Oral Argument Not Requested

Case No. 22-2141

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GUY CLARK; LINDA CORWIN;
CRAIG CORWIN; WESLEY HANCHETT;
RICHARD JONES; and MICHAEL WRIGHT,

Plaintiffs-Appellants

v.

DEB HAALAND, in her official capacity as Secretary of the Interior;
CAMILLE C. TOUTON, in her official capacity
as Deputy Commissioner, United States Bureau of Reclamation;
MARTHA WILLIAMS, in her official capacity as
Principal Deputy Director, U.S. Fish & Wildlife Service;
DR. RUDY SHEBALA, in his official capacity as
Executive Director, Navajo Nation Division of Natural Resources;
DAVID ZELLER, in his official capacity as
head of Navajo Indian Agricultural Products Industries;
MICHAEL HAMMOND, in his official capacity as
State Engineer of the State of New Mexico; and
ROLF SCHMIDT-PETERSEN, in his official capacity as
Director of the New Mexico Interstate Stream Commission,

Defendants-Appellees.

Appeal from the United States District Court for the
District of New Mexico, No. 1-21-cv-01901-KG-SCY
Judge Kenneth J. Gonzales

APPELLANTS' REPLY BRIEF

C. Brad Cates, Esq.
P.O. Box 592
Fairacres, NM 88033-0592
(505) 342-1846
brad@bradcates.com

Marston Law Office LLC
Travis J. Marston, Esq.
1703 Sudderth Drive #156
Ruidoso, NM 88346
(505) 670-9371
travis@marstonlawoffice.com

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INTRODUCTION

In their answering briefs, the defendants – federal, tribal, and state officials – attack the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), from every conceivable direction. The jurisprudence of *Ex parte Young* provides a means for the judiciary to compel public officials to comply with the law. For that reason, public officials try to resist and undermine *Ex parte Young* whenever the opportunity arises.

This litigation provides the defendants with an opportunity to nullify *Ex parte Young*, because the lower court dismissed the complaint for "lack of subject matter jurisdiction" on the grounds of "sovereign immunity." According to the mistaken opinion of the District Court, federal courts have no jurisdiction to enforce federal water laws set forth in statutes and case law, because federal, state and tribal officials are all vested with various forms of "sovereign immunity." App. Vol. 2 at 182-201.

In the present case, the plaintiffs Guy Clark *et al.* filed a complaint for declaratory and injunctive relief alleging that federal, state, and tribal officials are not enforcing key water laws, including:

- Section 8 of the Reclamation Act of 1902, codified in 43 U.S.C. §§ 372, 383 (beneficial use is the limit of the right to use water);

- The decisions of the Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963) and 460 U.S. 605 (1983) (beneficial use and PIA – practically irritable acreage); *United States v. New Mexico*, 438 U.S. 696 (1978) (minimum needs); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971) (no tribal immunity); and
- This Court's decision in *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (federal law requires the maximum conservation of water in the arid regions of the United States; government officials cannot authorize a wasteful use of water by contract).

The Clark complaint is written to come within the parameters of *Ex parte Young*. The complaint does not seek damages. Rather the lawsuit asks for prospective relief only, in the form of declaratory and injunctive relief to stop public officials from continuing to violate water laws. *Inter alia*, the complaint alleges that these public officials are wasting water at Navajo Dam, the Navajo Indian Irrigation Project (NIIP), the San Juan Chama Project, and Lake Nighthorse. All of these are Bureau of Reclamation projects, so they are bound by the beneficial use limitations in section 8 of the Reclamation Act of 1902, codified in 43 U.S.C. §§ 372, 383.

At Navajo Dam and NIIP, the defendants are wasting water every year in huge quantities – hundreds of thousands acre-feet per year – contrary to the beneficial use requirement and the PIA (practicably irrigable acreage) standard in federal law. Complaint ¶¶ 40-45, App. Vol. 1 at 27-28. At Lake Nighthorse, near Durango, Colorado, which is part of the Animas La Plata Project, the defendants are pumping water uphill to a reservoir, where "the water just sits in Lake Nighthorse and evaporates." *Id.* ¶¶ 47-50, App. Vol. 1 at 30. Their actions are contrary to this Court's decision in *Jicarilla Apache Tribe v. United States*, 657 F.2d at 1133-34, where this Court held that government officials cannot enter into agreements that waste water through excessive evaporation. A long-term drought is drying up the Colorado River Basin, so every year it becomes more critical for public officials to comply with the directive for maximum water conservation set forth in *Jicarilla*.

