

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, <i>ex rel.</i> State	)	
Engineer,	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	No. 15-2047
Plaintiff-Intervenor	)	No. 66cv6639 WPJ/WPL
	)	(D.N.M.)
and	)	
	)	
ELISA M. TRUJILLO	)	
Defendant-Appellant,	)	

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APPELLANT’S REPLY TO THE JOINT RESPONSE BRIEF OF APPELLEES  
PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, AND  
PUEBLO DE TESUQUE

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## INTRODUCTION

Appellant Elisa Trujillo, by her undersigned attorney, submits her Reply to the Joint Response Brief of Appellees, as follows:

Intervenor Appellee Pueblos and USA submit that the settlement agreement between the Plaintiff parties is not under the Court's jurisdiction and is not reviewable at this time. (Appellee Response, p. 10). Trujillo agrees.

Intervenor Appellee Pueblos and USA argue that the judgment in this case is a final order. (Appellee Response, p. 17). Trujillo agrees.

Intervenor Appellee Pueblos and U.S.A. argue that the Court is without jurisdiction to review the denial of Trujillo's motions to quash the 1983 preliminary injunction.

Trujillo submits that the Court has jurisdiction pursuant to 28 U.S.C.A. § 1291 and 28 U.S.C.A. § 1292(a)(2) and F.R.A.P. Rule 4(a)(1) to hear and decide whether the preliminary injunction herein is constitutionally infirm or statutorily deficient.

## ARGUMENT

**A. The Court has jurisdiction to hear and decide the appeal of the summary judgment and should overturn that decision because the Domestic Well Statute creates an entitlement to enough water to irrigate up to one acre foot of land and Trujillo presented genuine issues of material fact that were not considered by the court.**

Trujillo appeals the grant of summary judgment as it relates to the quantity of groundwater Trujillo is entitled to under the New Mexico Domestic Well Statute<sup>1</sup>, and to the prohibition against use of her domestic water for outdoor irrigation. The U.S.A. and Pueblos do not dispute the Court's jurisdiction to hear the appeal of the summary judgment as a final order. When pressed for authority to limit Trujillo's irrigation rights, the State Engineer cites only the district court's preliminary injunction entered by the district court on January 13, 1983. (Aplt Appdx @ 000031; Dkt. # 641) For these reasons, Trujillo can only prevail in defending her right to irrigate by attacking the preliminary injunction. Further, it is within the jurisdiction of this Court pursuant to 28 USC §1292 (a)(2) to review the facts and law underlying that motion to determine: (1) whether the Appellees have shown irreparable harm to justify the grant of that injunction as proper, and (2) whether the use of water for outdoor irrigation impairs senior rights, are material

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<sup>1</sup> "A person, firm or corporation desiring to use public underground waters described in this section for **irrigation of not to exceed one acre of noncommercial trees, lawn or garden** or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer. Upon the filing of each application describing the use applied for, the **state engineer shall issue** a permit to the applicant to use the underground waters applied for; provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978."

facts that should have been considered and were not considered, thereby rendering the grant of summary judgment improper.

The Court should overturn the summary judgment based on the provisions of the domestic well statute and the entitlement it creates when read with the administration of water made under the domestic well statute by the State Engineer pursuant to NMSA § 72-2-9.1 and N.M.Admin Code 19.25.13.1 et seq. The Plaintiff intervenors admit that the Court has jurisdiction over the summary judgment decision that deprives Trujillo of her entitlement to 3.0 AFY to irrigate one acre of land for trees, lawns and gardens. The legal questions presented in this appeal of summary judgment are: first, whether the language of the domestic well statute read plainly creates an entitlement to 3.0 acre feet of water per year to each applicant for a domestic well; and second, whether included in that usage is irrigation of outdoor vegetation.

Questions of statutory construction are reviewed *de novo*. ***Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio***, 289 P.3d 1232 (N.M., 2012). Because the text of the statute is the primary indicator of legislative intent, when presented with a question of statutory construction, a court begins its analysis by examining the language utilized by the legislature. *Id.*

A plain reading of that text shows that statute specifically states that outdoor irrigation is included in that usage.

Further, the State Engineer's authority is limited to administration of waters in the State and therefore can only administer the water to which a user is entitled under the Domestic Well Statute. NMSA § 72-2-9.1 and N.M.ADMIN CODE 19.25.13.1 et seq. See also *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, supra. The State Engineer may not adjudicate water rights. Id. @ {39}. Thus, the State Engineer's duty is to determine the duty of water at the site where the domestic well is located. The State Engineer determined the duty of water in the NPT Basin to be 3.0 AFY when it permitted usage of that amount of water for wells issued under the domestic well statute; provided that amount of water is available. There is no evidence that has been presented suggesting that the water is not available.

