IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO *ex rel.*
STATE ENGINEER
Plaintiff-Petitioner,
v.

UNITED STATES OF AMERICA,
Defendant-Respondent,
v.

NAVAJO NATION,
Defendant/Intervenor-Respondent,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION, *et al.*
Defendants-Petitioners.

No. S-1-SC-37068
Consolidated with
Nos. S-1-SC-37065,
37070, and 37076

PETITIONERS' MOTION TO VACATE COURT OF APPEALS DECISIONS

The Petitioners San Juan Acequias (San Juan Agricultural Water Users Association *et al.*) respectfully move the Court to reverse and vacate the Court of Appeals decisions filed April 3, 2018, on the grounds that former Judge Bruce Black was not authorized by the New Mexico Constitution to act as a judge in the Court of Appeals. Judge Black wrote the opinion under review, which is being challenged by the New Mexico State Engineer, the

Albuquerque Bernalillo County Water Utility Authority, the City of Gallup, the Acequias, and others.

This motion raises an overlooked constitutional question, so it should be considered at oral argument in addition to the arguments on the merits already raised by the multiple Petitioners.

Point I. The Court of Appeals decision was written by a judge who was not authorized by the New Mexico Constitution to act as a judge in the Court of Appeals.

The New Mexico Constitution does not authorize retired judges of the Court of Appeals to act as judges in the Court of Appeals. Article VI sets out detailed provisions governing how judges must be qualified and selected for the District Courts, the Court of Appeals, and the Supreme Court. Article VI also sets out specific constitutional requirements for which judges can be specially appointed (or designated) to which courts. The Constitution differentiates between active judges, those who currently hold office, and former judges, those who do not currently hold any judgeship. Retired judges can only be appointed to act in the District Court. N.M. Const. art. VI, § 15.

Retired Judge Bruce Black authored the Court of Appeals decision which is now under review by this Court. Judge Black's opinion is being challenged by numerous parties, including the New Mexico State Engineer,

the Albuquerque Bernalillo County Water Utility Authority, the City of Gallup, and the San Juan Agricultural Water Users Association, an association of more than 25 acequias in the San Juan River Basin.

Judge Black filed his Opinion on April 3, 2018, long after he retired from the New Mexico judiciary. Judge Black served as a judge in the New Mexico Court of Appeals from July, 1991 to December, 1995. He never served as a state district judge. He relinquished his COA office after he was appointed to the United States District Court in New Mexico, where he served until his retirement from the federal bench in January, 2017. https://ballotpedia.org/Bruce_Black.

Former Judge Black was appointed to this case by New Mexico Supreme Court Order on February 14, 2017. At the time of his selection to act as a judge in the Court of Appeals, he had been retired from the state judiciary for more than 21 years. At no time during this appeal did Judge Black hold any judicial office under Article VI of the New Mexico Constitution.

Therefore the Constitution of New Mexico did not vest Judge Black with any judicial authority to act as a judge in this appeal.

Article VI, section 15 is the only provision that allows the appointment of <u>retired</u> judges:

> C. If any district judge is disqualified from hearing any cause or is unable to expeditiously dispose of any cause in the district, the chief justice of the supreme court may designate any **retired** New Mexico district judge, court of appeals judge or supreme court justice, with said designees' consent, to hear and determine the cause and **to act as district judge** pro tempore for such cause.

[Emphasis added.] The Constitution authorizes the designation of former Court of Appeals judges to hear cases in the District Courts, but not in the Court of Appeals. Once judges or justices have retired from judicial office, they can be designated to act as a judge pro tempore in the district courts, but not elsewhere.

There are other constitutional provisions dealing with the designation of active judges or justices to various courts, but those provisions are limited to persons who currently hold judicial office. Section 6 allows an active district judge to be called in to act in the Supreme Court. Section 28 allows an active justice or district judge to be designated to act in the Court of Appeals.

