IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, *ex rel.* State Engineer, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Plaintiff-Intervener and ELISA M. TRUJILLO Defendant-Appellant,	No. 15-2047 No. 66cv6639 WPJ/WPL (D.N.M.) APPELLANT'S OPENING BRIEF

Appellant requests oral argument.

TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Prior Appeals. State of New Mexico v. Aamodt, 537 F.2d 1102, 1104-05 (10th Cir. 1976)

STATEMENT OF THE CASE

This is an appeal of a summary judgment entered on February 26, 2010 (6917; Aplt. App. 000042)[1] in this comprehensive adjudication of water rights. The subject stream system is located at the foot of the Sangre de Cristo mountain range in the Pojoaque Valley – a community in Santa Fe County, sixteen miles north of the City of Santa Fe, New Mexico. The stream system is also known as the Nambe-Pojoaque-Tesuque Basin ("Basin").

Trujillo appeals the grant of Plaintiff's motion for summary judgment relating to the denial of her claim for beneficial use of 3.0 AFY of groundwater, and the restraint from using her domestic well water for irrigating her trees, lawn and garden. The appeal centers on two documents: a settlement agreement and a preliminary injunction.

The preliminary injunction restrains the New Mexico State Engineer from enforcing the Legislature of New Mexico's grant to all applicants, including

[1]The documents in the Appendix are Bates numbered sequentially.
Citation includes the docket number followed by the six digit Bates number where the referenced page is found in the Appendix.

Trujillo, the use of sufficient water to irrigate up to one acre of non-commercial trees, lawns or gardens, if the water is available. (641; Aplt App. 000013).

The State Engineer issued a permit in 1985 to Trujillo's predecessor in title, to divert and use for domestic purposes, up to 3.0 AFY with a condition that the domestic well not be used for outdoor irrigation. The permit is in perpetuity. (6845-2; Aplt. App. 000040-000041).

Circa 2000, Plaintiff and the Intervener Plaintiffs met in secret behind closed doors and agreed on a two pronged plan that divests Trujillo, as domestic well owner, of most of her water rights. The plan: first, to reduce Trujillo's domestic water rights from 3.0 AFY to 0.5 AFY; then, second, to adopt an agreement that would automatically order Trujillo be bound by the terms of the agreement; then order Trujillo to convey her water rights to the County of Santa Fe or voluntarily reduce her domestic water rights even further. The Plaintiff parties named their plan a settlement agreement.

The first prong of the plan is structured to intimidate Trujillo from challenging the State Engineer's offer to adjudicate her domestic groundwater rights at 0.5 AFY rather than at the 3.0 AFY stated on her permit.

On August 20, 2009, the State Engineer obtained a two page affidavit from an employee of the Office of the State Engineer concluding that the average domestic water use in the Basin is 0.4 AFY. (6824-1; Aplt. App. 000150).

The affidavit does not provide a foundation for the conclusion and the State Engineer does not provide a *curriculum vite* for its expert to allow assessment of the State's expert's expertise. This document – described by the special master as "thin on substance" is used to take 2.5 AFY of Trujillo's water right. The water law of New Mexico does not measure water rights by guessing what the neighbor uses – unless it's done by the Legislature of New Mexico and it enacts laws that are vetted by the political process. The opinion is irrelevant.

The settlement parties agreed to present the 0.5 AFY offer to the court (settlement agreement, Sect. 3, p. 25; Aplt. App. 000076-000079) and the court accepted the State's expert's opinion and agreed to use the 0.5 AFY figure in its order to show cause. (6239; Aplt. App. 000033).

On or about November 11, 2008, Trujillo was presented with an order to show cause why the court should not enter judgment awarding Trujillo the beneficial use of up to 0.5 AFY that cannot be used outdoors. She was asked to sign the proposed stipulated judgment or be sued. Then Trujillo was reminded of the high cost of litigation to adjudicate water rights.

Being faced with the power and resources of the United States Department of Justice, the Department of the Interior, the Bureau of Reclamation, four Pueblos funded by the U.S.A., the State of New Mexico, the County of Santa Fe, and City of Santa Fe is intimidating. It is not difficult to see that a person faced with the possibility of waging litigation war with eight sovereigns would not want to surrender any water rights, but would not want to incur the high cost of litigation, and would simply not respond. Indeed, the record is replete with judgments by default or judgments without notice pursuant to the court's procedural order. A sample is provided at (10150; Aplt. App. 000170). A non-responder is treated as a settlement party which makes the non-responder subject to the settlement agreement, (settlement agreement; Sect. 3.9.1; Aplt. App. 000087).

