

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,**

Case No. 33371

Appellees/Petitioners

v.

LOUIS LOVATO,

Appellant/Respondent.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

APR 20 2015

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BRIEF IN CHIEF

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY

SEVENTH JUDICIAL DISTRICT COURT

HONORABLE JUDGE MATTHEW G. REYNOLDS

DISTRICT JUDGE, DIVISION III

Submitted by:

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Oral argument is requested

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SUMMARY OF PROCEEDINGS

A petition for injunctive relief was originally filed by the Mayordomo and commissioners of the La Joya Acequia Association against Gilbert Barela (not a party to this appeal) claiming he was violating its bylaws in D-725-CV-2008-172, and on October 10, 2008, another similar action was brought against Louie Lovato in D-725-CV-2008-173 [RP 1], with the case consolidated on 12/9/08 [RP. 31]. La Joya, New Mexico was originally a Spanish land grant, and Louie Lovato traces his lineage back into the 1600's to the original settlers. During the depression, the people left La Joya, and the land grant was sold for taxes. The lower court found that the Socorro County re-established the ancient La Joya ditch in 1974 using a recorded easement. [RP: 422, finding 4, Plaintiff Ex. 12 filed in Aug. 25, 2011 envelope]. La Joya today is a small population of those like Louie Lovato with historical ties to the land, and others within the past several decades acquired lands and started taking control of the La Joya Acequia Association. La Joya Acequia Association opted to not be a part of the Middle Rio Grande Conservancy District, and operates under §73-3-1, et seq., NMSA, and “when not inconsistent with” §73-2-1, et seq. [RP: 516]. Given the drought conditions that have occurred over the past several years, water has become more and more a contentious issue. Those with proven owned waters rights, like Louie Lovato, have in effect had to compete with those in La Joya without water

rights, but who purchase water from the Middle Rio Grande Conservancy District “Water Bank.”

The Acequia alleged in its petition for injunctive relief that Lovato was irrigating without complying with the Mayordomo’s schedule, flooding adjacent properties, not obeying the Mayordomo, etc. [RP 2] Lovato denied the the allegations of wrongdoing, and stated he owned water rights, paid his acequia assessments, and was entitled to non-discriminatory and non-abusive treatment regarding water delivery by the Acequia. [RP 10] After a site visit by the lower court judge, and holding a hearing the lower court issued a Continuing Temporary Injunction” on April 21, 2009, ordering Abeyta and Lovato to obey the Mayordomo, Barela to lift the check gate after irrigating, Lovato to take down a No Trespass sign, the Acequia to publish a weekly or monthly irrigation schedule posted on community bulletin boards, and ordering the parties through counsel to try to work out a solution to their problems. [RP 41-43].

On June 19, 2009, the Mayordomo filed a Motion for an Order to Show Cause against Lovato claiming several incidences when he irrigated without permission and did not close his turnouts after irrigating. [RP 80] The Mayordomo issued multiple citations against Lovato. [RP 82-83]. Lovato denied that he was deliberating

violating any court orders or the acequia rules, and that the mayordomo and he had problems communicating about the watering schedule. Lovato filed a counterclaim alleging that his irrigation equipment was being damaged by the Acequia. [RP 114] The record does not reflect what occurred and on June 4, 2010, the Acequia filed another Motion for Order to Show Cause against Lovato [RP 120]. Lovato filed a response that raised the following issues; 1) the Bylaws were not legal because not properly adopted or conveyed to the members; 2) that the Mayordomo did not live in La Joya, which violated a residency requirement; 3) that the commissioners were interfering with access to his lands by putting up fences. Lovato claimed he was present when irrigating, that he closed his turnouts after irrigating, and that someone else, presumed to be board members, reopened his turnouts trying to get him in trouble. [RP 124] Lovato does not live in La Joya, with his home being in Los Lunas. After a hearing the lower court found Lovato in contempt of court for not notifying the mayordomo after watering his lands, left his land unattended while watering, failed to close turnouts after watering and allowed overflowing of his lands, and fined him \$1500.

