent, the statute must either expressly or by necessary implication prevent an agent from acting. *Smith v. Walcott, supra; Coldwater Cattle Co. v. Portales Valley Project, Inc., supra.*
>
> The statute here does not state or imply that excavation by an agent is proscribed. We therefore conclude that in exempting the landowner from the permit requirement, the statute also allows the landowner to use an employee or agent to accomplish the task.

It is also axiomatic under the law of agency that a person can use an attorney for any lawful purpose to act as an agent for the client. Restatement (Third) of Agency § 1.01 cmt. c (2006); *Resolution Trust Corp. v. Ferri*, 120 N.M.

320, 325, 901 P.2d 738, 743 (1995) ("general rule of attorney-as-agent"); *Padilla v. Estate of Griego*, 113 N.M. 660, 665, 830 P.2d 1348, 1353 (Ct. App. 1992) ("each party is deemed bound by the act of his lawyer-agent") (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962)). An attorney is the quintissential agent. Indeed, the term "attorney" in its broadest sense means "agent" as in "power of attorney." Therefore, the law firm's request for records is a request by the client, merely acting through its attorney. And therefore the client can file suit under IPRA because the records request by its agent was refused. *See* § 14-2-12(D). By ruling otherwise, the district court has created a trap for attorneys and their clients.

Certainly there is nothing in IPRA that suggests that the Legislature intended to abolish or extinguish the common law of agency as regards requests for public documents. On the contrary, statutes are generally written with the assumption that the statutes will be read in conjunction with the common law, and supplemented and interpreted in accordance with the common law. *See Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153 ("A statute will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended."); *State v. Bryant*, 99 N.M. 149, 150, 655 P.2d 161, 162 (Ct. App. 1982) ("A statute designed to

effect a change from that which existed under the common law must be strictly construed; it must speak in clear and unequivocal terms and the presumption is that no change is intended unless the statute is explicit."); *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 ("The Legislature's continuing silence on the issue we confront herein is further evidence that it was both aware of and approved of the existing case law which long ago established the appropriate standards of proof . . . .").

In part, the Legislature's acceptance of the common law is a recognition of the judiciary as a co-ordinate and co-equal branch of government in our tripartite system of divided government and separated powers. In part, the Legislature's reliance on the common law is also a rule of necessity, for it would be virtually impossible to write a statute on any subject without relying on the legal principles already established by the courts, which are assumed without being spelled out in the statute. For example, when IPRA refers to the person requesting the public records, the statute includes an agent of the person. Because common law rules are operative unless the Legislature decides otherwise, it is not necessary for the Legislature to write a treatise on the law of agency into IPRA, or any other statute. The modern law of agency

developed because a complex commercial society cannot function without it. 1 Floyd R. Mechem, *A Treatise on the Law of Agency* §§10, 11 (2d ed. 1914).

The Legislature's intent to rely on the common law in addition to statutes is so strong that it has been enacted into statute. NMSA 1978, § 38-1-3 provides that "In all the courts in this state the common law as recogni zed in the United States of America, shall be the rule of practice and decision." And this statute has been repeatedly cited and upheld by the New Mexico appellate courts. *See, e.g., Lightsey v. Marshall*, 1999-NMCA-147, ¶ 16, 128 N.M. 353, 992 P.2d 904 ("New Mexico has adopted the English statute of frauds by adopting the common law."); *Lopez v. Maez*, 98 N.M. 625, 629, 651 P.2d 1269, 1273 (1982); *State v. Valdez*, 83 N.M. 632, 635-37, 495 P.2d 1079, 1082-84 (Ct. App.), *aff'd*, 83 N.M. 720, 497 P.2d 231 (1972) (although statutes completely cover the ground on change of venue, nothing in statutes precludes *sua sponte* action by trial court, because such action existed at common law).[1]

[1] The defendants erroneously argue that the request was made by Victor R. Marshall personally, but the request was actually made by the law firm, a professional corporation. Mr. Marshall acted as agent for the law firm.

II. The district court erroneously ruled that the law firm was required to disclose that the law firm was requesting the public records on behalf of the San Juan Agricultural Water Users Association, contrary to IPRA.

A. A law firm can request public records without identifying its client, because IPRA § 14-2-8(C) provides that "No person requesting records shall be required to state the reason for inspecting the records."

It was reversible error for the district court to require a law firm to identify its clients when making a public records request under the New Mexico Inspection of Public Records Act, because this violates a specific provision of the statute: "No person requesting records shall be required to state the reason for inspecting the records." NMSA 1978, § 14-2-8(C). This provision of the New Mexico statute, which has no counterpart in the federal statute, is designed to protect citizens who wish to inspect public records without fear of intimidation or retaliation. It is also designed to promote the avowed purpose of the New Mexico statute – open access to public records – without encountering the kind of obstruction and hyper-technical arguments that have been interposed by the defendant agencies in this case.