This controversy involves huge amounts of water, while the mega-drought makes every gallon more precious. If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *United States v. New Mexico*, 438 U.S. at 705. The Navajo Nation claims 635,000 acre-feet per year from the San Juan Basin

in New Mexico, plus large amounts in other states. By comparison, the entire allotment for the State of Nevada is only 300,000 acre-feet per year. Boulder Canyon Project Act of 1928, 43 U.S.C. § 617c(a).

When confronted with the water laws which they are legally required to obey, the Public Officials are unwilling to answer the Clark complaint, because that would force them to admit or deny the averments in the complaint. Fed. R. Civ. P. 8(b). The Public Officials are extremely reluctant to admit that they are subject to federal water laws – an obvious legal point – because they know that they have not been complying with those laws. Instead, the Public Officials evade the legal and factual issues entirely, by arguing that federal courts have no jurisdiction over them, due to sovereign immunity. Unfortunately, the lower court agreed with their mistaken view of the law.

At the district court level, the Public Officials succeeded in nullifying *Ex parte Young*, and on appeal they redouble their attacks on the doctrine, using a variety of tactics. All of the defendants studiously ignore the detailed allegations in the complaint. See POINT I below. The Navajo officials boldly ask this Court to overrule its *Ex parte Young* decisions in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007), and *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d

906 (10th Cir. 2008). POINT II. The Secretary of the Interior and the head of the BOR request this Court to invent a new doctrine to immunize them by using the remnants of the *Rooker Feldman* doctrine. POINT III below. The federal and state officials argue that federal courts do not have jurisdiction to redress constitutional violations. POINT IV. The tribal officials misquote *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983), as the district court also did. POINT V. The dismissal of the complaint is an erroneous "drive-by jurisdictional ruling," to use the words of the Supreme Court in *Wilkins v. United States*, 598 U.S. ___, No. 21-1164, 2023 WL 2655449 (Mar. 28, 2023). POINT VI.

I. THE COMPLAINT ALLEGES ONGOING VIOLATIONS OF FEDERAL LAWS, AND ASKS FOR PROSPECTIVE RELIEF ONLY, SO IT PLAINLY COMES WITHIN *EX PARTE YOUNG*.

The answering briefs assert the complaint does not adequately allege ongoing violations of specific federal laws. NM An. Br. at 11; US An. Br. at 16, 28. This assertion is quite wrong – the Public Officials have chosen to ignore what is written on the face of the complaint.

Inter alia, the complaint alleges that the government officials are failing to enforce: section 8 of the Reclamation Act of 1902 (beneficial use), Complaint ¶ 19; *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir.

1981) (beneficial use; prohibiting waste due to excessive evaporation), ¶¶ 20-21; *Arizona v. California*, 373 U.S. 546 (1963) and 460 U.S. 605 (1983) (beneficial use and practicably irrigable acreage), ¶¶ 24-30; *United States v. New Mexico* 438 U.S. 696, 700-01 (1978) (minimum needs doctrine), ¶ 31; the Navajo Indian Irrigation Project Act, ¶¶ 40-45; the Omnibus Public Land Management Act of 2009, ¶ 51; the Endangered Species Act, ¶ 52; *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996), 104 F.3d 1546 (10th Cir. 1997), ¶ 72; and *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013), ¶ 76.

The answer briefs claim that the complaint fails to allege continuing violations by the defendant public officials, but this assertion is simply incorrect. Paragraph 58 alleges that "The defendants have not complied with or enforced these laws." Paragraph 59 alleges that

> 59. The defendants are under strong political pressures not to enforce these laws. Federal statutes and case law set very clear rules, summarized above, to govern the Bureau of Reclamation, Navajo Dam, NIIP, other irrigation projects, and the quantification of water rights for tribes. However, it would be impolitic and stressful for defendants to enforce these laws.

Paragraphs 61 and 62 allege an "ongoing failure to enforce the laws," and "the defendants' long and continuing record of noncompliance with the law."