On November 12, 2010, Lovato and Barela filed a new counterclaim as allowed by the lower court on July 21, 2009, specifically alleging the destruction of his irrigation equipment by the Acequia and that the acequia violated Lovato's historical

easement in the ditch berms or banks of the ditch, and his access to his headgates, fields, check gates and other physical facilities on the ditch on the side of a contiguous landowner, Ernest Cordova, a commissioner, when he gated the south berm of the ditch at Lovato's property. [RP 155-160] Cordova relied on the acequia's attorney who wrote a letter stating that Cordova "owned" his property to the middle of the ditch, and that he revoked his previous permissive use of his side of the ditch to Lovato and "others." [RP 165] The counterclaim also alleged that the commissioners were allowing new lands to be opened and irrigated which did not have water rights or ditch rights, with the commissioners not disclosing self-dealing and conflicts of interest, and by allowing irrigation of these lands without the consent of the members. [RP 161–162] The counterclaim also alleged the acequia modified the ditch so that previous lands previously serviced by the ditch were cut off. [RP 162-163]

On August 24, 2011, Lovato and Barela filed a motion to dismiss the complaint because the bylaws were illegally constructed regarding voting rights as Art. 1, Sec. 3 allowed a members vote "in proportion to the number of benefitted acres under the Acequia," not based on owned water rights, ditch rights or acreage under irrigation, in violation of §73-3-3, NMSA 1978. The counterclaim alleged that the assessments with Acequia imposed were also unconstitutional since they were leveled against

property owners who did not irrigate, but “benefitted” by the acequia. [RP 178] Lovato alleged that the Mayordomo, Thomas Abeyta, worked for the Middle Rio Grande Conservancy District during the week and was unavailable to contact by phone for Lovato to give notice when he was starting and stopping irrigation. [RP 250-1]

On October 19, 2011, Lovato filed a petition to stop an election of commissioners for the acequia board set for November 7, 2011, because the acequia bylaws required it held on October 3, 2011; and further that voting based on “benefitted acres” was unconstitutional. [RP 270-273] On October 27, 2011, the lower court enjoined the election. Lovato on November 1, 2011, filed by a pleading seeking supplemental relief against issuing assessments to land owners of non-irrigated land, against Cordova from breaking Lovato’s fences, and from allowing previous board commissioners from office because of their past transgressions. [RP 283-289]

Lovato filed a motion to compel discovery since the acequia failed to respond to his request for production of documents sent December 2, 2011, with the acequia’s attorney responding that he refused because Lovato’s attorney failed to pay \$200 or show up for a schedule to inspect the records back in November 2010 after Lovato

had issued a subpoena for the same material. [RP349-352]. The lower court at the next hearing held to conduct an election in the courtroom under its supervision, ruled that it would not entertain the motion. [RP 11:37]

The lower court after it enjoined the scheduled November 7, 2011, election of the commissioners for being untimely under the acequia bylaws, then appointed the two of the same commissioners to hold office until the next election to be held in October 2013, and ordered them to appoint a third commissioner, and then together appoint a moyordomo. [TR 1/3/12 11:35] On January 3, 2012, the lower court issued ballots to whomever showed up at court to vote, and held an election. [Tr. January 3, 2012] In that transcript the lower court upheld his previous ruling that only water rights owners could vote, but allowed anyone who showed up the right to vote but their would be listed as challenged. [Tr. January 3, 2012, at 10:28] Unknown from the record how notice of the election was given, but nominations were taken at this hearing and whoever showed up were issued some ballots. Twenty five people showed up, and the court went through a tortuous process of who would be challenged. [TR January 3, 2012 generally] The court ruled that only water rights owners would be allowed to vote, and that it would be based on a majority of voters, not on one benefitted acre votes, though this was obviously in violation of the bylaws.

A Designation of Exhibits was issued to the District Court Clerk to supply all

exhibits for the case for the record on this appeal. Concerning the January 3, 2012, election held by the lower court in its courtroom, none of the ballots, nominations, or any documents concerning the election held in the lower court were kept in the record proper. The lower court tabulated the non-challenged votes and ruled no one got 13 votes, which is a majority of the 25 voters present. [TR 1/3/12, 11:05-07] The court then went on to count the challenged votes, based on non-ownership of water rights. When Lovato's attorney asked the court to make a ruling on who owned water rights, the lower court stated it would not make any rulings about water rights and that was something to be done at a stream adjudication, [TR 1/3/12, 11:07-11:10] so any voters with any water rights were allowed one vote, even if they were irrigating without water rights. Ditch right owners who did not have water rights were allowed only challenged votes.

