IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE BOARD OF COUNTY COMMISSIONERS,
SANDOVAL COUNTY, NEW MEXICO

Petitioners

vs. No.:_____

THE HONORABLE GEORGE P. EICHWALD,
THIRTEENTH JUDICIAL DISTRICT COURT JUDGE,

Respondent.

TESORO PROPERTIES LLC, et al.

Real-Parties In Interest.

VERIFIELD PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

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REAL PARTIES IN INTEREST

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JURISDICTION OF THE SUPREME COURT

This Court has supervisory and superintending control over all inferior courts in the State of New Mexico, as well as the authority to issue extraordinary relief to parties aggrieved by orders of inferior courts in the State of New Mexico and has original jurisdiction over this matter. NM Const., Art. VI § 3.

PROPRIETY OF THE WRIT IN THE SUPREME COURT

The Motions from which the Petitioner County seeks relief were filed in *Sandoval County v. Tesoro Properties et al.*, Thirteenth Judicial District Court, cause No. D-1329-CV-2009-2408. Petitioner seeks relief against the Hon. George P. Eichwald, District Judge of the Thirteenth Judicial District. There is no other Court in which such relief might be had.

REAL PARTIES IN INTEREST

The Real Parties In Interest are Tesoro Properties, LLC; Butera Properties, LLC; Carinos Properties, LLC; Recorp New Mexico Associates Limited Partnership; Recorp-New Mexico Associates Limited Partnership I; Recorp-New Mexico Associates Limited Partnership II; Recorp-New Mexico Associates Limited Partnership III and all unknown owners or claimants of the property involved.

THE GROUND UPON WHICH THE PETITION IS BASED

The County seeks a Writ of Prohibition or alternatively a Writ of

Superintending Control and a Stay preventing the district court from considering certain motions. The motions of the real parties in interests (hereinafter for brevity, "Recorp") and any relief which might be granted pursuant to the motions violate the Doctrine of Separation of Powers in the New Mexico Constitution, Art. III, § I, and exceeds the power of the District Court.

It is an improper attempt to involve the Court in matters that are purely legislative. The Territorial Supreme Court of New Mexico held the district judge belongs to the judiciary and the county commissions to the executive or legislative branch. *In re Sloan*, 5 N.M. 590, 5 Gild. 590, 25 P. 930 (1891), special concurrence by Justice Freeman.

I. INTRODUCTION AND FACTUAL AND LEGAL HISTORY

1. Petitioners are the Board of County Commissioners of Sandoval County, New Mexico (hereinafter "the Board"), a county created by statute in 1905. NMSA §4-23-1(1978). Recorp is a group of related entities who own approximately 11,683 acres of unimproved land in the Rio Puerco area of Sandoval County.

2. This case arose as an action in eminent domain. Recorp owns approximately 11,683 acres in the Rio Puerco area of Sandoval County. The County sought to condemn a total of 47.5771 acres in three different parcels. The district court denied the County's condemnation of 41.5208 acres on which two deep well

sites drilled by the County were located. Respondent granted the County's condemnation of 6.0563 acres in the same petition for a roadway known as Alice King Way. The County's Petition for Condemnation is attached hereto as Exhibit "1".

3. The district court found the County's notice of condemnation was inadequate for the deep well parcels and that the County failed to negotiate for the required twenty days respecting the deep well sites.

4. Although all the parcels for which the County sought condemnation were contained within the same Petition, and had been treated procedurally as only one condemnation action, the court found no defect of notice or negotiation for the 6.0563 acres sought for the Alice King Way road site. (Exhibit "2" Order from April 12, 2010 hearing).

5. Just compensation for all of the condemned property, based upon the County's appraisal, was deposited in the Registry of the Court and has not been withdrawn.

6. The County has not sought an interlocutory appeal of Respondent's action described in the preceding paragraphs denying the condemnation of the well sites.

7. No appraisal, evidence or counteroffer as to value has been tendered by

Recorp for Alice King Way, the parcel granted to the County by Respondent's Order (Exhibit "2").

