

STATE OF NEW MEXICO  
COUNTY OF CATRON  
SEVENTH JUDICIAL DISTRICT COURT

/s/ Olga Needy 10/7/2014

DARREL ALLRED, ROBERT ALLRED,  
JOHN ALLRED, BRUCE ALLRED, and  
DWANYNE ALLRED,  
Plaintiffs,

vs.

No. D-728-CV-2011-21

NEW MEXICO DEPARTMENT  
OF TRANSPORTATION,  
Defendant.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**THIS MATTER** came before the Court on July 24 and 25, 2014, for hearing on Plaintiffs' Motion for Sanctions against Defendant for Defendant's . The Plaintiff Darrel Allred appeared in person and Plaintiffs appeared through their attorney, Pete V. Domenici, Jr.. The Defendant appeared in person through its representative, Gene Paulk, and through its attorneys, Lawrence R. White and Cody R. Rogers. The Court, having considered the pleadings on file in this matter, the evidence presented at the hearing and at previous hearings, and the argument of counsel, hereby makes and adopts the following findings of fact and conclusions of law:

#### **A. FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO SUBSTANCE OF PLAINTIFFS' CLAIM FOR DAMAGES FOR CONTEMPT OF COURT BY DEFENDANT.**

1. This case began on June 17, 2011, by the filing by Plaintiffs of a complaint in the Seventh Judicial District Court, Catron County, New Mexico, against

Defendant, New Mexico Department of Transportation (referred to as "DOT") asserting claims for negligence, inverse condemnation, injunctive relief and damages.

2. Plaintiffs' claims relate to the US Highway 180 Bridge over Whitewater Creek in Catron County, New Mexico (the "Bridge"), and included claims related to the DOT's maintenance practices for the Bridge and the Whitewater Creek bed.

3. A preliminary injunction was entered November 14, 2011 after a hearing. The preliminary injunction required DOT to maintain the Bridge and creek channel according to standards contained in the preliminary injunction during the pendency of this proceeding.

4. The parties entered into a Settlement Agreement and Mutual Release, signed by each of the Plaintiffs on December 11, 2012 and signed by the Defendant on December 10, 2012 (the "Settlement Agreement"). The Settlement Agreement was entered into evidence at the July 24-25, 2014 hearing as Plaintiffs' Exhibit 1.

5. The parties entered into a Stipulated Permanent Injunction Order (the "Stipulated Judgment"), which was entered on January 18, 2013.

6. The Stipulated Judgment established parameters for the maintenance by DOT of the Whitewater Creek channel upstream from the Bridge for a specified distance, under the Bridge, and downstream from the Bridge for a specified distance.

7. The Stipulated Judgment at paragraph 5 contains a "maintenance trigger", requiring DOT to undertake the maintenance required by the Stipulated Judgment when the "average distance between sediment accumulations to the low chord of the bridge is 7 feet."

8. Upon undertaking the maintenance specified by the Stipulated Judgment, the Stipulated Judgment requires DOT to clean the Whitewater Creek stream channel to a depth of nine feet from the low chord of the bridge under the Bridge, with the channel and slopes of Whitewater Creek being restored to the channel and dike configuration defined in paragraphs 3 and 7 of the Stipulated Judgment.

9. Paragraph 14 of the Stipulated Judgment requires the continuing maintenance undertaken by the Defendant be diligently pursued until completion, recognizing that force majeure and regulatory restrictions could impact maintenance time frames.

10. On July 28, 2013, Plaintiffs notified DOT that the maintenance trigger provided in the Stipulated Judgment had been reached, so that DOT was then obligated to begin restoring the Bridge and Whitewater Creek bed to the parameters contained in the Stipulated Judgment.

11. On August 2, 2013, DOT dispatched two of its employees, Mr. Pat Gutierrez and Mr. Lester Peralta, along with two loader tractors and one dump truck, to work on cleaning sediment from the Whitewater Creek channel.

12. Mr. Gutierrez and Mr. Peralta used the loader tractors to scoop sediment and load it into the dump truck. Once loaded, one of the men would drive the dump truck to an off-site location where the material was stock-piled.

