IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
THE STATE ENGINEER,

Plaintiff-Appellee,

v.

Ct. App. No. 33535
See also
Nos. 33437, 33439, 33534
San Juan County
D-1116-CV-1975-00184, AB-07-1

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; HAMMOND CONSERVANCY DISTRICT; BLOOMFIELD IRRIGATION DISTRICT; VARIOUS DITCHES AND VARIOUS MEMBERS THEREOF,

Defendant-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

ACEQUIAS' REPLY TO SAN JUAN WATER COMMISSION
[Corrected Version]

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Oral Argument Requested

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A. The San Juan Water Commission Joined with the OSE, the Navajo Nation, and U.S. in Violating the Due Process Rights of Water Owners under *Mullane*, *Mennonite*, *Macaron*, and *Patrick v. Rice*.

[BIC POINT 11; RAISED IN LOWER COURT RP 12197]

In the answer briefs, the 3 governments spend many pages describing the steps they took to provide notice and service of process to the people they sued. However, the answer briefs never address the additional steps which the constitution required them to take, in order to notify the defendants in the inter se. The failure to take these other steps renders the notice insufficient as a matter of constitutional law.

The plaintiffs made a conscious decision to avoid searching reasonably available records, contrary to *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and a long line of subsequent cases, including *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Macaron v. Associates Capital Services Corp.*, 1987-NMCA-005, 105 N.M. 380, 733 P.2d 11; and *Patrick v. Rice*, 1991-NMCA-063, 112 N.M. 285, 814 P.2d 463. This litigation tactic was very successful, because it drastically reduced the number of persons who could object to the Navajo water claim.

- The plaintiffs never searched the real estate records of the San Juan County Clerk to identify property owners who would be affected by the

litigation. These records show the current owners of every parcel of land along the San Juan River. **[RP 6928]** (email from Victor Marshall to Arianne Singer: "Have you looked in the county real estate title records (at the county clerk), in addition to the county assessor, to see who currently owns tracts below the ditches?"

- The plaintiffs **refused to use the updated acequia membership lists which the San Juan Agricultural Water Users Association offered to provide at no cost**. **[RP6931, 6933, 6929, 6924, 6918-23, 6925-33]**

- The plaintiffs could have used the computerized property records that all title companies are required to maintain, by statute. § 59A-12-13.

- The plaintiffs did not follow up on the 2,425 returned envelopes. **[RP 2233-34]**

- The plaintiffs used the the 1938 hydrographic survey, which was 73 years out of date. And they used the 1948 Echo Decree, which was more than 63 years out of date. **[RP 2221]** The governments cannot seriously contend that due process under *Mullane* is satisfied by using data that is 73 years old.

- The three governments refused to conduct a current hydrographic survey of the San Juan River, which is required by statute. §§ 72-4-13 through -17.

● The three governments claim to have done a "hydrographic survey" – apparently without any field work – limited to Navajo tribal lands. This cannot meet constitutional standards, because a hydrographic survey limited to Navajo lands does not identify the people whom the governments were suing. Most of the defendants in the inter se are non-Navajos who do not live on the reservation.

● The three governments say that they consulted records on file at the OSE. OSE records are one of the data sources that must be used, but OSE records are often incomplete, incorrect or out of date, as the OSE will admit. For one thing, the owners of pre-1906 water rights are not required to obtain a permit from the OSE. § 72-1-3. This is one reason why the statutes require the OSE to conduct a current hydrographic survey.

B. The San Juan Water Commission Joined With Others in Preventing 9,000 Water Owners From Being Represented by Counsel.

After the three governments mailed notices about the Navajo inter se using the defective mailing lists, **[RP 7542-45]**, the court allowed a time period for filing "notices of intent to participate", **[RP 2236]**. The Marshall law firm had been working with more than 20 acequias to provide legal representation to them and their members, so the law firm filed a notice of intent to participate, listing 10,025 water owners who were shown on the acequias'

membership lists. **[RP5204-5573]** The filing was necessary to prevent these water owners from being defaulted for not participating in the case.

During this period most of the acequias in the San Juan Valley signed a written contract with the Marshall law firm to represent them and their members in the Navajo inter se proceeding, with funding to be provided by assessments of $3 per irrigated acre, **[RP 6918]**. The contracts for legal representation were approved and signed by the boards of the 24 participating acequias, **[RP 6917]**.

Because there would inevitably be some errors in a list of more than 10,000 water owners, the Marshall firm filed an explanation of its entries of appearances and offered to exclude anyone who wished to hire other counsel, or to participate pro se, or to not participate at all, **[RP 5050]**.

From the list of more than 10,000 names, only 23 water users notified the firm that they wished to be removed. The firm eliminated them from the firm's entry of appearance, **[RP6893-94; 6939-40; 7427-28; 7574-75; 8293-94]**.

At the urging of the San Juan Water Commission and the others, the lower court ruled that this was insufficient. The court held that in order to obtain legal representation in the Navajo inter se case, each individual water

owner had to sign and execute a written contract with the law firm, **[RP 7822-44].**

As the water commission and the three governments knew, requirement was impossible to fulfill, because there were thousands of water owners scattered up and down the San Juan and Animas River valleys, on both banks of the rivers over a total distance of more than 120 miles. And many water owners lived elsewhere, some of them outside of San Juan County and some outside of New Mexico.

Many of these water owners did not even know about the Navajo case, because they never received notice, since the court allowed the three governments to use defective mailing lists.