8. The only issue remaining for the District Court is the value of Alice King Way. After the Preliminary Order of Entry "is made permanent, all subsequent proceedings shall only affect the amount of compensation allowable." NMSA § 42-2-6(C) (1978).

9. Sandoval County approved a Master Plan for the Recorp entities on October 5, 2006, to develop a community to be known as "Rio West" and entered into a Memorandum of Understanding (April 19, 2007) and a Development Agreement (July 17, 2007) with Recorp. The Development Agreement incorporated and subsumed the Memorandum of Understanding into the final document. (Exhibit E to Exhibit "3", Paragraph 23.4). (The Development Agreement and the subsumed Memorandum of Understanding are hereinafter referred to as the Development Agreement unless one or the other is otherwise distinguished).

10. The County and Recorp believe an aquifer of brackish water lies beneath portions of the Recorp property. The County intends to desalinate the water pursuant to the Development Agreement.

11. The Development Agreement allocates to Recorp 18,000 acre feet of

the water for "Rio West" if it is possible to obtain that amount from the aquifer.

12. Recorp has filed Notices of Intent with the State Engineer which it claims created "vast water rights" and contends the County is attempting to take this "water or water right." (Exhibit "A" to County's Exhibit "3" herein). (Also alleged in all sustentative pleadings filed in the District Court by Recorp).

13. The County filed a Statement Disclaiming any intent to condemn water or water rights. (Exhibit "4").

14. Petitioner believes all Real Parties In Interest are under common control and have but a single goal in mind, notwithstanding their various corporate identities.

15. The Recorp respondents in the eminent domain action have submitted a motion to district court for permission to file a breach of contract counterclaim and a motion to amend the unfiled counterclaim to seek injunctive relief. (Exhibits "5" and "6" attached hereto).

16. The parties have agreed to mediate the issues.

17. The Carinos respondents have filed a motion asking Respondent to order the Board of County Commissioners (hereinafter "the Board") to meet in special session and then recess into closed (executive) session for the mediation. (Exhibit "7").

18. Carinos asks Respondent to order the Board to require all members of the Board to attend mediation. The Board considered Carinos' Motion and the Commissioners have declined to attend the mediation.

19. The Board gave full settlement authority to the County Manager for the mediation (Exhibit "8").

20. Exhibit "3" hereto is Recorp's "OBJECTION TO PRELIMINARY ORDER OF ENTRY AND COUNTY'S PROPOSED DEPOSIT" filed by Recorp. This pleading has the Memorandum of Understanding and Development Agreement attached as Exhibits B and E and is submitted in its entirety. This pleading also contains the argument that Recorp owns the water in the aquifer by virtue of its Notices of Intent and contains the copies of the Notices of Intent as Exhibit A. (The County originally objected to the form of this pleading because of its numerous unnumbered paragraphs. The Respondent heard arguments on the form of the pleading, but never ruled on the County's objection. The County finally submitted a Response that simply answered the pleading sentence by sentence).

II. THE MOTION TO COMPEL THE BOARD TO CONVENE A SPECIAL SESSION FOR MEDIATION VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

21. Recorp's request that the Court order the Board to convene in special session and then recess into a "closed session" for mediation seeks relief which is

beyond the power of the judiciary. The courts are without power to encroach upon legislative prerogative by judicial fiat. *State v. Steele*, 93 N.M. 470, 601 P2d 440 (1979).

22. The Judiciary lacks the power to order the County to perform a purely discretionary act. Convening a special meeting of the Board is a discretionary act. See also *State of New Mexico ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 199 N.M. 150, 889 P.2d 185 (1994), discussed more fully, *infra.*

23. The County's choice of who will represent it at mediation is a discretionary act. The only control given to the Court is in the local rule, NMRA LR-13-803(G) (2008), which states:

> "Attendance. Each counsel of record shall attend in person and shall ensure the attendance of all persons who have full and final settlement authority at the entire mediation conference." NMRA LR 13-803(G) (2008).