13. DOT did not provide Mr. Gutierrez and Mr. Peralta a bulldozer to use for cleaning Whitewater Creek. Removal of the sediment from the Whitewater Creek bed using only loader tractors, without the use of a bulldozer with rippers to rip or plow the

creek bed and stock-pile the dirt and aggregate material, is much slower than conducting the same work with a bull dozer.

14. For a very few days in August, 2014, DOT also had one or two other DOT employees assist Mr. Gutierrez and Mr. Peralta perform the work required by the Stipulated Judgment.

15. Darrel Allred assisted the DOT men with the process of removing sediment from the creek bed with his own bulldozer. Darrel Allred used the ripper teeth on the bulldozer to rip the dirt/aggregate sediment material in the creek bed so that it could be moved more easily, and pushed the sediment material into stock-piles so that the material could more easily be scooped by the loader tractors and loaded into the dump truck. Darrel Allred operated his bulldozer for one hundred fifty hours during August, 2013 assisting DOT in cleaning the Whitewater Creek bed.

16. Mr. Gutierrez and Mr. Peralta were required by their supervisor, Terry Trujillo, to stop their maintenance work cleaning the Whitewater Creek channel on approximately August 26, 2013. Mr. Trujillo was told at that time by his employees that the work in the creek bed and under the Bridge was not yet complete.

17. When Mr. Trujillo ordered Mr. Gutierrez and Mr. Peralta to stop working in Whitewater Creek, DOT had not complied with the Stipulated Judgment by returning the clearance under the Bridge and the creek bed areas east and west of the Bridge to the specifications contained in the Stipulated Judgment. An additional three to four feet of sedimentation under the Bridge, and an undetermined, material amount of sediment in the creek bed to the east and west of the Bridge, would have had to have been removed by

DOT when they stopped working on August 26, 2013, to comply with the Stipulated Judgment.

18. Between August 26, 2013 and September 13, 2013, there were two or three rain events in the Whitewater Creek drainage to the east of the Bridge that caused some additional sedimentation under the Bridge and in the creek bed.

19. DOT did not have any personnel or equipment perform any maintenance under the Bridge or in the Easement after August 26, 2013 and before September 14, 2013.

20. There are earthen dikes, approximately six feet in height, located along both sides of Whitewater Creek, both upstream and downstream from the Bridge. The purpose of the dikes is to contain water in the creek bed and to prevent water from flowing on the land located to either side of Whitewater Creek.

21. Plaintiffs are the owners of the real property upon which Whitewater Creek flows upstream and downstream from the Bridge for a distance.

22. Plaintiffs own and operate a farming and livestock operation on the lands adjacent to Whitewater Creek, both upstream and downstream from the Bridge. The farming operation includes water diversions, ponds for the storage and disbursement of irrigation water, ditches and pipelines for the conveyance of water to the ponds and to farm fields, and irrigated farm fields that are cultivated for the production of hay and grazed by livestock.

23. The dikes protect Plaintiffs' irrigation system and farming operation.

24. Pursuant to the Settlement Agreement, Plaintiffs granted DOT an easement (referred to as the "Easement") for the construction of dikes and concrete water

control measures by DOT, and to permit DOT access for the maintenance of the water control measures and for the removal of sedimentation from the creek bed, upstream and downstream from the Bridge.

25. In the area contained within the boundaries of the Easement, the dikes are both concrete and earthen material, and are maintained by DOT.

26. In the area outside of the Easement, both upstream and downstream from the Bridge, the dikes and are maintained by Plaintiffs.

27. In the area outside of the Easement, Plaintiffs remove any sedimentation that may occur in the creek bed in order to maintain the dikes at an approximate six foot height above the creek bed.

28. When the area under the Bridge and in the creek bed within the Easement fills with sediment, the flow of flood waters from rain events slows when flowing past the Bridge. As flood waters slow at the Bridge due to sedimentation under the Bridge and in the Easement, sedimentation drops out of the water on the upstream side of the Bridge, proceeding up Whitewater Creek past the Easement and into the area of the creek bed that Plaintiffs must maintain.

