IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DARREL ALLRED, ROBERT ALLRED, JOHN ALLRED, BRUCE ALLRED, and WAYNE ALLRED

Appellees,

v.

NEW MEXICO DEPARTMENT OF TRANSPORTATION,

Appellant.

Ct App. Nos.: 34, 226 & 34, 461

Oral Argument requested

On Appeal from: D-728-cv-2011-00021,
The Honorable Kevin Sweazea presiding

APPELLEES' ANSWER BRIEF

Submitted by:
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The hearings referenced herein were recorded digitally via "For The Record" (FTR) software program and referenced by time according to the date of the hearing (e.g., "2-22-13 CD (11:02:55-11:04:13)" indicates a hearing occurring on February 22 2013 and a point occurring at 11:02:55 am and concluding at the point indicated) .

Undersigned counsel hereby certifies that this Answer Brief has been prepared using Times New Roman (14 point font) with proportionally—spaced type, and that there are 9,710 words contained in the body of this brief using Microsoft Office Word 2010.

Pete V. Domenici, Jr., Esq.

TABLE OF AUTHORITIES

NEW MEXICO CASES:

OTHER CASE LAW:

NEW MEXICO CONSTITUTION:

NEW MEXICO STATUTES:

NEW MEXICO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS:

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Appellees hereby file their Answer Brief in accordance with Rule 12-210 NMRA.

Pursuant to Rule 12-214 NMRA, Appellees request oral argument. The case does not regard issues of first impression but regards the New Mexico Department of Transportation's (DOT) attempt to deprive the district court of its retained subject matter jurisdiction. The district court appropriately awarded compensatory damages, attorney's fees and costs in the form of sanctions against DOT for its violation of the injunction. Thus, oral argument would be helpful to advise the Court, accurately, of the district court's continuing jurisdiction and appropriate rulings made below.

Because the DOT misrepresents facts, circumstances, and pleadings below, and seeks to evade, in part, the standard of review applicable in this case, it is deemed necessary for Appellees to provide the following summary of proceedings. Rule12-213 (B) NMRA.

I. SUMMARY OF FACTS AND PROCEEDINGS

A. The complaint and preliminary injunction.

Appellees own and operate a farming and livestock operation on lands adjacent to U.S. 180 Whitewater Creek ("Creek"), both upstream and downstream from Whitewater Creek Bridge ("Bridge") in Glenwood, New Mexico. The farming operation includes water diversion, ponds for storage and disbursement of

irrigation water, ditches and pipelines for conveyance of water to two ponds and to fields, and irrigated fields that produce hay and graze cattle. [RP 1025, ¶ 22].

In 1981, DOT reconstructed the Bridge ("Bridge") which was originally designed to be an 8 span 216 foot bridge. DOT downsized the Bridge to a 1 span 60 foot bridge resulting in narrowing the channel and flow capacity of the Creek. [RP 2-3]. Thereafter, sediment aggradation began immediately and continues about the Bridge. [RP3]. Because DOT provided either no or insufficient maintenance on the Bridge or excavation of this sediment aggradation, which caused eminent threats of flooding through the last decades, Appellees filed their action for negligence, inverse condemnation, injunctive relief and damages on June 17, 2011. [RP 1-31]. The Compliant did not allege negligent design of the Bridge. *Id.*

Because of DOT's delay in obtaining necessary permits such as a PCN to perform sufficient maintenance above, under, and below the Bridge, and a *Clean Water Act* § 404 permit to enter the Creek, Appellees requested a hearing for preliminary injunction requiring DOT to proceed rapidly in obtaining sufficient scope and authorization to perform emergency maintenance. [RP 41-42]. The hearing was held October 20, 2011 and preliminary injunction was granted. [RP 65]; 10-20-13 CD (11:42:21-11:43:00; 11:43:00-11:52:00).

At the hearing, Judge Sweazea ruled claims for injunctive relief fell outside the *Tort Claims Act* in the context of waiver of immunity applied to the instant claim of negligent maintenance under NMSA § 41-4-11 (A). *Id.*: *see also* 11:44:40-11:45:03 ("If the DOT were maintaining the Whitewater Creek so that sedimentation did not occur above and below the [bridge] there would not be a problem.... It simply does maintenance when things are bad.").

Preliminary injunction was entered November 14, 2011. [RP 107-109]. The order, among other items, required the DOT to update its PCN and submit it to Army Corp of Engineers (ACE) to include a subsequent maintenance plan sufficient to put the creek bed and Bridge in compliance with the 1981 design standards (maintenance 452 feet downstream, 158 feet upstream, and 9 feet of clearance under the Bridge). [RP 107-108]. Within 30 days of ACE's approval, DOT was required to undertake maintenance and promptly prosecute maintenance to completion. [RP 108].

By March 1, 2012, DOT gained approval of the updated PCN and began work on the Creek, March 14, 2012. [RP 132]. However, the DOT attempted to implement a maintenance plan that did not provide for maintenance 452 feet below the Bridge and that proposed a downstream .44 % slope inconsistent with the 2.0 % slope assumed by the DOT's own hydraulic engineer. [RP 11-112; 117-120]. The plan threatened more frequent accumulation of sediment under and about the

Bridge and undermined the basis that arrived at the mandatory 9 feet of clearance under the Bridge. *Id.* On March 22, 2012, the district court held an emergency status conference and ruled that the DOT was required to excavate 450 feet below the Bridge, provide a 2% downstream slope and excavate 50 feet wide to return the Creek to the as-built 1981 design standards. [RP 156].

Because DOT did no further work on the Creek and failed to revise its PCN in accordance with court orders, the parties entered court ordered mediation in April, 2012 with the understanding that success was dependent upon agreement to the essential terms of a permanent injunction, which occurred. [RP 157]. The DOT, however, did not provide any revisions to the draft form of injunction to Appellees until May 21, 2012—39 days after mediation despite repeated requests by undersigned counsel. *Id.* Appellees did not receive any draft form of the separate settlement agreement from DOT until May 30, 2012—48 days after mediation. *Id.*

May 21, 2012 marked the beginning of the devastating Whitewater-Baldy Complex fire, which completely destroyed the Whitewater Creek watershed. *Id.* Appellees counter-motioned to enforce the preliminary injunction in opposition to DOT's motion to present its form of permanent injunction that differed substantially from the agreed-to terms at mediation. *Id.* At that point, DOT had still not submitted and obtained a revised PCN, which would only take days to

complete on an expedited basis. [RP 159]. In lieu of motion practice and given the emergency, on June 5, 2012 the parties stipulated to channel configuration that exceeded the boundaries of the PCN, as approved on March 1, 2012, as required under the preliminary injunction. [RP 168-172].

