IN THE NEW MEXICO COURT OF APPEALS

TOMAS ABEYTA, Mayordomo of
The La Joya Acequia, and Commissioners
Of the La Joya Acequia Board of Socorro County,
Appellees/Petitioners

CASE No. 33371

-vs-

LOUIS LOVATO,
Appellant/Respondent.

ANSWER BRIEF

Submitted by:

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I. TABLE OF CONTENTS

Page

i. Table of Contents..... 2

ii. Table of Authorities..... 3

iii. Supplemental Summary of Proceedings..... 4

ISSUE ONE:
LOWER COURT ERRED IN APPOINTING BOARD MEMBERS AND CONDUCTING ELECTION IN ITS COURTROOM IMPROPERLY..... 11

ISSUE TWO:
LOWER COURT ERRED IN NOT HOLDING APPELLEES IN VIOLATION OF INJUNCTION AGAINST OPENING NEW LANDS FOR IRRIGATION..... 13

ISSUE THREE:
COURT ERRED IN NOT RULING ON LOVATO'S CLAIMS IT (sic) WAS CHARGING ILLEGAL FEES..... 15

ISSUE FOUR:
LOWER COURT ERRED IN FINDING LOVATO GUILTY OF CONTEMPT FOR IRRGATING ON October 5, 2012 (sic) AS UNSUPPORTED BY SUBSTANTIAL EVIDENCE..... 15

CONCLUSION..... 17

TABLE OF AUTHORITIES

New Mexico Cases:

Bounds v. Hamlett, 2011 NMCA 078, 150 N.M. 389, 258 P.3d 1181..... 6

Holmberg vs. Bradford, 56 N.M. 401 6

Olsen vs. H & B Properties, Inc., 118 N.M. 499..... 6

Wilson v. Timberon Protective Ass'n,
111 N.M. 478, 485-86, 806 P. 2d 1068, 1075-76 (Ct.App. 1990)..... 11

New Mexico Statutes:

NMSA 1978 73 - 2 § 1 ..... 8, 12

NMSA 1978 73 - 3 § 1 ..... 8, 12

NMSA 1978 73 - 3 § 3 11

SUPPLEMENTAL
SUMMARY OF PROCEEDINGS

This eight year lawsuit is the culmination of Appellant's long-standing feud with the Mayordomo and Commissioners of the La Joya Acequia Association over Lovato's .

Lovato has repeatedly violated the rules and regulations of the Association and ignored the instructions of the Mayordomo. **[RP 108, Tr.12:48:17], [RP 127, Tr. 1:36:29], [RP 131, Tr. 2:33:20], [RP 134, Tr. 3:01:50], [RP 136, 3:25:19], and [RP 75, Exhibs 3,4,5], [RP 76, Exhib DLA], [RP 82, 83, 84, 85, 86].** He has taken water from the ditch without the Mayordomo's permission, **[RP 135, Tr. 1:38:21], [RP 204, Tr. 12:01:28]**(often interfering with downstream users lawfully irrigating at those times by interrupting the ditch flow **[RP 62, Tr. 11:57:42 &:12:06:43] [RP 1:30:23]** left the area and returned to his home in Los Lunas while irrigating **[RP 136, Tr. 3:24:53]**, failed to monitor for leaks when irrigating, over-watered and caused overflows (resulting in floods of neighboring lands and nearby roads to the point that he installed a culvert pipe under a neighboring road to handle some of the illegal overflow), and releasing his cattle to roam (and damage) the ditch banks, blocking the Acequia easement across his lands **[RP 62, Tr. 11:56:29]**, and generally failing to follow the Acequia's Rules and Regulations for requesting to be placed on the watering schedule **[RP 51, Tr. 10:11:52 – 10:32:40; [RP 80, 82-88].**

Because local law enforcement views the situation as a "civil matter" they do not support the Mayordomo or the Commission when responding to continual confrontations between the parties and the Acequia filed the within action to permanently restrain Appellant from continuing to violate Association rules and regulations and statutes involving irrigation. **[RP 1].**

At the conclusion of the 10/23/2008 initial hearing, the lower court ordered a Preliminary Injunction against Lovato **[RP 27]** and proceeded to conduct a trial consisting of seven different hearings over the next 7 years, during which Lovato filed several different counter-claims and was again cited for multiple new violations.

On 3/30/2009, a hearing on a Temporary Injunction was commenced and continued at the close of Plaintiff's Case in Chief, with the Court issuing a "Continuing Temporary Injunction."