29. If DOT fails to remove sedimentation from under the Bridge and within the Easement, then it is useless for Plaintiffs to remove sediment from the creek bed upstream from the Easement, because the area upstream from the Easement will immediately refill with sediment when rain water flows due to the condition within the Easement and the condition under the Bridge slowing the water flow.

30. During the night of September 14, 2013, there was a rain event in the Whitewater Creek drainage which resulted in water flowing down Whitewater Creek, backing up from the Bridge, flowing over the top of the Bridge, and over-topping the dikes located on either side of Whitewater Creek on the upstream side of the Bridge.

32. On September 14, 2013, immediately prior to the rain event, there was approximately three feet of clearance between the low chord of the Bridge and the Whitewater Creek bed, and the stream bed in the area of the Easement was full of sediment.

33. On September 17, 2013, after the September 14, 2013 rain event, there was approximately two feet of clearance between the low chord of the Bridge and the Whitewater Creek bed.

34. On the night of September 14, 2013, Darrel Allred was watching the water flow over the Bridge. When he walked out on the dikes on the upstream side of the Bridge, as the water flow was slowing he could see the sedimentation in the creek bed rising. As the sedimentation in the creek bed increased, Darrel Allred watched the water eventually overtop the dikes, flooding the irrigated fields and the irrigation pond.

35. As the water flowed over the top of the dike to the south of Whitewater Creek, the water washed substantial portions of the dike away, flooded the irrigated field depositing rock, dirt and debris in the field, washed away or filled in irrigation ditches, and damaged the hay crop planted on the field. As a result of a portion of the dike being washed away, the water also washed out a portion of a 16" steel irrigation pipeline,

referred to in testimony as a siphon, that had been located in the dike and under the creek bed.

36. To the north of Whitewater Creek on the upstream side of the Bridge, the water flowed over the dike, damaging or washing out portions of the dike, and flooded an irrigation ditch and irrigation pond, causing them both to be filled with sediment.

37. At the Bridge, the water flowed over the top of the Bridge to a depth of approximately two feet, flowed across the highway and downstream inside and outside of the creek bed. The water that flowed to the north of the creek bed outside of the Easement damaged Plaintiff's fencing and filled another of Plaintiffs' irrigation ponds with sediment.

38. Had DOT complied with the Stipulated Judgment by completing the process of cleaning the sediment out of Whitewater Creek under the Bridge and to the east and west of the Bridge as specified in the Stipulated Judgment prior to September 14, 2013, then on September 14, 2013 the water in Whitewater Creek would not have over-topped the Bridge, and would not have over-topped the dikes along Whitewater Creek upstream from the Bridge.

39. The failure of DOT to complete the maintenance required by the Stipulated Judgment in August or early September, 2013 was not excused by force majeure pursuant to the Stipulated Judgment, in that the rain events that occurred in the Whitewater Creek drainage during July, August and early September, 2013 were normal monsoonal rains that occur almost every summer in the mountains of Southwest New Mexico, and those rain events did not cause unusual sedimentation in the creek bed.



40. The rain event that occurred on September 14, 2013 was large, being estimated by Plaintiffs' expert witness as a 15 or 20 year event, but was not extreme or of biblical proportions.

41. Each time a rain event occurs in the Whitewater Creek drainage that results in storm water flowing under the Bridge, some sedimentation occurs under the Bridge and in the creek channel.

42. The normal monsoonal rains that occur almost every summer in the mountains of Southwest New Mexico are a foreseeable occurrence, so that DOT knew or should have known that rain events could deposit more sediment in the creek bed during the time that DOT was removing sediment pursuant to the Stipulated Judgment.

43. The rain events that occurred in the Whitewater Creek drainage during July, August and early September prior to September 14, 2013, did not excuse DOT from complying with the Stipulated Judgment, but did impact the time for completion by DOT of performance by excusing DOT from working in Whitewater Creek when too much storm water was flowing in Whitewater Creek.

44. Whitewater Creek is a perennial water course, with water flowing under the Bridge all of the time. When rain storms occur in the Whitewater Creek drainage upstream from the Bridge, more water will flow in the creek for a few hours as the storm water flows down-stream. Maintenance work using loader tractors and bulldozers can be safely performed in Whitewater Creek provided that the water is not so high that it flows over the tracks of a bulldozer.

