Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, *et al.*, Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA, *et al.*, Defendants - Appellees,

On Appeal from District Court Nos. 2:10-cv-01993-DGC, 2:10-cv-02017-DGC, 2:10-cv-02138-DGC, District of Arizona, Phoenix

REPLY BRIEF OF APPELLANTS DELVIN JOHN TERRY; CELESTINO RIOS; BRANDON RIOS; DAMON RIOS; AND CAMERON RIOS

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INTRODUCTION

The opening brief of appellants Delvin John Terry, Celestino Rios, Brandon Rios, Damon Rios, and Cameron Rios (the "Terry and Rios Plaintiffs")[1] demonstrates that individuals who are entitled to seek judicial review should not be denied the opportunity to raise an argument not raised during agency proceedings when they were not given notice prior to the agency's final decision and did not participate in the agency proceedings. As explained below, Appellees fail to refute these arguments.

ARGUMENT

THE TERRY AND RIOS PLAINTIFFS DID NOT WAIVE THE § 6(C) ARGUMENT BY NOT RAISING IT PRIOR TO THE FINAL DECISION.

A. The Terry and Rios Plaintiffs Did Not Waive the § 6(c) Argument.

"A waiver is an intentional relinquishment or abandonment of a known right or privilege" and will be found where there is "clear, decisive and unequivocal conduct which manifests an intent to waive the legal rights involved." *Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp.2d 1117, 1138 (D. Ariz. 1998)(citing *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970); *see Intel*

[1] The Terry and Rios Plaintiffs join in the arguments presented in the briefs of Appellants Gila River Indian Community and State of Arizona, City of Glendale, Michael Socaciu, and Gary Hirsch, except for the arguments related to the Indian Commerce Clause and the Tenth Amendment. The defined terms used in this reply brief have the same meaning as when they were used in the Terry and Rios Plaintiffs' opening brief.

Corp. v. Hartford Accident & Indemnity Co., 952 F.2d 1551, 1559 (9th Cir. 1991); *Pioneer Roofing Co. v. Mardian Constr. Co*., 733 P.2d 652, 665 (Ariz. Ct. App. 1986). Waiver is an affirmative defense and the party asserting it carries the burden to prove it by clear and convincing evidence. *Central Arizona Water Conservation Dist.*, 32 F. Supp.2d at 1138; *see Intel Corp*., 952 F.2d at 1559.

Because a waiver is a voluntary act, a right must be known before it can be waived. *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). Generally, publication in the Federal Register is legally sufficient notice to all interested or affected persons. *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008).

Appellees admit that the DOI did not give formal notice of the Nation's application to have Parcel 2 taken into trust prior to publication of the Trust Decision in the Federal Register. U.S. Br. 22. Appellees nevertheless contend that the amount of local press coverage should have put the Terry and Rios Plaintiffs on notice that they were obligated to present any comments to the agency during the decision-making process, observing that the DOI received and considered letters

from other individual citizens, citing various newspaper articles and letters. U.S. Br. 23, n. 5. However, even if the Terry and Rios Plaintiffs may have seen these articles, none of them include information informing the public of a right to provide comments regarding the Trust Decision or that any such comments would be considered by the DOI. To the contrary, some of these articles state that the decision had already been made and that providing comments would be futile. [2] FSER at 216, 237-44, 247.

No notice of the administrative proceedings was given to the Terry and Rios Plaintiffs prior to publication of the Trust Decision in the Federal Register. Because they did not have prior notice of the proceedings, their failure to participate or to provide comments cannot be interpreted as an "intentional relinquishment" of a known right or "clear, decisive and unequivocal conduct"

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[2] The following are some examples of the confusing and conflicting information in the articles: "Allen Anspaugh, regional director of Bureau of Indian Affairs, said, "We have determined [Parcel 2] qualifies for mandatory acquisition."" Federal Defendants-Appellees' Supplemental Excerpts of Record (FSER) at 237; "Whatever the Tohono O'odham Nation wants to do with the land, the city cannot stop it, [Peoria Mayor Bob] Barrett said." FSER at 238; "Whether the Interior Department will seek local opinion before deciding on the tribe's application is unclear." FSER at 216; "We, the city, cannot prevent this from happening…" FSER at 238; "We [Glendale City Attorney Craig Tindall] met with the BIA and there was a clear indication they weren't interested in having a dialogue with us at all." FSER at 239, 241-42; and "Attorneys with the U.S. Department of Interior will determine if the Tohono O'Odham application … proceeds on the "mandatory" path for taking land into trust, as the tribe advocates. If so, the city and governor would have no input." FSER at 247.

manifesting an intent to waive legal rights. Appellees have not carried their burden of proving that the Terry and Rios Plaintiffs waived the § 6(c) Argument.