So the water commission and the three governments succeeded in their plan to stop more than 9000 local water owners from having legal counsel in the case. To comply with the lower court's order, the entry of appearance was reduced from 10,005 persons to less than 1,000.

C. The Lower Court Violated *Tri State* and *Reynolds v. Allman*.

[BIC POINT 12; RAISED IN LOWER COURT RP12178-12260; RP17817-17902]

According to the Supreme Court in *Tri-State*, "inter se adjudications provide the opportunity for parties to dispute the determination of their water

rights among each other". *Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 7 n.1, 289 P.3d 1232.

The lower court denied non-Indian water owners any opportunity to prove the amount and priority of their rights against the Navajo Tribe and the U.S. The court refused to hear the water owners' counterclaim, **[RP 14158-62]**, even though the counterclaim was mandatory under Rule 1-013 and allowed by Rule 1-071.2.

This ruling is contrary to *Tri-State* and the inter se rule itself, because it turned the inter se into a one way street. The local water owners were denied the right to prove their water rights at trial, relative to the U.S. and Navajo Nation. *When are water owners going to be given that opportunity? Never ?*

This denial of the right to be heard is so serious that it constitutes a denial of due process. **[BIC Point 11]** *State ex rel. Reynolds v. Allman*, 1967-NMSC-078, ¶¶ 3, 15, 16, 78 N.M. 1, 427 P.2d 886, holds that due process was denied when the trial court denied the defendant-appellants an opportunity to prove the relative priority of their water rights in an inter se proceeding.

Remarkably, the answer briefs never address *Reynolds v. Allman*.

D. The Governments Persuaded the Lower Court to Strip the Defendants of Their Rights under the Rules of Procedure and the Rules of Evidence.

In this case, the three governments and the water commission convinced the judge that the few defendants who remained should not be given the procedural and substantive protections afforded by the Rules of Civil Procedure and the Rules of Evidence. The lower court refused to treat water owners as defendants. To the court, they were merely objectors. The remaining water owners were not entitled to the dignity of being called defendants.

The three governments used two mantras which proved very effective. By chanting "settlement" and "expedited inter se" over and over again, the three governments achieved a systematic denial of due process and the judicial rules, which are supposed to protect parties in a civil case. *Inter alia*, they persuaded the lower court to do the following:

- The notice procedures violated the constitutional protections in *Mullane*, *Mennonite, et al.*

- The lower court set the procedures for the case before the defendants were even served, so they were deprived of the right to be heard on the procedures that should be used. Due process includes the right to be heard on

procedure as well as the merits, because procedures often determine the outcome of a case, as they did in the present case.

- The lower court denied water owners the right to file a counterclaim, contrary to Rule 1-013, *Tri-State*, and *Reymolds v. Allman*.

- The lower court excused the governments from the procedural requirements of Rule 1-056 for summary judgment. The opinion dismisses them as merely "technical requirements". **[RP 33761]**

- The lower court excused the governments from the Rule 1-056 evidentiary requirement: evidence to support summary judgment must "set forth such facts which would be admissible in evidence." Rule 1-056(D)(2).

- The lower court did not require the plaintiffs to file a complaint that conforms to the pleading requirements in Rule 1-008.

- The court ruled that local irrigators cannot testify about local irrigation practices and feasibility, **[RP 33785; 33789]**. This is contrary to Rule 11-701, which allows expert testimony by lay witnesses. It is contrary to Rule 11-702, which allows witnesses to qualify as an expert by experience, i.e. decades of operating an acequia and farming irrigated lands along the San Juan. It is also contrary the case law that allows property owners to offer opinions about their

property. This ruling means that most local water owners can be prevented from testifying in stream adjudications.

- The court refused to accept expert testimony from the former head of the OSE office in Aztec.

- The court closed discovery before the governments submitted their expert affidavits, so the defendants had no opportunity to controvert them, **[RP 14437]**.

- The court sanctioned an attorney for objecting to a judicial viewing of the Animas-La Plata Project, which was an issue in the litigation, until all parties were joined and allowed to participate. The attorney cited good authority in his written objection, such as UJI 13-119; *Travis v. Preston*, 643 N.W.2d 235, 242 (Mich. Ct. App. 2002) ("An unauthorized view by the finder of fact is misconduct.") (quoting *Vanden Bosch v. Consumers Power Co.*, 224 N.W.2d 900 (Mich. Ct. App. 1974)); *State v. Eckard*, 2002 WL 1357788 (Ohio Ct. App. 2002); Annotation, *Prejudicial Effect of Unauthorized View by Jury in Civil Case of Scene of Accident or Premises in Question*, 11 A.L.R.3d 918 (1965).

The objection also raised the following grounds:

> Furthermore, the proposed tour is hosted by the San Juan Water Commission, so the Commission would have the opportunity to select the viewing sites and to present their own viewpoint or "spin" about the project. Other parties and participants would not

> have an equal opportunity to present other viewpoints, i.e., that the Animas La Plata Project has been an economic and environmental disaster. . . .

[RP 28744-45]

The San Juan Water Commission was trying to *ex parte* the assigned judge before the defendants were served in the case. This was highly improper, but the Commission persuaded the judge to penalize the attorney for raising a valid objection.

SUMMARY

The supporters of the Richardson-Navajo agreement managed to prevent thousands of water owners from having the basic rights that belong to any person in any court in the United States of America.

Respectfully submitted,

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By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, a true and correct copy of the foregoing was served on counsel for the *amici*, appellees, and the appellants by email.

/s/ Victor R. Marshall
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