45. No evidence was presented at the July 24 – 25, 2014 hearing, or during any other hearing, concerning the precise amount of time between July 28, 2013 and

September 14, 2013, when the storm waters were flowing at a sufficient rate to prevent heavy equipment from safely working in Whitewater Creek. From the evidence presented at the July 24 – 25, 2014 hearing and at prior hearings, the court is convinced that from August 2, 2013 through September 14, 2013, there was enough water flowing in Whitewater Creek to prevent equipment from safely working in the creek bed for only a minimal amount of time. The court is also convinced that high water flowing in Whitewater Creek did not prevent DOT from timely performing and completing the maintenance work required by the Stipulated Judgment.

46. On September 13, 2014, DOT personnel removed the guard rails from the highway edges over the Bridge, demonstrating that they were aware on that date that the capacity under the Bridge was not sufficient to accommodate the water that might flow in Whitewater Creek, and that water in Whitewater Creek might flow over the top of the Bridge.

47. District 1 DOT Maintenance Engineer Gene Paulk directs the performance of highway maintenance in the Southwest area of the State of New Mexico, including the area of the Bridge.

48. The District 1 DOT heavy maintenance crew is a contingent of DOT personnel, equipped with bulldozers, semi-trucks, tractor loaders, and other heavy equipment, delegated to conduct maintenance in of waterway crossings on New Mexico State maintained roadways in DOT District I. During August, 2013, the District 1 DOT heavy maintenance crew was working along Interstate 25 in the area of Truth or Consequences, New Mexico, at the direction of Mr. Paulk.

49. On approximately August 28, 2013, Mr. Paulk directed the heavy maintenance crew move to Whitewater Creek to conduct maintenance pursuant to the Stipulated Judgment, with work to begin on September 30, 2013. Mr. Paulk testified at the October 9, 2013 hearing that the heavy maintenance crew would not begin work at Whitewater Creek sooner than September 30, 2013 because DOT determined that the heavy maintenance crew should perform the work along Interstate 25 near Truth or Consequences, New Mexico before performing the maintenance work at the Whitewater Creek Bridge. Mr. Paulk also testified at the October 9, 2013 hearing that it would take the heavy maintenance crew several days' work time to move its equipment from Interstate 25 to Whitewater Creek.

50. After complaints by Darrel Allred to DOT that DOT had not complied with the Stipulated Judgment and that his property was in danger of being flooded, DOT determined that the heavy maintenance crew could actually arrive at Whitewater Creek sooner than Mr. Paulk had earlier scheduled the heavy equipment crew to arrive. The date that the heavy equipment crew was begin work at Whitewater Creek was moved up to Monday, September 16, 2013. Although after the aforementioned change, the maintenance work was to begin on Monday, September 16, 2013, and it would take several days to mobilize the equipment at Whitewater Creek, no credible evidence was presented that the heavy equipment used by the heavy maintenance crew was ever mobilized by DOT at Whitewater Creek prior to the Saturday, September 14, 2013 rain event.

51. DOT did not timely devote its DOT District 1 heavy maintenance crew to conduct the maintenance required by the Stipulated Judgment.

52. DOT did not devote sufficient resources, in the form of personnel and heavy equipment, to timely complete the maintenance under the Bridge and in the creek bed required by the Stipulated Judgment.

53. Had DOT timely devoted sufficient resources, in the form of personnel and heavy equipment, to the process of maintenance required by the Stipulated Judgment, DOT could have completed the maintenance required by the Stipulated Judgment prior to September 14, 2013, in spite of the rain events that occurred prior to September 14, 2013.

54. Paragraph 14 of the Stipulated Judgment requires that once DOT undertakes maintenance work pursuant to the Stipulated Judgment, the work must be diligently pursued until completion. Included within the concept of diligence is an implied condition that DOT timely begin the maintenance work, taking into consideration the substantial likelihood of rain events causing sedimentation during July, August and September each year. Also included within the concept of diligence is an implied condition that DOT devote sufficient resources, in the form of personnel and heavy equipment, to enable DOT to complete the maintenance required by the Stipulated Judgment within a reasonable time after the maintenance is required to be undertaken.