These allegations bring the complaint within the ambit of *Ex parte Young*. These federal water law claims stand on their own, making a case for declaratory and injunctive relief, independent of what did or did not happen in the state court litigation. *Bolden v. City of Topeka*, 441 F.3d 1129, 1143, 1145 (10th Cir. 2006) (if a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached, then there is subject matter jurisdiction; dismissal reversed because the "federal claim would have been the same in the absence of the state-court judgment.").

In the San Juan Basin, the defendants have been failing to comply with water laws for more than more than 70 years, going at least as far back as the 1950s. Without relief from the federal courts, this non-compliance will continue for more than two hundred years, as the State Engineer has stated that it will take more than two centuries before local water owners can be heard. See POINT IV below.

II. THE COURT SHOULD DENY THE NAVAJO NATION'S REQUEST TO OVERRULE *HILL* AND *TARRANT*.

On page 18 of its Answering Brief, the Navajo officials ask this Court to overrule *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007) and *Tarrant Regional Water District v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008). The Court should decline this request, because those cases are an integral part of federal

jurisprudence in this circuit and elsewhere. By asking the Court to overrule its own controlling precedents, the Navajo officials are conceding that the dismissal of the Clark complaint is contrary to existing law.

Hill holds that *Ex parte Young* jurisprudence is set by *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002), rather than the "multiple and fractured opinions" in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

> In *Ex parte Young,* the Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself. . . . Young further commands us to afford federal jurisdiction to federal claims even when a competent state forum stands ready and able to adjudicate those claims; indeed, the presence or absence of a state forum simply does not enter into the *Young* equation.
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> "[A] court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"
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> ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim.").

Hill, 478 F.3d at 1255-56, 1259, 1262.

Tarrant held that sovereign immunity does not protect the members of the Oklahoma Water Resources Board (OWRB), the state agency responsible for regulating water in Oklahoma. The *Ex parte Young* doctrine allowed the

plaintiffs to proceed on their complaint for declaratory and injunctive relief against those water officials. 545 F.3d at 911-12. In New Mexico, the State Engineer and the Interstate Stream Commission perform roughly the same functions, which is why the Clark complaint names those officials.

To give the Navajo government officials what they would like – absolute immunity from all lawsuits – this Court would also have to overrule many cases besides *Hill* and *Tarrant*. For example, the Court would also be obliged to overrule its action in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011):

> Today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity.

III. TO NULLIFY *EX PARTE YOUNG*, THE FEDERAL GOVERNMENT NOW ASKS THE COURT TO CONCOCT A NEW RULE COMBINING *IN REM* CONCEPTS WITH THE LARGELY DEFUNCT *ROOKER FELDMAN* DOCTRINE.

On appeal, the federal defendants are changing the position which they stated below. In the District Court, the US defendants admitted that the *Rooker Feldman* doctrine does not apply to persons who were not parties to the earlier court proceeding. They conceded that

> The Doctrine applies only where parties to the federal action have been parties to the underlying state decision. In *Lance v. Dennis,* 546 U.S. 459 (2006), the Court found that the *Rooker-Feldman*

> Doctrine generally did not apply in circumstances where the parties to the federal action were not also parties to the state action. The Tenth Circuit Court of Appeals has closely followed the Supreme Court's common party direction in applying *Rooker-Feldman* Doctrine. For example, in *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1234-38 (10th Cir. 2006), the court rejected application of the Doctrine where parties to the federal action were not parties to the state action.

App. Vol. 2 at 154.

This law applies to Messrs. Clark, Hanchett, and Jones (hereafter "the Rio Grande Plaintiffs") who live in the Albuquerque area. Complaint ¶¶ 13, 15, 16, App. Vol. 1 at 18. The Rio Grande plaintiffs were not parties to the San Juan River adjudication, they were not served with process, they had no opportunity to litigate the issues on the merits, and therefore they are not bound as a matter of res judicata or collateral estoppel. Complaint ¶ 66, App. Vol. 1 at 34. The situation is unclear as to the plaintiff Michael Wright, because the 3 governments (United States, Navajo Nation, and State of New Mexico) have provided no proof that they served Mr. Wright with a summons and a copy of their complaint.

Now, on appeal, the United States reverses its position in the district court. For the first time the federal defendants ask the Court to decide that *Rooker Feldman* creates a bar to persons who were <u>not</u> parties to the earlier water litigation. This new federal request is contrary to all the applicable

precedents including *Lance v. Dennis*, 546 U.S. 459 (2006); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229 (10th Cir. 2006); and *Bolden v. City of Topeka*, 441 F.3d 1129 (10th Cir. 2006).