24. As shown by the affidavit of Sandoval County Manager Juan Vigil, attached as Exhibit "8", the County intends to fully comply with this rule.

25. Carinos asserts in its Reply to the County's Response to the Real Parties' Motion to Compel Mediation that the Board cannot delegate its legislative authority to the County Manager. See Exhibit "9". The Board can and does delegate authority to the County staff in litigation matters and does so in every lawsuit referred to mediation.

26. The determination to delegate settlement authority is itself a legislative function over which the Respondent has no authority.

27. Real Parties cite no law that forbids a delegation of the Board's power and authority in litigation. To carry Carinos' argument to its illogical conclusion, no governmental body could ever go to mediation without its entire governing body present for the mediation.

28. The Open Meetings Act NMSA §10-15.1, et seq (2009) provides for closed or executive sessions so counsel or staff for a local government can be prepared to mediate with full and final settlement authority. This is the method used by Sandoval County in all its State and Federal Court litigation.

29. Recorp asserts that a court may oversee discretionary acts of a legislative body if it has engaged in "related, unlawful conduct," and claim that: "Breach of contract is such conduct." (See Exhibit "9").

30. In this eminent domain case the breach of contract counterclaim has not yet been permitted.

31. Recorp asserts it is appropriate to attempt to mediate all pending and potential disputes in the mediation connected to this proceeding. However, the only pending dispute in this proceeding is the value of Alice King Way. See NMSA §42-2-6 (C) (1978).

32. Recorp asserts that the provision of the Development Agreement requiring that County staff "use his or her best efforts" (Exhibit E to Exhibit "3", paragraph 17.2) to bring Rio West development issues to the County Commission if an impasse has been reached must now be construed to require the County Commission to mediate issues at this time which are not before the District Court and are not relevant or related to the condemnation.

33. For Respondent to agree with Recorp, he must engage in impermissible stacking of inference on inference, contrary to the rule of *Lovato v. Plateau, Inc.*, 79 N.M. 428, 444 P.2d 613 (Ct. App. 1968) and *Hausler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). The inferences whose stacking is not permitted are (1) that an issue respecting something other than the value of Alice King Way exists; (2) that impasse respecting it has been reached between Recorp and the County, and (3) that bringing the issue to court-ordered mediation is the same as bringing it to the Board for resolution. The portion of the paragraph cited by Recorp requires an impasse in the Rio West development be brought to the Board or the Planning and Zoning Commission in a regularly scheduled public meeting, not at mediation. See Development Agreement, p. 17.2 (Exhibit "E" to County's Exhibit "3"). Contracts must be read and construed as a whole and not as a series of isolated statements. *Gardner-Zemke Company v. State*, 109 N.M. 729, 790 P.2d 1010 (1990).

34. The amount of just compensation for the taking of "Alice King Way" is the sole remaining issue before the District Court under the provisions of NMSA §42-2-6(C) (1978).

35. Irrespective of the issues before the Court, the County has not attempted to limit the mediation issues to the compensation for Alice King Way.

36. Respondent lacks the power to order the Board to convene a special session, recess into closed session and compel all five members of the Board to attend the mediation. *State v. Steele* and *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, supra.* The Board gave settlement authority to the County Manager. (Exhibit "8").

37. Each year, pursuant to NMSA § 10-15-1 (1978), the Board adopts an Open Meetings Act Resolution. (Exhibit "10"). The 2010 Open Meetings Act Resolution states in paragraph 4:

> "Special meetings may be called by the Chairman or a majority of the members upon three (3) days notice. The Notice shall include an agenda for the meeting or information or [sic, should be "on"] how members of the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before any special meeting." (See Exhibit "10" attached hereto.)

38. Only the Board can determine when it shall meet and only the Board has the power to determine if a special session is necessary or desirable.