*Hagerman v. Cowles, 94 P. 946, 14 N.M. 422.*

55. DOT's decision not to allocate sufficient resources, in the form of personnel and heavy equipment, to timely complete the work required by the Stipulated Judgment, and DOT's decision to not continuously prosecute the maintenance work after the work was undertaken, was a deliberate, conscious decision by DOT management, and was in willful and wanton disregard to the danger of flooding to Plaintiffs' property.

The aforementioned willful decision by DOT to violate the Stipulated Judgment constitutes contempt of court.

56. DOT's failure to timely comply with the Stipulated Judgment caused serious damage to Plaintiffs' property. The damages sustained by Plaintiffs as a result of the violation of the Stipulated Judgment by DOT are as follows:

A. During August, 2014 Darrel Allred assisted DOT personnel in cleaning the Whitewater Creek bed in the Easement, using Darrel Allred's privately owned bulldozer, for 150 hours. Darrel Allred testified that the value of the bulldozer and operator was \$100.00 per hour, for a total damage amount to Plaintiffs of \$15,000.00.

B. Subsequent to September 14, 2014, Darrel Allred operated his bulldozer rebuilding dikes and building a temporary dike to protect his irrigated field upstream from the Bridge. Darrel Allred testified that he had operated his dozer doing the aforementioned work for 536 hours. However, Darrel Allred testified that 130 of those hours were spent working on dikes and working on the creek bed downstream from the Easement, and the Court rules that those 130 hours were not compensable. Accordingly, Plaintiffs are entitled to recover for 406 hours of work operating their bulldozer repairing damage to their property, at the rate of \$100.00 per hour testified to by Darrel Allred, for a total of \$40,600.00.

C. Repair of irrigation pipeline, including locating buried end of existing pipeline, tractor work, labor and materials, as testified by Darrel Allred, in the total amount of \$30,000.00.

D. Backhoe work performed by Darrel Allred of 250 hours repairing damage to Plaintiffs' property caused by the flood waters. Darrel Allred testified that the backhoe work had a value of \$80.00 per hour, for a total of \$20,000.00.

E. Mariano Taglialegami of Triangle Paving Company testified regarding the cost to repair certain flood damage, including repairing and replacing damaged dike, removing debris from the irrigated field and re-leveling and replanting the field, draining and dredging the two irrigation ponds, and repairing the fence ruined by the water flow. Mr. Taglialegami's proposal for the repairs was introduced into evidence as Exhibit 7, totals \$266,964.00, and purports to be plus tax. However, the aforementioned written proposal does not state the amount of the tax or state the tax rate, and no evidence was introduced of the gross receipts tax rate applicable to Mr. Taglialegami's proposed repair work. Accordingly, the total amount of damages supported by the testimony of Mr. Taglialegami is \$266,964.00.

F. Due to the damage to Plaintiffs' irrigation system and irrigated fields, and the reduced grazing capacity of those fields caused by the flooding, Plaintiffs were required to reduce their cattle numbers by selling 14 replacement heifers that they would otherwise have kept in the cow herd. The loss for the sale of 14 replacement heifers, sold for \$700.00 per head, and which will cost Plaintiffs \$1,900.00 per head to replace, is \$1,200.00 per head, or \$16,800.00 total.

G. Due to the damage to Plaintiffs' irrigation system and hay fields, the production of hay by Plaintiffs on their irrigated fields has been reduced. During the year 2013 Plaintiffs produced 1,200 bales of hay less than before the flood damage, during 2014 Plaintiffs produced 400 bales less than before the flood damage and Plaintiff

expects that during 2015 they will produce 400 bales less than before the flood damage. Plaintiff expects to have their fields back to normal production after 2015. In total, Plaintiffs have lost or will lose 2,000 bales of hay in production. Darrel Allred testified that each bale of hay is worth \$10, for a total loss of hay production of \$20,000.00.

57. Although DOT counsel did cross examine Plaintiffs witnesses, DOT did not offer any evidence concerning the damages claimed by Plaintiffs, or to rebut Plaintiffs' evidence of damages.

