

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

STATE OF NEW MEXICO, ex rel. STATE)
ENGINEER,)
))
Plaintiff,)
))
v.)
))
R. LEE AAMODT, et al.,)
))
Defendants,)
))
and)
))
UNITED STATES OF AMERICA,)
PUEBLO DE NAMBÉ,)
PUEBLO DE POJOAQUE,)
PUEBLO DE SAN ILDEFONSO,)
and PUEBLO DE TESUQUE,)
))
Plaintiffs-in-Intervention.)

No. 66cv6639 WPJ/WPL

**Defendants Trujillos’ Motion to Quash the Preliminary Injunction Or,
Alternatively, For Three Judge Court,**

Defendants Arsenio Trujillo and Elisa Trujillo move the Court to Quash the Preliminary Injunction entered herein on January 13, 1983 (Dkt. # 641) for want of jurisdiction.

Alternatively, if this Court finds it has subject matter jurisdiction pursuant to 28 USC §2283¹ and 28 USC §2284², Defendants move the Court to convene a three judge court to hear and determine the preliminary injunction filed by the single judge court on January 13, 1983.

¹ 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.

² (a) 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.

Points and Authorities

I. 28 U.S.C. § 2283 and 28 U.S.C. §2284 apply.

II.

1. By enacting 28 U.S.C §2283, Congress codified the national policy of not interfering with state court proceedings, except under special circumstances and only with a three judge court.
2. This is a general water adjudication case filed on April 20, 1966.
3. The Legislature of the State of New Mexico enacted § 72-12-1.1³, NMSA ,by Laws 2003, ch. 298, § 2, to grant an owner of a permit issued by the New Mexico state engineer to drill

(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) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(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.

28 U.S.C.A. § 2284

³ 72-12-1.1. Underground waters; domestic use; permit. (2003)

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

a domestic water well the right to use groundwater to irrigate up to one acre of trees, lawns or gardens, if the water is available.

4. The state engineer is an official of the state of New Mexico with the authority and duty to administer the Water Code set forth in 72-2- 1 to 72-2-18, including the administration of permits to drill a water well for domestic uses. 72-2-9.1.⁴
5. Each Defendant Trujillo is owner of a permit issued by the State Engineer pursuant to 72-12-1.1, (Domestic Well Statute). Each permit contains condition number 8 which prohibits the use of domestic well water for outdoor irrigation. (Exhibits 1 and 2)
6. On February 26, 1982 the USA and Pueblo Plaintiffs-in-Intervention filed a motion and memorandum (Dkt.# 576, 577) alleging a concern that they did not have reliable

require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.

History: 1978 Comp., § 72-12-1.1, enacted by Laws 2003, ch. 298, § 2.

⁴ 72-2-9.1. Priority administration; expedited water marketing and leasing; state engineer. (2003)

Statute text

A. The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

B. The state engineer shall adopt rules for priority administration to ensure that authority is exercised:

(1) so as not to interfere with a future or pending adjudication;

(2) so as to create no impairment of water rights, other than what is required to enforce priorities; and

(3) so as to create no increased depletions.

C. The state engineer shall adopt rules based on the appropriate hydrologic models to promote expedited marketing and leasing of water in those areas affected by priority administration. The rules shall be consistent with the rights, remedies and criteria established by law for proceedings for water use leasing and for changes in point of diversion, place of use and purpose of use of water rights. The rules shall not apply to acequias or community ditches or to water rights served by an acequia or community ditch.

D. Nothing in this section shall affect the partial final decree and settlement agreement as may be entered in the Carlsbad irrigation district project offer phase of State of New Mexico ex rel. State Engineer v. Lewis, et al., Nos. 20294 and 22600 (N.M. 5th Jud. Dist.).

History: Laws 2003, ch. 63, § 1.

information regarding the amount of water actually being pumped by domestic wells in the Pojoaque Basin and sought an adjudication of all such wells to determine that amount. To that end, they requested a preliminary injunction to maintain the status quo *pendent lite* and to ensure that all water users in the Pojoaque Basin have their water rights adjudicated. Id at pp. 1-2.