Given §14-2-8(C), a public agency cannot require a law firm to identify its clients, because that would force the law firm to disclose why it is requesting the records. In this case, the undersigned law firm requested the

documents on behalf of a client (the San Juan Agricultural Water Users Association), without disclosing the identity of the client for whom it was acting. Such requests are permissible, and perhaps even encouraged, under the New Mexico statute, because the statute expressly prohibits a state agency from inquiring about the purpose of the request. *See* § 14-2-8(C), quoted above.

The Legislature included this "ask no questions" provision in the statute to prevent citizens from being deterred from requesting public records. An agency cannot chill public inquiries by asking questions like:

> "Why do you want these records?"
>
> "Who wants to know?"
>
> "Do you want these records for yourself, or somebody else?"
>
> "Who is your client?"

Under the IPRA statute, unlike FOIA, these are illegal inquiries. A law firm cannot be required to divulge the identity of its clients, as that would divulge the purpose of the inquiry. Yet the district court ruled that the law firm should have disclosed that it was asking for the records because it wanted them for the Association to review. This ruling is flatly contrary to the plain

text of IPRA. The law firm was not required to explain that it was requesting the records for the San Juan Agricultural Water Users Association.

This case illustrates the reasons why the Legislature included this provision in IPRA. The San Juan Agricultural Water Users Association represents roughly 8,000 water users along the San Juan River, and most of them need permits from the State Engineer. NMSA 1978, § 72-5-1. These water users depend on water from the river, and the State Engineer has the ability to make life very difficult for them. The State Engineer claims the unilateral authority to restrict the land that can be irrigated by individual water users, to limit the amount of water that can be used, and the right to cut off the water supply in times of drought, without going to court. *See Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, Memorandum Decision, No. D-0725-CV-05-03 (7th Jud. Dist. Ct. May 16, 2007), now pending in this Court (No. 27,802). Thus, individual water users might well be intimidated from investigating the State Engineer. Without the ability to make anonymous inquiries by hiring a law firm or another agent, like a friend, most water users in this state would be intimidated from investigating the State Engineer's office, even when there are good reasons to suspect illegal or improper activities at the agency.

Herrington v. State ex rel. Office of the State Engineer, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258, demonstrates why water users are wary of "getting crossways" with the State Engineer. Over the objections of the OSE, the Herringtons proved in court that they were entitled to a pre-1907 right to 49.37 acre-feet from the Rio de Arenas in the Mimbres basin in southwest New Mexico. The Herringtons then applied to the OSE for a supplemental well to make up for the depletion of their stream water by junior users. The supplemental well had been suggested by the OSE during the stream adjudication, and it was not opposed by any neighboring well owners. Nevertheless, the State Engineer denied the application, and in 1983 the Herringtons appealed to an OSE hearing officer. "Inexplicably, the State Engineer did not set a hearing for eighteen years." *Herrington*, 2006-NMSC-014, ¶ 6. When the hearing was finally held in 2001, the State Engineer reversed its prior factual position, and the State Engineer's hearing officer agreed with the State Engineer. In 2006, the Supreme Court reversed the OSE, and ordered the State Engineer to issue the permit – 24 years after the Herringtons started their journey through the system.

As *Herrington* demonstrates, the OSE can exercise arbitrary and unchecked power over water users, simply by doing nothing. Therefore

persons who are regulated by the OSE have good reason to hire someone else to obtain public records, lest they antagonize the OSE.

Of course, the problem of intimidation and retaliation is not limited to the OSE, or the ISC, or the University of New Mexico. All public agencies hate investigations by the public, because a request for public records under IPRA has the potential to embarrass the agency. If a member of the public is forced to make a formal written IPRA request, most bureaucrats react with alarm, because IPRA carries with it the threat to "make the agency look bad" or to "cause trouble." Of course, the main legislative purpose of IPRA is to expose incompetence, irregularities, or malfeasance in government, and this is why IPRA encounters so much resistance from government agencies. In order to overcome this resistance, the Legislature wrote IPRA to prevent agencies from intimidating or deflecting inquiries by demanding to know the reasons for the request.

B. The district court ruling will have a chilling effect on whistleblowers and news media who are investigating possible wrongdoing within government.