On November 11 2012, Appellees motioned to enforce the settlement agreement on grounds that seven months had passed since mediation and the incorporated as-built drawings, survey of the completed project on the Creek, and associated construction maintenance easements ("CMEs") were still not completed/delivered to Appellees and other non-party property owners along the Creek. [RP 178, 186]. By February, 2013 DOT had provided proposed CMEs to Appellees that included broad prohibitory language in favor of DOT to the effect that DOT retained "[f]ull and unrestricted right to prohibit all usage of said land for purposes which may be or become inconsistent with the regulations of the New Mexico Department of Transportation." [RP 203, Exhibit 1]. DOT proposed a version of the CME without this prohibitory language February 18, which was accepted by Appellees but then proposed drafts that reinserted this language and that also prohibited access by third-parties [RP 203, Exhibits 4, 5]; 2-22-13 CD (11:02:55-11:04:13).

On February 21, the Court held a hearing on the motion to enforce settlement. At hearing, Appellees explained that they historically moved cattle

under the Bridge to their east pasture, which is the only feasible way to do so in the town of Glenwood. 02-22-13 CD (10:47:48-10:48:28). Appellees were concerned that such broad prohibitory language granted in favor of DOT would afford DOT the right to limit Appellees' use and enjoyment of their property for such uses as cattle grazing and trout fishing in a stream that runs through Appellees' property. 2-22-13 CD (10:41:30-10:43:31). The Court found and ruled that prohibitory language restricting the servient estate owner's use and enjoyment of property was not necessary under the common law of easements as both estate holders had a cause of action for any alleged misuse of the easement. *Id.* (11:06:41-11:07:26); [RP 207-209].

B. The stipulated permanent injunction, separate settlement agreement, and order dismissing remaining claims.

The separate settlement agreement was signed by all the parties by December 11, 2012 and entered as an exhibit to DOT's motion to enforce settlement filed July 23, 2014. [RP 841-844]. The stipulated permanent injunction ("injunction") was signed by Judge Sweazea and entered January 18, 2013. [RP 190-196]. The order dismissing all remaining claims other than the injunction was entered February 27, 2013 [RP 210-211].

The subject matter of the settlement agreement concerns the granting of easements, compensation, and release of claims. [RP 1040, ¶ 81; 842]. By May 31, 2013, DOT had not executed the remaining CMEs to three adjacent non-party

property owners in violation of the separate settlement agreement, which resulted in unnecessary delay of triggered maintenance under the injunction. [1] [RP 855 "Exhibit E"]. Undersigned counsel requested DOT finally execute the remaining CMEs or submit to arbitration under the separate settlement agreement, as appropriate. *Id.* The separate settlement agreement does not incorporate by reference the injunction, which was signed and entered after entry of settlement. [RP 841-844].

The subject matter of the injunction regards maintenance about the Bridge and the creek bed. [RP 1040, ¶ 82]. The last paragraph of the injunction states that its terms resolved "all pending issues related to the injunctive relief requested by the Plaintiffs. Title and compensation issues between Parties shall be disposed of and resolved through a separate simultaneously executed settlement agreement and release." *Id.*, ¶ 82, 83; [RP 194]. The settlement agreement contains a provision for arbitration of disputes, whereas the injunction does not. [RP 1040, ¶ 80; 843, § 4]. The injunction states that in the event the parties disagree that site conditions change such that DOT's ability to comply with the terms of the injunction is impacted, DOT must request and obtain a modification to the permanent injunction. [RP 193, ¶ 12].

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[1] Upon information and belief DOT has still not executed CMES to other non-party property owners that have frontage along Whitewater Creek as required by the separate settlement agreement.

The Order of dismissal on its face dismissed remaining claims other than the injunction. [RP 210]. The order noted the parties' entry of stipulated permanent injunction and "further notice of settlement of the remaining disputes between them in the underlying lawsuit..." *Id.* (emphasis added).

The injunction states, "maintenance of the creek will be triggered when the average distance between sediment accumulation to the low chord of the bridge is 7 feet." [RP 191, ¶ 5]. "When the maintenance requirement is triggered...sediment shall be removed in accordance with the approved PCN, to return the distance between the channel bottom and the low chord of the bridge to 9 feet." [RP 192, ¶ 6.] "Continuing maintenance... shall be diligently pursued until completion..." [193, ¶ 14]. "Maintenance can be triggered due to findings from the [DOT's] regularly scheduled inspections, and can also be triggered upon notice to the NMDOT's District 1 office of any significant event that results in the distance between sediment accumulations under the bridge averaging 7 feet to the low chord of the bridge...." [RP 192, ¶ 8].

After Appellees provided notice to the DOT that required maintenance under the injunction was triggered in July, 2013, the DOT began maintenance on the Creek August 2, 2013, but thereafter stopped work on August 28, 2013, left the Creek, and did not complete the maintenance to re-establish the 9 feet of clearance between the channel bottom and low chord of the Bridge until after the September

15 flood discussed below. [RP 242-243; 234, ¶ 4]. On August 28, Appellees notified DOT that required maintenance under the Injunction must be completed because the average distance between sediment accumulation to the low chord of the bridge was at or past 7 feet. [RP 248, ¶ 6]. By September 9, and in response to Appellees' requests that DOT complete the required maintenance, DOT personnel stated words to the effect that the injunction had nothing to do with DOT's maintenance schedule, DOT would not argue with Appellees, and that DOT intended to enter the Creek on September 30, 2013 to complete required maintenance. [RP 248, ¶ 7, 251, 252-253].

On September 10, heavy rain fell in the area and stopped by that evening leaving only about five feet of clearance under the Bridge. [RP 249-250]. On September 11, and in response to undersigned counsel's letter demanding required maintenance be completed on the Creek, DOT acknowledged that it would begin work in the Creek the next week subject to the possibility/ necessity of a fish study. [RP 254]. On September 12, heavy rains began falling through that night. On September 13, there was another heavy rain event which left only three feet of clearance under the Bridge.

With only three feet of freeboard, however, a tree jammed under the Bridge. Flood waters topped the Bridge about 12:00 am September 15, 2013 causing damage above and below the Bridge, including damage to Darrel Allred's

residential area, Appellees' irrigation systems, and destruction of dikes and one of Appellees' upstream hay fields. [RP 249-250]. Dikes along the Creek were non-existent in Glenwood and the Creek accreted next to houses in town. *Id.*

Appellees thereafter filed a motion to enforce the injunction for violation of the injunction, as amended, to reflect the DOT returned after the flood to complete maintenance, and requested an emergency hearing in *Allred et al. v. NM DOT*, D-728-CV-2011-00021. [RP 212-227; 242-257]. The record reflects DOT responded by way of general denial of violation of the injunction and 1) never raised ad hoc argument of failure to state a claim on the basis of Rule 1-60 NMRA, 2) never raised argument that the matter was subject to arbitration under the separate settlement agreement, and 3) never raised lack of subject matter jurisdiction as a defense. [RP 233-241]; *see also* [RP 258-260 (DOT witness list); 229-232 (COS re: service of subpoenas on DOT witnesses, accepted by DOT)].

C. October 9, 2013 hearing on DOT's violation of the stipulated permanent injunction.

At the October hearing the DOT agreed that the proceeding would be limited to determining whether it violated the terms of the permanent injunction. If so, issues of causation, liability, and damages would be reserved for future proceedings pursuant to Appellees' leave to file a petition for sanctions. 10-09-13 CD (10:43:45-10:14:16).