7. Although the Plaintiffs-in-intervention state that they have no reliable information about the amounts of water being pumped, they allege that it is "...**obvious** that the newer permitted wells are withdrawing substantial amounts of groundwater..." and having "... a substantial effect on all senior water rights." Id at p. 2. The Plaintiffs-in-Intervention have not offered proof of actual irreparable harm if the preliminary injunction is not issued.
8. The State Engineer objected to the preliminary injunction. See memorandum in support of the State Engineer's response to motion for injunction, filed March 11, 1982. Dkt. # 580.
9. On January 13, 1983, the Court granted the motion and filed a preliminary injunction restraining the State Engineer from issuing permits pursuant to the DWS that are not limited to indoor use only. (Dkt. # 641). A copy of the preliminary injunction is attached as exhibit 3.

III. **The Preliminary Injunction is Null and Void for Want of Jurisdiction.**

10. The Court made no specific findings, based on evidence, of specified irreparable harm as required by 28 USC §2284(b)(3).
11. The January 13, 1983 preliminary injunction restrains the State Engineer from performing his statutory duty to grant all permits owners the right to divert sufficient water to irrigate up to one acre of domestic water for non-commercial trees, lawns and gardens as required by 72-12-1.1.

12. The preliminary injunction violates 28 USC § 2283.
13. The single judge failed to consider whether the motion for a preliminary injunction meets the tests for any of the exceptions to the Anti-Injunction Act before granting the request for injunction.
14. The single judge failed to convene a three judge court to review the actions of the Court after granting the motion as required. See 28 USC s2284 .
15. Under New Mexico law a water right is property protected by the Due Process Clause of the Fifth and Fourteenth amendment of the U.S. Constitution. *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.
16. Where constitutional questions involving deprivation of a constitutional right presented are not plainly unsubstantial, the single-judge district court is powerless to dismiss the action on merits and is required to convene a three-judge court. *Schneider v. Rusk*, 372 U.S. 224, 83 S. Ct. 621, 9 L. Ed. 2d 695 (1963).
17. The allegations underlying the Plaintiffs-in-Intervention's motion for preliminary injunction fail to raise a substantial federal question and should be quashed. See *Schneider v. Rusk*, 372 U.S. 224, 83 S. Ct. 621, 9 L. Ed. 2d 695 (1963).
18. 28 USC §2284(b)⁵ sets forth the procedure for the district court upon receiving a motion for three judge panel. The district court judge is required to initiate the process to appoint

⁵ 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.

three judges to hear and determine the action or proceeding. *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S. Ct. 70, 70, 74 L. Ed. 233 (1929)

19. The district judge is authorized to determine initially whether the complaint is not plainly unsubstantial. If the complaint does not meet the exceptions to 28 USC §2283, the single judge may deny the motion and dismiss the complaint. 28 USC §2284(b)(1).
20. Jurisdiction is determined by the contents of the complaint. *Ex parte Poresky* , 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933).
21. If the complaint raises sufficient federal question, the single judge is required to convene a three judge court. 28 USC §2284(b)(3)
22. A single judge may enter a temporary restraining order on a specific finding that the Plaintiffs-in-Intervention will suffer specified irreparable damage if the restraining order is not granted. The order shall remain in force only until the three judge court conducts a hearing and determines the application for a preliminary injunction. 28 USC §2284(b)(3)
23. The district judge to whom the application for three-judge district court is addressed may dismiss complaint which fails to raise substantial federal question. *Lindauer v. Oklahoma City Urban Renewal Authority*, C.A.10 (Okla.) 1971, 452 F.2d 117, certiorari denied 92 S.Ct. 1293, 405 U.S. 1017, 31 L.Ed.2d 479, rehearing denied 92 S.Ct. 1607, 406 U.S. 911, 31 L.Ed.2d 823. Cf. *Ex parte N. Pac. Ry. Co.*, 280 U.S. 142, 144, 50 S. Ct. 70, 70, 74 L. Ed. 233 (1929)(the district judge was without authority to grant or deny motion to dismiss).

When the district judge herein granted a temporary restraining order to restrain the state engineer, it became his duty under 2284(b)(1) immediately to call two other judges to convene a three judge panel. *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S. Ct. 70, 70, 74 L. Ed. 233 (1929)(Decided under 28 USC §380.)

