

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. A-1-CA-33535
See also
Nos. A-1-CA-33437, -33439,
and -33534
San Juan County
D-1116-CV-1975-00184 and
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.

EMERGENCY MOTION TO ENFORCE RULE 21-211

The reasons for this motion are as follows:

In 2013, without a trial, Judge James Wechsler granted summary judgment to the Navajo Nation on its claim for water in the San Juan River basin in New Mexico. Judge Wechsler awarded the Navajo Nation 635,729 acre-feet of water per year, in perpetuity. That is roughly one quarter of all the stream water in the entire State of New Mexico. It is more than six times the amount of water used by the Albuquerque metropolitan area, and twice as much as the City of Phoenix.

To make that award to the Navajo Nation without a trial, Judge Wechsler rejected the beneficial use requirement and the PIA (practicably irrigable acreage) standard for Indian water rights. Judge Wechsler had no legal authority to reject the beneficial use and PIA requirements, because these requirements are imposed by both federal and state law, including: the Reclamation Act of 1902; Article XVI of the New Mexico Constitution; NMSA 1978, § 72-1-2; *Winters v. United States*, 207 U.S. 564 (1908); the Colorado Compacts, § 72-15-5 and § 72-15-26; *Arizona v. California*, 373 U.S. 545 (1963); *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194 (“*Mescalero*”); *State ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264; *Mimbres Valley Irrigation Co. v. Salopek*, 1977-NMSC-039, 90 N.M. 410; *State ex*

rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375; and the Colorado River Storage Act, Pub. L. No. 84-485, 70 Stat. 105 (Apr. 11, 1956).

Instead, Judge Wechsler decided to adopt the amorphous “homeland” concept espoused by the Arizona Supreme Court in *In re General Adjudication of All Rights To Use Water in Gila River*, 35 P.3d 68 (Ariz. 2001) (“*Gila V*”). *Gila V* allows the trial judge to set a number for a tribe’s water rights, unconstrained by beneficial use. The award can be based on a “myriad of factors” chosen by the judge, such as tribal history, rituals, culture, topography, human resources, technology, potential employment base, and projected population. *Gila V* is an aberration: it contradicts the water law adopted by the courts of the United States and New Mexico. *Gila V* has been rejected by the other courts that have considered it.

Judge Wechsler also refused to comply with *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562. Without approval from the New Mexico Legislature, he awarded the Navajo Nation more than half of New Mexico’s statutory share of water under the Colorado River Compacts, NMSA 1978, §§ 72-15-5 and -26.

In January 2018, disquieting rumors about Judge Wechsler began to circulate in the New Mexico Legislature, prompting some legislators to ask whether or not the rumors could be substantiated.

Since then, a preliminary but incomplete investigation has revealed:

- James J. Wechsler was employed by the Navajo Nation for approximately six years as an attorney at Diné Bee'íiná Náhiilnah Bee Agha'diit'aaahii (or “Attorneys Who Contribute to the Economic Revitalization of the People”), commonly known as DNA Legal Services, an agency and instrumentality of the Navajo Nation.
- Upon information and belief, James Wechsler lived with his family on the Navajo Reservation at Crownpoint, New Mexico from approximately 1970 to 1976. He worked primarily at the DNA law offices in Crownpoint, which is the headquarters of the Navajo Nation Eastern agency. Crownpoint is located within the San Juan River basin, in the area for which Judge Wechsler awarded water rights to the Navajo Nation.
- As an advocate for the Navajo Nation and tribal members, James Wechsler participated in several important cases advancing the rights of Navajo people, including: *Haceesa v. Heim*, 1972-NMCA-088, 84 N.M. 112; *Natonabah v. Board of Ed. of Gallup-McKinley Cnty. Sch. Dist.*, 355 F. Supp. 716

(D.N.M. 1973); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973); *Morton v. Mancari*, 359 F. Supp. 585 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974).

- Judge Wechsler did not disclose to all the parties on the record that he had worked as an attorney for the Navajo Nation.
- The Navajo Nation also knew that Judge Wechsler had previously worked for it as a lawyer, but it did not disclose these facts either.

VIOLATIONS OF RULE 21-211 NMRA AND OTHER RULES

(A) Judge Wechsler did not disclose to the parties in this case that he had previously represented the Navajo Nation, one of the adversaries in this litigation. Rule 21-211 requires a judge to volunteer on the record information that the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

(B) Judge Wechsler did not comply with the requirements of Rule 21-211(C) for seeking a remittal of disqualification from the parties.

(C) Judge Wechsler did not comply with Rule 21-211(A): “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned”

(D) Because of his service to the Navajo Nation and the years he lived on the reservation, Judge Wechsler has personal extrajudicial knowledge about the Navajo Nation and the “myriad of factors” under *Gila V* which he could select to award water to the Navajo people – the people he represented as an attorney. Rule 21-211(A)(1) requires judges to recuse themselves when they have personal knowledge relating to the matters in controversy.

(E) Having previously worked as a lawyer for the Navajo Nation, Judge Wechsler has a continuing duty under Rule 16-109 not to use information to the disadvantage of his former clients. Because the information he learned as a lawyer for the Navajo Nation can be used for the benefit of his former clients, but not against them, Judge Wechsler has a one-way bias imposed by Rule 16-109 itself.

(F) Because Judge Wechsler worked as an attorney and advocate for the Navajo Nation and the Navajo people, he has a continuing duty of loyalty to his former clients:

In the practice of law, there is no higher duty than one’s loyalty to a client. This duty applies to current and former clients alike.

Roy D. Mercer, LLC v. Reynolds, 2013-NMSC-002, ¶ 1, 292 P.3d 466.

Loyalty to present and past clients is a positive bias which springs directly from a lawyer’s ethical obligations under the Rules of Professional

Conduct. “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system”. Preamble to the Rules of Professional Conduct. The undivided loyalty and zeal required of a lawyer advocate cannot be reconciled with the strict impartiality that is required of all judges in all cases.

(G) Judge Wechsler did not comply with Rule 21-211(A)(5) regarding prior involvement or prior government service relating to the matters in controversy.

(H) Judge Wechsler has not complied with Rules 21-100 and 21-102, which require judges to act with independence, integrity, and impartiality, to avoid impropriety or even the appearance of impropriety, and to promote public confidence in the judiciary.

In short, the Code of Judicial Conduct does not allow a judge to sit on a case involving a party that the judge previously represented as a lawyer, while not disclosing the facts to all the parties in the case.

The concurrence of opposing counsel has not been sought, due to the nature of the motion and the virtual certainty that the Navajo Nation will oppose it.

WHEREFORE, the acequia defendants respectfully move this Court to enforce the Code of Judicial Conduct and the Code of Professional Conduct by recusing Judge Wechsler from this case, vacating his rulings, and ordering that this case be heard *de novo* by an impartial judge.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

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I hereby certify that a true and correct copy of the foregoing was efiled and served via Odyssey File and Serve to counsel of record on February 26, 2018.

/s/ Victor R. Marshall
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