39. The exercise of power by a county in New Mexico was determined by

the Territorial Legislature in 1876 which stated: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." NMSA §4-38-1 (1897). Counties were granted the same powers as municipalities except for powers that would be inconsistent with the two forms of local government in NMSA §4-37-1 (1978). Included in the grant of powers are those powers

> ". . . necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the moral, order, comfort and convenience of any county or its inhabitances." NMSA §4-27-1, §4-37-1 (1978).

40. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties. Id.

41. In 1876, the Territorial Legislature passed what is now NMSA §4-38-8 (1976), which states:

> "The board of county commissioners shall meet, after notice as required by law for meetings of public bodies, at the county seat of each county at quarterly meetings in January, April, July and October in each year and at such other times within the prescribed county which in the opinion of the board the public interest may require. . . . All meetings shall be held in a public building . . . ." (Emphasis added).

42. The law does not otherwise directly address the power of a county to hold public meetings. When to meet, and what subject matters are to be discussed is a matter solely in the discretion of the Board.

43. A County must hold meetings to conduct business. The Court should take Judicial Notice pursuant to NMRA 11-201(B)(1) as a fact generally known within the community that the County does hold regular meetings. The regular meeting schedule of the Board is shown on Exhibit "9".

44. The judicial branch does not have the power to order the Board to meet. In *State ex rel., Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 889 P.2d 185 (1994), this Court examined the power of the judiciary over the decisions of local governments, and held discretionary legislative powers and duties of local governments include determination of time, manner or locations of performance of governmental duties. Specifically listed as a discretionary power is the provision of necessary or desirable public works projects. The condemnation that is the genesis of the instant case is such a public works project, specifically the condemnation of well sites and a roadway.

45. Counties were granted the explicit power to condemn water rights in 1959 by NMSA §72-4-2 (1978) and the power to acquire land to access water has never been questioned. See, e.g. *City of Sunland Park v. Paseo del Norte Limited Partnership*, 128 N.M. 163, 1999-NMCA-124 (Ct. App. 1999). In the instant case, there was no challenge to the County's power to condemn the deep well sites or Alice King Way. Respondent found notice inadequate and negotiations insufficient

for the condemnation of the well sites, although not for the roadway. The decision to use the power of eminent domain is a discretionary act. The requirement to pay just compensation is non-discretionary legal requirement that flows from a discretionary decision. While mediation of a discretionary act may be appropriate, the executive or legislative body's determination regarding its representative at the mediation must be honored by the judiciary.

46. The determination of the municipality respecting its representation in mediation is presumptively valid. *Los Ranchos*, *supra*. The burden of proving invalidity is upon Respondent. The Court held in *Los Ranchos*, that the judicial branch will not interfere with the exercise of discretionary powers. The Board authorized the County Manager to represent the County at the mediation with full settlement authority on behalf of the County. That decision is beyond the power of the district court to review or reverse and is not a concern of either Respondent or Recorp, when the requirements of LR 13-803(G) (2008) are met.

47. More specifically, this Court's holding in *Los Ranchos*, *infra*, is:

> "As long as [the municipality] acts within its sphere of discretion we will not inquire into the wisdom of the act even if it "is an economic burden upon the taxpayers, as so often is urged in contests of this nature" {quotation in original}. A different policy would place courts in the untenable role of administration rather than adjudication." *State of New Mexico ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 158, 889 P.2d 185, 193 (1994).

48. The County has agreed to fully participate in meaningful mediation in good faith as required by NMRA LR 13-803(G) (2008). However, it is solely within the discretion of the Board to schedule its own meetings and determine the agenda for the meetings as well as its mediation tactics and positions. There remains no role for the Judiciary to interfere with this legislative discretion.