Testimony on the record corroborated that after Appellees gave notice that maintenance was triggered under the injunction late July, 2013, the DOT entered the Creek on or about August 2, 2013 with a maintenance crew and worked with equipment to remove sediment from the Creek at, below, and above the Bridge. 10-09-13 CD (11:37:09-11:39:06; 1:04:31-1:05:15; 1:08:07-1:14:12; 1:54:25-1:56:04). However, DOT Maintenance Engineer Gene Paulk, who was aware of the requirements of the injunction under "judgment call", began pulling men and equipment off the job before completing required maintenance and before a rain event occurred on August 27 that deposited more sediment about the Bridge further reducing clearance. *Id.* After the rain event, Gene Paulk ordered the remaining two DOT personnel out of the Creek on August 28 and the DOT did not return to complete maintenance until after the September 15 flood. *Id.*

The required 9 feet clearance under the Bridge together with maintenance 452 feet below, 158 feet above the Bridge as incorporated under the injunction, was never achieved at any time during DOT work. *Id.* Appellee Darrell Allred, however, entered the Creek with his bull dozer, which is allowed equipment under the PCN to assist the only two DOT personnel left on the Creek to attempt completion of the required maintenance before the August 27 rain event. 10-09-13 CD (11:27:30-11:27:40). Both DOT personnel ordered off the Creek on August 28 testified that, had they been allowed to stay, they could have completed required

maintenance within one week. 10-09-13 CD (11:27:30-11:27:40; 11:59:34-12:00:21). No credible evidence of force majeure or other regulatory restrictions were on the record such that DOT was excused from the terms of the injunction. 7-25-14 CD (4:32:15-4:36:18).

Judge Sweazea found that the context of the injunction governed the matter. The district court found that the DOT violated the injunction by not diligently pursing required maintenance until completion. 10-09-13 CD (2:31:28-2:32:04; 2:32:15-2:32:42; 2:33:51-2:37:40) [RP 291, ¶ 5]. The district court found that flooding occurred in Glenwood, New Mexico on or about September 15, 2013 and granted Appellees leave to file their petition for sanctions such that a hearing would address issues of liability, causation, and damages. [*Id.*, ¶¶ 6,7]. Judge Sweazea ruled that a Rule 16 scheduling conference would be scheduled to address defense of sovereign immunity and the legal effect of the *Tort Claims Act*, if any, before taking further evidence in the case. [*Id.*, ¶¶ 8-10].

D. The parties' pre-sanctions hearing litigation conduct.

On November 8, 2013 the DOT filed a motion to reconsider the Court's ruling that DOT violated the Injunction. [RP 293-318]. The DOT argued again that force majeure intervened or alternatively that the DOT had discretion under the injunction to determine when required maintenance is completed. [RP 296-297]. Appellees responded in opposition and thereafter filed their petition for sanctions

November 21. [RP 360-375]. The petition included three estimates for damages to improvements and removal of debris on site in excess of $300,000. [RP 367-373].

DOT argued in opposition to the petition that force majeure intervened on the basis of refuted and unsupported evidence that 16,000 cubic feet per second (cfs) flows came down the Creek the night of the flood. [RP 391]. DOT defended on grounds of sovereign immunity "[t]o the extent that the design of the bridge ...caused or contributed to the bridge's inability to pass the floodwaters..." [RP 392]. DOT also stated in response, "[t]here is no dispute that the Stipulated Permanent Injunction which presently controls this matter contains no provision regarding sanctions for attorney fees." [RP 393]. DOT agreed that sanctions can be awarded against a state government entity under appropriate circumstances and that the Court had the inherent authority to regulate the conduct of litigants, including the DOT before it. [RP 394].

A Rule 16 conference occurred February 27, 2014. At the conference, DOT's motion for reconsideration was denied. [RP 572]. The application of the *Tort Claims Act* capping damages was argued and ruled inapplicable upon law of the case that already ruled claims for injunctive relief based upon negligent maintenance fell outside the *Tort Claims Act*. Given the context that the permanent injunction was elevated to a judgment by the parties, claims for compensatory sanctions for breach of the injunction was outside and not limited by the Act and

constituted the appropriate remedy. 2 27 2014 CD (10:38:28-10:35:41). The parties determined discovery needs that included depositions, and a scheduling order was entered that closed discovery on June 1, 2014 and set trial initially on June 25, 26 [RP 574]. No claims of compelled arbitration/ lack of subject matter jurisdiction were made by DOT counsel at the scheduling conference. 2 27 2014 CD (10:00:38-10:08:05; 10:14:53-10:16:08; 10:21:06-10:24:5; 10:33:08-10:35:33).

The parties exchanged written discovery in April and early June, 2014. [RP 584-585, 586]. Appellees previously submitted their expert report of Walt Niccoli, P.E. on December 13, 2013. Mr. Niccoli opined that, had the Creek bed been returned to the required 9 feet clearance under the Bridge and sediment removed to the east and west of the Bridge, as specified in the injunction before the September 15, 2013 rain event, enough capacity to pass peak flows estimated at 5,000 cfs under the Bridge would have prevented flooding. [RP 462,463, 482, 1028, ¶ 38].

In response to Appellee's interrogatory that requested the following specific information on DOT's named expert, John Wallace, PE/CFM, the DOT did not provide any information concerning: Mr. Wallace's opinions, the grounds for those opinions or facts, and reliance documents that Mr. Wallace might utilize. [RP 727-728, 1037, ¶ 70]. On May 14, 2014 undersigned counsel sent correspondence preserving its right to strike Mr. Wallace if this information was not supplemented

and Mr. Wallace did not submit to deposition. [RP 733] No response was forthcoming. [RP 718].

In response to Appellees' third requests for production submitted June 2, 2014, DOT stated correspondence including reports and studies from DOT to United States Geological Service (USGS) were irrelevant to the issues. [RP 718-719]. But DOT inconsistently stated finalized USGS studies were now deemed *relevant* and essential for Mr. Wallace's noticed July 2, 2014 deposition [2] and opinions pursuant to DOT's motion for stay, filed July 1, 2014. [RP 605 (motion for stay) (indicating DOT knew about the USGS planned study regarding September, 2013 precipitation in Catron County as early as January, 2014 with results expected early to mid-2015), RP 720, ¶ 15]. DOT refused to present Mr. Wallace for deposition under a baseless motion for protective order and notice of non-appearance filed June 30, 2014. [RP 591-603; 1038, ¶ 72 (no evidence regarding alleged scheduling conflict on the record)].

On July 8 Appellees appropriately filed a motion in limine to strike John Wallace's testimony for DOT's violation of the rules of civil procedure regarding discovery. [RP 717-743]. On July 16, DOT filed a motion to strike Appellees'

[2] DOT did not respond by June 9, 2014, as requested, to undersigned counsel's June 5, 2014 correspondence noticing the July 2 deposition, offering to pay for Mr. Wallace's time and good faith effort to arrange other particulars. [RP 738].

expert alleging that Mr. Niccoli's opinions did not address causation and damages. [RP 764-816].