On 6/19/2009, Appellant was charged with new violations in contempt of the Court's Preliminary Injunction, **[RP 78-87]** and which were heard on July 15, 2009 **[RP 91]**.

ON 9/15/2009, Appellant filed the first of eight separate requests for affirmative relief in his "*Amended Answer to Petition for Injunctive Relief and Counterclaim for Damages*" (even though the "Amended" Answer is for all intents and purposes identical to the initial *Answer*) which alleges claims for replacement of his turnouts and for lost crops. **[RP 114]** These claims were ultimately unsuccessful.

On 6/4/2010, Appellant was charged with again flooding the road by failing to turn off his irrigation in time to prevent flooding, in contempt of the Court's Preliminary Injunction, **[RP 120]** heard 7/15/2010 when he was found in contempt for interfering with the Mayordomo and for failing to follow the Acequia Association's Rules and Regulations **[RP 144]**.

On 9/23/2010 at a Status Hearing, Appellant was granted leave to amend his counterclaim for the second time, based upon claimed "interference by officers of the ditch." **[RP 148]**.

On 11/12/2010 Appellant filed his *Amended Answer*, **[RP 155]**completely changing his theory of Defense; he repeats his first counterclaim and adds a *"Supplemental Counterclaim for Damages, Injunction and Removal,"* in which Count 1 alleged interference with a claimed

easement in Lovato over the ditch bank concentric with the Acequia easement across other irrigators' lands. This count was ultimately dismissed with prejudice in the Court's final order.

Count 2 seeking damages and removal of the Commission and Mayordomo for illegal irrigation of "new lands not previously irrigated by the Acequia" without the written approval of Defendants and in derogation of their water allocation. The injunction was ultimately issued upon the Commission's inability to document that written approval of a majority of the members had consented to adding new lands to the ditch's serviced areas as required by **Holmberg vs. Bradford, 56 N.M. 401; Olsen vs. H & B Properties, Inc., 118 N.M. 499**, during the past 41 years because technically all lands had not been irrigated immediately prior to the restoration of the Mother Ditch in the 1970's. (Upon the issuance of the Court's order, the Commission immediately obtained blanket approval from a majority of the parcientes for the irrigation of any and all lands presently paid up and irrigated.)

Count 3 alleged that the Commissioners illegally lowered the ditch invert in order to prevent Defendant's land from being capable of being irrigated. (The court ultimately dismissed this claim with prejudice.) **[RP 198]** Trial testimony revealed that it was physically impossible to lower the water level or the invert of the ditch if a gravity flow was to be maintained all the way to the outfall of the ditch where it re-entered the Rio Grande.

On August 24, 2011, Appellant filed a *Motion to Dismiss* invoking still another theory: that the Association's By-Laws, Rules and Regulations were illegally enacted by an improper method under the recently decided case of **Bounds v. Hamlett, 2011 NMCA 078, 150 N.M. 389, 258 P.3d 1181.**

On 8/24/2011, the trial court heard the continued trial of 3/30/2009, continued 19 months earlier, for presentation of the Defense's case wherein the court declined Appellant counsel's request to hear their *Motion to Dismiss*, filed the morning of trial—Plaintiffs not having had an opportunity to respond—and proceeded to hear Appellant's second counterclaim.

The trial court purportedly completed the trial and required closing arguments in writing and facts and conclusions be submitted by October 14, 2011, but leaving open the Motion to Dismiss with the statement to counsel "P(laintiff) needs to Answer in the regular time for the Motion to Dismiss that was filed today – if you have supplemental defenses that you are going to address you need to advise D- you guys can work out the process."**[RP 208, Tr. 12:51:43].**

The Association had inadvertently failed to conduct the biennial Board and Mayordomo elections on the first Monday of October as required by NMSA §73-3-3 and Art. III §2.

The day before the hearing of Appellant's *Motion to Dismiss*, scheduled for October 20, 2011, Appellant filed yet another claim for relief, "*Petition to Enjoin Conduct of Election*" scheduled for November 7, the Board's last day in office.**[RP 270]** Because the trial court indicated a willingness to hear a subsequent election, the Appellees stipulated that the scheduled election would be postponed and Appellant was instructed to file a Motion to Reopen the Evidence. **[RP 282].**

Instead, on 11/1/2011 Appellant filed a *Motion for Supplemental Relief*, seeking refunds of, and to enjoin, assessments for non-irrigated lands and seeking to bar the still current Commissioners from any "claim of office" and asking that Appellant "be appointed interim receiver of the acequia" (sic).