III. THE MOTION FOR INJUNCTIVE RELIEF IS BEYOND THE JURISDICTION OF THE DISTRICT COURT IN THIS EMINENT DOMAIN ACTION AND VIOLATES THE SEPARATION OF POWERS DOCTRINE AND NEW MEXICO LAW

49. Recorp seeks leave to file or amend an unfiled counterclaim in the condemnation action.

50. The counterclaim is compulsory or mandatory under NMRA 1-013. Attached hereto and incorporated by reference herein as Exhibit "11" is Recorp's Reply to the County's Response to Recorp's Motion to Amend their counterclaim to add a claim for injunctive relief. The penultimate sentence of Recorp's argument states: "Clearly, Recorp's counterclaim and proposed amendment could be categorized as compulsory." (Exhibit "11", page 4).

51. The counterclaim is barred because as a compulsory counterclaim because it is untimely under NMRA 1-013 (2010).

52. In addition, only counterclaims for inverse condemnation are permitted

in eminent domain cases. The proposed amendment to the unfiled counterclaim would include a cause of action for injunctive relief. (See Exhibits "5" and "6").

53. Recorp claims the result of the Development Agreement is a "joint venture" between it and Sandoval County which created a fiduciary relationship. Recorp argues the relationship entitles it to an injunction against Sandoval County as its "joint venture" or partner from "in any form or fashion competing with the operations of the [claimed] joint venture . . . which involves the development of water rights, the development and treatment of water and the sale of water located in Sandoval County."

54. Recorp contends it should have injunctive relief in the eminent domain case. Recorp has already prevailed in the portion of the eminent domain action that is the basis for their injunction request. Respondent dismissed the portion of the eminent domain action in which the County sought the condemnation of the well sites. (See Exhibit "3").

55. Recorp asserts that any action by the County "would be in direct competition with [and] damaging to the joint venture." Sandoval County is informed and believes and therefore alleges Recorp is asserting whatever action it seeks to have enjoined would impair its water rights, and the Respondent should consider its counterclaim to prevent such impairment.

56. In order for there to be impairment, there must be water rights;

57. Recorp has no water rights.

58. Recorp has drilled no wells of which Sandoval County is aware;

59. Recorp has applied no water to beneficial use as far as Sandoval County is aware;

60. Recorp made no application to the State Engineer for any permit to appropriate water;

61. Recorp has made no claim that its water rights would be impaired by Sandoval County.

62. The Courts may determine what protections and remedies are appropriate only when water rights are perfected or instituted by whatever legal means are available to do so. The determination of impairment depends upon the other users of the water source and the degree to which the water has already been appropriated. Here no water rights have been instituted or perfected by Recorp and therefore it has nothing to be protected by an injunction. See, *Turner v. Bassett*, 137 N.M. 381, 2005-NMSC-009. "The proposed severance [of the water from the real property] is evaluated by the State Engineer to determine whether the changed use of water may result in adverse impacts to other appropriators or may be detrimental to water conservation and the public welfare. Protests and objections

are also submitted during this initial point in the process." (emphasis added) 137 N.M. 381, 386.

63. Both the County and Recorp filed Notices of Intent with the State Engineer to drill wells into an aquifer lying more than 2,500 feet below the surface and containing saline water. The State Engineer did not then control the appropriation of deep water from a saline aquifer. The Notices were filed at a time when such deep water aquifers were beyond the administrative jurisdiction of the State Engineer under NMSA §72-12-25 (2009) (prior to amendment by the 2009 Legislature). (See Exhibit "3" attached hereto.)

64. At that time, the State Engineer had no statutory authority over such water, and even now has exercised none of the power given to him by the 2009 Legislature over the acquisition or development of water rights in the water in question.

65. The purpose of the Notices of Intent to drill exploratory wells was to alert the State Engineer so that he could supervise the plans and construction of the wells.

66. The State Engineer required the submission of plans and specifications in order to assure that water from the deep saline aquifer did not contaminate the shallow fresh water aquifers above and to assure that fresh water was not lost to the

saline aquifer below.

67. The County proceeded in accordance with the approval of its plans and specifications by the State Engineer to drill two exploratory test wells at a cost of about $6.5 million.