Three days before hearing, and for the first time, DOT communicated to the district court by e-mail letter that it did not have subject matter jurisdiction and that DOT had a right to refer the sanctions action to arbitration. [RP 1039, ¶ 76]. On July 22, the district court held a status conference and informed the parties that the hearing would not be continued and that evidentiary and other objections concerning witnesses and evidence would be heard at the start of the hearing. *Id.*, ¶ 77. One day before the hearing, DOT filed its first pleading challenging subject matter jurisdiction. [RP 856-874].

E. July 24-25, 2014 hearing on Appellees' petition for sanctions.

The district court heard argument on DOT's motions regarding lack of subject matter jurisdiction and alleged right to compel arbitration at the beginning of the July 24, 2014 hearing. The district court ruled DOT waived any right it had to compel arbitration by litigating the Motion to Enforce in the Seventh Judicial District Court from October 3, 2013 without ever asserting a claim of right to compel arbitration until days before the July 24, 2014 hearing. 7 24 2014 CD (10:12:24-10:13:00, 10:14:28-10:14:40, 10:33:15-10:36:10, 10:44:32-10:44:42); [RP 1040-41, ¶ 85]. Appellant co-counsel Larry White misrepresented to the district court that he had only recently taken the case over and had only seen the

terms of the separate settlement agreement the Sunday before hearing (which formed another basis for waiver) despite his signature on pleadings throughout the record, including his entry of appearance and answer to the original complaint in 2011 and his participation in several early negotiations circa 2011. 7 24 2014 CD (10:11:56-11:12:13, 10:16:50-10:17:06); [RP 45, 58].

The district court ruled it had subject matter jurisdiction to proceed on Appellees' petition by plain reading of the settlement agreement and injunction showing that the documents were separate and that the injunction was not intended to be deferred to arbitration. 7 24 2014 CD (10:19:07-10:26:33, 10:36:25-10:47:12) [RP ¶¶ 78, 80-85].

At the beginning of the July 24 hearing, Judge Sweazea ruled that motions in limine would be addressed when witnesses were called given that the hearing was a bench trial. 7 24 2014 CD (10:47:20-10:47:35). Objection to the admission of evidence would be raised at the time of tender. *Id.* After examination of Appellees' expert, DOT called its intended expert to the stand, John Wallace, PE/CFM. 7 25 2014 CD (3:25:45-3:50:15). Appellees renewed their motion in limine and Mr. Wallace was not allowed to testify due to DOT's discovery violations discussed above. *Id.* Regarding Mr. Wallace's testimony, no offer of proof was ever raised by DOT at hearing. *Id.* DOT made an untimely offer of proof two months after hearing, which was denied. [RP 996-1020].

Liability

Credible testimony on the record reiterated the October 9, 2013 hearing testimony that DOT pulled equipment and men off the Creek well before the late August rain event that dropped sediment about the Bridge and further reduced clearance under the Bridge without ever meeting the requirements under the injunction. 7 25 2014 CD (4:30:07-4:32:15);[RP 1023, ¶¶ 11-13; 1024, ¶¶ 14-17].Only Two DOT personnel were left to finish the work with insufficient equipment before that rain event and were ordered out of the Creek August 28. *Id.*

Testimony at the hearing substantiated that flows in the Creek were not impassable such that a dozer could enter the Creek, which was available to DOT, to expedite the required maintenance after August 28 until about September 13, 2014. 7 25 2014 CD (9:27:46-9:28:20); [RP 1023, ¶ 13]. The DOT had knowledge of the injunction, knew required maintenance under the injunction was not met, knew rains were foreseeable given the active monsoon season, but made an intentional decision to leave the Creek and only committed to return earlier than September 30, 2013 after threatened court action by undersigned counsel. 7 25 2014 CD (3:04:39-3:17:00); [RP 248, ¶ 7, 251, 252-253].

Causation

Appellee Darrell Allred testified that on the night of flooding at approximately 12 am, September 15, 2013, he watched water flow over the Bridge.

When he walked out on dikes upstream from the Bridge, he could see sedimentation in the creek bed rising. 7 24 2014 CD (11:21:00-11:27:18; 3:23:50-3:24:37, 3:36:56-3:44:58); [RP 1027, ¶ 34]. The night was clear in Glenwood and lightning strikes from storms situated in the Mountains upstream from the Creek provided additional light. *Id.* Before retreating for his safety, Mr. Allred watched the water eventually overtop the dikes, which flooded Appellees' irrigated fields and ponds upstream. *Id.*

DOT personnel Patricio Gutierrez testified that he was also present at the Bridge the night of the flood and witnessed two feet of water overtop the Bridge, observed water back up beyond Appellees' upstream hay field and overtop Appellees' dikes. 7 24 2014 CD (1:55:00-2:09:14); [RP 1027, ¶ 35].

Appellees' expert Walt Niccoli testified that the September 15 rain event constituted a 15 or 20 year event. 7 25 2014 CD (11:51:45-2:52:00); [RP 1029, ¶ 40]. Mr. Niccoli opined that the peak flows on the night of the flood were 5,000 cfs and that had required maintenance been completed before September 15, water would have stayed in the bounds of the Creek and would not have overtopped the levies up above to the east of the Bridge. *Id.*, [RP 1028, ¶ 38].

Despite, the district court's striking of certain testimony of Appellees' expert by DOT's open court motion after excusal of Mr. Wallace, Judge Sweazea found that Appellees had carried their burden of proof by a preponderance of the

evidence that but for DOT's failure to complete required maintenance under the injunction, flooding would have not caused damage to Appellees' improvements/personal property on the basis of remaining expert and lay testimony discussed above and cited in the record. 7 25 2014 CD (4:38:09-4:39:41, 4:39:55-4:40:04, 4:44:35-4:45:05, 4:45:25-4:45:43, 4:57:20-4:59:24).

Damages

The Court found and ruled that the DOT's failure to timely comply with the injunction caused Plaintiffs to sustain serious property damage upstream and downstream of the Bridge and quantified those actual damages upon credible evidence and testimony entered at hearing in an amount, excluding interest and attorney's fees, of $408,764.00. 7 24 2014 CD (2:26:40-3:08:23); 7 25 2014 CD (10:29:23-10:50:50); [RP 1033-35, ¶¶ 56, 58]. No rebuttal to estimates for repair of damage to Appellees' irrigation system, dikes, silting in of their ponds above stream, fields, fencing, and lost profits for reduction in head of cattle and loss of production of bales of hay were entered by DOT before or at trial. [RP 1035, ¶ 57].

The Court entered its Findings of Facts and Conclusions of law on October 6, 2015. [RP 1021-1043]. Final judgment in *Allred et al. v. NM DOT*, D-728-CV-2011-00021was entered October 16, 2014. [RP 1080-81].

Objection to Appellees' requests for costs and fees was thereafter overruled by the district court and fees and costs in the amount $54,301.41 were awarded to

Appellees on the basis that expert fees billed were necessary for the work and expert testimony actually admitted, Rule 1-54 (F) NMRA (provisions of rule do not apply to claims for fees and expenses as sanctions), and on the basis that the requested fees and costs were otherwise reasonable under the circumstances. 12-08-14 CD (1:59:37-2:19:50); [RP 1150-52].