To override established case law, the federal government now asks the Court to conjure up a new theory based on alleged *in rem* or *quasi in rem* jurisdiction, a theory which they never mentioned before.[1] As best one can tell, that new theory is a mashup of *Rooker Feldman* and notions about *in rem* jurisdiction. The federal brief alludes to *Bruce v. City & County of Denver*, 57 F.4th 738 (10th Cir. 2023), which is not on point. That case involved a lien on residential real property at a fixed location. No one has a lien on the water that flows in an interstate river. Furthermore water is converted to personal property only after it is legitimately diverted and put to beneficial use.

The brief also cites *Dorce v. City of New York*, 2 F.4th 82 (2d Cir. 2021), which also involves the priority of claims to fixed real property. *Dorce* actually holds that *Rooker Feldman* does not bar plaintiffs' claims for denial of due process, equal protection, and taking without compensation.

[1] It is not clear whether the state and tribal defendants join in this novel argument. Perhaps the state and tribal officials realize that the federal argument has dangerous ramifications for them.

There are many reasons why *Rooker Feldman* does not bar the Clark complaint. These points are discussed at length in plaintiffs' response, App. Vol. 2 at 169-79, so they are merely summarized here:

- The Clark lawsuit cannot be dismissed because several of the plaintiffs were never parties to the earlier state court litigation. *Lance*; *Exxon Mobil*; *Mo's Express*; *Bolden*.
- The Department of the Interior and the New Mexico defendants have failed to enforce federal water laws for decades, for reasons other than the 2018 COA decision. Their failure predates the earlier litigation by several decades.
- The grounds for prospective relief are found in the federal statutes and cases, which provide independent grounds for relief which stand on their own, regardless of the state court proceedings. Federal laws exist and must be enforced, even though state courts may misapprehend them.
- *Rooker* does not apply because there was no decision by the New Mexico Supreme Court in the Navajo case, so there was no right of appeal to the United States Supreme Court.
- *Rooker* does not apply because the Clark complaint was filed while the state court appeal was pending on certiorari to the New Mexico Supreme Court. *Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006) (*Rooker-Feldman* does not

bar a physician's suit that was filed in federal district court while his petition for certiorari to the state supreme court was pending.); *Exxon Mobil*, 544 U.S. at 291 (same).

- The earlier litigation has no preclusive effect because the Navajo water claims were settled, not litigated. In New Mexico, cases that are settled are not given preclusive effect. *State ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA- 041, ¶¶ 13-15; *Pope v. The Gap*, 1998-NMCA-103.
- The Corwins and other local water owners were not allowed to litigate their claims on the merits in the state proceeding. The state court refused to hear the counterclaim filed by local water owners and acequias, even though the counterclaim was compulsory.
- Federal constitutional claims are not subject to *Rooker*. In Part VI, App. Vol. 1 at 41-54, the *Clark v. Haaland* complaint alleges violations of due process and other constitutional provisions. Such claims are not subject to *Rooker* dismissal. *Jensen v. Wagner*, 603 F.3d 1182, 1193 (10th Cir. 2010) (due process claims not barred by *Rooker-Feldman* doctrine); *Behr v. Campbell*, 8 F.4th 1206 (11th Cir. 2021) (same); *Dorce*, *supra*.
- Federal courts are free to reach their own conclusions on questions of federal law. In *Mo's Express*, this Court analyzed the point in detail:

> **As the Supreme Court emphasized in *Exxon Mobil,* the *Rooker-Feldman* doctrine does not apply "simply because a party attempts to litigate in federal court a matter previously litigated in state court."** 125 S.Ct. at 1527. To the contrary, a party may lose in state court and then raise precisely the same legal issues in federal court, so long as the *relief sought* in the federal action would not reverse or undo the *relief granted* by the state court: "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party ..., then there is jurisdiction....'" *Id.* (quoting *GASH Assocs. v. Village of Rosemont,* 995 F.2d 726, 728 (7th Cir.1993)).
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> **To be sure, Mo's Express has asked the federal courts to accept a legal argument that was specifically rejected in its earlier lawsuit in state court**. If the Plaintiffs eventually prevail on the merits, the Colorado courts will have held that the PUC can exercise jurisdiction, while the federal courts will have held that it cannot. **That result should not be alarming, however, because state and federal courts enjoy concurrent jurisdiction over questions of federal law, and the possibility of inconsistent rulings on issues of federal law is a predictable, if infrequent, consequence of our dual system.** A federal court is free to "den[y] a legal conclusion that a state court has reached," provided it does not exercise *de facto* appellate jurisdiction by entertaining a suit that would disrupt the final judgment entered by the state court. *GASH Assocs.,* 995 F.2d at 728. Because the prospective relief requested by the Plaintiffs would not undo the penalties imposed by the state court judgment, the district court erred in applying the *Rooker-Feldman* doctrine, even against Mo's Express [a party to the case].