Trujillo is a young mother of three. The disparity of resources between Trujillo and the Plaintiff parties renders Trujillo vulnerable to coercion and abuse of power. If the judgment is by coercion is not a taking without just compensation, it is, a defense in contract law. Obviously Trujillo opted to incur the high cost of litigation. She did not sign the proposed settlement agreement (settlement agreement; Aplt. App. 000104-000124) nor did anyone acting with authority from Trujillo. As, promised, the Plaintiff parties have been relentless in suing her.

Summary judgment is granted by the special master because Trujillo could not produce required historical data of actual usage to prove ownership of 3.0 AFY

of water rights, (6917; Aplt. App. 000042). Instead, Trujillo produced an affidavit describing the extent of her outdoor use to raise a challenge to the State's expert opinion, if the court deemed it relevant, (6845-5; Aplt. App. 000153). The burden of proof has been on the claimant to prove her claim. The claimants in this case have historically proved their claim by presenting their permit. That is the law of the case. Trujillo has not kept usage records because the State Engineer did not require it. To require that data at this point is lacking in adequate notice.

The special master granted the State Engineer's motion for summary judgment on February 26, 2010. (6917, Aplt. App. 000042).

Trujillo, having been adjudicated owner of the right to divert up to 0.5 AFY, is faced with the second prong of the plan to take her water rights without paying for them. (settlement agreement, Aplt. App. 000054-000124).

The Plaintiff parties have filed a motion for partial final decree to, *inter alia*, approve the settlement agreement and make it an order of the court. Once approved and adopted by the court, the settlement agreement, among other things, would:

1) Order that Trujillo be bound by the settlement agreement. (8035; Aplt. App.000231, 000236)
2) Order Trujillo to opt between:

a. Transferring all water rights to the County of Santa Fe when she dies, for a promise to be connected to a regional water system by 2024. If the water system is not completed by 2024, Trujillo can have her water rights restored. The settlement agreement is unclear on how her water rights would be restored. (8035; Aplt. App. 000079)

b. Transferring all water rights to the County of Santa Fe when she transfers title to her land, for a promise to be connected to a regional water system by 2024. If the water system is not completed by 2024, Trujillo can have her water rights restored. The settlement agreement is unclear on how her water rights would be restored. (8035; Aplt. App. 000079), or,

c. Keep her well in perpetuity but agree to reduce her water right to 0.3 AFY (settlement agreement Sect. 3.1.7; Aplt. App. 000079), and,

3) Waive all objections to the quantification of the Pueblos' water rights as set forth in the agreement; mutually waive all claims and objections and all appeals. (settlement agreement, Sect.6.2; Aplt. App. 000097).

4) Any person who does not respond to the order to show cause why the court should not enter judgment for 0.5 AFY, is automatically made a

settlement party who agrees to be bound by the agreement. (settlement agreement, Sect. 3.9.1 Aplt. App. 000087).

If Trujillo agrees to transfer her water rights to the County at death or at the time title is transferred, she will be permitted to continue to use her well until connected to a proposed regional water system or until 2024. She will keep a domestic water right to divert 0.5 AFY until she is connected to a proposed regional water system or 2024, whichever comes first. The consideration conveying her water rights to the County is a qualified promise by the Pueblos not to exercise their right to all the water in the Basin by priority call. (settlement agreement, Sect. 4; Aplt. App. 000089). Trujillo's request for information regarding the feasibility of the proposed regional water system, the court denied it because there is no requirement for feasibility of the proposed regional water system or that it will be constructed. (9473; Aplt. App. 000157). Trujillo is unable to assess the likelihood of a priority call without the requested information to determine if the settlement agreement fails for lack of consideration. The proposed settlement agreement is so blatantly unconstitutional that it could be called the settlement conspiracy. It shocks the conscience.

Trujillo owns land that is irrigated from the *Acequia de Los Ortiz's.* On November 4, 2011 the State Engineer and Trujillo have stipulated that her surface water rights in the *Acequia de los Ortiz'* have a priority date of 1786. Groundwater

rights run with the land. Before Trujillo was made a party and without notice to Trujillo, the court ordered that all water rights in the Basin are "immemorial" and thereby, superior to all other water rights in the Basin, including Trujillo's .