II. LEGAL ARGUMENT AND AUTHORITIES

Standard of Review

"When reviewing a charge of civil contempt, the action of the trial court will not be disturbed absent an abuse of discretion." *State ex rel. Udall v. Wimberly*, 1994-NMCA-121, ¶ 15, 118 N.M. 627, 884 P.2d 518. This Court will reverse a contempt judgment where "the ruling is clearly against the logic and effect of the facts and circumstances of the case [, or] based on a misunderstanding of the law." *Chavez v. Lovelace Sandia Health Sys., Inc.*, 2008-NMCA-104, ¶ 25, 144 N.M. 578, 189 P.3d 711 (internal quotation marks and citation omitted). "Even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." *Id.* (alteration, internal quotation marks, and citation omitted). When reviewing whether the district court's findings are supported by the evidence, this Court "views the evidence in the light most favorable to the trial court's decision, resolves all conflicts and indulges all permissible inferences to uphold the court's decision, and disregards all evidence and inferences to the

contrary." *State v. Gonzales*, 2001-NMCA-025, ¶ 40, 130 N.M. 341, 24 P.3d 776, *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810. In doing so, this Court is mindful that, as in all civil cases, "[t]he burden of proof in [civil contempt proceedings] . . . is . . . the preponderance of the evidence." *Greer v. Johnson,* 1971-NMSC-127, ¶ 9, 83 N.M. 334, 491 P.2d 1145. In addition, "the credibility of the witnesses and the weight to be given the evidence is for the trier of the facts." *Id.*

Trial court rulings that address questions of law such as the construction and interpretation of the underlying stipulated permanent injunction, separate settlement agreement and mutual release, the dismissal of remaining claims other than the injunction, and subject matter jurisdiction are reviewed de novo. *Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 12, 143 N.M. 320, 176 P.3d 309.

As there is a presumption in favor of the decision, this Court should not lightly overturn the district court's judgment and is required to search the record on appeal for substantial evidence to support the judgment. *Rutledge v. Johnson*, 1970-NMSC-023, 81 N.M. 217, 221, 465 P.2d 274, 278. New Mexico courts will not set aside an award of damages unless it is not supported by substantial evidence, based on speculation, or the fact finder employed an incorrect measure of damages. *Ranchers Exploration Dev. Corp. v. Miles*, 1985-NMSC- 019, 102 N.M. 387, 390, 696 P.2d 475, 478. Civil compensatory contempt compensates the

complainant for actual losses sustained. *State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, 74 N.M. 201, 203, 392 P.2d 347.

ARGUMENT

A. The district court retained subject matter jurisdiction upon entry of the stipulated permanent injunction and the parties' dismissal of remaining claims.

The examination of the order of dismissal filed after entry of the injunction shows on its face that the intent of the parties was only to dismiss remaining claims grounded in tort and inverse condemnation. As such the Court always retained subject matter jurisdiction and the case was left pending. *Morris v. Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (court retains jurisdiction under parties' settlement agreement if the order of dismissal shows an intent to retain jurisdiction or incorporates settlement agreement); *Pope v. Gap, Inc.*, 1998-NMCA-103, ¶ 10, 125 N.M. 376, 961 P.2d 1283 (appellate court may look to federal law for guidance when construing rules of civil procedure identical to federal counterpart); Rule 1-041 (a) (1) (b) NMRA; *McDonald v. Padilla*, 1948-NMSC-066, 53 N.M. 116, 202 P.2d 970 (where the lack of jurisdiction does not affirmatively appear on the face of the record, the judgment is not subject to collateral attack); N.M. Const., Art. VI, Sec. 13.

The facts show Judge Sweazea construed the injunction and the settlement agreement and did not resort to extrinsic evidence when the district court found

that the settlement agreement was unambiguously separate from the permanent injunction. *Owen v. Burn Constr. Co.*, 1977-NMSC-029, 90 N.M. 297, 299, 563 P.2d 91, 93 (although a contract between the parties, a stipulated judgment that is clear and ambiguous may not be construed or changed in meaning by pleadings, findings, or matters *dehors* the records). To wit, the terms of the injunction regarding required maintenance on the Creek were apart from the settlement terms and the last paragraph of the injunction is dispositive to show the parties' intent that the settlement agreement was at all times separate from and intended to deal only with title and compensation issues. [RP 193-94 ¶ 14]. Further, the intent that the DOT submit to the district court to modify terms of the injunction is clear on its face and the injunction did not contain an arbitration provision. [RP 193, ¶¶ 11, 12].

As a matter of law, the arbitration provision listed in the settlement agreement cannot relate to disputes that lie outside that document. *Heimann v. Kinder-Morgan CO2 Co., L.P.*, 2006-NMCA-127, ¶ 25, 140 N.M. 552, 144 P.3d 111. Further, the DOT cannot be heard to claim that the permanent injunction came before the settlement agreement. The injunction was signed after the settlement agreement. The settlement agreement cannot supersede the injunction and it is not integrated into the settlement agreement. There is no evidence on the face of the settlement agreement that the parties incorporated the permanent injunction. As the

permanent injunction was not merged into the settlement agreement and was agreed to after the settlement agreement, and did not vary the settlement agreement terms, the parole evidence rule would not apply to bar the district court's review of other pleadings and evidence in this case other than the four corners of these documents. *Nakashima v. State farm Mutual Auto Ins.*, 2007-NMCA-027, ¶ 12, 141 N.M. 239, 153 P.3d 664 (integration/merger clauses only cover antecedent agreements and do not foreclose the possibility of future agreements); *C.R. Anthony v. Loretta Mall Partners*, 1991-NMSC-070, 112 N.M. 504, 508-9, 817 P.2d 238, 243 (overruling by implication the "four corners" standard); *Mark V, Inc. v. Mellakas*, 1993-NMSC-001, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (even if language of contract appears clear and unambiguous court may hear evidence of circumstances surrounding the making of the contract and any relevant course of dealing and performance).

Even if the district court did resort to review the record outside the four corners of the permanent injunction and settlement agreement, the holding that the permanent injunction was neither dismissed nor otherwise referred to arbitration would be no different. The parties' course of dealing, performance, and pleadings indicate the district court always had jurisdiction to hear the merits of Appellees' claims that DOT violated the injunction. [RP 212-227, 258-260 (DOT witness list), 229-232 (COS re: service of subpoenas on DOT witnesses, accepted by DOT; 10-

09-13 CD, 293-318, 393 (admitting stipulated permanent injunction controls sanctions action), 855 ("Exhibit E") (showing CME disputes, if any, controlled through arbitration)]. The only aspect that changed and continues to change is newly appointed in-coming DOT counsel that seeks to re-invent the facts and circumstances of matters below. *Major v. Bishop*, 462 F.2d 1277 (10th Cir. 1972) (mere fact that parties are in disagreement to construction given does not necessarily establish ambiguity).