Mo's Express, LLC v. Sopkin, 441 F.3d at 1237, 1238.

The *Rooker* argument advanced by the federal officials is hardly a model of clarity, and to the extent it can be understood at all, this last minute argument contradicts these controlling precedents.

If their last minute argument were adopted in any respect, the consequences would be devastating to the adjudication of water rights throughout the West. To understand the destructive ramifications of the federal argument, one must look at the geography of the Colorado River hydrologic basin and the surrounding areas. See The Bureau of Reclamation map, Exhibit 1 to the complaint, App. Vol. 1 at 60. The BOR map shows that states and the federal government take water from the Colorado River system and transport it to urban areas outside the Colorado River basin.

For example, the BOR San Juan Chama project transports water under the Continental divide to supply Albuquerque and other communities along the Rio Grande. The plaintiffs Guy Clark, Wesley Hanchett and Richard Jones live in the Albuquerque area, so they rely in part on Colorado River water, even though they live in a different hydrologic basin. As a result, they were never given notice and an opportunity to be heard in the San Juan proceeding.

According to the BOR map, there are millions of other people who are in the same situation as the Rio Grande plaintiffs:

- The inhabitants of Denver and the Front Range rely in part of water transported across the mountains from the Colorado River Basin.
- Salt Lake City receives water from the Colorado River system, even though it is located outside the river's hydrologic basin.
- Los Angeles and San Diego rely to a significant degree on Colorado River water.

If the Court were to create a doctrine along the lines proposed by the federal officials, then the Department of the Interior and the Bureau of Reclamation would be immunized from lawsuits by citizens in surrounding areas who rely on Colorado River water supplied by the BOR itself. While this would be convenient for officials at the BOR and the Department of the Interior, it would oust the courts from jurisdiction. and make federal water laws effectively unenforceable.

In their Opening Brief, the Clark plaintiffs asked a fundamental question:

> In their answer brief, the public officials ought to explain how water rights could ever be adjudicated in the West, if federal, state, and tribal governments were granted the types of sovereign immunity created by the district court.

Br. 31.

In their answer briefs, the Public Officials cannot answer this basic question.

IV. THE COMPLAINT ALLEGES CIVIL RIGHTS VIOLATIONS WHICH ARE NOT BARRED BY SOVEREIGN IMMUNITY.

Part VI of the Clark complaint alleges civil rights violations, including violations of the due process clause, the First Amendment, and the equal protection clause. Complaint ¶¶ 92-139 and Exhibits 2 through 10, App. Vol. 1 at 41-54, 61-171. Such claims are cognizable in federal court.

For example, the complaint states that plaintiffs and local water owners are being denied their due process right to be heard at a meaningful time and in a meaningful manner.

> 92. Plaintiffs are being subjected to ongoing deprivations of their fundamental rights of due process under the federal Constitution, "Due process requires prompt notice with 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Sandia v. Rivera*, 2002-NMCA-057, ¶¶ 12 and 17, 132 N.M. 201, 46 P.3d 310 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).
> 93. The San Juan adjudication has already been pending for more than 46 years, without giving local water owners the opportunity to prove and protect their water rights. In October 2017 the OSE informed Judge Wechsler that it would take 200 [two hundred] more years to complete the adjudication. EXHIBIT 2. This is a denial of the right to be heard at a meaningful time in a meaningful manner. The OSE admits that it does not have the funding or staff to carry out its duties under the law.

According to the Office of the State Engineer, local water owners will have to wait until the year 2217 for their opportunity to be heard, two centuries from now. App. Vol. 1 at 63. A delay of two centuries is a violation of due process on its face.