The problem of intimidation and chilling is not limited to citizens who are subject to regulation by a public agency. In many instances, there are whistleblowers inside of government, or outside of government, who wish to

remain anonymous while they investigate the activities of their government. For example, a state government employee may suspect wrongdoing by his or her superiors, but is afraid to inquire, for fear of retaliation. By hiring a law firm to request records, the employee can maintain his or her anonymity. As another example, consider a company that bids unsuccessfully on a state contract. The company has good reason to suspect that a state agency has colluded with the successful bidder, or violated the state procurement code. However, if the company requests public records in its own name, it will be blackballed by the agency on future contracts. To protect itself, the company must be allowed to hire an attorney to make the request as its agent, but without revealing the identity of the client.[2] This is why the New Mexico Legislature has written the statute in a way that protects a citizen's right to investigate without fear of retaliation.

In addition, the news media are supposed to function as watchdogs or whistleblowers for the public, so the Legislature wrote IPRA to encourage and facilitate their inquiries. The New Mexico Legislature often relies on news reporters to unearth wrongdoing by public agencies, so that the Legislature can

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[2] Since the reasons for the request are protected by IPRA, this lawsuit could have been brought in the name of "John Doe," with the identity of the client not disclosed, except perhaps *in camera* to the Court. Under IPRA, it is nobody's business who is requesting the records, or why.

take corrective action. Newspapers and television stations ordinarily use agents – employees or freelancers – to gather the news, so a prohibition against the use of agents would hobble the news media.

In many instances, it is easier for a news reporter to get public documents by using his or her own name, even though the reporter is acting as an agent or employee for a news company. For example, Laurence M. Barker of Albuquerque is often able to obtain public documents without any great fuss, whereas Larry Barker sets off alarm bells whenever he asks for documents for KRQE Channel 13. Laurence M. Barker often obtains documents over the counter without disclosing that he is working for KRQE. This is perfectly appropriate under IPRA, because it is nobody's business whom the requester is working for. Most news reporters are agents for corporations, but nothing in IPRA requires them to explain that they are requesting the records on behalf of the Albuquerque Journal, or the Santa Fe New Mexican, or the Associated Press, or KOAT-TV, Inc.

In fact, IPRA would make no sense without the concept of agency. § 14-2-6(C) of IPRA defines "person" to include artificial or unnatural persons like corporations and partnerships. These artificial persons can act only through agents. Since unnatural entities have no corporeal existence, they are

unable to act except through agents – natural persons who act on their behalf, *see* UJI 13-409. The Association is an unincorporated association, which is an unnatural entity under NMSA 1978, § 53-10-1, so it can act only through an agent, like a corporation. Thus IPRA necessarily assumes and relies upon the concepts of agency, even though they are not expressly stated in the statute. And IPRA does not require an agent to identify its principal, because that would disclose the reason for his inquiry, contrary to § 14-2-8(C).

So the district court ruling runs contrary to the express provisions of IPRA. The ruling also runs contrary to the rules of law that favor and protect news gathering. U.S. Const. amend. I; N.M. Const. art. II, § 17; Rule 11-514, NMRA 2008 (News media-confidential source or information privilege.). The law also protects and encourages whistleblowers. NMSA 1978, § 44-9-11; *Rhein v. ADT Automotive, Inc.*,1996-NMSC-066, 122 N.M. 646, 930 P.2d 783.

C. The statute requires the name and address of the requester simply to facilitate the production of public documents.

The district court relied heavily on the fact that a person requesting public documents under IPRA must supply a name and address. Apparently, the district court construed this provision as repealing the concepts of agency, or requiring the agent to disclose the principal for whom he is acting. The district court has read far too much into this modest provision. The provision

is simply to facilitate the production of documents by the public agency. Obviously, to produce documents the agency must have contact information to communicate with the requester and produce the documents. The name and address provision is simply a practical requirement to facilitate the logistics of producing documents. There is actually nothing that suggests that it impliedly repealed the concepts of agency that apply pursuant to the common law and § 38-1-3.

In this instance, the law firm provided its name and address. That is all the agency needs to know, and that is all that it is allowed to ask. The agency cannot ask whether the law firm is acting on behalf of a client, or who the client is, because that would reveal some of the reasons why the law firm is requesting records, contrary to the express prohibition in § 14-2-8(C).

The erroneous rule of construction adopted by the district court would lead to absurd results under other statutes as well. For example, NMSA 1978, § 48-10-12(A) allows a request for a copy of notice of sale to be filed with the county clerk. The statute further states that "the request shall provide the name and address of the person requesting a copy. . . ." Under the district court's analysis, this statute would prohibit a title company from asking for a notice to be sent to its address, because the title company might be acting as an

agent for an undisclosed principal who might be interested in buying the property. Likewise, the district court would prohibit an attorney from asking for a copy of the sale notice be sent to his office address.