The DOT cannot rely on mistake to the extent it alleges it misunderstood that the district court always retained jurisdiction to proceed on Appellees' petition for sanctions. "The manifestations of the parties are operative in accordance with the meaning attached by one of the parties if (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party." RESTATEMENT (SECOND) OF CONTRACTS § 20(2) (1981) *cited by Pope*, 1998-NMCA-103, ¶ 13, 961 P.2d 1283, 1287. In this action the record is clear that DOT knew or had reason to know the meaning of the order dismissing remaining claims other than the injunction and that Appellees did not know or had reason to know of any other meaning attached by DOT to the order, entry of

injunction, and separate settlement agreement until a few days before the July, 2014 sanctions hearing.

The DOT impugns the dignity of the district court by inaccurately stating that it did not analyze its basis for holding it retained subject matter jurisdiction. *But see* [RP, ¶¶ 78, 80-85]. The district court continues to have subject matter jurisdiction whereas the DOT impermissibly attempts collateral attack on both the injunction and dismissal of remaining claims other than the injunction. *Myers v. Olson*, 1984-NMSC-015, ¶ 16, 100 N.M. 745, 748, 676 P.2d 822, 825 (properly authorized stipulated judgments are conclusive of all claims determined therein and may not be collaterally attacked by the parties thereto).

B. Appellees were not required to file a separate lawsuit but merely a motion to show cause why contempt was not justified.

Appellees' motion to enforce the injunction for violation of the injunction, as amended, and petition for sanctions operated to allow DOT the opportunity to show cause why civil contempt in the form of compensatory damages was not justified. *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980); *Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, 74 N.M. 201, 204, 392 P.2d 347, 349 *citing Jencks v. Goforth*, 1953-NMSC-090, 57 N.M. 627, 261 P.2d 655; *see also Laumback v. Board of County Comm'rs*, 1955-NMSC-096, 60 N.M. 226, 290 P.2d 1067 (Denomination of pleading is irrelevant since allegations and relief determine nature of the relief sought). The DOT presented testimony and evidence at

hearings, participated in written discovery, and cross-examined Appellees' witnesses such that DOT had fair notice and an opportunity to be heard. *Concha v. Sanchez*, 2011-NMSC-031, ¶ 25, 150 N.M. 268, 258 P.3d 1060, 1066. At the close of the October, 2013 motion hearing, the district court found that flooding occurred in Glenwood, New Mexico on or about September 15, 2013 and determined DOT violated the injunction by not diligently pursing required maintenance until completion. The district court granted Appellees leave to file their petition for sanctions such that further proceedings would address claims and defenses regarding liability, causation, and damages.

Appellees' option to pursue compensatory damages in the form of sanctions within the pending injunction proceeding is an appropriate remedy and allowed in New Mexico. The record indicates the procedural history of Appellees' motion to enforce, as amended, and subsequent hearing on Appellees' petition for sanctions was at all times appropriately administered by the district court. The DOT's allegations that Appellees were required to file a separate action for breach of contract are without merit.[3] Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 974, 975

[3] On September 9, 2015 Appellees filed a protective filing pursuant to previously and timely filed notice of tort claim. The filing was made out of caution to protect against DOT's "shot gun" approach in its attempt to overturn judgment. Appellees' petition for sanctions, however, remains the appropriate remedy and judgment should not lightly be disturbed by this Court.

(1980) ("When an aggrieved individual requests compensatory contempt, rather than bringing a separate and independent action, he simply makes a post-judgment motion. Compensatory contempt therefore remains part of the injunction lawsuit....").

C. DOT waived any right it may have had to arbitrate Appellees' claims, including any ability it had to put on expert testimony by its own litigation conduct.

Waiver of arbitration

In New Mexico, 1) there is a preference for arbitration where a *relevant* arbitration provision is shown; 2) relief from arbitration will only be granted upon a showing of prejudice and 3) reliance is measured upon the extent to which the party urging arbitration has "previously invoked the machinery of the judicial system." *Board of Educ. v. Architects*, 1985-NMSC-102, ¶ 9, 103 N.M. 462, 709 P.2d 184. Prejudice usually manifests in reliance in preparing for trial in the belief that the other party intends to litigate rather than to demand arbitration. *Wood v. Millers Natl. Ins. Co.*, 1981-NMSC-086, 96 N.M. 525, 527, 632 P.2d 1163, 1165.

Although there is a heavy burden to avoid a *relevant* arbitration clause, there is a "point of no return" when the discretionary power of the district court on questions other than arbitration is invoked prior to demanding arbitration. *AFSCME v. City of Albuquerque*, 2013-NMCA-049, ¶ 11, 299 P.3d 441. When

facts are disputed, the standard of review is not necessarily de novo. *Id.*, 2013-NMCA-049 at ¶ 8.

In *Wood*, waiver was found where the party waited three and one-half months after the filing of a complaint to demand arbitration and before that time, filed a motion to dismiss. 96 N.M. at 527-58, 632 P.2d at 1165-66. In *Architects*, the party had activated the judicial machinery of the court by waiting about twelve months to file its motion to compel arbitration, filed multiple motions, propounded discovery and thus caused "undue delay." 103 N.M. at 463-64, 709 P.2d at 185-86.

Here and to the extent the matter was ever susceptible to referral to arbitration—which is strenuously denied by Appellees—DOT clearly waived its right to arbitrate the petition for sanctions action. The DOT did not bring its motion to demand arbitration until ten (10) months after the filing of the October, 2013 motion to enforce the injunction, brought merely one day before hearing on Appellees' petition for sanctions in July, 2014. [RP 831-874]. In the meantime, DOT litigated the motion to enforce the permanent injunction in October, 2013, called witnesses and introduced exhibits, never raised affirmative defense of arbitration provision, propounded discovery, participated in a Rule 1-016 NMRA scheduling conference in 2014 before the sanctions hearing, never raising defense by way of arbitration, and filed five other motions invoking the judicial machinery of the district court that did not relate to the question of arbitration.

DOT caused prejudice to Appellees in causing Appellees to justifiably rely on the belief that DOT intended to litigate the action rather than demand arbitration. DOT activated the judicial machinery of the district court regarding its discretion on questions other than arbitration, and the DOT caused undue delay as apparent on the record. Under any standard of review, DOT waived any right it had to compel arbitration.

Exclusion of DOT's expert witness, John Wallace.

Where a litigant has inadequate time to prepare their cross-examination and trial strategy due to the other party's failure to supplement expert opinions during discovery —there is no abuse of discretion by the trial court to exclude an intended expert. *Shamalon Bird Farm, Ltd. v. U.S. Fidelity & Guar. Co.*, 1991-NMSC-039, 111 N.M. 713, 809 P.2d 627. Experts who have been retained in preparation for trial and expected to testify are subject to discovery. Rule 1-026(B) (6) (a) NMRA. Our Supreme Court has stated that, unlike the extreme sanction of dismissal, "[e]xcluding a witness, while still a drastic remedy, is 'one of the lesser sanctions' available to the court." *Lewis ex rel. Lewis v. Samson,* 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972 (*quoting Shamalon,* 1991-NMSC-039, 111 N.M. 713, 716, 809 P.2d 627, 630).