24. Here Plaintiffs-in-Intervention do not challenge the constitutionality of any state statute, and they do not ask that enforcement, operation, or execution of any state statute be enjoined pursuant to an expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. *Massachusetts Welfare Rights Org. v. Ott*, 299 F. Supp. 296 (D. Mass. 1969) aff'd, 421 F.2d 525 (1st Cir. 1969). (The application was denied and complaint dismissed.).
25. “The requirement of a three-judge court is not a mere privilege or right which the parties may waive. It is a jurisdictional requirement.” *Borden Co. v. Liddy*, 309 F.2d 871 (8th Cir. 1962).
26. The direct-appeal provision of §1253 obviously reflects the particular sensitivity of granting or denying an injunction in those important cases required to be heard by three-judge. *Perez v. Ledesma*, 401 U.S. 82, 128, 91 S. Ct. 674, 699, 27 L. Ed. 2d 701 (1971).
27. The preliminary injunction is void for lack of subject matter jurisdiction. 28 USC s2283. This statute acts as a complete prohibition against a federal court injunction of state court proceedings, unless the injunction falls within one of the exceptions specifically set forth in the statute. *Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1254 (11th Cir. 1988).

IV. Defendants Trujillo Have Standing Because A Three Judge Court Can Fully Redress The Preliminary Injunction With a Favorable Ruling With Respect To The Court’s Lack Of Authority To Enjoin The State Engineer From Enforcing The New Mexico Domestic Well Statute.

28. As a direct result of the entry of the January 13, 1983 preliminary injunction, the state engineer has issued each of the Defendants a permit to divert groundwater pursuant to the Domestic Well Statute which limits the use of the groundwater to indoor use, thereby depriving the Defendants of their statutory right to use their domestic wells for irrigation of non-commercial trees, lawns and gardens. The right to irrigate has a commercial and

cultural value to the Defendants. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972). (“That rights in property are basic civil rights has long been recognized...”).

29. In the case of *Massachusetts v. E.P.A.*, 549 U.S. 497, 540-41, 127 S. Ct. 1438, 1467, 167 L. Ed. 2d 248 (2007), the Supreme Court cited a three-part test for standing to request a three judge court: 1) the alleged injury must be “concrete and particularized” and 2) “distinct and palpable” and 3) the movant must be affected in a “personal and individual way”. The relief sought directly and tangibly benefits him in a manner distinct from its impact on “the public at large.”
30. In this case, Defendant Elisa Trujillo moved the Court to quash the preliminary injunction. (Motion filed 6/16/11 Dkt. # 7403). The Court has denied her motion on March 30, 2012. Dkt. # 7579. The Court has entered summary judgment against Defendant Elisa Trujillo which incorporates the restriction against outdoor irrigation with domestic wells.
31. Defendant Arsenio Trujillo has objected to the special master’s order denying his motion for summary judgment and granting the State Engineer’s motion for summary judgment which incorporates the preliminary injunction’s restraint on the use of domestic water for outdoor irrigation. See Order filed on February 24,2014; Dkt. 8119, p.10).
32. Although the court’s preliminary injunction is against the state official, the Defendants Trujillo are directly affected by the prohibition against outdoor irrigation with domestic water in a personal and individual way.
33. A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in

property are basic civil rights has long been recognized. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972).

34. If the three panel court were to decide that the court is without jurisdiction to enter the preliminary injunction, the prohibition against use of domestic well water for outdoor irrigation would be void. Restoring the right to irrigate their trees, lawns and gardens with their domestic wells would make the Defendants whole, except for attorney's fees. See *Monroe Division, Litton Business Systems, Inc V. De Bari*, 562 F.2d 30 (Cir. 10, Sept. 26, 1977).
35. Even after a three-judge district court has been demanded, the single judge to whom application for injunction or other relief is presented may dismiss the suit if good cause therefor is shown before three-judge district court is convened. *Bussie v. Long*, E.D.La.1966, 254 F.Supp. 797, affirmed 383 F.2d 766.
36. A single federal district judge may issue temporary restraining orders, and thereafter a three-judge court be convened and the temporary orders are then reviewable. In *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972).
37. The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. *Ex parte Poresky*, 290 U.S. 30, 31-32, 54 S. Ct. 3, 4, 78 L. Ed. 152 (1933)
38. The burden is on the court to initiate a request for a three judge panel. 28 U.S.C. §2284 *Borden Co. v. Liddy*, 309 F.2d 871 (8th Cir. 1962); (When the application for such an injunction is presented to a justice or judge, he must immediately call to his assistance two other judges, as stated, but, if he is of opinion that irreparable loss may otherwise result to the complainant, he may grant a temporary restraining order which is to remain in force

only until the hearing and determination of the application for an interlocutory injunction upon prescribed notice.) Cf. *Stratton V. St. Louis Southwestern Ry. Co* 51 S.Ct. 8 (1930) (Decided pursuant to 28 USC § 380, precursor for §2283).