The Pueblos and the non-Pueblo people have been developing the water rights together, individually, and accumulatively for over 300+ continuous years. The decision by the court that all Pueblo water rights are superior to Trujillo's rights ignores the State's water law principle that the water right vests when the water is diverted and is put to beneficial use. In this case, the water has been put to beneficial use by both Pueblos and non-Pueblos claimants continuously since the 1700's. Trujillo and her predecessors have acquired water rights during the time before the Pojoaque Valley became a part of the U.S.A. in 1848 that the court ignores.

The non-Pueblo water rights structure presented in Section 3 of the settlement agreement (Aplt. App. 000076) ignores Trujillo's pre-1848 water rights which are specifically protected by the Treaty of Guadalupe Hidalgo, Art. X [2].

On June 14, 2007, the court entered an order setting the procedure for approving the settlement agreement. (6236; Aplt. App. 000018). The procedure is

[2] In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

a hybrid of the Federal Rules of Civil Procedure. The hybrid procedure replaces discovery and a hearing with a right to file "objections" to the settlement agreement. The court set a deadline of April 7, 2014 to file such objections. Trujillo filed objections. Seven hundred ninety-one claimants also filed objections to the settlement agreement. The hybrid procedure is unclear about how to resolve the objections. (6236; Aplt. App. 000030). Trujillo submits that 792 objections are a *per se* rejection of the settlement agreement.

Not having a clear procedure on how to resolve the objections, the court entered a case management order requiring the parties to brief their positions on the issue and the court would decide how to resolve the objections. Trujillo filed a brief in opposition to the motion for partial final decree on or about January 7, 2015. (9973; Aplt. App. 000186) The decision on the objections is pending. The motion for partial final decree is pending.

To add another fly to the ointment, on December 8, 2010, the Aamodt Litigation Settlement Agreement Act, Pub. L. No. 111-291 §§ 601 *et seq*., 124 Stat. 3134, was enacted which provides in part that the U. S. will pay $106M as its total contribution to construct a water project to divert 2,500 AFY from the Rio Grande to meet the Pueblos' rights as set forth in the settlement agreement. Those particular water rights can be leased out of the Basin. (settlement agreement, Sect. 2.1.5; Aplt. App. 000063). The payment of the $106M is contingent on the filing of

a partial final decree approving and adopting the proposed agreement by September 17, 2017, or the funds return to the Treasury. (9506; Aplt. App. 000124). The court has indicated that its objective is to meet the deadline. (9506; Aplt. App. 000124).

Trujillo appeals the denial of her motion to quash the preliminary injunction that underlies the prohibition against outdoor irrigation contained in her permit as Condition 8. (6845-2; Aplt. App. 000041).

Issues of state's rights and equal standing among the states that also affect Trujillo are raised by the preliminary injunction are beyond this appeal.

JURISDICTIONAL STATEMENT

1. The district court's jurisdiction is based on concurrent jurisdiction with the State court in comprehensive water adjudication cases wherein the U. S. is making a claim or will make a claim. 28 USC §1345
2. The Court's jurisdiction on appeal is 28 USC §1291 based on the district court's designation of its judgment as a final judgment despite the district court's statement that the judgment was subject to *inter se* proceedings which could change the amount of water rights that Trujillo would receive. The proposed settlement agreement would waive all *inter se* challenges. The

inter se proceedings have not been scheduled. In reality, it is highly unlikely that the judgment will be changed.

3. The Court also has jurisdiction under 28 U.S.C. §1292 which allows appeals of interlocutory judgments denying a motion to quash an injunction. The district court has denied Trujillo's motion to quash the preliminary injunction or call a three judge panel. (10204;Aplt. App. 000147)
4. Filing dates:

   February 26, 2010 - Special master order granting Plaintiff's motion for summary judgment

   September 26, 2021 – Memorandum of law denying Objection to grant of summary judgment.

   January 12, 2015 – Final judgment of Appellant's domestic water rights.

   March 12, 2015 – notice of appeal.

STATEMENT OF ISSUES

1. Whether the judgment is void or lack of evidence.
2. Whether the judgment is void for violation of the Anti-Injunction Act.
3. Whether the Appellant Trujillo is denied Equal Protection of the Law by the court's use of a double standard to determine the quantities and use of her domestic well water.

4. Whether Trujillo is deprived of property Without Due Process of Law by the hybrid procedure used to approve the proposed settlement agreement.
5. Whether the grant of summary judgment to plaintiff State Engineer is error.
6. Whether the court's preliminary injunction entered on January 14, 1983 should be quashed.
7. Whether Appellant Trujillo was deprived of the beneficial use of 2.5AFY without Due Process of Law and without just compensation.