Accordingly, retired Court of Appeals judges are not constitutionally qualified to act as judges in the Court of Appeals. Likewise, retired Supreme Court justices are not authorized to act as justices in the Supreme Court. There are several good reasons for this constitutional rule, including the following:

First, all active judges and justices are subject to elections. Under the 1988 constitutional amendment for the merit selection of judges, every judge who wishes to hold office is subject to a partisan election initially, and retention elections every 4, 6, or 8 years thereafter. N.M. Const. art. VI, § 33. The 1988 constitutional amendment was written so that judges would remain accountable to the people. For these reasons, the legislature passed, and the voters enacted, a hybrid system that combines merit selection with elections. This constitutional amendment contained delicate compromises which ultimately created bipartisan support, with unusual alliances of legislators for and against the reform.[1] Judicial vacancies are initially filled through merit selection, whereby a committee vets the candidates and submits to the Governor a list of those the committee considers best qualified. Then the appointed judge is subjected to a partisan contest at the next general election. After that, every judge is subjected to the judgment of the electorate in periodic elections where the voters decide whether the judge should be retained or removed from office. In 1994, voter control over judges was reinforced by raising the retention requirement from 50% to 57% of the votes cast. The

[1] Undersigned counsel was one of the Senate co-sponsors of the 1988 constitutional amendment for merit selection of judges.

amendment was proposed by S.J.R. No. 1, 1994 N.M. Laws 1515-17, and adopted at the general election on November 8, 1994.

Second, Article VI is designed to prevent the judiciary from becoming stagnant. The 1988 amendment rejected the concept of lifetime appointments and instead created constant infusion of new talent into the judiciary at all levels. This purpose is hindered if former judges could continue to sit on the Court of Appeals.

Third, by prohibiting the continuance of retired judges on the same court, the Constitution prevents the authority of active judges from being diluted. Retired judges may have greater experience, but this creates dangers of its own. By reason of their experience or personality, retired judges might be able to impose their views on younger colleagues, even if those views are out of date. And retired judges may tend to give undue weight to their own views, even if those views are aberrational.

Fourth, when former judges sit on cases in the district courts, they affect only the parties to that case, whereas judges on the Court of Appeals make law that affects all the people in New Mexico. See further discussion in Point III below.

Fifth, while the Court of Appeals does have a significant workload and backlog, Article VI provides a solution. Section 28 provides that the Chief Justice "may designate any justice of the Supreme Court, or any district judge of the state, to act as a judge of the Court of Appeals." When the Court of Appeals is backlogged, Section 28 authorizes active justices and district court judges to help clear the docket.

Point II. The judiciary has inherent powers, but those inherent powers cannot override the express provisions of the Constitution.

It might be argued that the judiciary has the inherent power to designate any judge to any court in the state, but that argument contradicts the plain text of the Constitution. Of course, the courts do have some inherent powers to act where the Constitution is silent.[2] However, when the Constitution establishes the structure of the courts and specifies in detail who may serve on each court, the Constitution must be obeyed. See *Aguilar v. City Commission*, 1997-NMCA-045, ¶¶ 11-13 (municipal judge had no inherent authority to appoint a replacement or temporary judge). The plain text of the Constitution cannot be ignored; otherwise it would be a nullity.

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[2] For example, if a judge holds active status at the time he or she is selected for a case, there is no constitutional reason why the judge cannot complete that assignment after retirement.

Point III. This constitutional error is not harmless.

It might be argued that the error is harmless because the appellate decision was rendered by a panel, rather than a single judge. There are several flaws in this argument.

A. The United States Supreme Court specifically rejected this contention in *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899, 1909-10 (2016). The Supreme Court vacated a decision by the Pennsylvania Supreme Court because a disqualified judge participated in the appeal. The constitutional error was not cured by the fact that a majority of the qualified judges on the panel voted for the decision.

B. A fundamental constitutional error – lack of judicial authority – cannot be ignored.

C. In this case Judge Black actually wrote the opinion, not the other judges, so it cannot be argued that his views were superfluous.

D. The opinion is not harmless, because it is a radical opinion which overturns long-established state and federal law on water.