On 11/30/2011 Appellees filed their response, citing sections of the statutes involved in **NMSA 1978, §73-2-1 et seq. and NMAS 1978, §73-3-1, et seq.** regarding officer vacancies and special elections **[RP 310-311].**

At the 12/22/2011 hearing the trial court determined that **NMSA 1978 73-3-1 et seq**. contained the controlling law, that the Commissioners and Mayordomo could not "hold over" their positions and that the statute required an appointment, rather than an election, to fill the vacancies **[RP 325, TR 11:18:19]**. The Court requested a list of all members of the acequia—both those having rights in the ditch, and those having only rights to the use of the ditch, i.e., those purchasing water from the MRGCD, and established a procedure whereby members would be notified of their right to nominate persons for appointment by the Court at a January 3, 2012 hearing.

At the 1/3/2012 hearing the court first counted the nominations cast by 27 "unchallenged members" with water rights. No single nominee got a majority 14 of those voting **[RP 358-9]**and the court next determined that 4 of the 8 voters challenged were entitled to vote, resulting in required majority of 16 of 31 votes cast. After a determination that both John Corangelo and Marcel Abeyta had received a majority of the 31 "nominators", they were then appointed by the court and instructed to appoint a third Commissioner and the three of them a Mayordomo, all to serve until the October 2013 next regularly-scheduled election **[RP 361, Tr. 11:19:92].** Mercifully, the court declared "the trial is closed and we will wrap up in February-my findings and conclusions" and concluded the hearing **[RP 364.]**

On February 9, 2012, to no one's surprise, Appellant next filed a Motion to Quash 212 & 2013 Assessments, claiming the appointments by the Court were invalid **[RP 368].**

On April 4, 2012 the court filed its Findings and Conclusions on the Complaint and determined the Plaintiffs were entitled to a Permanent Injunction against Appellants. **[RP 387].**

On May 2, 2012 the trial court held a status conference and went over Defendant's new claims and set them for trial two weeks later **[RP 395]** despite the fact that Appellee had not filed a Motion to Re-open the Evidence as previously suggested by the court.

At the May 16, 2012 trial the trial court dismissed the balance of Defendant's claims without prejudice as filed untimely and proceeded to hear the issue of Lovato's claim of a personal easement over the entire ditch easement which was denied on a directed verdict.

On June 6, 2012 the trial court filed its Findings and Conclusions on Respondent's various claims for relief **[RP 421]** denying Appellant's claims for damages to turnouts, interference with easement, and damages and injunction for ditch modification without consent. The court found for Appellant on the issue of illegal irrigation of new lands by Petitioners.

On June 20, 2012 Appellant filed a Motion to Alter, Amend or Set Aside the Court's findings and conclusions, which was subsequently granted with regard to his easement issue, but did not affect the court's determination that there was no easement.

On July 19, 2012 Appellant was yet again charged with violating the Continuing Temporary Injunction by again irrigating without permission and disobeying the Mayordomo's order to cease his illegal irrigation.

At the August 23, 2012 hearing the court found that Lovato had again violated the Acequia's Rules and Regulations, and the court's prior orders, but refused to find him in contempt, instead issuing yet another stern warning **[RP 475].**

On October 15, 2012 Appellant was charged again with violating the injunction for watering without the written approval of the Mayordomo and interfering with irrigation by a downstream parciente.

One week later, on October 23, 2012 Appellant was charged with another violation for unauthorized irrigation of his lands without the authorization of the Mayordomo **[RP 488].**

At the October 31, 2012 hearing the court dismissed all undetermined issues, claims and counterclaims **[RP 494].**

On November 1, 2012 Appellant filed a Motion to Disqualify Counsel for Plaintiff **[RP 515]** which was subsequently withdrawn.

On November 19, 2i012 Appellant filed a Motion to Set Aside the Judgment **[RP 521]** entered November 7, 2012, [RP 516] which was subsequently denied.

On August 29, 2013, Lovato was found in contempt of Court and ordered to pay Plaintiff's attorney fees in the amount of $1,000.00 plus gross receipts tax within 30 days.

On October 9, 2013 the court entered its Order on Motions denying the Motion for Reconsideration of Judgment, found Defendant in contempt of court, and denied all pending motions **[RP 568].**

On October 28, 2013 Appellant filed his Notice of Appeal.