STATEMENT OF FACTS

1. On March 15, 1985, Plaintiff issued Defendant's predecessor in title a permit to divert up to 3.0 acre feet per annum of water from the N-P-T Basin. (6845-1; Aplt. App. 000040).
2. The permit issued to Defendant Trujillo's predecessor restricts Defendant's domestic well water use to indoor use only (Condition 8) and also restricts usage to non-commercial trees, lawns and gardens, (Condition 4). (6845-2; Aplt. App. 000041).
3. On May 26, 1985, Defendant's predecessor drilled a well and began to divert groundwater from the Basin. (Exhibit 1b).
4. On January 13, 1983, the Court entered a preliminary injunction against the State Engineer.

5. The amount of water in the N-P-T Basin is fifty-five million acre-feet.

1. The N-P-T Basin holds 55 million acre-feet of water in its aquifer. Exhibit 1.

2. The combined diversion of groundwater in the N-P-T Basin has a *de minimus* impact on surface waters. Exhibit 1.

ARGUMENT

I. SUMMARY JUDGMENT IS NOT SUPPORTED BY LAW OR FACT.

"We review de novo a district court's grant of summary judgment, applying the same legal standard employed by the district court, to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. ***Zamora v. Elite Logistics, Inc.***, 449 F.3d 1106, 1111 (10th Cir. 2006); ***Sac & Fox Nation of Mo. v. Pierce***, 213 F.3d 566, 583 (10th Cir. 2000).

II. THE PRELIMINARY INJUNCTION IS VOID.

A. The Preliminary Injunction Is Not Supported By The Evidence.

The court's order entered January 14, 1983 is labeled a preliminary injunction. Upon close review, the order is actually a permanent injunction. The order begins:

"IT IS ORDERED that no permits to appropriate underground water shall be issued within the Rio Pojoaque stream system under Section 72-12-1 N.M.S.A. 1978."

The injunction is clear and it is permanent. (641; Aplt. App. 000013).

The Order then allows for permits as follows:

"Permits may issue limited to the use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing and (sic) consumptive use of water. All subject to further order of the court."

There is no language in the Order that sets a time for the preliminary injunction to expire. Indeed, the restraint against outdoor use of domestic well set forth in Condition 8 in Trujillo's permit issued by the State Engineer is permanent. The permit itself has conflicting conditions allowing and prohibiting outdoor use. See Permit Conditions 4 and 8. (Aplt. App. 000041).

Thus, Plaintiff and Plaintiff Interveners seek to enforce a permanent injunction against Trujillo that was entered without notice and a hearing; that cites no irreparable harm; does not cite authority for subject matter jurisdiction; was entered before Trujillo was made a party to this lawsuit, and; that contains a typographical error that clouds the court's intention.

B. The U.S. District Court For New Mexico Is Not Authorized To Enjoin The New Mexico State Engineer From Enforcing The Domestic Well Statute.

In ***Ex Parte Young,*** 209 U.S. 123, 155-56, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908), a U. S. district court in Minnesota was faced with the same question about

one of that state's statutes. The court answered in the affirmative and the Supreme Court agreed.

The Supreme Court first examined the Eleventh Amendment protection of sovereign immunity of a state. The Court held that performing an act made illegal by the unconstitutional nature of the statute being enforced removes the state officer's cloak of authority and what remains is the individual person so that the Eleventh Amendment is not implicated. The case at bar is almost identical.

In ***Ex Parte Young,*** the U. S. district court initiated contempt proceedings against the attorney general of Minnesota, a state officer charged with the enforcement of a state statute that regulated railroad fees. The district court found the state statute violated the Due Process and Equal Protection rights of some railways and enjoined the attorney general from enforcing the unconstitutional state statute. The attorney general violated the court's restraining order against enforcement and was charged with contempt for disobeying the Federal Court's order.

The case at bar presents facts very similar to the facts in ***Ex Parte Young,*** the U. S. District Court for New Mexico has issued a preliminary injunction against the New Mexico State Engineer, a state officer charged with the enforcement of New Mexico's Domestic Well Statute[3] ("DSW") as it relates to Trujillo's right to

[3] (§72-12-1.1 1978 as amended)

irrigate her trees, lawn, and garden with her domestic well. The difference between the two cases is that the Minnesota district court's injunction is properly based on a state statute held to be unconstitutional. In this case, the Domestic Well Statute is constitutional and free of federal question. The case makes it clear that the federal court may enjoin a state officer from enforcing a state statute, but the subject state statute must be suspect of violating the U.S. Constitution or other federal law.