39. If the trial court was correct in holding that subject-matter jurisdiction is not alleged, there is no need of pursuing further the question of the need for a three-judge court. *Board. of Education. of Independent. School. District. 20, Muskogee, Oklahoma. v. State of Oklahoma.*, 409 F.2d 665, 667 (10th Cir. 1969).
40. The state engineer is now requiring proof of actual historic use of domestic well water to determine the amount of water rights that Defendants are entitled to, but the preliminary injunction does not allow them to use the domestic water outdoors, so the preliminary injunction is also preventing the Defendants from claiming all the water that they are entitled to. In Elisa Trujillo's case, her attempt to claim the water she used for irrigation was denied as unauthorized violations of the preliminary injunction. (Memorandum opinion and order file September 20, 2012, Dkt.# 7757, p. 10). Besides losing property value, the defendants also lose the cultural and familial benefits of outdoor irrigation. *Massachusetts v. E.P.A.*, 549 U.S. 497, 540-41, 127 S. Ct. 1438, 1467, 167 L. Ed. 2d 248 (2007)

The Defendants have standing to apply for a three judge court.

V. Conclusion.

Title 28 USC §2283 is unequivocal that “[a] court of the United States may not grant an injunction to stay proceedings in a State court...” The January 13, 1983 preliminary injunction is such an injunction.

There should be no question that 28 USC §2283 applies to the January 13, 1983 preliminary injunction: it is an injunction that restrains a state officer from enforcing a statute duly enacted by the Legislature of the State of New Mexico, namely the Domestic Well Statute (DWS), §72-12-1.1 NMSA enacted by Laws 2003, ch. 298, § 2. It has passed a constitutional challenge (*Bounds v. State*, 2013-NMSC-037, 306 P.3d 457). There is no specific finding of irreparable harm by the single judge court if the preliminary injunction is not granted. Prohibiting landowners from landscaping their property has not been expressly authorized by Act of Congress. The preliminary injunction does not aid the court's jurisdiction, or protect or effectuate its judgments. The preliminary injunction is not exempt from the prohibition against the injunction set forth in §2283.

Defendants Trujillo submit that the preliminary injunction entered on January 13, 1983 is contrary to Title 28 USC §2283's prohibition against enjoining a state official from enforcing a state statute. When the court entered the preliminary injunction, the single judge court was duty bound to convene a three judge court to hear and decide the case. The single court judge is not authorized to decide the merits before the three judge panel reviews the complaint. The preliminary injunction is null and void for lack of jurisdiction. *Younger v. Harris*, 91 S.Ct. 746 (1971). See *Ex parte Northern Pacific Railway. Co.*, 280 U.S. 142, 144, 50 S. Ct. 70, 70, 74 L. Ed. 233 (1929).

Accordingly, Defendants respectfully request the Court to quash the preliminary injunction entered on January 13, 1983.

If the court decides that the motion for preliminary injunction is not plainly unsubstantial or otherwise sufficiently within the exceptions to the 28 USC §2283 prohibition, Defendants

submit that the preliminary injunction must be reviewed and determined by a three judge court, and so request.

Defendants request an award of attorney fees incurred by Defendants to quash the unlawful injunction. *Monroe Division, Litton Business Systems, Inc V. De Bari*, 562 F.2d 30 (Cir. 10, Sept. 26, 1977).

Opposing counsel object to this motion.

FAMILIA LEGAL SERVICES

Filed electronically
LORENZO ATENCIO
Attorney for Defendants Trujillo
P.O. Box 1538
Española, NM 87532
(505) 920-7382

I hereby certify that I filed the foregoing electronically through the CM/ECF system which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means on this 3rd day of October, 2014.

Filed electronically
Lorenzo E. Atencio