The Acequia currently distributes only one-half of the water to which it is entitled **[RP 206 Tr. 12:37:46]** and Appellant is on record as stating under oath that "I am not complaining that (Appellee) has not given me the water in the past" **[RP 137 Tr. 3:38:09].**

Contrary to Appellant's asserted fact that "(Outsiders) within the past several decades have acquired lands and started taking control of the La Joya Acequia Association" **[Brief in Chief, p.**

1, l. 12] the Mayordomo and a majority of the Board of Commissioners as well as the membership of the Association have always been persons with ancestral ties to the La Joya Grant itself and to their lands situate in the original La Joya Grant.

The La Joya Acequia Association is unique in that in addition to conveying river waters historically carried by the Ancient Ditch, it also conveys to private landowners water purchased from the MRGCD,

Under the Acequia By-Laws, those lands in La Joya capable of irrigation from the mother ditch and its laterals are "benefitted acres" for which they are assessed an annual fee proportionate to the amount of that acreage. Those actually receiving water are charged an additional fee based on the number of acres receiving water. **[Brief in Chief, p. 13, Par. 1]**

ARGUMENT

ISSUE ONE: THE LOWER COURT ERRED IN APPOINTING BOARD MEMBERS AND CONDUCTING AN ELECTION IN ITS COURTROOM IMPROPERLY.

Appellant's position on this first issue is a little confusing in that he first asserts that the trial Court's establishment of the successor Board of Commissioners in 2011 was improper because it was not conducted in conformance with the Association By-Laws and at the same time he asserts that the method set forth in the By-Laws is unconstitutional and a violation of the New Mexico Election Code.

Appellee cites **Wilson v. Timberon Protective Ass'n**, 111 N.M. 478, 485-86, 806 P. 2d 1068, 1075-76 (Ct.App. 1990) for the proposition that the Acequia violates **NMSA 1978 §73-3-3,** the election laws, and the federal constitution, but admits the case stands for the proposition that Acequias are a different situation. **(Br. In Chief, ll.7-12.)**

Appellant's position on the Court's election of the Board is incorrect, because they were not elected, but rather, were appointed by the Court to serve out the balance of the then current term of office by members of the Association.

The out-going Board had in fact scheduled an election for November 7, 2011, which the Appellant agreed to postpone, because technically not allowed under the statute requiring the election to be held in October. The court specifically found that **NMSA 1978 73-3-1** was controlling law:

> **"73-3-1. Officers; election; bonds; vacancies.**
> .... In case of the joint vacancy of two or more commissioners, a majority of the owners of the water rights in the ditch shall immediately appoint their successors who shall qualify and hold office as herein provided."

and that officers were required to be appointed and not elected **[RP 326 Tr. 1:23:32].**

Since all of the officer vacancies occurred at the same time on November 7, 2011, there were no officers capable of appointing their replacements, the court ordered that all of the members having rights to the water in the ditch (as opposed to rights in the ditch itself) should submit to the court their nominations for appointment.

The statute specifically requires a majority of the owners of the water rights. It does not require a majority of the water rights.

After canvassing those unchallenged voters at the court hearing whom the parties agreed could validly vote, and overruling the challenges to four additional voters, the court appointed two commissioners, both of whom were agreed to by a majority of the persons voting **[RP 360],** who then were instructed to appoint a third Board Member and the Mayordomo, consistent with the By-Laws for filling vacancies.

Appellant has offered nothing to show that a Court is prohibited from soliciting and considering input from an association's membership prior to filling vacancies in the association's governing body.

The Appellant has failed to establish that appointment by the court was somehow unconstitutional or a violation of the rights of Appellant who voluntarily participated in the process of which he now complains.

ISSUE TWO: OPENING NEW LANDS FOR IRRIGATION

Appellee does not even allege that new lands were opened by the Board following the Court's directive, let alone in violation of the Court's order.

He nonetheless maintains that the lower court erred because it did not hold Appellee's in violation of the Court's November 7, 2012 injunction against opening new lands to irrigation except upon approval by a majority of the members having ditch rights together with payment as required by law. He has offered no evidence as to the specific lands to which he refers. The Board was already collecting fees for use of the ditch from all landowners receiving irrigation, and therefore the only possible issue remaining was whether a particular use had been approved by a majority of the membership.

Since Appellant presented no such evidence the Board felt that the only way to correct any perceived deficiency was to obtain approval from a majority of the members of all "new" lands that had been "opened to irrigation" since re-establishment of the Acequia following WWII.

Technically all of the lands under irrigation from the re-established ditch were "new lands opened to irrigation" since the re-establishment of the Acequia in 1974.

