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**State of New Mexico
Court of Appeals**

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February 7, 2013

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In the Matter of the Class 2 Modification for Shielded Containers for Remote-Handled Transuranic Waste at the Waste Isolation Pilot Plant U.S. EPA No. NM4890139088

Re: Southwest Research and Information Center and Margaret Elizabeth Richards vs. State of New Mexico Environment Department, Ct. App. No. 32,499.

**IN PERSON MEDIATION CONFERENCE NOTICE
AT SANTA FE COURT OF APPEALS**

Dear Mr. De Saillan:

Pursuant to Court of Appeals Order No. 1-42, Settlement Conference Procedures, this case has been scheduled for an **IN PERSON MEDIATION CONFERENCE** on **Wednesday, March 13, 2013, at 9:00 a.m.** The conference will be conducted in the Court of Appeals Courtroom of the Supreme Court Building. Please allow the entire morning for the conference. If you have a conflict with the date or time please speak with opposing counsel to determine alternate dates and times and call Charlene at (505) 827-3694.

Lead counsel and the party, or party's representative, with authority to settle the case located within 150 miles of Santa Fe are anticipated to attend in person. Those located farther than 150 miles may attend by telephone. The conference will be an informal meeting to identify the parties' needs and interests at this stage of the litigation, assess the risks and benefits of proceeding with the appeal, and explore options for global settlement. Enclosed please find information relating to the Appellate Mediation Program.

Mr. Lovejoy, and Mr. Flynn have also been notified of this conference. Please contact this office by telephone immediately if we need to notify additional lawyers. **If parties confer and are in agreement that there is no opportunity for resolution of any issues at appellate mediation, please let me know at your earliest convenience, but no later than one week prior to the scheduled mediation.** I can be reached by e-mail at coarer@nmcourts.gov, or by telephone at (505) 767-6102.

Sincerely,

Robert Rambo
Appellate Mediator



The New Mexico Court of Appeals
MEDIATION CONFERENCE PROCEDURES AND
SUGGESTIONS FOR EFFECTIVE MEDIATION REPRESENTATION

The Appellate Mediation Office conducts mediation conferences pursuant to Rule 12-313 NMRA, and Court of Appeals Order No. 1-42.* Mediation Procedures are governed by Order No. 1-42* and the procedures outlined herein, not the Mediation Procedures Act. (See NMSA 1978, § 44-7B-3(B)4 (2007)). The mediation conferences are designed to reduce the time and expense of civil appeals by addressing any matter that may aid in their disposition. The mediation conferences offer parties and their counsel confidential, no cost, risk-free opportunities to explore possibilities for voluntary settlements.

Case Selection

Any matter pending before the Court is eligible for mediation. Although the Appellate Mediation Office typically schedules civil cases for mediation upon assignment to the general calendar, mediation services are available at any time during the pendency of the appeal. Counsel may request mediation by contacting the Mediation Office; such requests are kept confidential unless permission is given to disclose the request. Additionally, the Court may refer cases for mediation at any time. The Mediation Office does its best to schedule conferences only in cases that appear to have some potential for settlement; should a case be scheduled for mediation that seems unsuited or inappropriate for mediation counsel are requested to contact the Mediation Office.

Appellate Mediation Conference Format

After a brief opening statement by the mediator, each side will be asked to make an opening statement that should include its perspectives on the conflict and possibilities they see for a mediated outcome. Often, by going beyond the issues on appeal, participants are able to identify important needs, values, and interests that serve as a basis for global resolution of the dispute. Legal issues may be directly discussed, however, the purpose is not to decide or reach a conclusion about the merits of the appeal, but rather to facilitate an understanding of the issues and an evaluation of the risks and opportunities for each side. Candid examination of the case can help the parties reach consensus on a reasonable settlement. The mediator may inquire whether any procedural questions or problems can be resolved by agreement.

** Available online at www.nmcourts.com, by using the link for "Court Sites," then linking to "NM Court of Appeals." Once on the Court of Appeals web site put your cursor on the button "About the Court," a drop down menu will appear, move your cursor down to "Mediation Office," and another menu will appear to the right allowing you to select and view the "Order Establishing Program."*

*** Appeals in which one or more parties are not represented by counsel are not included in the mandatory program. However, a mediation conference may be scheduled in such cases where all parties, both those unrepresented as well as those represented, voluntarily consent to participate.*

Extensions of Time

The times on appeal are not suspended upon notice of a mediation conference. However, the Court recognizes that a case's settlement potential may decline as substantial funds are expended on an appeal. In order to moderate such expenditures in appropriate cases while settlement is being considered, counsel are encouraged to orally request the mediator to grant an extension of time on deadlines imposed by the Court. Such requests may be made before, during, and after a scheduled conference. The mediator has complete authority to grant such extensions of time. No formal motions are required.

