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New Mexico, ex rel. State Engineer v. Trujillo, 813 F.3d 1308 (10th Cir. 2016)

Margaret Casey

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rush.

Finally, the court of appeals noted that the Petitioner may have had a separate colorable claim if they had argued that the agencies must have supplemented an existing EIS with an analysis of how year-round dam operations affect the spread of the flowering rush. Agencies have a duty to supplement if there are “significant new circumstances or information relevant to environmental concerns” that were not considered in an earlier EIS. However, the court of appeals found that issue was outside the scope of the case and only raised on appeal.

Accordingly, the court of appeals held that the agencies’ decision to move forward with the Plan without preparing an EIS did not violate NEPA.

Trevor C. Lambirth

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

New Mexico, ex rel. State Engineer v. Trujillo, 813 F.3d 1308 (10th Cir. 2016) (holding that a special master in a general stream adjudication properly granted summary judgment against an individual who objected to a district court’s proposed order limiting her water use to 0.5 acre-feet per year (“AFY”).

This case came before the Tenth Circuit Court of Appeals as an individual challenge to a general stream adjudication initiated by New Mexico to determine water rights in the Nambe-Pojoaque-Tesuque Basin (“Basin”), which originates in the Sangre de Cristo Mountains. Elisa Trujillo held a domestic well permit allowing her to divert underground water in the Basin. The individual adjudication of water rights led to the conflict between Trujillo and New Mexico. In 1983, the United States District Court for the District of New Mexico prevented the State from issuing domestic well permits in the Basin unless the water was used only for household purposes. This permit provision specifically excluded using water for irrigation. In 1985, Trujillo’s predecessor-in-interest received a domestic well permit in accordance with the 1983 injunction (prohibiting irrigation) and was granted a maximum use of 3.0 AFY.

In 1994, the district court directed a special master to determine the appropriate amount of water rights for all permits granted after 1982, including Trujillo’s. The doctrine of beneficial use controls how much water is granted to each permit and, under the New Mexico Constitution, is the amount of water that can be used beneficially and with purpose; water rights are limited based on that use.

Because of the 1994 order by the district court, Trujillo’s permit was amended to limit water use to either 3.0 AFY or the historic, beneficial use, whichever was less. The district court allocated 0.5 AFY for domestic wells unless permit holders showed a greater beneficial use. In 2006, the district court required permit holders to show (1) why the permit should not be adjudicated to 0.5 AFY and (2) why the water rights should not be otherwise adjudicated consistent with the terms of the domestic well permit in order to obtain more AFY. Essentially, the burden was placed on the permit holder to prove a need for more than 0.5 AFY in keeping with the doctrine of beneficial use.

Trujillo’s permit was originally designated for domestic use, and in 1985, the permit allowed for up to 3.0 AFY of water. The State’s proposed order

restricted Trujillo's water use to indoor purposes and limited the amount to 0.5 AFY based on historic beneficial use. Trujillo objected to her permit's prohibition on outdoor use and the limitation of 0.5 AFY. The State offered into evidence an affidavit by an expert witness stating that, on average, permits for a domestic well use 0.4 AFY per household. Trujillo failed to prove that she had the right to use more than 0.5 AFY under the doctrine of beneficial use for a purpose other than as allowed in the permit. In 2010, the special master granted summary judgment in favor of New Mexico.

After the special master issued the order, Trujillo filed several motions, including an objection to the 2010 order of summary judgment, two motions to quash the 1983 injunction, and a motion to reconsider the district court's overruling of her objection to the order of summary judgment. In 2015, the district court issued an order adjudicating Trujillo's domestic water rights as part of a regional general stream adjudication. The 2015 order issued by the district court imposed identical conditions on Trujillo's domestic water rights as had been stated in the 2010 order: a limit of 0.5 AFY with a prohibition on outdoor use including irrigation.

On appeal, the court of appeals did not find this to be a final ruling subject to its jurisdiction because Trujillo and other permit holders may object to the order during the *inter se* stage before the district court enters a final judgment on September 15, 2017. Therefore, the court of appeals did not have jurisdiction under 28 U.S.C. § 1291 to review 2015 order by the district court. The pragmatic finality doctrine is an exception under § 1291 and may be applied in order to expedite appellate review. However, the court of appeals did not apply the pragmatic finality doctrine to Trujillo's appeal, instead finding jurisdiction under 28 U.S.C. § 1291(a), which permits interlocutory appeals.

Accordingly, the court of appeals had jurisdiction to review the special master's summary judgment order issued in 2010. The court of appeals upheld the district court's ruling from 2010 and the subsequent order in 2015. Trujillo did not present the court with evidence of her beneficial indoor use. Trujillo failed to raise an argument against the 2010 decision upon which the 2015 decision was based. Contrary to New Mexico law, Trujillo argued that her permit alone created the water right. Beneficial use is the basis from which all water rights within the state may be legally measured and limited, and Trujillo gave no evidence of her beneficial use for indoor purposes in excess of the allocated 0.5 AFY.

Therefore the court of appeals affirmed the district court's order for summary judgment in favor of the state of New Mexico.

Margaret Casey

STATE COURTS

COLORADO

County of Boulder v. Boulder & Weld Cnty. Ditch Co., 367 P.3d 1179 (Colo. 2016) (holding that the Water Court correctly denied the County of Boulder's change of use application because it failed to meet its burden of proving an accurate historical consumptive use analysis).

Beginning in the early 1990s, the County of Boulder (the "County") entered