A grant of summary judgment is reviewed *de novo*, applying the same standard used by the district court. Summary judgment is appropriate if 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed.R.Civ.P. 56(c). We examine the factual record in the light most favorable to the party opposing summary judgment, extending to that party all reasonable factual inferences. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)

**B. The Court has jurisdiction to review the motions to quash the preliminary injunction; and the court's failure to grant that motion was erroneous because the standard of showing irreparable harm had not been met by the Pueblos.**

Trujillo filed two motions to quash the preliminary injunction. The first was filed on June 16, 2011 (Dkt. # 7403) and denied on March 30, 2012 (Aplt. Appdx @ 000239; Dkt. # 7579). The July 16, 2011 Motion is based on the Pueblo's failure to provide evidence of irreparable harm to support the grant of the injunction. Trujillo filed a second motion to quash the preliminary injunction for being in violation of the Anti-Injunction Statute, 28 USC §2283. In the alternative, Trujillo moved for a three judge panel to review the preliminary injunction. (Aplt Appx , @ 00131; 11-1-14)

When Trujillo filed a notice of appeal, the first motion to quash the preliminary injunction had been denied by the district court, and the second motion to quash had been filed but not decided.

**1. The Court has jurisdiction to review the 2011 motion to quash the preliminary injunction.**

The general rule is that interlocutory rulings merge into the final judgment of the court and become appealable once a final judgment has been entered, provided the parties are not prejudiced. *Knight v. Brown Transport Corporation*, 806 F.2d 479, 483-484 (3<sup>rd</sup> Cir. 1986); *Mock v. T G & Y Stores*,



*Co.*, 971 F.2d 522, 527 (10<sup>th</sup> Cir. 1992) citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225–26, 93 L.Ed. 1528 (1949). The Court has jurisdiction to hear the appeal of the first motion to quash the preliminary injunction pursuant to USC §1291 because it is an interlocutory order which may be appealed with the final order. A decision not to file an immediate notice of appeal of the interlocutory order denying the first motion does not waive appeal of that order. *Knight v. Brown Transport Corporation*, supra at pp. 483-484; *B. Willis, CPA, Inc v. BNSF Railway, Corp.*, 531 F.3d 1282, 1295-1296 (10<sup>th</sup> Cir. 2008). Moreover a notice of appeal that names the final judgment is sufficient to support jurisdiction over earlier orders that merged in the final judgment. The notice of appeal herein includes a copy of the judgment being appealed which, together with the docketing statement, are sufficient to preserve the right to appeal the denial of the two motions to quash the injunction. The order denying Trujillo's motion to quash the preliminary judgment merged into the final decree and may now be appealed as an earlier interlocutory order underlying the portion of the judgment that restrains Trujillo from outdoor irrigation. See *Fields v. Oklahoma State Penetentiary*, 511 F.3d 1109, 1111 (10<sup>th</sup> Cir. 2007).

The court erred in failing to grant the 2011 Motion to Quash the Preliminary Injunction because the Pueblos did not provide any evidence of irreparable harm if

the injunction was not issued. In *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004) the 10<sup>th</sup> Circuit Court of Appeals held that an injunction should be denied where the moving party failed to show that irreparable harm would occur absent issuance of the injunction. The only evidence of irreparable harm presented by the Pueblos was a claim that their senior water rights would be impaired by Trujillo's junior water rights if Trujillo is allowed to irrigate her trees, lawn, and garden. The Pueblos cannot establish that impairment presently as they do not have vested water rights because the adjudication is still ongoing and therefore the proposition that Trujillo's use of water will cause irreparable harm to their prospective water rights is mere speculation and should be reversed. Finally, Trujillo's expert hydrologist estimated the N-P-T Basin aquifer holds 55 million acre-feet of water, a fact that was not contested by the State Engineer. That quantity makes irreparable harm improbable.

**2. The 2014 motion to quash the preliminary injunction is reviewable.**

The second motion to quash the preliminary injunction filed in 2014 is based on the violation of the Anti-Injunction Act (28 USC §2283) and the failure to comply with the three judge panel requirement as set forth in 28 USC §2284 for violation of 28 USC §2283. The appeal of the second motion to quash is also taken pursuant to 28 USC §1292 (a)(2) with a notice of appeal filed on March 12, 2015

that merged into the final order with the filing of the May 29, 2015 order. Those matters again are proper for review at this time on appeal as an interlocutory order that merges into the final order. See *Knight v. Brown Transport Corporation*, supra, citing *Cole v. Ruidoso Mun. Sch.*, supra at 1383 n. 7 (10th Cir.1994) Here these matters were decided with finality because Trujillo can never again present them for review outside this appeal. Entry of the May 29, 2015 order denying the second motion to quash rendered the judgment “final” and appealable. See *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 646 (10th Cir. 1988). (Fed.R.App. P.4(a)(2)<sup>2</sup> ripens and saves the prematurely filed appeal, where appellant obtains certification or final adjudication of matter before Court of Appeals considers appeal on its merits.