III. The district court ruling is contrary to the express purposes and policies of IPRA.

A. § 14-2-5 of IPRA states that "all persons are entitled to the greatest possible information regarding the affairs of government."

The district court ruling contravenes the explicit statutory purpose of the Inspection of Public Records Act:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

NMSA 1978, § 14-2-5.

The ruling also runs contrary to the common law and constitutional doctrines that favor the gathering of information about the government, and its dissemination to the public. *See also State ex rel. Newsome v. Alarid*, 90 N.M.

790, 796-97, 568 P.2d 1236, 1242-43 (1977) (public's right to inspection is favored, denial is the exception) (quoting cases from Wisconsin and Oregon). This legislative policy also has constitutional roots in the clauses of the New Mexico Constitution that guarantee the people's right to popular sovereignty; the people's right to govern themselves; and the citizens' right to speak freely, criticize the government, and petition the government for a redress of grievances. N.M. Const. art. II, §§ 2, 3, 17.

B. Cases construing the federal statute are misleading, because IPRA was written to be much stronger than the federal statute.

In the district court, the defendants cited federal court cases construing FOIA, some of which hold, or say in dicta, that FOIA prohibits the use of agents in making FOIA requests. It is not clear whether the district court relied on these federal cases, but it appears that it was influenced by them. Reliance on federal cases is misplaced, because FOIA is quite different than IPRA. As a quick comparison of the texts will demonstrate, the New Mexico statute is not modeled after FOIA. Contrast the text of IPRA with the text of the Freedom of Information Act, 5 U.S.C. § 552. The New Mexico Legislature drafted IPRA to be much stronger than FOIA, to favor the public's right to know, and to eliminate many of the problems with FOIA. The federal

statute does not contain a provision like the New Mexico one, that no person requesting records shall be required to state the reason for the request.

Federal court decisions construing a different federal statute are not binding on the courts of New Mexico. *State v. Long*, 121 N.M. 333, 335, 911 P.2d 227, 229 (Ct. App. 1995) ("New Mexico courts follow federal law only to the extent they find that law persuasive."); *Sundial Press v. City of Albuquerque*, 114 N.M. 236, 239, 836 P.2d 1257, 1260 (Ct. App. 1992) ("we are not bound by these federal decisions"). They cannot be used to override or thwart the express provisions of the IPRA (or any other statute) as written in the law by the Legislature. *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 37, 140 N.M. 464, 143 P.3d 502 ("there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico"); *New Mexico Dep't of Labor v. A.C. Electric Inc.*, 1998-NMCA-141, ¶ 31, 125 N.M. 779, 965 P.2d 363 (New Mexico statute does not track the language of federal statute, so New Mexico Legislature clearly chose a different test than Congress).

The federal cases are decided in the context of the limited federal jurisdiction under Article III of the U.S. Constitution. *See, e.g., Mahtesian v.*

United States Office of Personnel Management, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (federal courts are creatures of limited jurisdiction, constrained by Article III and the jurisdictional limitations imposed by Congress). *See also, e.g., Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) and the latest Guantanamo cases (*Boumediene v. Bush*, No. 06-1195 (U.S.) and *Al Odah v. United States* (U.S.)), where Congress amended the so-called Patriot Act to limit the jurisdiction of the federal courts to hear *habeas corpus* cases. The federal courts are limited by the constraints of Article III, and by additional jurisdictional limits placed on them by Congress.

Moreover, the federal government itself is a government of limited powers within our system of federalism. By contrast, state courts have plenary general jurisdiction springing from the New Mexico Constitution itself, *see* N.M. Const. art. VI, § 1, rather than from the Legislature. Thus, federal court decisions are often an uncertain or erroneous guide to the interpretation and application of state law, as in this case, even though federal cases are routinely and unthinkingly cited by most litigants. Fortunately, the New Mexico appellate courts have often recognized that federal cases are decided in a different legal environment. *See, e.g., Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 15, 173 P.3d 765:

> [W]e also note that in the federal courts the right of an aggrieved party to appeal is merely statutory. *See Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002). In the courts of this state, an aggrieved party has "an absolute right to one appeal" granted by our state constitution. N.M. Const. art. VI, § 2.

Most importantly, there is a huge amount of common law in the state courts, whereas there is almost no common law at all in the federal courts. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938): "There is no federal general common law." *See also* 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4514, at 451-52 (1996) ("Since *Erie*, it has become clear that this statement is not completely accurate: although the is no 'general' federal common law, it now is recognized that in certain narrowly defined but extremely important circumstances the federal courts may fashion 'specialized' federal common law . . . .").