58. Plaintiffs should be awarded their actual losses as damages for the damage to their property caused by DOT's willful violation of the Stipulated Judgment, in the total amount of \$408,764.00.

**B. FINDINGS OF FACT RELATING TO ISSUES OF JURISDICTION, THE CLAIM OF RIGHT TO COMPEL ARBITRATION, THE APPROPRIATE REMEDY FOR CONTEMPT AND OTHER, MICELLANEOUS MATTERS.**

59. On September 17, 2013 Plaintiff filed its Verified Motion to Enforce Permanent Injunction for Relief for Violation of Permanent Injunction and Request for Emergency Hearing (the "Motion to Enforce").

60. DOT filed its Response to Motion to Enforce on October 3, 2013.

61. The Motion to Enforce was scheduled for hearing on October 9, 2013. Hearing on the motion was scheduled at the Seventh Judicial District Sierra County Courthouse in Truth or Consequences, New Mexico, rather than at the courthouse in Catron County, New Mexico, to accommodate the schedule of attorneys for Plaintiffs and DOT, and the schedule of the Court.

62. After hearing the Motion to Enforce on October 9, 2013, the Court entered an order on October 25, 2013, finding, among other things, that DOT had violated the Stipulated Judgment by failing to diligently pursue maintenance until completion as required by the Stipulated Judgment.

63. On November 8, 2013, DOT filed a motion to reconsider the Court's ruling reflected in the October 25, 2013 order. On November 21, 2013, Plaintiffs filed a response to the Motion to Reconsider, and on December 9, 2013, DOT filed a Reply.

64. On November 21, 2013, Plaintiffs filed a Petition for Sanctions and Damages Against New Mexico Department of Transportation for Violation of the Permanent Injunction (the "Petition for Sanctions"). On December 9, 2013, DOT filed a Response in Opposition to Plaintiffs' Petition for Sanctions. On December 17, 2013, Plaintiffs filed a Reply.

65. A hearing was scheduled for February 13, 2014, on DOT's Motion to Reconsider. On February 7, 2014, DOT filed a motion for continuance of the hearing on the Motion to Reconsider. On February 11, 2014, Plaintiffs filed a response in opposition to the motion to continue. On February 11, 2014, the Court entered an order without hearing, continuing the February 13, 2014 hearing. The hearing on DOT's Motion to Reconsider was rescheduled for February 27, 2014.

66. At the February 27, 2014 hearing, DOT's motion for reconsideration was heard and denied. An order denying the Motion to Reconsider was filed March 24, 2014.

67. During the February 27, 2014 hearing, the parties and the Court also discussed scheduling matters, discovery, and the issues that remained to be determined by



the Court. A Scheduling Order was filed March 24, 2014 that reflects the aforementioned matters raised by the parties and addressed by the Court.

68. On March 14, 2014, a Notice of Hearing was filed, scheduling the Motion for Sanctions for hearing on June 25 and 26, 2014.

69. From April, 2014 to early June, 2014, the parties conducted discovery concerning the Motion for Sanctions, including propounding interrogatories and requests for the production of documents to each other, and providing responses to the same.

70. Included within the interrogatories and request for production propounded to DOT by Plaintiff was Interrogatory number 4 concerning expert witnesses, which inquired “With respect to all expert witnesses you may call at trial in this matter, please state their names, occupations, specialties, addresses, telephone numbers, the subject matter about which each expert will testify, all opinions which each expert is expected to offer, the grounds for all opinions expected to be expressed by each expert, and all facts, documents, and other information each expert is expected to rely upon as support for each and every opinion expected to be offered by each expert.” In response, DOT named John Wallace as an expert witness, provided that the expert witness could be contacted through defense counsel at their address and telephone number, and DOT described the subject matter of Mr. Wallace’s expected testimony. However, DOT did not include in the interrogatory answer any information concerning the opinions which Mr. Wallace might offer, the grounds for those opinions, or the facts, documents and other information that Mr. Wallace might be relying upon for his opinions. DOT did not provide Plaintiffs with a written report prepared by Mr. Wallace.

71. On May 12, 2014, the Court filed and served a Notice vacating the June 25 and 26, 2014 hearing date, and rescheduling the hearing for July 25 and 26, 2014.