In Title 28 USC §2283,[4] Congress enacted the most current version of the holding in ***Ex Parte Young,*** namely: 28 USC §2283. The district court in this case held that:

> "The preliminary injunction enjoins the State Engineer from issuing domestic well permits which allow use of domestic well water for outdoor irrigation. The preliminary injunction does not "stay proceedings in a State court." (10204; Aplt. App. 000147)

The district court does not consider this case to be a state court proceeding, despite the State Engineer's exclusive authority and duty to administer the New Mexico water laws. Certainly the injunction herein restrains a state officer. The federal and state courts have concurrent jurisdiction in a water adjudication case such as this case. This adjudication is effectively a state court proceeding applying

[4] 28 USC §2283: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments "

state law. That would make the preliminary injunction subject to an §2283 review. As the Supreme Court said in a case based on an Act of Congress -the ***Clayton Act***:

> "Suffice it to say that the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." ***Vendo Co. v. Lektro-Vend Corp.***, 433 U.S. 623, 630, 97 S. Ct. 2881, 2887, 53 L. Ed. 2d 1009 (1977) citing ***Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.,*** 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 447 (1940)

> The statute concerning three judge district courts, 28 U.S.C. §2284,(b), states

in part:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

The Anti-Injunction Act[5] prohibits a federal court from enjoining a state officer from enforcing a state statute, unless the subject state statute presents a substantial federal question, and may only be permanently restrained by a three

[5] 28 USC §2283 A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

judge court. 28 USCA §2281; 28 USCA . §2284(b)(3)[6]. ***Jackson v, State of Colorado***, 294 F. Supp. 1065 (Colo. 1968); ***Vendo Co. v. Lektro-Vend Corp.,*** supra. In this case, the district court enjoins the State Engineer.

The district court's injunctive order does not cite an Act of Congress that expressly authorizes its preliminary injunction. The district court's jurisdiction is not being challenged other than its jurisdiction to issue its preliminary injunction. There is no judgment to protect or effectuate. The preliminary injunction is not exempted from the Anti-Injunction statutes.

Even if the district court was authorized initially to enter a temporary restraining order *pendent lite,* there is still no specific evidence of irreparable harm

---

[6] §2284 **(b)** In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding…

(2) …

(3) **(3)** A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

after over 30 years since the preliminary injunction was entered. Trujillo has been and continues to be deprived of her property right to use her domestic well to irrigate her trees and gardens.

The district court must determine if the suspect State statute is constitutionally infirm. If the answer is in the affirmative, the district judge may not determine the merits of the injunction. Only a three judge panel has authority to decide the merits of the injunction. Responsibility is on the single judge to convene a three judge panel. 28 USC §2284(b) (9906; Aplt. App. 000131). If the suspect statute is not constitutionally infirm, the injunction must be quashed. See

Schneider v. Rusk, 372 U.S. 224, 83 S. Ct. 621, 9 L. Ed. 2d 695 (1963)

The preliminary injunction herein is void *ab initio* for the district court's failure to comply with the procedure set forth in 28 U.S.C. §2284(b), the court is without subject matter jurisdiction. ***Kalson v. Paterson***, 542 F.3d 281, 287-88 (2d Cir. 2008)(("*[G]eneral* [federal] subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial") (emphasis added). Trujillo argues that the reasons for the preliminary injunction (577, 579; Aplt. App. 000001-000005) are insubstantial on the issue of a federal question and hence the motion for preliminary injunction should be quashed rather than remanding for consideration by a three-judge court.

Thus, the single judge court lacks subject matter jurisdiction to enter its preliminary injunction without evidence of a specific irreparable harm the Intervener Plaintiffs will suffer if the injunction is not issued. 28 USC §2284. That failure renders the preliminary injunction void, thereby rendering Condition 8 of Trujillo's permit to drill a domestic well, void. The prohibition against outdoor irrigation is void. The settlement agreement is void. The grant of summary judgment is error.

The motion to quash the preliminary injunction or, in the alternative, for three judge panel was denied on May 29, 2015 (10204; (Aplt. App.000147), thereby removing the possibility that the decision on the motion would change the terms of the judgment as it relates to the finality of the judgment.