Federal law is largely devoid of common law because federal law is statutory in nature – it does not exist until Congress enacts a statute on a particular topic. Furthermore, the United States Code does not have a provision adopting the common law as the rule of decision in cases governed by federal law, whereas the New Mexico Code expressly adopts and incorporates the common law. NMSA 1978, § 38-1-3.

IV. The district court violated Rule 15 by refusing to allow amendment of the complaint to add the law firm as an additional plaintiff, which would have cured the defect perceived by the court.

A. Rule 15 requires that leave to amend the complaint shall be liberally granted.

The lower court committed an independent reversible error when it dismissed the complaint with prejudice, without leave to amend, thereby prohibiting an amendment to include the law firm as an additional plaintiff. The plaintiffs had indicated that they would probably amend the complaint to add the law firm if the court adopted the defendants' argument. The plaintiffs made it clear that the argument was legally erroneous, but if the court ruled that only the "requester" could file suit under IPRA, then the law firm could be added to cure this supposed problem, thereby mooting this tangential issue [Tr. 31]. Without any explanation whatsoever, the district court dismissed the case with prejudice, without leave to amend [R.141-43].

This is simply contrary to Rule 1-015, NMRA 2008. First, the defendants had not filed an answer to the complaint, so the plaintiffs had the right to amend the complaint once without leave of court or the other side. Second, Rule 15 commands that leave to amend shall be freely given when justice so requires. *See Kirby Cattle Co. v. Shriners Hosp.*, 88 N.M. 605, 610, 544

P.2d 1170, 1175 (Ct. App. 1975), *rev'd on other grounds*, 89 N.M. 169, 548 P.2d 449 (1976). Under both prongs of Rule 15, the amendment should have been allowed. After all, the real question in this case is whether the records are public under IPRA, and the defendants' argument is at best tangential and hyper-technical. "New Mexico follows the principle that in the interests of justice and to promote the adjudication of a case upon its merits, amendments should be freely granted." *Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 17, 126 N.M. 288, 968 P.2d 799 (quoting *Chavez v. Regents of the Univ. of N.M.*, 103 N.M. 606, 610, 711 P.2d 883, 887 (1985)). The amendment would have cured the defect that was perceived, erroneously, by the district court. At this early stage of the proceedings, there was no reason not to allow amendment, and the district court offered none.

B. The district court erred when it refused to allow the requester to be added as an additional plaintiff.

There is a fundamental contradiction in the decision of the district court. The district court believed that the lawsuit should have been brought by the person requesting the records, but then it refused to add the requester as a plaintiff. If the court deemed the law firm to be the requester rather than the Association, then the law firm had "standing" to enforce IPRA, and it could easily have been added as an additional plaintiff. This would have eliminated

and mooted this entire tangential argument, which has nothing to do with the central issue in this case: whether the defendants refused to produce documents that are covered by IPRA.

In essence, the district court ended up ruling that the Association could not bring suit because it was not the "requester." And then the district court ruled that the "requester" could not bring suit either. Even under the court's own analysis, this makes no sense.

CONCLUSION

For the reasons stated, the district court should be reversed, and this case should be remanded for further proceedings, with instructions to reinstate the complaint as filed by the San Juan Agricultural Water Users Association. Unless the district court is reversed, the defendant state agencies will have succeeded in creating yet another obstacle to public scrutiny, by forcing clients to reveal themselves. The defendants' position is substantively wrong, because it is contrary to the plain text of IPRA, to the express purposes of the statute, and to the long-established law set forth in *Coldwater Cattle*; *Turley*; *Smith v. Walcott*; and the Uniform Jury Instructions. Costs and attorneys' fees for this appeal should be assessed pursuant to NMSA 1978, § 14-2-12(D) and *Board of*

Comm'rs v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 37, 134 N.M. 283, 76 P.3d 36.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By _____

Victor R. Marshall
Attorneys for Plaintiffs/Appellants
12509 Oakland NE
Albuquerque, New Mexico 87122
505-332-9400 / 505-332-3793 FAX

I hereby certify that, according to the word count provided by WordPerfect Version X3, the body of the foregoing brief contains 8,680 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in a 14-point proportionally-spaced typeface (Calisto MT).

I further certify that a true and correct copy of the foregoing was mailed to John B. Pound, Esq.; Mark T. Baker, Esq.; Charles R. Peifer, Esq.; Matthew R. Hoyt, Esq.; and Leonard J. DeLayo, Jr., New Mexico Foundation for Open Government As Amicus, this 22nd day of September, 2008.

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