B. Issue Exhaustion Does Not Bar the Terry and Rios Plaintiffs from Raising the § 6(c) Argument.

While it is clear that Appellees failed to prove waiver, Appellees nonetheless argue that issue exhaustion bars the Terry and Rios Plaintiffs from raising the § 6(c) Argument. Nation Br. 26-31; U.S. Br. 22-23. But, none of the cases cited by Appellees concern a similar situation, *i.e.*, where a person is barred from raising an issue not brought up in the during agency proceedings when such person (i) was not given notice of agency proceedings prior to publication of the agency's decision in the Federal Register and (ii) did not participate in agency proceedings.[3]

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[3] Of the eight cases cited by Appellees that decided whether an issue could be considered by the reviewing court, three did not find that issue exhaustion or waiver barred the issue and thus provide little support for Appellees. *See Sims v. Apfel*, 530 U.S. 103, 112 (2000)(holding issue exhaustion inappropriate to bar new issues brought by a participant in an agency action (a claimant in inquisitorial Social Security proceedings)); *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 632-33 (9th Cir. 2008)(holding issue exhaustion does not apply to a participant in an agency action (a claimant in nonadversarial ERISA review proceedings)); *Portland General Electric Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024-25 (9th Cir. 2007)(holding that issues had not been waived by participants in an agency action because they had been raised by other participants during the agency's notice-and-comment proceedings).

The other five cases cited by Appellees barred consideration of a new issue because the petitioner participated in agency proceedings or had prior notice by publication in the Federal Register – not the facts here. *See Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 764-65 (2004)(finding participants

The reason Appellees can cite no such case is obvious – it would be fundamentally unfair.

Appellees cite two cases addressing exceptional circumstances that may excuse issue exhaustion.[4] Nation Br. 26. Although Appellees candidly admit that exceptional circumstances might be established by parties who had neither actual nor constructive notice that an agency was considering a matter affecting their interests, Appellees go on to argue that the exceptional circumstances doctrine

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in an agency action forfeited objections not raised during the period provided for public comment); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 34-35 (1952)(finding that participants in an agency action should not be allowed to raise a new argument when they had many opportunities to do so during agency proceedings); *Geo-Energy Partners-1983 Ltd. v. Salazar*, 613 F.3d 946, 959 (9th Cir. 2010)(finding issue exhaustion applied where a participant in an agency action failed to raise an issue with the agency); *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1020-21 (9th Cir. 2004)(finding waiver where the petitioners received notice through publication in the Federal Register); *Natural Resources Defense Council, Inc. v. U.S. Envtl. Protection Agency*, 25 F.3d 1063, 1073-74 (D.C. Cir. 1994)(finding waiver where participants in an agency action failed to raise an issue with the agency during the notice and comment period).

[4] Unless required by statute, even when it is found to apply, issue exhaustion may nevertheless be excused under exceptional circumstances. *Portland General Electric Co.*, 501 F.3d at 1024; *see Geo-Energy Partners-1983 Ltd.*, 613 F.3d at 959 (finding no exceptional circumstances where a participant in an agency action decided to focus on other aspects of the case and then came up with new arguments to support its position on appeal); *Universal Health Services, Inc.*, 363 F.3d at 1021 (finding no exceptional circumstances where the petitioners received sufficient notice and there was no compelling reason why their arguments were not raised before the agency). Here, relevant regulations authorize participation and appeal by just the applicant and the only statutory avenue for objection by the Terry and Rios Plaintiffs is judicial review after the decision has been made. 5 U.S.C. § 702; 25 C.F.R. § 151.12.

should not apply to the Terry and Rios Plaintiffs. Nation Br. 31. This argument misses the mark for two reasons. First, waiver and issue exhaustion simply do not apply on these facts, as established above. Second, Appellees have failed to show that the Terry and Rios Plaintiffs received such actual or constructive notice.[5]

In passing, Appellees also assert that the interests of the Terry and Rios Plaintiffs were represented by the Community during agency proceedings – a novel argument to be sure, as the very issue that the Terry and Rios Plaintiffs now seek to raise was not presented to DOI by the Community or anyone else.[6] Nation Br. 31-32. Moreover, as the Community explains in its briefs, some of the most relevant evidence relating to the § 6(c) Argument (*i.e.*, the Nation's efforts to conceal the true nature of its various land purchases) was not even known to the Community prior to the conclusion of the agency proceedings. It is hard to comprehend the

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[5] Without citing any authority, Appellees also state that the Terry and Rios Plaintiffs cannot claim exceptional circumstances because they did not deny that they had actual notice of the Nation's application, Nation Br. 31; but the initial burden to prove waiver is upon Appellees and Appellees have not met that burden.