68. The County received a permit from the New Mexico Environment Department ("NMED") to bring the brackish water to the surface and to test a treatment method for the water. The County's Preliminary Engineering Report test results indicate the water can be made potable and palatable, but the County has proceeded no further with the project.

69. The County cannot use the water referred to above until a permit is granted by NMED. (NMAC §20.6.2.3104). At this time, the County expects the process to take about three (3) more years before the County can begin desalinating the water.

70. The State Engineer gave the County and Recorp approval only of the plans and specifications for the exploratory wells.

71. No water rights were created by the State Engineer (*see*, NMSA § 72-12-1 et seq. for the exclusive means by which the State Engineer can create underground water rights) or recognized by the Engineer (which, in any event, is beyond his power under *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73

(1963).

72. Recorp asserts, in various fashions, that their Notice of Intent gave them substantive, appropriative water rights to all the water that lies beneath their 11,683 acres as well as the entire aquifer itself. (*See* Exhibit "12", Carinos' Objection to the Preliminary Order of Entry filed on October 29, 2009, page 5, paragraph 19,

> "This agreement . . . illustrates . . . [the County's] awareness that Respondents own the real property, own the wells, and own the rights to drill for and use the water in the aquifer below."

73. This is a new and novel proposition under New Mexico's law of prior appropriation in which the "law of capture" plays no role. *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929).

> [a] person owning a parcel of land situated over an underground aquifer does not necessarily own the right to use that water. Ground water, like surface water, must be appropriated and applied to beneficial use before a vested water right will result. *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749.

74. Respondent agreed with Recorp/Carinos that the County's attempt to condemn the sites on which the wells were drilled by the County (with Recorp's permission) was an attempt to take water or water rights, despite the County's Disclaimer (See Exhibit "4").

75. Recorp claims that the Notices of Intent gave them ownership of the

entire aquifer. (Exhibits "3", "5", "6", "11" and "12").

76. The result of the April 12, 2010 hearing was that the County was permitted to condemn Alice King Way and was denied condemnation of the two well sites. No other issues were decided, although a mortgagee of one of the Recorp affiliates withdrew its Motion to Intervene. (Exhibit "13").[1]

77. In the proposed counterclaim to the condemnation action, Recorp requests Respondent enjoin the County from doing anything at anytime in anyway related to the aquifer, desalination, "development, processing and sale of deep water" anywhere in any area of Sandoval County.

78. Recorp believes it is in a "joint venture" with the County (See, Exhibits "5", "6" and "11"). (Emphasis added).

79. The contract of the County with Recorp can be neither a joint venture nor a partnership as a matter of law.

80. Counterclaims are limited in an eminent domain action, which is a statutory cause of action. The Eminent Domain Code states:

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[1] The Motion to Intervene was filed by Southwest Lending. Recorp recorded a $35 million non-recourse loan secured only by water rights on September 30, 2009. That was the date the Board of County Commissioners for Sandoval County authorized the condemnation at issue in this case. The title search was completed prior to the recordation of the Southwest Lending mortgage. Therefore, Southwest Lending was not named in the condemnation. The County did not oppose a limited intervention by a Recorp creditor. The County argued the creditor had an intervention right to claim the proceeds under the holding of *City of Sunland Park v. Santa Teresa Services Company*, 134 N.M. 243, 2003-NMCA-106 (Ct. App. 2003).

"The Rules of Civil Procedure shall apply to the special alternative procedure in eminent domain except where special provisions are found in the special alternative procedure which conflict with the Rules of Civil Procedure and then the Rules of Civil Procedure shall not apply." NMSA §42-2-18 (1978).

81. If the Legislature intended the Rules of Civil Procedure to apply uniformly to condemnation proceedings, NMSA §42-2-18 (1978), would be rendered meaningless. *See, also*, NMSA 42A-1-15 (1978):

"Unless specifically provided to the contrary in the Eminent Code . . . or unless inconsistent with its provisions, the Rules of Civil Procedure for the District Courts govern matters pursuant to that act."