As concerns Lovato's counterclaim that Cordova destroyed his equipment and blocked access to the easement on his side of the fence, the lower court dismissed it as against Cordova because he was not individually served with process. [TR 1/3/12 11:35 - 11:43] Cordova was a named plaintiff as a commissioner of the acequia, was represented by Mr. Deschamps who acknowledged receiving the counterclaim on his behalf, but the lower court refused to hear any complaints against Cordova destroying Lovato's fences and other equipment. *Supra*. As concerns assessments of non-

irrigated lands, the lower court made findings of fact and conclusions of law on April 4, 2012, affirming its prior rulings on the continuing temporary injunction, and concerning Lovato’s claims of illegality of the bylaws, assessments on non-irrigated lands, and the voting rights based on benefitted acres, held that “There are other remedies at law for the Acequia to handle disputes with Respondents regarding the validity of the Acequia’s bylaws, and injunctive relief is not therefore required for any other matters regarding their relationship besides those addressing the Continuing Temporary Injunction.” [RP 387-392, para. 17] The lower court basically sidestepped the issues of constitutionality of the bylaws, and whether assessments by the acequia on non-irrigated lands were legal.

On June 6, 2012, the lower court issued its findings of fact and conclusions of law regarding Lovato’s counterclaim regarding Cordova and the acequia damaging his turnouts in 2009 and claims to an easement right along the ditch running through Cordova’s land. The court held that Lovato was responsible for his turnouts being destroyed by his “improper watering and waste” so he was not entitled to relief. The lower court ruled that the acequia held a dominant easement to the acequia, and that Lovato did not hold an expressed or prescriptive easement, despite having used the ditch by him or his family predecessors in title going back decades, because Cordova through his lawyer’s letter stated he had only given Lovato permission previously,

and it was withdrawn. [RP 421- 428, and the letter RP 165]. The lower court also ruled that the board was allowing illegal irrigation of new lands that did not have ditch or water rights, and since these new lands were not part of the “originally irrigated lands served by the community ditch created by the newly formed La Joya Acequia Association in 1974,” they were enjoined from continued to allow that “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] Lovato’s claims that ditch modifications resulting in denying him access to irrigation of part of his lands was denied because the modifications occurred more than 20 years ago. [RP 427]

On June 20, 2012, Lovato filed a motion to amend the findings and conclusions contained in the June 6, 2012 rulings. The court amended its finding and ruled Lovato did not prove he held an easement across any other’s land, “except for maintenance and repair of the ditch as it relates to his land.” [RP 455]

On July 19, 2012, the acequia commission and mayordomo filed another Motion for Order to Show Cause alleging Lovato again appropriated water without permission on July 2, 2012. [RP 436-7] Lovato denied the allegations in writing, and

stated he had the Mayordomo's permission to irrigate by telephone call on July 2, 2012, and there was no posted watering schedule as ordered by the court. The Court had previous ordered the parties to fax their notices about irrigating, since the Mayordomo was unable to receive calls during the week while at work, so they should use a fax machine to document everything; but the mayordomo's fax machine was broken when Lovato tried to fax him something on June 30, and on July 2. [RP 457-9] The court held a hearing on August 23, 2012. [TR 8/23/12 3:10 - 4:37] The lower court orally ruled he would not impose sanctions at the end of this hearing, but required Lovato and Mayordomo to get working fax machines.

On November 7, 2012 the lower court issued its "Permanent Injunctions and Final Judgment" which basically contained his previously issued findings of fact and conclusions of law. On November 19, 2012, Lovato filed through Mr. Klein a motion to set aside certain provisions of said final judgment. [RP 521-22] Mr. Klein passed away sometime on January 21, 2013, and the undersigned counsel entered his appearance on April 10, 2012. A hearing was held on September 3, 2013, about the pending motions and another attempt by Plaintiffs to hold Lovato in contempt for alleged violations of mayordomo orders on October 5, 2012 and October 14, 2012. Lovato claimed that he was on a written schedule to water, that he notified the mayordomo he was going to water after the person listed before his name, and he

turned off his shutoff value. The lower court ruled that there was insufficient evidence about the October 14; but that Lovato made a bad judgment call about not calling the mayordomo just before irrigating even though he was listed on the schedule who knew Lovato was watering next. He fined Lovato \$1000. [RP 565-6] The evidentiary hearing revealed that neither the mayordomo nor Lovato were using fax machines, and that phone calls between them were difficult or impossible and acrimonious. The lower court denied Lovato's motion to reconsider [566] and Lovato timely appealed on October 28, 2013.