72. On June 5, 2014, Plaintiffs submitted a notice of deposition to DOT, scheduling the deposition of Mr. John Wallace, DOT's expert witness, for July 2, 2014. Along with the notice of deposition, Plaintiffs' counsel sent defense counsel a letter requesting that alternative dates be provided by defense counsel if the July 2, 2014 deposition date was not acceptable to them. Defense counsel did not notify Plaintiffs' counsel until June 29, 2014 that defense counsel had a scheduling conflict on July 2, 2014. Counsel could not agree on another date to conduct the deposition prior to the July 24 and 25, 2014 hearing date. Defense counsel filed a Notice of Non-Appearance and Motion for Protective Order on June 30, 2014, raising the scheduling conflict and other complaints that defense counsel had concerning the notice of deposition. No evidence was introduced concerning the date that defense counsel first knew that they had a scheduling conflict for July 2, 2013.

73. On July 1, 2014, DOT filed a Motion to Stay, wherein DOT argued that the July 24 and 25, 2014 hearing should be continued to permit some additional evidence to be obtained by DOT. On July 8, 2014, Plaintiffs filed a response to the Motion to Stay.

74. On July 8, 2014, Plaintiffs filed a Motion in Limine, seeking to prevent DOT's expert witness from testifying at the July 24 and 25, 2014 hearing. On July 16, 2014, DOT filed a response to Plaintiffs' Motion in Limine.

75. On July 16, 2014, DOT filed a motion to Strike Plaintiffs' Expert, seeking to prevent Plaintiffs' expert from testifying at the July 24 and 25, 2014 hearing. On July 23, 2014, Plaintiffs filed a response to the Motion to Strike Plaintiffs' Expert.

76. On July 21, 2014, counsel for DOT communicated with the Court ex parte by letter in which counsel contended for the first time that the Court did not have jurisdiction and contended for the first time that DOT had the right to compel that the issues raised in the contempt proceeding be submitted to arbitration.

77. On July 22, 2014, the Court held a telephonic, on the record status conference. During the status conference, the Court discussed the ex parte communication by counsel for DOT, the Court informed the parties that the July 24 and 25, 2014 hearing would not be continued, and that the motions the parties had filed concerning various witnesses, and concerning evidence, would not be heard prior to July 24, 2014. The Court further instructed the parties that they could raise the evidentiary and other objections not addressed prior to the July 24 and 25, 2014 hearing at the hearing.

78. On July 23, 2014, DOT filed a Motion to Vacate Hearing Based on Lack of Subject Matter Jurisdiction, challenging the Court's jurisdiction to hear the contempt proceeding. The aforementioned pleading was the first pleading filed by DOT challenging the Court's jurisdiction. The Court heard brief argument concerning the jurisdiction issue during the July 24 – 25, 2014 hearing, and ruled that it had jurisdiction to proceed on the Motion to Enforce and the Petition for Sanctions filed by Plaintiffs and litigated by the parties. N.M. Const., Article VI, Section 13.

79. On July 23, 2014, DOT filed a Motion to Enforce Settlement Agreement, which is the first pleading wherein DOT contends that it had a right to require the contempt proceeding be submitted to arbitration.

80. The Settlement Agreement contains a provision for the arbitration of disputes. The Stipulated Judgment does not contain a provision requiring arbitration of disputes concerning the Stipulated Judgment.

81. The general subject matter of the Settlement Agreement concerns the agreement to grant construction and maintenance easements by Plaintiffs to DOT for the Bridge, for the payment of money by DOT to Plaintiffs, and for a release of claims.

82. The general subject matter of the Stipulated Judgment is the maintenance of the Bridge and the Whitewater Creek bed. Pursuant to the last paragraph of the Stipulated Judgment, the terms contained in the Stipulated Judgment resolved “all pending issues related to the injunctive relief requested by the Plaintiffs.”

83. Pursuant to the last paragraph of the Stipulated Judgment, title and compensation issues between the Parties were “disposed of and resolved through a separate simultaneously executed settlement agreement and release.”