82. The Eminent Domain Code and the case law there under have "provided to the contrary" and the Rules of Civil Procedure are inconsistent with some of the provisions of the condemnation statutes.[2]

83. NMSA § 42-2-1 is the declaration of Legislative intent.[3]

84. An action for injunction is not a permitted counterclaim in a condemnation proceeding. If the taking is not for a public purpose, an injunction is unnecessary because the condemnation fails as a matter of law. If the taking is for a

[2]The Laws of 1981, ch. 125, § 62 repealed 42-1-1 to 42-1-39 NMSA 1978 and replaced the Code with §§ 42A-1-1 through 42A-1-33 NMSA 1978.

[3]The Legislature finds the Eminent Domain procedure in place was leading to delays in both public works projects and the award of just compensation. NMSA § 42-2-2 (1978) makes it clear the Code applies to all political subdivisions of New Mexico. Both Chapters 42 and 42A of the Statutes provide a specific procedure for the condemnee and condemnor to follow and set forth what must be contained in the petition and methods that court may use to arrive at the amount of compensation for the taking that is "just compensation".

public purpose, the taking succeeds and there is no activity to enjoin. NMSA §42-2-6(C)(1978) provides that the only remaining issue is just compensation. Therefore, there is no activity that can be enjoined in a condemnation. If the condemnation harms property that is not the subject of the pending eminent domain action, the proper claim in an original action or counterclaim in a pending action is inverse condemnation.

85. The Respondent has no jurisdiction in the present case either to adjudicate the water rights of Recorp (or anyone else), or to perform essentially the same function, to enjoin the use of the public water. *State ex rel Reynolds v. Sharp*, 66 N.M. 192, 194, 344 P.2d 943, 944 (1959); N.M.S.A. 72-4-13, et seq.; *City of Albuquerque v. Reynolds*, 71 N.M. 428 at 433, 379 P.2d 73 (S. Ct. 1962).

86. The mere possibility that injury, such as impairment of water rights, may result from a public works project is not a basis for injunction. The courts will not interfere where the claimed injury is doubtful, speculative or contingent. *City of Albuquerque v. State of New Mexico ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991).

87. Even if the County was taking water, Recorp's options would be limited to a claim of inverse condemnation based on impairment of its water rights, damage to its aquifer (if it owned one), or to the taking of its water.

88. The County is vested with statutory authority to plan and construct a County water project if it so chooses and an injunction cannot be used to stop a public works project. *City of Albuquerque v. State ex rel. Village of Los Ranchos, supra.*

89. If the County's action with respect to the deep well project, which is not yet in existence, is claimed to be a breach of contract, Recorp must file a separate action. It cannot proceed with such a counterclaim in this eminent domain case, particularly since the County was denied access to the well sites and hence to the water which might be accessed by it, (and, as a meaningless aside, some of which may be under the Recorp land).

90. The Real Parties argue that the holding of this Court in *Ortega, Snead, Dixon & Hanna v. Gennitti*, 93 N.M. 135, 597 P.2d 745 (1979) is dispositive on the issue of whether any and all manners and types of counterclaims may be filed in an eminent domain action. The County disagrees. The question before the Court in the *Ortega, Snead* case only involved counterclaims in quiet title actions. The statutes governing quiet title actions, NMSA §§42-6-1 et seq. (1978), were passed by the 1897 Territorial Legislature and have apparently remained relatively unchanged since at least 1937. The Quiet Title Article does not have a statement of legislative intent similar to NMSA §42-2-1 (1978). The Article does not address

the Rules of Civil Procedure as the Eminent Domain Code does in NMSA§42A-1-15 (1978). The Quiet Title statutes do not have any section comparable to NMSA §42-2-6(C) which specifically instructs the district court that only compensation remains as an issue after the Preliminary Order of Entry is either made permanent or dissolved. Quiet Title cases cannot be equated to eminent domain cases. Any citizens "having or claiming an interest" in the "title to real property" can file a Quiet Title action. NMSA §42-6-1(1978). Only government or quasi-government entities can file an eminent domain action, with the exception of limited condemnation rights granted to entities such as utilities and railroads.