ARGUMENT

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

Standard of Review Section 73-3-3, NMSA 1978 allows only those having water rights in the acequia or ditch, and who are not delinquent in the payment of their assessments shall be allowed to vote, with votes allowed in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights, which for election purposes, shall never exceed the lands under irrigation the outgoing year. The statute plainly recognizes alternative methods of voting for ditch officers and, specifically, provides that voting shall be in proportion to the interest in the ditch or in proportion to the interest in the water flowing through

the ditch, the latter of which is defined by water rights. Three interests are recognized are ownership interest, an easement interest and the interest of being a water user. *Wilson v. Denver*, 1998 NMSC 016, 125 N.M. 308, 961 P.2d 153 (1998), and *Bounds v. Hamlett*, 2011 NMCA 078, 150 N.M. 389, 258 P.3d 1181.

The La Joya Acequia Association issued bylaws on January 4, 2006, revised in 1999. Members entitled to vote are “those persons who own land entitled to irrigate water from said ACEQUIA. The rights privileges and obligations of all member shall be in proportion to the number of benefitted acres owned by each member.” *See Pl. Ex. 2 filed 4/23/09, Sec. 3.* Three commissioners exercise general control and supervision over the acequia, and are elected at a general membership meeting on the first Monday of October in odd numbered years, with commissioners required to be “an owner of an interest in the La Joya Acequia or the water therein with the right to take water from the Acequia.” *See Pl. Ex. 2 filed 4/23/09, Art III, Sec. 2.* Only those persons “who own lands under the Acequia (ie. Members)” are allowed to vote, and their “vote share shall be in proportion to the number of benefitted acres under the Acequia. One acre of land or major portion thereof shall entitle the member to a vote value of one unit” and votes must be by written proxy. *See Pl. Ex. 2 filed 4/23/09, Art. III, Sec. 2.*

The acequia's bylaws defined members as "those persons who own land entitled to irrigation water from said Acquia. The rights, privileges and obligations of all members shall be in proportion to the number of *benefitted acres* owned by each member." P. Ex. 2 in 4/23/09 envelope, Bylaws, At. I, Section 3. The bylaws go on to state that Only those persons who own lands under the Acequia (i.e. Members) ... shall be allowed to vote. A member's vote value shall be in proportion to the number of benefitted acres under the Acequia. One acre of land or major portion thereof shall entitle the member to a vote of one unit." *Supra* at Art. III, Sec. 2.

Lovato filed a motion for injunction against an election scheduled for November 7, 2011, as untimely since the bylaws specifically mandated them in the first week of October. The lower court agreed and enjoined the election, and then scheduled a hearing for January 3, 2012, during which it would hold an "election" about two commissioners who would be "appointed" by the court, who were then to appoint a third commissioner, and together the three would appoint a mayordomo. Obviously, this procedure did not follow the bylaws and seemed a violation of the Election Code, §1-1.1, et seq NMSA 1978. Twenty five people from La Joya attended the hearing. The lower court allowed a qualification process, where the parties could contest the right of anyone proposing to vote, but allowed anyone to cast a vote even if they did not own water rights or ditch rights, but allowed the partieis the

right to contest it. The vote was not based on the number of “benefitted acres” but was purely on a majority of votes based one person - one vote. The lower court counted the uncontested votes, which did not yield a majority, and then went to the uncontested votes, and somehow arrived at a majority to justify his appointment of two commissioners Marcel Abeyta and John Corangelo (the same who previously held office) [TR 1/2/12 11:18 -11:20] who then appointed a third and together a mayordomo, also the same persons previously holding those offices. So these commissioners and mayordomo were the same as before, were not really elected by processes specified in the bylaws or laws contained in the statutes, but were by the lower court’s own guidelines resulting in his appointment of those offices until they could be elected legally in the next election to be held in October 2013. This process resulted in illegal appointments by the lower court, and not a legally conducted election. The lower court’s rulings also kept intact the bylaw language that votes could be based on benefitted acres, and thus the lower court ignored Lovato’s contention that the election process in the bylaws were unconstitutional.