III. THE JUDGMENT VIOLATES TRUJILLO'S RIGHT TO EQUAL PROTECTION OF THE LAW PROVIDED BY THE McCARRAN AMENDMENT.

A. The District Court Applies A Double Standard Of Law.

The court denied a motion to quash the preliminary injunction because it denies Appellant her right to Equal Protection of the law. (7579; Aplt. App. 000246). The court found that the Pueblos and non-Pueblos are not similarly situated because the Pueblos' water rights are governed by Federal laws and non-Pueblos' water rights are governed by State laws. The court ignores the McCarran Amendment.

The McCarran Amendment[7] places the U.S.A. and the Pueblos under a single legal standard as all other claimants by waiving sovereign immunity for the U. S. and the Pueblos in comprehensive water adjudication cases wherein the U.S. claims a water right, such as the case at bar. See ***Colorado River Conservation District v. U.S.,*** 424 U.S. 800, 96 S.Ct. 1236 (1976).

Congress enacted the McCarran Amendment to remedy the chaos created by the development of two sets of laws relating to the ownership and administration of water rights in the western states: Federal law verses State law. 97 Cong. Rec. 7817 (1951). The waiver also makes the U.S.A. and the Pueblos subject to a State court judgment.

---

[7] 43 U.S.C. §666(a) (1952):

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

The purpose of the McCarran Amendment is to make the Federal law amenable to State law for a proper administration of the water law "as it has developed over the years." See Statement of Purpose, S. Rep. No. 755, 82nd Cong., 1st Sess. (1951)

The Senate Committee described this situation as one that "cannot help but result in a chaotic condition." Id.

A. Trujillo, The USA, And The Pueblos Are Similarly Situated As Claimants To The Pojoaque Basin Water.

Having two distinct bodies of law to quantify and administer water rights is a recipe for chaos, as the Senate Judiciary Committee recognized in reviewing the McCarran Amendment.

Rep. No. 755, 82nd Cong., 1st Sess. (1951).

The Committee recognized that each and every owner along a water course must be amenable to the laws of the State if there is to be a proper administration of the water or " suits of the adjudication of water rights will necessarily come to a standstill, and confusion results." 97 Cong. Rec. 12947-48 (1951).

In ***Colorado River Water Conservation District v. United States,*** a water adjudication case in Colorado very similar to the case at bar, the Supreme Court held that the State court and the Federal court have concurrent jurisdiction in comprehensive water adjudication suits like this case. The court also held that the State court has jurisdiction over Indian water rights under the McCarran

Amendment; that the Amendment includes consent to determine in State court reserved rights held by the Pueblos**. Id** at 424 U.S. 810-811, (Excluding Indian water rights from coverage by the Amendment "would enervate" the Amendment's

IV. THE JUDGMENT VIOLATES TRUJILLO'S RIGHT TO DUE PROCESS.

A. Trujillo Owns A Property Interest In The Permit**.**

"A property interest exists if discretion is limited by the procedures in question, that is, whether the procedures, if followed, require a particular outcome." ***Crown Point I, LLC v. Intermountain Rural Elec. Ass'*n**, 319 F.3d 1211, 1217 (10th Cir. 2003). In this case, applying for a domestic well permit, if procedure is followed properly should result in a permit to divert sufficient water for household use and irrigate one acre of non-commercial vegetation.

Defendant's claims are "specific and presently enforceable*." **Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1569 (10th Cir. 1993)***.* (The specificity strengthens a claim of entitlement.) Defendant's property interests are defined by §72-12-1.1, the Domestic Well Statute (DWS) and the permit issued by Plaintiff pursuant to N.M.A.C. 19.27.5 ("The Use Of Public Underground Waters For Household Or Other Domestic Use In Accordance With Section 72-12-1.1 NMSA").

Trujillo asserts that filing a well record is the final step in perfecting a property right in domestic well water. The State Engineer Rules (NMAC) require that the

well be drilled and the well record filed within one year of date the permit is issued[8]. The State Engineer argues that he has the authority to set water rights by assuming that all domestic well users consume less than 0.5 AFY. The Legislature of New Mexico has already made the assumption that a domestic well user will use enough water to irrigate up to one acre of non-commercial trees, lawns and gardens. That amount in the Pojoaque Basin is up to 3.0 AFY and has set that amount in the permits as the amount of groundwater that may be put to beneficial use. The State Engineer does not have authority to modify or amend the legislation.

A water right or an interest in water is real property and is treated as real property under laws pertaining to real property, including the Statute of Frauds. ***Posey V. Dove***, 1953-NMSC-019, 57 N.M. 200,210, 257 P.2d 541 (S. Ct. 1953) citing ***New Mexico Prods. Co. V. New Mexico Power Co.***, 1937-NMSC-048, 42 N.M. 3.