What Participants Can Expect

The mediator typically probes for each party's underlying needs and interests in an effort to help the parties create and explore options for resolving the dispute. The mediator may lead a considered and sometimes detailed exploration of the cases' merits, depending on the extent to which the participants place importance on their ability to predict how the Court of Appeals would resolve the appeal. The Mediation Office welcomes the opportunity to go beyond just the issues in the appeal to explore the possibilities of global settlement of any and all issues related to the parties.

What the Court Expects from Counsel

Mediation is most productive when counsel are conversant with the pertinent facts and law in a case and are fully aware of their clients' interests, goals, and needs. Sessions are not productive when counsel present and maintain extreme positions and engage in hard, bottom-line bargaining. Counsel should obtain advance authority from their clients to make those commitments as may reasonably be anticipated. By developing and discussing a realistic view of the consequences of not reaching an agreement, counsel can obtain the authority to settle the case if the mediation results in a settlement opportunity that is favorable to the client. Experience has shown that in most cases there is substantial movement from prior settlement positions. Counsel are strongly urged to consider having their clients present or available by phone at the time of the conferences.

Mandatory Participation--Voluntary Settlement

Although mediation conferences are relatively informal, they are official proceedings of the Court and the Court may require all parties to participate. The mediation process is nonbinding, so no settlement is complete until all parties fully agree to settlement terms and conditions and the necessary documents are finalized.

Confidentiality

The Court, by rule and verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the mediator, is disclosed to anyone on the Court of Appeals or any other court that might address the case's merits. The Court will not reveal any request by counsel for mediation without the requesting party's permission. Ex parte communications are also confidential except to the extent disclosure is authorized. This confidentiality rule applies in all cases including those referred for mediation by a panel.

How to Prepare for a Mediation Conference

- Prepare thoroughly (as if you were going to a hearing or a trial) with the ultimate goal of resolving the dispute in mind. Make a candid assessment of the respective strengths and weaknesses of both sides' legal positions. Be prepared to suggest an approach for the mediator to take in an attempt to settle the case (e.g. "problem" to be resolved, sequence of issues). Understand your client's priority of interests. Imagine creative solutions.
- Understand the rules of the Court and the role of the mediator.
- Advise the mediator if you believe it might be helpful to invite the participation of an entity who is not a party to the appeal.
- Consider contacting opposing counsel in advance of the conference as a means to establish a positive working relationship.
- Consider the principal-agent issues (e.g. incentives, roles, information) that may impact on each side's behavior.

The "Authority" Issue in Mediation

- If "having the right person involved in the negotiation" has been a problem in the past, raise the issue with the mediator before the mediation session. Obtain a clear understanding of who will be present at the mediation and what authority they will have.
- If your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the mediator in advance.
- Understand whether the person has authority to decide or to "report and recommend" a proposed settlement to a superior.
- Have someone with authority present or available.

How to Work with the Mediator

- Follow the mediator's cues. Anticipate questions such as: (1) What happened? (2) How do you feel about the situation and what underlying needs would you like have satisfied? (3) What do you want from the mediation in terms of priorities, interests, results?
- If the mediator asks you to restate a point, be patient. The mediator may be asking you questions for clarification or to elicit information that the other party needs to hear.

The Role of Case Evaluation in the Mediation

- Mediation is not designed for "deciding past rights and past wrongs"--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- The mediator will not predict how the court will rule in a particular case, but rather attempt to clarify the tensions surrounding the issues on appeal.
- The mediator may provide objective court information--how the court operates. The mediator may discuss generally how a case gets assigned to a non-summary calendar, the probabilities of the case being decided by a formal opinion, time lines, and generic reversal rates.

Elements of Effective Communication

- A skillful presentation does not need to be conciliatory. A reason based approach to settlement may serve to generate a rigorous analysis of the risks and benefits of both reaching a settlement and continued litigation. There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the “common ground” that the parties may have in seeking to resolve the situation.
- Encourage your client to speak if you believe it appropriate, and let your client respond directly to questions from the mediator or the other side, if you are prepared to do so.

Private Conferences with the Mediator

- Be clear about what information you expect the mediator to treat as confidential.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the case; (4) discuss the other party’s needs or interests; (5) discuss what information the mediator can use to do “reality-testing” of other party’s expectations and position.

Further information is available from the Appellate Mediation Office, New Mexico Court of Appeals, Box 2008, Santa Fe, New Mexico 87504. Telephone 505-827-3694. Fax 505-827-6642.