84. The arbitration agreement contained in the Settlement Agreement pertains to disputes concerning the title and compensation issues resolved by the Settlement Agreement, and does not require that contempt proceedings for violations by DOT of the Stipulated Judgment, such as the claims raised in the Motion to Enforce, be submitted to arbitration.

85. In the event the arbitration agreement in the Settlement Agreement were held to require that contempt proceedings concerning DOT’s violation of the Stipulated

Judgment be submitted to arbitration, then DOT waived the contract right to compel arbitration by litigating the Motion to Enforce in the Seventh Judicial District Court from October 3, 2013, when it filed its Response to the Motion to Enforce, until days prior to the July 24 - 25, 2014 hearing, without ever asserting a claim of right to compel arbitration. *See, eg. United Nuclear Corp. vs. General Atomic Co.*, 597 p.2d 290, 93 N.M. 105 cert. denied 100 S.Ct. 222, 444 U.S. 911, 62 L.Ed.2d 145.

86. Contempt proceedings are a principal means of enforcing mandatory orders, such as injunctions. *See, eg. Kucel vs. New Mexico Medical Review Commission*, 997 P.2d 823, 128 N.M. 691, 2000-NMCA-026, cert. denied 997 P.2d 820, 128 N.M. 688.

87. Civil contempt sanctions may be imposed by a court upon adherence to basic due process protections, which include fair notice and an opportunity to be heard. *Concha vs. Sanchez*, 258 P.3d 1060, 150 N.M. 268, 2011-NMSC-031.

88. The elements necessary for finding civil contempt are 1) knowledge of the court's order, 2) ability to comply with the order and 3) willful noncompliance with the order. *State ex rel. Udall vs. Wimberly*, 884 P.2d 518, 118 N.M. 627. The burden of proof in a civil contempt case is proof by a preponderance of the evidence. *Id.*

89. Judicial sanctions may be employed in civil contempt for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained. *State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc.*, 74 N.M. 201, 392 P.2d 347 (1964).

90. The court has the power to award damages and attorney's fees to a party aggrieved by a contempt, though recovery is limited to actual loss plus costs and

expenses, including counsel fees, incurred in investigating and prosecuting the contempt. *See, eg. In the Matter of Hooker, 617 P.2d 1313, 94 N.M. 798.*

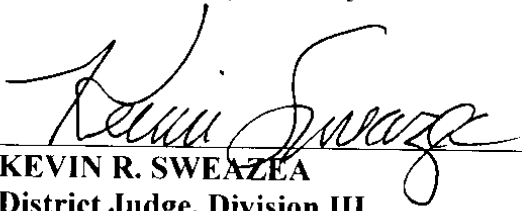
91. Plaintiffs should be awarded sanctions against DOT as set forth in these findings of fact and conclusions of law to compensate Plaintiffs for the actual losses suffered by Plaintiffs as a result of DOT's contempt of court.

92. Plaintiffs should be awarded their attorney fees incurred in connection with this litigation from the filing of the Motion to Enforce to the present, awarded against DOT as a sanction for DOT's contempt of court.

93. To the extent that any requested finding of fact or conclusion of law by any party has not been set forth in these Findings of Fact, Conclusions of Law, the same is hereby denied.

Counsel for Plaintiff shall prepare an Order consistent with the provisions of these Findings of Fact and Conclusions of Law, and within seven days after the date of this Pleading, shall submit the proposed form of Order to Counsel for Defendant for review and approval as to form. After gaining the approval of counsel for Defendant as to the form of the Order, counsel for Plaintiffs shall submit the Order to the Court for entry. In the event that within ten days after the date of this pleading the parties are unable to agree upon the form of the Order, within twenty days after the date of this Pleading, counsel for Defendant shall file a pleading setting forth Defendant's objections to the form of the Order, and counsel for Plaintiffs and counsel for Defendant shall each submit to the Court their respective proposed forms of Order. The failure by Defendant to file a pleading within twenty days after the date of this Pleading setting forth specific objections to the form of Order suggested by Plaintiffs, and to submit a proposed form of Order to the

Court for consideration, shall constitute a waiver of any such objections.

  
**KEVIN R. SWEAZEA**  
**District Judge, Division III**

Copies Mailed/Delivered on October 6<sup>th</sup>, 2014, to:

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