Trujillo has vested property rights in her DWS permit.

---

[8] **Well record:** The well driller shall keep a record of each well drilled as the work progresses. The well driller shall file a complete well record with the state engineer and the permit holder no later than twenty (20) days after completion of the well drilling. A well log shall be filed for each hole drilled, including a drill hole that does not encounter water. It is the responsibility of the permit holder to ensure that the well record for the 72-12-1.1 domestic well has been properly filed with the state engineer.

[19.27.5.13 NMAC - N, 8-15-2006; A, 10-31-2011]

Although the state court has held that a permit by itself is an inchoate right, it has not decided how to perfect it. Obviously Trujillo at least perfected 0.5 AFY. The State Engineer does not say how or when it was done.

i. *The Domestic Well Statute Creates An Entitlement*.

The Legislature declared the measure of groundwater that each applicant for a permit is entitled to is enough to irrigate one acre of trees, lawns and gardens. The duty of water in the Basin is 3.0 AFY per acre so the amount of water required to irrigate one acre in the N-P-T Basin is 3.0 AFY.

Defendants have complied with the State Engineer's requirements for perfecting their domestic well water right with the drilling of a well and filing the well record. The State Engineer has not required Trujillo to measure domestic water usage. There is no notice to the domestic well owner of a change in the procedure to perfect domestic well rights; that she would require actual meter readings to prove her rights.

ii. *NMAC 19.27.5.9(D)*[9] *Creates An Entitlement to 3.0AFY*.

[9] NMAC 19.27.5.9: **Well record:** The well driller shall keep a record of each well drilled as the work progresses. The well driller shall file a complete well record with the state engineer and the permit holder no later than twenty (20) days after completion of the well drilling. A well log shall be filed for each hole drilled, including a drill hole that does not encounter water. It is the responsibility of the permit holder to ensure that the well record for the 72-12-1.1 domestic well has been properly filed with the state engineer.

NMA**C** 19.27.5.9(D) provides that a person who can prove that the combined use of domestic wells in the Basin does not impair senior rights is entitled to use 3.0 AFY.

There is no evidence that any senior rights are impaired. ***New Mexico v. Gen. Elec. Co.***, 467 F.3d 1223, 1251-52 (10th Cir. 2006). The amount of water in the Basin also allows the assessment of the likelihood of a priority call which is offered as consideration for accepting the settlement agreement.

The amount of water in the N-P-T-S aquifer becomes an issue. Trujillo's expert hydrologist states that the Pojoaque Basin aquifer holds 55 million acre-feet of water and that domestic wells are having a *de minimus* effect on surface water. (See affidavit of Francis West. Aplt. App. 000163). That is uncontroverted evidence that the Pojoaque Basin contains sufficient groundwater to service all domestic wells without impairing existing water rights and thereby entitle Defendants to 3.0 AFY of groundwater.

B. <u>The Hybrid Procedure For Approving The Settlement Agreement Denies Trujillo Due Process</u>**.**

On June 14, 2007, the court entered its procedural order for adjudicating post 1982 wells, such as Trujillo's, to approve the settlement agreement. (6236; Aplt. App. 000018). It is a hybrid of the Federal Rules of Civil Procedure. The primary difference is that the hybrid rules substitute "objections" for adequate

notice and a fair trial prior to entering a judgment affecting Trujillo's water rights. Trujillo requested discovery but was denied the opportunity. The objective of the hybrid rules is to approve the settlement agreement before September 15, 2017. (9964; Aplt. App. 000155). The district court's hybrid procedure sacrifices Due Process for expediency.

On April 7, 2014, Trujillo, with 792 other defendants, filed objections to the settlement agreement.

The hybrid rules fail to provide a specific procedure for resolving the objections. So the magistrate entered a case management order requiring the parties to brief their positions on the objections and the court will decide to either dismiss all the objections or how to resolve them by September 15, 2017 while affording Trujillo Due Process.

The objections are pending. The district court continues to enter judgments.

As the Supreme Court observed in Eagle County, "Indeed, Eagle County spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for the purposes of the Amendment." ***United States v. District Court for Eagle County***, 401 U.S. 520,523 91 S.Ct. 998,1002 28 L.Ed.2d 268 (1971).