Lovato maintains that the bylaws allowing votes based on “benefitted acres” is unconstitutional and in violation of §73-3-3, NMSA 1978, and *Wilson*, supra. However, Lovato also argues that voting based on benefitted acres also violates the Equal Protection Clause's mandate of one person, one vote, see *Reynolds v. Sims*, 377

U.S. 533, 577-81, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); U.S. Const. amend. XIV.

In *Reynolds*, the United States Supreme Court held that “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

Wilson held that the “statutes governing acequias are limited in purpose, that ditch associations exercise narrow functions, and that, therefore, ditch officer elections do not fall within the requirement of one person, one vote.” *Supra* at 162. However, the *Wilson* court was clearly hesitant about the breath of its rulings regarding departure from one man - one vote, that departures be based only on clear legislative intent and that a rational basis exist. Acequia and community ditch associations are political subdivisions of this state. Section 73-2-28, NMSA 1978. As such, they fall within the ambit of the Open Meetings Act, 10-15-1(B) NMSA 1978, and elections of acequia board members requires full compliance with the OMA. See also, *Parkview Cnty Ditch Ass'n v Peper*, N.M. App. No. 32,276, opinion filed 12/19/2013.

Water rights are not clearly defined as the amount of water for irrigation for each acre foot of water right can vary depending on availability due to drought, and

is a proportional right as measured against other water right users. La Joya Acequia may decide that a number of property owners without water or ditch rights be allowed to irrigate in derogation to downstream users, which include farmers going all the way south to Las Cruces and even Mexico. If a few people own large tracks of land in La Joya want to control who get what, including allowing new property owners without water or ditch rights. Those few control the elections in La Joya, and if they propose to open new lands to be irrigated, they then have a meeting of themselves acting as members to vote on allowing these new lands, and since they have a majority, they approve the new lands, pursuant to the lower court's order that a "majority vote of the members confirms the additional use in accordance with Section 73-2-7, NMSA 1978." All the other members may be opposed because it negative affects their irrigation rights as titled water and ditch right owners, but no matter. Lovato has claimed discriminatory treatment against him for years, and he is routinely listed last on the irrigation schedule. No other person is required to fax or call the mayordomo about watering. The list of citations, which purport to be criminal in nature, issued to Lovato are from a state entity, acknowledged by the Plaintiffs. Lovato claims that those without water rights or ditch rights, but who are allowed to water by purchasing from the MRGCD and La Joya "Water Banks," get preferential treatment ahead of those with water and ditch rights. Lovato and his family date

back to the 1800's, yet their pre-1905 water rights are given less consideration than newcomers recently purchasing land. The *Wilson* court acknowledged that a rational basis must support a departure from the typically constitutional requirement of one-person one-vote, but here there is no rational basis for allowing those with no water rights and no ditch rights and even no history in the area, to have superior irrigation privileges, all because elections are allowed based on "benefitted acres."

Lovato claims that the acequia deliberately constructed new ditches and turn-outs in such a manner that diminished his longstanding historical use of the ditches and damaged his property without due process of law, in that acres previous irrigated historically were lost due to lowering the elevation of the water. He claimed the acequia closed off roads that had been in existence since before the early 1900's, that they misused their authority to deny landowners access to their own lands, and prohibited proper use of the berms and access roads along the ditches. Lovato lives in Los Lunas, and he alleges that Plaintiffs or their agents have started irrigating his fields without his permission so they could set him up for a motion for contempt of injunctive orders, that one of his bulls was killed and another cow shot, and that he has been the victim of overt physical threats by Plaintiffs or their agents. Police have been called out with demands that people be arrested.

People are pulling guns out in La Joya because the elections result not in the will of the people, but the dictates of a few rich. These actions directly affect property ownership, and just classifying acequias as "limited purpose entities" ignores the fact that constitutional rights and property rights are directly affected by voting based on "beneficial use."