The refusal to hear water owners within a reasonable time is also suspect under the equal protection clause. The three governments agreed to create two separate classifications for the San Juan litigation. The first class is for the Navajo claims, which were quickly decided in a so called "expedited inter se proceeding." The second class includes all other claims to the same river: these non-native rights will be deferred for two hundred years.

In their answer briefs, the state and federal officials contend that they enjoy sovereign immunity even as to civil rights claims. NM An. Br. at 8; US An. Br. at 36. Without quite saying so, the defendants want the court to abrogate its decisions in *Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487 (10th Cir. 1998); *Meiners v. Univ. of Kan.*, 359 F.3d 1222 (10th Cir. 2004); *Opala v. Watt*, 454 F.3d 1154 (10th Cir. 2006); and *Columbian Financial Corp. v. Stork*, 702 Fed. Appx. 717 (10th Cir. 2017). These decisions are discussed in th Opening Brief at 17-19. See also *Wilkins*, below.

There is federal subject matter jurisdiction over civil rights actions under 28 U.S.C. §1331 and 1343; 5 U.S.C. § 702; 42 U.S.C. §1983 and the United States Constitution. The federal courts have authority to enforce the laws in question pursuant to 28 U.S.C. § 2201, 2202, 1343, Fed. R. Civ. P. 57 and 65, and the general legal and equitable powers of the judiciary.

V. THE LOWER COURT AND THE NAVAJO NATION HAVE BOTH MISQUOTED *SAN CARLOS APACHE*, WHICH HOLDS THAT TRIBES DO NOT ENJOY SOVEREIGN IMMUNITY AS REGARDS WATER RIGHTS.

In dismissing the complaint, the lower court misquoted *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983). In its opinion the District Court relied on *San Carlos* for the proposition that "The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive Indian sovereign immunity." App. Vol. 2 at 198. In actuality, the lower court was quoted the argument (463 U.S. at 566) which the Supreme Court rejected in *San Carlos Apache.* After analyzing the tribal argument, the Supreme Court ruled that state and federal courts have concurrent jurisdiction to adjudicate tribal water under the McCarran Amendment. 463 U.S. at 567-70.

The district court misapprehended *San Carlos Apache*, and this error of law is sufficient by itself to require reversal of the dismissal.

Like the lower court, the Navajo Nation also misquotes *San Carlos Apache* about tribal immunity. The Navajo answering brief flips *San Carlos Apache* upside down. On page 9, the answering brief describes and quotes the opinion as follows:

> In *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545 (1983), the Supreme Court held the McCarran Amendment only abrogated *federal* sovereign immunity, and explicitly *disclaimed* it abrogated tribal sovereign immunity. *San Carlos*, 463 U.S. at 567, n.17 (explaining the "McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications") (emphasis in original).

NN An. Br. at 9.

This is a misquotation of footnote 17 in *San Carlos*. In pertinent part footnote 17 actually reads as follows:

> This argument, of course, suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, **it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings.**

463 U.S. at 567, n.17. [emphasis added]

VI. THE DISMISSAL OF THE COMPLAINT FOR LACK OF JURISDICTION IS A "DRIVE-BY JURISDICTIONAL RULING" CONTRARY TO *WILKINS v. UNITED STATES*.

The District Court dismissed the Clark complaint in its entirety "for lack of subject matter jurisdiction" based on sovereign immunity. App. Vol. 2 at 182-201. This is a plain legal error.

The Supreme Court has recently emphasized once again that the federal courts have subject matter jurisdiction unless there is a clear statement that Congress acted to withdraw subject matter jurisdiction under Article III. *Wilkins v. United States*, 598 U.S. ____, No. 21-1164, 2023 WL 2655449 (Mar. 28, 2023). Under the "clear statement rule" promulgated in *Wilkins*, federal courts must find a clear statement that Congress has acted to limit the subject matter jurisdiction of the federal courts over the particular case or controversy.

In *Wilkins* the Supreme Court reiterated that courts must not conflate threshold requirements with "jurisdiction," although that happened many times in the past. Justice Sotomayor wrote the opinion, joined by Justices Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson.