Trujillo owns water rights in the Pojoaque Basin, be they 3.0AFY as she claims or 0.5 AFY as the State Engineer claims. Yet, the district court states in its

procedural order of May 24, 2007 (6236; Aplt. App. 000025), "[t]he Settlement Parties' Motion does not violate due process because it does not deprive any person of their property rights. *See* ***Mitchell v. City of Moore***, 218 F.3d 1190, 1198 (10th Cir. 2000)." *See* ***Kothe v. Smith***, 771 F.2d 667, 669 (2nd Cir. 1985) (The court cannot coerce a party to settle).

The Court has already decided that it will approve the settlement agreement. See the order to show cause filed December 6, 2013. (8035; Aplt. App. 000231)

V. CONCLUSION.

The preliminary injunction does not state the reason(s) for restraining the State Engineer, an officer of the State of New Mexico, from enforcing Trujillo's rights to irrigate her trees, lawns and gardens with domestic well water. The uncontroverted evidence is that the aquifer in the N-P-T Basin holds an excess of 55 million acre-feet of water. The preliminary injunction is morphed into a permanent injunction without a hearing through Trujillo's permit's permanent restriction against outdoor irrigation. The consequence of the injunction is to deprive Trujillo of economic value in her land, aesthetic losses of trees and gardens, cultural losses of traditions developed over generations. The district court binds Trujillo to the preliminary injunction although it was entered years before Trujillo was made a party to this adjudication.

The preliminary injunction fails to raise a federal question that is not insubstantial. It violates the Anti-Injunction Act and assaults the State of New Mexico's sovereignty.

For over 300 years the non-Pueblo people lived in the midst of the Pueblos in the Pojoaque Valley. The present posture of the case unlawfully pits the Pueblos against the non-Pueblos.

Trujillo has incurred significant litigation costs in dissolving the wrongful injunction and should be made whole. See ***Lueker v. First National Bank (Guernsey) Limited,*** 82 F.3d 332 (NM 1996.

This case was filed on April 20, 1966. Its resistance to complete resolution of all claims results from the diversity of claimants, the value of water, the duty to be responsible care-takers of the water, history, and money. Eight sovereigns and over 3000 claimants vie for 55 million acre-feet of water that is worth obscene amounts of money. Sovereigns are expected to protect the water while growing the economy; they should also ask whether $106M is worth emasculating the Fifth and Fourteenth Amendments.

The final judgment that is the subject of this appeal is the product of a wrongful injunction and a procedure that is intended to bully the domestic well user into accepting a reduction of water rights.

Trujillo is deprived of 2.5 AFY of domestic water rights with a single page affidavit adopting a single page memo stating that Trujillo's neighbors use 0.4AFY of domestic water. Trujillo is deprived of the right to use her domestic well to irrigate outdoors with a two page injunction.

For the foregoing reasons, Appellant Trujillo, respectfully requests the Court judgment as follows:

1. The preliminary injunction entered on January 14, 1983 deprives Appellant Trujillo of the beneficial use of her domestic well for outdoor irrigation without Due Process of Law and is otherwise in violation of the Federal Anti-Injunction Act and should be quashed.
2. The procedure for approving and adopting the proposed settlement agreement violates Appellant Trujillo's right to Equal Protection of the Law by its use of a double standard of law for administrating water rights for the Pueblos and Trujillo;
3. The denial of Trujillo's motion to dismiss the Intervener Plaintiffs or realign them as defendants (7454, filed July 29, 2011) should be reversed and the Intervener-Plaintiff parties re-aligned as defendants; and
4. Appellant Trujillo be awarded attorney fees and costs.

Oral argument is requested due to the size and complexity of the case.

Respectfully Submitted,

_/S_ Filed electronically
LORENZO ATENCIO
FAMILIA LEGAL SERVICES
P. O. Box 1538
Espanola, N. M. 87532
505-920-7382
familialgl@cybermesa.com

Stephan J. Mares
THE MARES FIRM
1225 S. St Francis Dr., Suite D
Santa Fe, NM 87505
505-310-1346
smares@mareslaw.us

Attorneys for Appellant Elisa M.Trujillo

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, I caused the foregoing to be filed electronically through the CM/ECF system which caused parties on the electronic service list to be served as described in the Notice of Electronic Filing.

/s Filed electronically
LORENZO ATENCIO

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,

Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 7,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in size 14 font and Times New Roman type style, or

[ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: June 29, 2015

Signature of the attorney

/s Lorenzo E. Atencio

Lorenzo E. Atencio
Attorney for Appellant Elisa M. Trujillo
P. O. Box 1538
Espanola, New Mexico 87532
familialgl@cybermesa.com
505-920-7382