POINT TWO: THE LOWER COURT ERRED NOT HOLDING APPELLEES IN VIOLATION OF INJUNCTION AGAINST OPENING NEW LANDS FOR IRRIGATION

Standard of Review Injunctions are authorized by Rule 1-066 of the New Mexico Rules of Civil Procedure. In determining whether to grant injunctive relief, a trial court must consider a number of factors and "balance the equities and hardships." *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P.2d 875, 882 (Ct.App.1995) reversed on other grounds, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350; *Insure New Mexico, LLC v. McGonigle*, 128 N.M. 611, 995 P.2d 1053 (N.M. App., 2000). Injunctions are harsh and drastic remedies that should issue only in extreme cases of pressing necessity and only where there is no adequate ... remedy at law. *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, ¶ 51, 121 N.M. 353, 911 P.2d

Argument Some of the factors the lower court must consider in deliberating on requests for injunctions are : (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the interests of third parties; (4) the practicability of granting and enforcing the order; and (5) the relative hardship likely to result to the defendant if granted and to the plaintiff if denied. *Wilcox v. Timberon Protective Ass'n*, 111 N.M. 478, 485-86, 806 P.2d 1068, 1075-76 (Ct.App.1990); *Insure New Mexico, LLC v. McGonigle*, 128 N.M. 611, 995 P.2d 1053 (N.M. App., 2000).

The lower court issued an permanent injunction against the La Joya Acequia from “irrigating any “new lands” unless and until they have obtained the permission from a majority of themembers having ditch rights and received from the owners of the new lands the appropriate payment as required by law.” Permanent Injunction and Final Judgment, entered 11/7/12. {RP 519] However, if a majority of those allowed to vote based on ‘benefitted acres” are only a few ipersons, who also are in control of the acequia board of commissioners, then they basically approve what they themselves set out in opening “new lands.” In the instant case, these commissioners subsequent to the lower court’s final judgment, notified La Joya that a majority had approved new lands for irrigating, thus legitimizing what is on its face a violation of the lower court’s injunction that the acequia comply with the law. The trial court's

discretion will not be disturbed unless there is an abuse of discretion. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153.

POINT THREE: COURT ERRED IN NOT RULING ON LOVATO'S CLAIMS IT WAS CHARGING ILLEGAL FEES

Standard of Review Injunctions are authorized by Rule 1-066 of the New Mexico Rules of Civil Procedure. In determining whether to grant injunctive relief, a trial court must consider a number of factors and "balance the equities and hardships." *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P.2d 875, 882 (Ct.App.1995) reversed on other grounds, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350; *Insure New Mexico, LLC v. McGonigle*, 128 N.M. 611, 995 P.2d 1053 (N.M. App., 2000). Injunctions are harsh and drastic remedies that should issue only in extreme cases of pressing necessity and only where there is no adequate ... remedy at law. *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, ¶ 51, 121 N.M. 353, 911 P.2d 861.

Argument Lovato filed a counterclaim aleging that the assessments the Acequia imposed were unconstitutional since they were leveled against property owners who

did not irrigate, but based by board decision, they “benefitted” from the acequia. [RP 178] Lovato had been billed assessments for land he did not irrigate, but he paid the assessments for years under protest. The assessment policy appears to track the acequia’s bylaws about voting rights based on “benefitted acres.” The lower court sidestepped this issue with the following language in its findings of fact issued on April 4, 2012: “There are other remedies at law for the Acequia to handle disputes with the Respondents regarding the validity of the Acequia’s bylaws and regulations, and injunctive relief is not therefore required for any other matters regarding their relationships besides those addressed in the Continuing Temporary Injunction.” That finding was mirrored in its final judgment, when the lower court ruled that “all other claims and cross-claims raised in this cause other than those rejected for being untimely filed, are hereby dismissed with prejudice.” [RP 520]

Lovato was denied a determination of the legality of assessments against non-irrigating landowners, and his request that his payments for land he does not irrigate be returned to him by the board, were summarily denied, though the lower court heard testimony and held pleadings contesting this issue. Whether non-irrigating landowners would be required to pay assessments to the acequia involved any fact issues about what were “benefitted acres” which the bylaws seemed to allow voting rights for those without water or ditch rights, and who sis not irrigate. The lower

court in its hearing on the “election” held in its courtroom, only allowed those with water rights to vote to support the lower court’s appointment of two commissioners allegedly based on the “will of the members.” Those without water rights were not allowed to vote in the court’s election, though they might be allowed by the board in future elections based on “benefitted acres;” but those without voting rights were allowed to be assessed fees because of the fell within the bylaws about “benefitted acres.” Now that the lower court has given the association a green light to open “new lands” based on the members allowed to vote approving the new lands by a majority, new lands arguable not entitled to be irrigated are now allowed to irrigate, and presumable vote as members based on “benefitted acres,” while those who do not irrigate must pay assessments to support these expanded lands, even though they do not directly benefit from irrigation from the acequia.