Un-damned rivers in the West periodically move their beds. The other "new" lands to which Appellant objects are those that are no longer under water as a result of the Rio Grande's meandering river bed during the past four decades such that lands are now available for irrigation and growing crops. Historically, such lands would have been added to the ditch system when available and until once again inundated by the ever-shifting (un-damned) river.

After that date, lands historically irrigated by the Ancient Acequia, but fallow during the Depression and WWII when the Acequia fell into disrepair were constantly being re-opened to irrigation, but there is no record that the "prior approval" requirement had ever been utilized, as the prevailing philosophy was always that the Ancient Ditch was to benefit the entire membership of the land grant. While these lands were "new" to the newly restored acequia system in 1974, they were not necessarily "new" to the Ancient ditch system originally in use.

As Appellee sets forth at line 5 of page 9 of his Brief in Chief:

> "(Board Members) were enjoined from continuing to allow {new land irrigation} 'until compliance with the law governing newly irrigated lands for acequias.' **[RP 423-4].** The Court ruled that compliance with the law meant that a 'majority vote (of the acequia members) confirms the additional use and appropriate payment is made to La Joya in accordance with law.' **[RP 424, para. 20]"**

Appellant has offered no evidence that the officers supplied water to any new lands following the Court's stated directive and in fact obtained a blanket approval from a majority of the members for all lands currently receiving water from the ditch and who were already paying their annual assessments It is

difficult to fathom how these facts could be considered contumacious in these circumstances.

ISSUE THREE: DID THE LOWER COURT ERR IN NOT RULING ON THE ISSUE OF ILLEGAL FEES RAISED IN APPELLANT'S AUGUST 2011 MOTION TO DISMISS THE SUIT?

Appellant maintains that the trial court erred in failing to find the fee structure utilized by the Acequia Board unlawful, thereby entitling him to damages in the amount of fees he had paid over the years. He admits that the Association's fees track the By-laws and he accurately quotes the relevant By-Law portion in his Motion to Dismiss filed August 24, 2011. **[1st RP 174]** (there are two RP pages numbered 174).

The by-law in question establishes a two tiered fee structure whereby acreage capable of irrigation is assessed an annual fee for maintenance of the ditches, and a second fee for those acres actually receiving irrigation waters.

Aside from the fact that the Motion improperly asks for damages and is in effect yet another counter-claim, the Court correctly determined that the issue "was outside the Order permitting a counter claim to be filed." **[RP 494; Tr. 1:41:56].**

Appellee has not indicated in any way that it was not.

ISSUE FOUR: DID THE TRIAL COURT ERR IN FINDING LOVATO GUILTY OF CONTEMPT FOR HIS OCTOBER 5, 2012 IRRIGATION?

Appellant erroneously asserts that the finding that on October 5, 2012, he violated the Court's Permanent Injunction issued the month following the alleged violations. The Order he was found to have violated was the Court's Continuing Temporary Injunction issued 4/21/2009 **[RP 41]** not an Order issued subsequent to the dates of the alleged violations as Appellant claims.

For purposes of argument, Appellee will now address the issue of whether there was substantial evidence to support a finding of a violation of any order.

While the Court specifically found that there was not enough evidence to find a violation on October 14, 2012 (there were two separate violations 9 days apart that were heard at the 8/229/2012 hearing) the court specifically referenced Appellant's own statements on Cross-Examination as supporting its finding of a violation on October 5, 2012 **[RP 564, TR 2:51:37, et seq.].**

Appellant's defense was that it was his turn to irrigate, and that the irrigator ahead of him gave him permission to irrigate.

The issue is not whether another irrigator gave him permission, nor whether he faxed the Mayordomo. None of these assertions have any bearing on the issue of whether or not he had received written permission from the Mayordomo to start watering, as previously required by the Court.

The rationale for the Court's requirements was twofold:

First, to have a documented record on the issue of whether or not Lovato had permission when he irrigated or whether he was doing so in violation of the rest of the injunction against unauthorized watering—as he has done so often in the past, and

Second, to alert the Mayordomo of the danger that Lovato would again allow water to escape his lands as had occurred repeatedly in the past.

The uncontroverted evidence is that he admitted he did not obtain the required written permission from the Mayordomo to begin watering and thereby violated the court's directive.

CONCLUSION

The decision of the lower court should be affirmed. Appellee should be awarded their costs and attorney fees in responding to this appeal.

Respectfully Submitted,

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Certification:

I hereby certify that I caused a copy of the foregoing Answer Brief to be delivered to opposing counsel as follows:

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