The DOT did not provide a statement of how any appellate issues were preserved in its Brief-in-chief. Rule 12-213 A (4) NMRA. Despite this fact, the

intended testimony of DOT's expert witness was stricken in total from the hearing before Mr. John Wallace ever testified as to the basis of his opinions in the case. 7 25 2014 CD (3:25:45-3:50:15). This particular issue was not preserved below.

Because the substance of the facts and opinions to which DOT's expert was expected to testify and a summary of the grounds for each opinion was not disclosed during discovery pursuant to Rule 1-026 (B) (6) NMRA, and because the DOT refused to present its expert for deposition upon conflicting and changing rationales and upon no supporting evidence in the record, the district court did not abuse its discretion by striking Mr. Wallace's testimony from the record for DOT's discovery violations pursuant to Rule 1-037 B(2)(b) (NMRA). *Id.* (court may strike disobedient party's designated claims, defenses and prohibit introduction of exhibits for failure to obey Rule 1-026 NMRA). Further, the DOT did not make a timely offer of proof during hearing as required by the rules of evidence. Rule 11-103 (A) (2); *State v. Shaw*, 1977-NMCA-059, 90 N.M. 540, 565 P.2d 1057 (offer of proof must be timely); *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935 (same).

This Court should *sua sponte* strike DOT's impermissible back door effort to enter intended testimony or other evidence of John Wallace at Brief-in-Chief, p. 37, fn. 9, as it is *dehors* the record and inappropriate for this Court to review.

D. Sanctions in the form of compensatory damages, fees and costs remain appropriate in this case and this Court should not disturb final judgment.

Pending stipulated judgments in both criminal and civil contempt proceedings have been construed as legally effective such that courts in New Mexico and other jurisdictions have subject matter jurisdiction and inherent power to award and affirm compensatory damages for actual losses sustained. *Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, 74 N.M. 201, 392 P.2d 347, 349 (affirming contempt award on basis of violation of consent decree); *State ex rel. Udall v Montoya*, 1998-NMCA-149, 126 N.M. 273, 968 P.2d 784 (reviewing liability for criminal contempt on basis of stipulated permanent injunction and remanding on basis that "reasonable doubt" burden was not invoked); *State ex rel. CYFD v. Mercer-Smith*, Ct. App. No. 35, 427, 2015-NMCA-093,__N.M.___, ___P.3d____ (Ct. App., June 18, 2015) (*cert. granted* Aug. 26, 2015) (affirming contempt award but remanding for calculation of attorney's fees award on basis of stipulated order); *Doobie Bros. Corp. v. Curcio et al.*, No. 03-16515 (11th Cir. 2004) (per curiam) (affirming award of civil contempt damages for violation of stipulated permanent injunction entered as a result of settlement).

The elements of contempt are knowledge of the Court's order and ability to comply. *In re Hooker*, 1980-NMSC-109, 94 N.M. 798, 799, 617 P.2d 1313, 1314; *Rhinehart v. Nowlin*, 1990-NMCA-136, 111 N.M. 319, 326, 805 P.2d 88, 95 (same). Despite substantial evidence and findings that DOT's conduct in not complying with the injunction was deliberate, willful and self-created, this element

as suggested by other New Mexico cases is actually not an element of contempt. *See e.g.* [RP ¶¶ 52-55]. Consequently, DOT's arguments regarding lack of willful intent to disobey the injunction is no defense and must fail. *State ex rel. Human Servcs. Dept. v. McDermott*, 1996-NMCA-048, 121 N.M. 609, 620, 916 P.2d 228, 239. Further, alleged inability to comply, even if self-created, is no defense to this indirect, remedial civil compensatory sanctions actions as held by this Court. *Id.*, 121 N.M. 609, 618, 916 P.2d 228, 237.

The record establishes that DOT created the alleged inability to comply with the injunction mandating that DOT diligently pursue maintenance to completion when it chose to walk off the Creek before finishing the job and never complied with the terms of the injunction, two weeks before the flood. The record establishes that DOT could have re-entered the Creek within two weeks before the flood as flows and rain events before September 15, 2013 on the Creek did not impede DOT from entry with equipment. Further, the only two DOT personnel left on the Creek both testified that had they been allowed to remain after August 28, 2013, they could have completed required maintenance within one week even with the scant equipment they were allowed.

Contradicting inference regarding the single requirement of nine feet of clearance reached under the Bridge before work was ordered stopped August 28, 2013 during the second testimony of DOT personnel Lester Peralta is of course

disregarded under substantial evidence review as this Court must view the evidence in the light most favorable to the district court's decision. *State v. Gonzales*, 2001-NMCA-025, ¶ 40, 130 N.M. 341, 24 P.3d 776, *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810; *compare* Oct 9, 2013 CD (11:56:16-11:58:47) *with* 7 25, 2014 CD (11:27:00-11:28:05). The conflicting inference in any event is not supported by other DOT personnel Patricio Gutierrez and Mr. Peralta's testimony corroborates that required maintenance above, under, and below the Bridge was never completed before August 28, 2013.

It is undisputed that DOT had knowledge of the injunction. Substantial evidence shows DOT also had the ability to comply but attempted to circumvent the injunction by simply creating an inability to comply with it, and did not inform Appellees of this alleged circumstance or seek modification to the injunction by the district court in violation of its express provisions. [RP. 193 ¶¶ 11,12 (alleged regulatory changes or conditions and site condition changes must be noticed to Appellee Darrel Allred such that an opportunity to resolve disputes related thereto can be addressed by the district court)].

Because the injunction is silent on the reasonable time in which DOT was to diligently pursue maintenance until completion, Judge Sweazea appropriately relied on *Hagerman v. Cowles*, 1908-NMSC-015, 14 N.M. 422, 94 P.946 to imply

the condition that DOT devote sufficient resources in the form of personnel and equipment to complete maintenance within a reasonable time from the trigger of the maintenance in July, 2013. [RP 1032, ¶ 54]. The question of reasonable time is one of fact when it depends on disputed facts extrinsic to the injunction and the matter was a bench trial in this case. 1908-NMSC-015, ¶ 4, 14 N.M. 422, 425. As credibility of witnesses and the weight to be given the evidence is for the trier of the facts and Judge Sweazea's finding is not clearly against the logic and effect of the facts and circumstances of the case, this Court should reject DOT's arguments that the district court otherwise reformed the injunction and allegedly read words into the injunction. *See also* "Diligent [dil-i-juh nt] ... adjective 1. constant in effort to accomplish something; attentive and persistent in doing anything....
2. done or pursued with persevering attention; painstaking..." *available at* http://dictionary.reference.com/browse/diligent (last visited October 26, 2015).

DOT's argument that a before and after measure of damages on the basis of real property valuation was required for breach of the underlying stipulated injunction is without merit. The record abundantly supports that damages were claimed regarding personal property/improvements. Once Appellees satisfied their burden of proving the violation of the injunction, proximate cause and actual damages sustained, Appellees were entitled to recovery of actual damages. *El Paso Prod. Co. v. PWG Partnership, et al.*, 1993-NMSC-075, ¶ 31, 116 N.M. 583,

592 866 P.2d 311, 320 (district court has no discretion to deny compensatory damages if established with reasonable certainty).