**POINT FOUR: LOWER COURT ERRED IN FINDING LOVATO GUILTY
OF CONTEMPT FOR IRRIGATING ON October 5, 2012 AS UNSUPPORTED
BY SUBSTANTIAL EVIDENCE**

Standard of Review If there is substantial evidence to support the trial court's decision, it will not disturb that decision on appeal. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a

conclusion." *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In reviewing a claim that the trial court's decision was not supported by substantial evidence, the appellate court views the evidence "in the light most favorable to the decision below, resolving all conflicts in the evidence in favor of that decision and disregarding evidence to the contrary." *Powers v. Miller*, 1999-NMCA-080, ¶ 14, 127 N.M. 496, 984 P.2d 177. We will reverse only when the evidence, or reasonable inferences from the evidence, cannot support the trial court's findings and conclusions. *McCurry v. McCurry*, 117 N.M. 564, 567, 874 P.2d 25, 28 (Ct.App.1994).

In the last hearing held on a claim of contempt of court by Lovato, Judge Reynolds found him in contempt of court for watering without making a phone call to the Mayordomo. Lovato was last on the posted schedule about who and when irrigation was allowed by the acequia. Lovato maintained that many property owners who do not own water or ditch rights were allowed preferential treatment to irrigate before him. The lower court had ordered Lovato and the Mayordomo to fax each other when Mr. Lovato could irrigate, which was done. Everyone else had already watered, with the last person on the list informing Mr. Lovato he was finished and it was his turn to irrigate. Lovato proceeded to irrigate as no one else was on the list, and the mayordomo and the association issued a citation alleging a violation of the

Court's injunctive orders. The lower court found Lovato in contempt of court and fined him \$1000, even though no specific provision of the lower court's permanent injunction was violated.

The order to show cause was based on the permanent injunction issued by the lower court on November 7, 2013, concerning the following language of the order: "Lovato is "permanently enjoined from appropriating water from the La Joya Ditch without the prior authorization of the Mayordomo or other authorized representative of the La Joya Acequia Board of Commissioners, contrary to NMSA 1978, §73-2-64(D). Further, Lovato shall only water based upon written permission from the Mayordomo via facsimile, and he must cease watering immediately upon written fax notice by the Mayordomo." [RP 518, ¶ 14. The evidence at the hearing on the issue showed that Lovato did give fax notice to the Mayordomo, that he was ion the scheduled list to irrigate (he was last on the list as could be expected), that the previous irrigator told him he was finished and to go ahead with his turn. The lower court rejected that as sufficient to be in compliance with its permanent injunction and held Lovato again in contempt of court with a fine of \$1000.

Lovato claims that no evidence in the record of that hearing on the issue held on August 29, 2013, supports the lower court's finding, since he had given written faxed notice and was in compliance of the irrigation schedule.

CONCLUSION

Lovato prays the Court to reverse the finding of contempt of court made against him for irrigation activities on October 5, 2012. His previous contempt of court fines are not being appealed. Lovato also requests the lower court to find that the acequia's bylaws allowing voting based on benefitted acres be ruled illegal in violation of state law and in violation of the constitutional rights of Lovato, and those similarly situated in La Joya NM. The lower court conducting an "election" in its courtroom should be declared void, as not complying with state law concerning elections for commissioners for acequias. The acequia imposing fees or assessments against ono-irrigators should be declared void, and any money paid by Lovato or anyone else concerning non-irrigated land assessments should have their nmoney returned to them. Finally, the lower court's rulings about landowners with ditch rights with their landownership apparently extending to the middle of the ditch should have an prescriptive easement based on historical use.

Respectfully submitted:

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I hereby certify that a copy of the foregoing motion
was successfully emailed to opposing counsel on the
20th day of April 2015.