- As the State Engineer and the Water Authority have correctly pointed out, the COA opinion errs by pre-empting state control over river water. COA Op. at ¶¶ 16-22. The opinion is flatly contrary to the McCarran Amendment,

43 U.S.C. §§ 666, and *California v. United States*, 438 U.S. 645, 653 (1978) (federal law generally defers to state water laws in the arid West).

- The COA opinion at ¶¶ 23-27 rejects the PIA (practicably irrigable acreage) standard for quantifying *Winters* reserved rights. The opinion directly violates the Supreme Court's ruling in *Arizona v. California*, 373 U.S. 545, 601 (1963) ("the only feasible and fair way . . . is irrigable acreage"). The Supreme Court explicitly reaffirmed its PIA ruling 20 years later in *Arizona v. California*, 460 U.S. 605, 617 (1983) ("the irrigable acreage standard allowed a present water allocation that would be appropriate for future water needs").

- The opinion nullifies the beneficial use standard in the New Mexico Constitution and the federal Reclamation Act of 1902, 43 U.S.C. § 372. See in particular Op. ¶¶ 16,18. In paragraph 18, the opinion concedes that

> [Appellants] are correct that if this were indeed a Reclamation Act case, the Secretary of the Interior would be required to follow the state law interpretation of "beneficial use."

But then, the COA opinion mistakenly holds that the Reclamation Act is inapplicable. This is plain legal error, because the Navajo Indian Irrigation Project (NIIP) is a BOR (Bureau of Reclamation) project subject to the Reclamation Act. Section 4 of the Colorado River Storage Act, Pub. L. No. 84-485, 70 Stat. 105 (Apr. 11, 1956) expressly provides that the projects are

subject to the Reclamation Act. Section 2 of the Navajo Indian Irrigation Project Act, Pub. L. No. 87-483, 76 Stat. 96 (Jun. 13, 1962) provides that NIIP is authorized under the 1956 Act, which is subject to the Reclamation Act.[3]

- At ¶ 40, the COA opinion holds that a district court can adjudicate a river without considering global warming, regional drought, water shortages, other reserved federal water uses, or endangered species. Under the COA decision, climate change denial is now the official policy of the New Mexico courts.

All of these unprecedented rulings were made without the benefit of oral argument in the Court of Appeals.

And all of these erroneous rulings are now the law of the land throughout New Mexico, not just for the parties but for all two million inhabitants. Under Rule 12-405(C) NMRA, Judge Black's rulings now have the force of law throughout New Mexico, even though *certiorari* has been granted, and even though Judge Black had no authority to act. Therefore it is

[3] This illustrates another problem with the use of retired judges – they do not have the assistance of law clerks. An alert law clerk could have confirmed that NIIP is subject to the Reclamation Act, by checking the statutes cited in the briefs. NIIP cannot be exempted from the beneficial use and PIA standards, because NIIP accounts for over 500,000 acre-feet of water per year.

imperative that this Court correct the errors on the merits which are contained in the COA's 2018 rulings.

And these rulings were issued by a judge who had no constitutional authority to act.

Counsel for the Acequias has conferred about this motion. The Albuquerque Bernalillo County Water Utility Authority and the City of Gallup take no position on this motion at this time. The motion is opposed by the Navajo Nation, the United States, the Jicarilla Tribe, and the OSE. Other parties have not responded.

Conclusion

The designation of Judge Black to act as a Court of Appeals judge was void *ab initio* under the New Mexico Constitution. He lacked constitutional authority to sit as a judge in this case. Therefore the decisions below must be reversed and vacated in their entirety, and given no precedential or persuasive weight. The decisions below must also be corrected and reversed for all of the other reasons stated by the various petitioners, because the 2018 opinion overthrows the most fundamental doctrines of state and federal water law.

WHEREFORE, Petitioners respectfully move the Court to vacate the Court of Appeals opinion for the reason stated, in addition to the other reasons

presented by the Acequias, the State Engineer, the Albuquerque Bernalillo County Water Utility Authority, and others. Petitioners respectfully ask the Court to consider this issue during oral argument along with the other arguments by the parties.

Respectfully submitted,

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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 all counsel of record on December 30, 2020.

/s/ Victor R. Marshall
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