The district court’s order denied Trujillo’s second motion to quash or review by the three judge panel thereby resolving all outstanding issues and making the judgment herein final. The court has declared the judgment a final order. The court is clear

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<sup>2</sup> (a)(2) **Filing before entry of judgment.** A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

that it will not modify the judgment provisions for the quantity or use of Trujillo's water rights.

Appellees would have Trujillo filing an interlocutory appeal with all interlocutory orders. This is neither practical nor serves the interests of judicial efficiency.

**C. Trujillo also appeals the deprivation of her right to beneficial use of 3.0 AFY of groundwater without Due Process Of Law.**

Trujillo submits that the Domestic Well Statute enacted by the Legislature of New Mexico entitles her to beneficial use of sufficient water to irrigate one acre of non-commercial trees, lawns and gardens. The State Engineer argues forcefully that the measure of rights is the actual amount of water used by Trujillo, knowing that Trujillo would not have actual usage data because the State Engineer has not previously required Trujillo to capture or provide such data. The law of the case is that a claimant is only required to present a valid permit to drill a domestic well and the well record to show that the well is dug and is presumably using the water. The requirement for actual data to prove historic use is a requirement that Trujillo did not receive notice of until she was served an order to show cause why the court shouldn't enter judgment for 0.5 AFY. (Appt. App, # 8035)

The district court required Trujillo to produce data to show actual beneficial use of groundwater, but allowed the State Engineer to use an estimate of use to determine that Trujillo is entitled to 0.5 AFY.

However, the amount of domestic well water that Trujillo uses is irrelevant to the issue of the quantity she is entitled to because the Legislature has established a uniform measure for all applicants: enough to irrigate one acre of trees, lawns and gardens. The legislative intent is contained in §72-12-1 NMSA 1978: “By reason of the *varying amounts and time* such water is used and the *relatively small amounts of water consumed...* in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use... application for any such use shall be governed by the provisions of §§72-12-1.1...” NMSA 1978. By so doing, the Legislature has simplified the State Engineer’s duty to administer domestic wells because he is relieved of the requirement to keep a separate record of fluctuating usage for each domestic well owner. The DWS allows the State Engineer to assume all domestic well owners in the Basin use 3.0 AFY.

The Legislature enacted the Domestic Well Statute and authorized the State Engineer to administer it. The State Engineer must determine the quantity of water required to irrigate one acre of non-commercial trees, lawns and gardens where the

domestic well is located. Trujillo's permit shows that the State Engineer has determined that amount to be 3.0 AFY in the N-P-T Basin.

The State Engineer argues that the permit by itself is an inchoate right of no value, yet admits that Trujillo owns 0.5 AFY. This incongruity raises questions: 1) how and when did Trujillo's water rights become vested? 2) Did the State Engineer arbitrarily choose 0.5 AFY as the amount Trujillo owns? The New Mexico Legislature has set the amount of entitlement to be enough water to irrigate one acre of land. The State Engineer cannot affect that amount without proof that senior water rights are impaired. See Appellees' Response, pp. 15-16. The State Engineer may affect water rights "after a proper evidentiary hearing." And a court that seeks to impose limitations on water rights may not do so without an evidentiary hearing. There is no evidence of impairment of senior rights or limitations by a lawful court order that is entered after a hearing. Appellees forfeit this opportunity to point to that evidence.

## **II. Conclusion.**

This appeal involves 3.0 acre-feet of groundwater and quality of life. There are 55 million acre-feet of groundwater in the Nambe-Pojoaque Tesuque-San Ildefonso Basin. Confident in their superior resources against Trujillo, Appellees refuse to mediate. (Dkt. # 7958, 9/10/13).

Appellant Trujillo respectfully requests the Court to find that it has jurisdiction to hear and decide whether the preliminary injunction entered on January 13, 1983 is lawful; that the denial of Appellant's right to 3.0 AFY is without Due Process of Law and denies Trujillo Equal protection of the Law by the double standards used to determine water rights; and otherwise unlawful; and that said preliminary injunction should be quashed; that the parties to this appeal be ordered to mediate in good faith; that Trujillo be awarded attorney fees and costs of the appeal.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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 Lorenzo Atencio

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Date: September 21, 2015

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