IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

-vs- 01cv00072 BDB-ACE

STATE OF NEW MEXICO, ex rel. State Engineer, A & R Productions, et al., ZUNI RIVER ADJUDICATION

Defendants.

REPONSE TO THE MOTION (No. 396) OF WESTERN NEW MEXICO WATER PRESERVATION ASSOCIATION FOR CERTIFICATION OF QUESTIONS TO THE NEW MEXICO SUPREME COURT

John A. Yates, Yates Petroleum Corporation, and Trust Q Under the Last Will and Testament of Peggy A. Yates, Deceased, oppose the motion of Western New Mexico Water Preservation Association by reason of the following:

1. They join with the United States in the opposition stated in its response (Doc. No. 405).

2. In addition, they suggest that the New Mexico Supreme Court is without jurisdiction to entertain the questions because the resolutions to the questions are all governed by constitutional provisions and statutes of New Mexico.

NMSA § 39-7-4 (1997) provides that:

> The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, a tribe, Canada, a Canadian province or territory, Mexico or a Mexican state if the answer may be determinative of an issue in pending litigation in the certifying court **and there is no controlling** appellate decision, **constitutional provision** or statute of this state. (Bold added.)

There is a controlling constitutional provision. Art. XVI, § 3, N.M. Constitution provides that:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

The questions posited by the motion to certify are, with one possible exception, governed exclusively by Art XVI, Sec. 3. The question which may not be governed by XVI, Sec. 3, is:

> 6. If the facts demonstrate that, a) the actual amount of water required to irrigate not more than one acre of non-commercial trees or garden is a diversionary amount of three acre feet per year, b) if the existing permits on their face provide an entitlement to this amount and do not require application of water to beneficial use within a specific period of time, and c) that allowing the diversion of this amount of water would have a de minimus effect on all other users of water within the basin, then should each domestic user be authorized to divert this amount under his permit as a part of a final decree whether or not he has done so historically?

To the extent the question posed in request No. 6 is not directly governed by the constitutional provision, it is governed by statute, NMSA 1978 Section 72-4-19 (1907) (Laws 1907, ch. 49, § 23):

> Upon the adjudication of the rights to the use of the waters of a stream system, a certified copy of the decree shall be prepared . . . . Such decree shall in every case declare, as to the water **right** adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the **right** and its priority. (Bold added.)

Section 72-4-19, supra, was adopted as a part of the same

act of the New Mexico Legislature as Section 72-1-2, NMSA:

> Beneficial use shall be the basis, the measure and the limit of the **right** to the use of water . . . . (Laws 1907, ch. 49, § 2). (Bold added.)

The legislature used the same word, “right”, in the different parts of the same act, and it must have intended the word to have the same meaning wherever in the act it was used. Hence the “right to the use of water” in 72-1-2, must be deemed to be the same “right” as is referred to at least twice in Section 72-4-19, which is the statute on which this action is based.

The only conclusion from the above is that beneficial use, and not the permits of the state engineer, govern this adjudication. Even the subsequent 1931 underground water code (for the most part compiled as Sections 72-12-1, et seq.,) could not, in light of the constitutional provision, be deemed to supersede the quoted portions of the 1907 water code, because of the incorporation in them of the language of the state constitution, Art. XVI, Sec. 3.

The proposition that the permits of the State Engineer do not give rise to vested water “rights” or protected licensed water rights is bolstered by recent cases in the New Mexico Supreme Court, Turner v. Bassett, 2005-NMSC-009, 111 P.3d 701 (2005); and Sun Vineyards v. Luna County Wine Dev., 107 N.M. 524 760 P.2d 1290 (1988), both of which lead to the conclusion that

the permitted quality of water rights means very little, and that until the rights vest by the licensure provisions of the water law, they lack at least some of the attributes necessary to qualify and protect them as property.

Conclusion

The issues raised by Western New Mexico Water Preservation Association are all answerable by the constitutional and statutory provisions cited. The certification statute expressly excludes from the New Mexico Supreme Court's jurisdiction the power to answer questions which are answerable by reference to constitution and statute. The motion should be denied.

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