As already discussed above and cited in the record, Appellees carried their burden by a preponderance of the evidence that the stipulated injunction was violated. Similarly, a preponderance of the evidence in the record shows that flows would not have topped and backed up above the Bridge damaging Appellee's upstream hay field, ponds, irrigation system, as well as destroying dikes, improvements and damaging personal property and fences downstream of the Bridge on the basis of expert and several lay witnesses' testimony. 7 25 2014 CD (4:38:09-4:39:41, 4:39:55-4:40:04, 4:44:35-4:45:05, 4:45:25-4:45:43, 4:57:20-4:59:24).

The Court applied the appropriate measure of actual losses sustained, which was predicated on testimony of two experienced contractors at hearing and on their reasonable estimates entered in the record that DOT never rebutted. *Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, 74 N.M. 201, 203, 392 P.2d 347 (actual losses sustained is the correct measure of damages in civil compensatory contempt proceedings). The amount of damages was proved with certainty and not otherwise speculative and constituted credible witness testimony and evidence. The record supports also that the valuation of cost to repair damages was estimated at a discount given the fact that Mr. Taglialegami is a friend of Appellee Darrel

Allred. Because Mr. Taglialegami was an experienced contractor, he knew the pricing for his services went at a higher rate on the open market.

DOT's alternative argument that Appellees' compensatory damages should be capped by the *Tort Claim Act* is also without merit and has been rejected, again, recently by this Court. The *Tort Claims Act* is silent on contempt power of the district court. *State ex rel. CYFD v. Mercer-Smith*, Ct. App. No. 35, 427, 2015-NMCA-093, ¶ 55, __N.M.___, ___P.3d____ (Ct. App., June 18, 2015) (*cert. granted* Aug. 26, 2015) ("Simply because contempt compensatory damages are similar to tort damages does not mean they are governed by the [New Mexico Tort Claims Act]...." To rule otherwise would mean "the Legislature effectively 'destroyed' the district court's ability to find state agencies in contempt and provide a remedy therefor, a clear and improper infringement on the inherent power of the judicial branch.") (internal citation omitted). [4]

In re Hooker, 1980-NMSC-109, 94 N.M. 798, 617 P.2d 1313 approves the award of attorney fees incurred for a party aggrieved by contempt in investigating and prosecuting the contempt. Further, Appellees' action for sanctions is exempted from the ambit of Rule 1-054 NMRA. Rule 1-054 (F) NMRA ("The provisions of this rule do not apply to claims for fees and expenses as sanctions."). The expert

[4] *See also Harrison v. UNM Bd. of Regents*, 2013-NMCA-105 ¶ 34, 311 P.3d 1236 (Garcia, J.) (dissenting) (discussing the district court's non-punitive power and authority to impose a variety of sanctions in a variety of settings to uphold court orders).

testimony actually admitted was necessary to prosecute the contempt action. The pleadings filed and other associated costs and expenses were also necessary to prosecute the contempt action. The record illustrates that undersigned counsel waived and discounted substantial time in the prosecution of the contempt such that the award of fees and costs were otherwise reasonable. Despite the district court's conclusion in this regard, fees, costs and expenses are not governed by Rule 1-054 precisely because the action, at all times from October, 2013 through 2014, sought remedial relief in the form of compensatory sanctions. Award of attorney's fees is a routine component of contempt award not subject to the so-called "American rule" regarding fees, expenses and costs in other types of litigation. *Santa Fe Properties, Inc. v. French & French Fine properties*, No. CIV 04-05i8 JB/DJS, 2005 WL 2313680, at *5 (D.N.M. Aug. 9, 2005) (internal citation omitted) (also holding stipulated order violated).

Finally, DOT alleges with no analysis that under *Rhinehart*, 1990-NMCA-136, ¶ 28, 111 N.M. 319, 326, 805 P.2d 88, 95 Appellees cannot show that they won the action in the original suit. The *Rhinehardt* opinion goes on to state however, that complainant in that case won the action on the original suit by prevailing on her motion to show cause why contempt should not be granted in addition to prevailing on her motion for costs and fees, which is the exact case in this action. *Id.*, 136, ¶ 40, 111 N.M. 319, 329, 805 P.2d 88, 98. Further, in 2011

Appellees in this matter prevailed on their preliminary injunction pursuant to their request for injunctive relief, which formed the basis of the stipulated permanent injunction due to DOT's inaction or other conduct. [RP 107-109].

As the Appellees do not have to prevail on all issues to be the "prevailing party", settlement and dismissal of remaining claims other than the injunction is not dispositive to defeat standing for Appellees to obtain an award of compensatory sanctions. *See e.g. Malvo v. J.C. Penny Co.*, 512 P.2d 575 (Alaska, 1973); *see also* Rhinehart, 1990-NMCA-136, ¶ 65, 111 N.M. 319, 333, 805 P.2d 88, 102 (Hartz, J.) (concurring and dissenting in part) ("'[t]his sanction [civil contempt to compensate for losses due to contemptuous conduct] is available only if petitioner wins his action in the original suit on the merits.' Fink, Basic Issues in Civil Contempt, 8 N.M.L. Rev. 55, 71 n. 62 (1977-78). Unfortunately, the article cites no case law in support of the proposition, so its scope is unclear.").

III. CONCLUSION

As the parties do not dispute that the injunction, separate settlement agreement and order dismissing the remaining claims other than the injunction are unambiguous, the district court retained jurisdiction such that DOT, subject to the injunction, had an obligation to seek clarification from the district court if it did not understand the injunction. When DOT instead "undert[ook] to make [its] own determination of what [a] decree mean[s]" , DOT acted at its own peril. *McComb*

v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949). "It does not lie in [the contemnors'] mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to [a] program of experimentation with disobedience of the law." *Id.* For these reasons, DOT was without discretion to walk off the Creek before required maintenance triggered under the injunction was completed. DOT's contentions otherwise amount to an impermissible collateral attack by a party to the terms of a stipulated permanent injunction agreed to years ago.

The district court case remained pending and Judge Sweazea retained continuing jurisdiction to find and hold DOT in civil contempt for violation of the injunction. The award for actual losses sustained was reasonably certain, and supported by substantial evidence. Fees, expenses, and costs awarded were also appropriate in this action and otherwise reasonable. As the DOT can show no abuse of discretion in this compensatory contempt action in all findings, conclusions and rulings made below, and substantial evidence supports the district court's finding and conclusions, the Court of Appeals should affirm the decision below and deny DOT's appeal.

WHEREFORE, based on the foregoing arguments, facts, circumstances and authorities, Appellants respectfully requests that this Court:

1. uphold and affirm the district court's final judgment in full awarding Appellees sanctions in the form of compensatory damages, fees, and costs for DOT's violation of the permanent injunction, and
2. order the DOT to pay the final judgment without further delay.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was e-mailed to opposing counsel of record and that an original and requisite copies of the same were filed by hand-delivery to the Clerk of the Court of Appeals on the 4th day of November, 2015.

Pete V. Domenici, Jr., Esq.