> Jurisdiction, this Court has observed, is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (internal quotation marks omitted). In particular, this Court has emphasized the distinction between limits on "the classes of cases a court may entertain (subject-matter jurisdiction)" and "nonjurisdictional

> claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." The latter category generally includes a range of "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit."
> To police this jurisdictional line, this Court will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler* v. *Commissioner,* 596 U. S. ——, ——, 142 S.Ct. 1493, 1497, 212 L.Ed.2d 524 (2022) (quoting *Arbaugh*, 546 U.S. at 515, 126 S.Ct. 1235).
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> Under this clear statement rule, [mundane statutes of limitation are not "jurisdictional] . . . "[c]ourts, including this Court, have more than occasionally misused the term 'jurisdictional' to refer to nonjurisdictional prescriptions." *Fort Bend*, 587 U. S., at —— – ——, n. 4, 139 S.Ct., at 1848, n. 4 (some internal quotation marks and alterations omitted). The mere fact that this Court previously described something "without elaboration" as jurisdictional therefore does not end the inquiry. *Henderson*, 562 U.S. at 437, 131 S.Ct. 1197. . . . If a decision simply states that "the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established," it is understood as a "drive-by jurisdictional rulin[g]" that receives "no precedential effect." *Arbaugh*, 546 U.S. at 511, 126 S.Ct. 1235.

Wilkins, slip op. at 3-5.

The court held that "General statements in the opinion about waivers of immunity cannot change this basic fact." *Id.*, at 6.

In dissent, Justice Thomas joined with Justices Roberts and Alito. They expressed a much broader opinion about sovereign immunity:

> The doctrine of sovereign immunity bars suits against the United States.
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> * * *

> As a sovereign, the United States "is immune from suit save as it consents to be sued, ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."
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> *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (stating that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and "not enlarge[d] ... beyond what the language requires."

Id., at 8. The majority rejected this broad view by a vote of 6 to 3.

Wilkins reorients the law on jurisdiction and sovereign immunity, by doing away with the expansive view of sovereign immunity expressed in the dissent. *Wilkins* expressly holds the imposition of "sovereign immunity" must be based on a clear statement in the statute that Congress intended to deprive the courts of subject matter jurisdiction.

No such statement exists in the present controversy. To the contrary, the APA generally authorizes the courts to decide controversies about agency failures to comply with federal laws generally. Administrative Procedure Act, 5 U.S.C. § 702; *Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 28 (D.D.C. 2014), *aff'd*, 791 F.3d 24 (D.C. Cir 2015). In the area of water rights, the McCarran Amendment explicitly does away with government immunities concerning water rights. 43 U.S.C. § 666; *see also United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983). In

addition to these statutes, the *Ex parte Young* doctrine provides a broad authorization for the courts to enforce the laws with declaratory and injunctive relief.

So the answer briefs rest on an argument that is no longer valid. The defendants argue that they cannot find a clear waiver of sovereign immunity in the relevant statutes, but that is the wrong inquiry. The proper question is whether Congress clearly limited the subject matter jurisdiction of the federal judiciary.

Wilkins and *Arbaugh* correct the semantic confusion about the term "jurisdiction" which appears in many cases, including the Supreme Court's own opinions. This semantic confusion has lead to conceptual confusion about "subject matter jurisdiction" resulting in "drive-by jurisdictional rulings." *Wilkins* identifies this semantic and conceptual confusion, and rectifies it.

Wilkins clearly identifies the errors in the dismissal of the Clark complaint due to "lack of subject matter jurisdiction" and "sovereign immunity."

CONCLUSION

The doctrine of *Ex parte Young* is necessary to ensure that the laws are faithfully executed. The Constitution requires that the Executive "shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3. This would be an empty command without the judicial oversight provided by *Ex parte Young*.

For the reasons stated, the dismissal of the complaint should be reversed, and the case remanded to the District Court for further proceedings on the merits, with instructions that the defendants should answer the complaint in accordance with Fed. R. Civ. P. 8(b).

Respectfully submitted,

/s/ C. Brad Cates
C. Brad Cates, Esq.
P.O. Box 592
Fairacres, NM 88033-0592
(505) 342-1846
brad@bradcates.com

Marston Law Office LLC
Travis J. Marston, Esq.
1703 Sudderth Drive #156
Ruidoso, NM 88346
(505) 670-9371
travis @marstonlawoffice.com

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the Tenth Circuit Court of Appeals using the CM/ECF system, which will send notification to all counsel of record.

/s/ C. Brad Cates
C. Brad Cates,Esq.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) it because contains 5607 words. The brief has been prepared with Wordperfect using 14-point Calisto, which is a proportionally spaced typeface.