91. The development agreement does not create either a partnership or a joint venture. Included in the elements of a joint venture are a right to share in the profits and a duty to share in any losses. *Fullerton v. Kaune*, 72 N.M. 201, 382 P.2d 529 (1963); *Copper v. Curry*, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978). Governments do not make profits. (Exhibit "47" Deposition of County Manager Juan R. Vigil). Further, a duty to share in any losses would make the County the equivalent of an insurer.

92. Recorp and Sandoval County cannot be partners, either. A joint venture is simply a partnership for a single transaction. *Hansler v. Bass*, 106 N.M. 382, 743

P.2d 1031 (Ct. App. 1987).

93. For Recorp to prevail not only must they overcome the law of partnerships and joint ventures, as well as the limitations on injunctions against local governments such as Sandoval County, they must also prevail on two other issues over which the Respondent has no jurisdiction. First, that the court has the power to adjudicate water rights, i.e. recognize and define them. Second, that Respondent has the power to create water rights, which is a power reserved to the State Engineer. NMSA §72-2-1 (1982).

IV. RELIEF REQUESTED AND NEED FOR STAY ON THE ISSUE OF MEDIATION

94. Real Parties in Interest have requested a setting of September 9, 2010, for the Court to hear the motion to allow the counterclaim for injunction. At that hearing, if set by the Respondent, matters in excess of the Court's jurisdiction will be considered.

95. The ultimate relief requested by the County is a Peremptory Writ of Prohibition or Superintending Control that prohibits Respondent from requiring attendance at mediation by the entire County Commission.

V. RELIEF REQUESTED AND NEED FOR STAY ON THE ISSUE OF INJUNCTIVE RELIEF

96. Although the Recorp Respondents seek to enjoin the County from

doing anything concerning water anywhere in the County, the County cannot proceed forward on the desalination project until NMED acts. NMED must approve the County's plan to dispose of the by-products that will be isolated in the desalination project. At this time, the County cannot proceed on the desalination project.

97. While the County has no known immediate need for well sites at other County facilities, such as the County's fire stations, it is not possible to predict when there might be an immediate or emergency need for the County to provide water, drill wells, condemn water rights or take or sell water. The relief requested by the County is a Peremptory Writ of Prohibition or Superintending Control that prohibits the district court from any further action in the Eminent Domain case except establishing just compensation for Alice King Way.

WHEREFORE, Sandoval County respectfully requests that the Court issue its alternate writ of prohibition or superintending control, and upon the hearing thereof, to make such writ permanent, and that it have such other and further relief to which it is entitled. Petitioner further requests this Court to issue a Stay of Proceedings in the above-referenced matter in order to conduct briefing and argument.

Respectfully submitted:

David Mathews, County Attorney
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(505) 771-7194 facsimile

Peter B. Shoenfeld by DM
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, I caused to be hand-delivered a copy of the foregoing pleading to:

The Honorable George P. Eichwald
Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, New Mexico 87004
(505) 867-2861

Deborah K. Farrar, CCR, RPR
Official Court Reporter

Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, New Mexico 87004

I caused to be mailed and emailed a copy of the foregoing pleading to:

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Real Parties in Interest

David Mathews, County Attorney
Sandoval County
Petitioner

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Real Parties in Interest

David Mathews, County Attorney
Sandoval County
Petitioner

VERIFICATION

STATE OF NEW MEXICO)
ss.:
COUNTY OF SANDOVAL)

JUAN R. VIGIL, COUNTY MANAGER OF SANDOVAL COUNTY, being first duly sworn upon oath, deposes and states that he is the designated representative of the Petitioner in the above entitled cause; that he has read the above and foregoing Petitioner and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information and belief.

JUAN R. VIGIL

SUBSCRIBED AND SWORN TO BEFORE me this 19 day of August, 2010.

Notary Public

My Commission Expires: August 19, 2012

[seal]