[6] Although Appellees cite no authority, they may be relying on some notion of "virtual representation." In *Taylor v. Sturgell*, 553 U.S. 880 (2008), the United States Supreme Court analyzed "virtual representation" under claim preclusion principles, noted that the party asserting it has the burden of proof, and cautioned that the application of claim preclusion to nonparties "runs up against the deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 892-893 (internal quotation marks omitted), 904, 907. It would be an understatement to note that Appellees have failed to meet their burden.

argument that the Terry and Rios Plaintiffs were adequately represented by a participant that was not even aware of the relevant facts.

Appellees contend that not requiring the Terry and Rios Plaintiffs to present their arguments during agency proceedings would encourage interested parties to "bypass the administrative process."[7] Nation Br. 32. However, as stated in the notice concerning the Trust Decision that was published in the Federal Register, the purpose of requiring that notice be given to the public with a 30-day waiting period "is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." 75 Fed. Reg. 52,550-01 (August 26, 2010); *see Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011). Finding a waiver of issues not raised during agency proceedings by those who had no right to comment and had no notice prior to publication is inconsistent with requiring that notice be published and allowing a 30-day period to seek judicial review. There would be no reason to require public notice if judicial review was meant to be limited to parties or to persons who were already aware of the issues

[7] Appellees cite *Puga v. Chertoff,* 488 F.3d 812, 815 (9th Cir. 2007) for this proposition, Nation Br. 31, but *Puga* addressed exhaustion of administrative remedies, not issue exhaustion, and concerned an effective assistance of counsel claim where the applicable statute specifically imposed a remedy exhaustion requirement. *Id*.

involved and participated in the administrative proceedings leading to the agency's final decision.

The Supreme Court declared, after noting the general rule regarding waiver later addressed in *Portland General Electric Co.* and *L.A. Tucker Truck Lines, Inc.*, that:

> [The r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941).

If judicial review is limited to issues raised during agency proceedings, aggrieved nonparticipants such as the Terry and Rios Plaintiffs, who did not receive prior notice of agency proceedings, would be denied any meaningful ability to judicially challenge the agency's decision. Finding a waiver here, simply based on nonparticipation, would prevent the Terry and Rios Plaintiffs from having a full and fair opportunity to raise the § 6(c) Argument, would render the publication of notice of the Trust Decision in the Federal Register and the statutory right of appeal for aggrieved persons meaningless, and would deny the Terry and Rios Plaintiffs their day in court. Fundamental justice should not be sacrificed to allow this result.

C. Because the Terry and Rios Plaintiffs Did Not Waive the § 6(c) Argument, the Proper Remedy Is to Remand the § 6(c) Argument to the DOI.

Appellees ask this Court to reject the Plaintiffs' interpretation of the Act and to affirm the district court's decision on the grounds that the Plaintiffs' interpretation is clearly wrong or that the DOI's interpretation is reasonable. Nation Br. 17; U.S. Br. 32. It is generally true that a court may decide, on the basis of the record provided by the agency, whether an agency action passes muster under the appropriate standard of review; but, if the agency has not considered all relevant factors, the proper course for the reviewing court is a remand to the agency for additional investigation or explanation. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Remand to the agency allows the agency to bring its expertise to bear upon the matter, evaluate the evidence, and make an initial determination. *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 169 (2nd Cir. 2006). Because the § 6(c) Argument was not a factor considered by the DOI in rendering the Trust Decision and is based on newly discovered evidence, it is appropriate here for this Court to remand the § 6(c) Argument to the DOI for its initial consideration.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and this case should be remanded to the district court with instructions to remand to the DOI for consideration of the § 6(c) Argument.

Respectfully submitted,

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October 6, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,685 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Douglas A. Jorden
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2011. All counsel of record in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas A. Jorden
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