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NEW MEXICO

Tri-State Generation & Transmission Ass'n v. D'Antonio, 289 P.3d 1232 (N.M. 2012) (holding the New Mexico State Engineer's adoption, by legislative direction, of new Active Water Management regulations for the administration of water rights in priority were not unconstitutional on separation of powers, due process, and vagueness grounds).

In 2003, the New Mexico Legislature enacted N.M. STAT. ANN § 72-2-9.1 ("statute"), directing the New Mexico Office of the State Engineer to adopt rules to administer water allocations efficiently and in priority. In 2004, the State Engineer, pursuant to the statute, developed the Active Water Resource Management ("AWRM") regulations, which allow the State Engineer to identify water districts in need of management and to appoint water masters to those districts. Under AWRM regulations, these water masters evaluate their respective districts' water supplies and manage the allocation of that supply according to users' priority dates.

AWRM regulations establish "administrable water rights" to impound, store, or release water according to the elements a court or the State Engineer determines to be appropriate. When the task falls to the State Engineer, the State Engineer determines the users' priority date using the following hierarchy: (i) final adjudicatory decrees; (ii) adjudicatory subfile orders; (iii) offer of judgments; (iv) hydrographic surveys; (v) issued licenses; (vi) issued permits; and (vii) historic beneficial uses. The State Engineer then publishes the priority dates, and water users may appeal the determinations. *Tri-State Generation & Transmission Association, Inc.* ("Tri-State"), an electric power cooperative with water rights, filed suit challenging the AWRM regulations on separation of powers, due process, and vagueness grounds.

The District Court of Socorro County ("district court") found the statute violated Article III, Section 1 of the New Mexico Constitution because the State Engineer's authority to determine priority dates originated from a century-old statute granting weight to licenses and adjudications only. Therefore, the district court reasoned, the State Engineer could only consider evidence of adjudications or licensing (items (i), (ii), (iii), and (v) above) when determining administrable rights. The district court found the remaining provisions of AWRM regulations unconstitutionally exceeded the scope of the State Engineer's statutory authority, in violation of due process and contrary to constitutional guarantees of *inter se* adjudication of water rights.

The State Engineer appealed the district court's decision to the New Mexico Court of Appeals ("appeals court"), which affirmed the district court in part. The appeals court held that, because the statute did not grant the State Engineer new authority to adopt AWRM regulations, the regulations unconstitutionally exceeded the State Engineer's existing authority. The appeals court, however, reversed the district court's due process ruling as speculative. The State Engineer petitioned for certiorari, and Tri-State also cross-petitioned for certiorari to the New Mexico Supreme Court.

The Court considered four issues on appeal. First, the Court considered whether the State Engineer had authority to implement AWRM regulations. Applying two canons of statutory construction, the Court held the Legislature

intended to expand the State Engineer's authority by enacting the statute. The Court reasoned that enacting legislation entitled, in part, "An Act Relating to Water *Providing Authority for State Engineer*" indicated a grant of legislative authority by its plain meaning. Further, the statute's placement within the chosen statutory framework did not limit this intent. Specifically, the Court held that, because the Legislature did not dictate the specific sub-section for the statute, the statute's placement within the overall statutory scheme did not limit the scope of the statute and its expansion of the State Engineer's authority.

Second, the Court examined Tri-State's claim that AWRM regulations violated separation of powers principles, because only *inter se* adjudication could determine water rights in New Mexico. The Court distinguished adjudication from administration, holding the Legislature constitutionally permitted the State Engineer to administer the state's water supply. The Court noted that, while the State Engineer lacks the authority to adjudicate water rights, nothing in the New Mexico Constitution actually requires adjudication. Instead, the Court concluded the New Mexico Constitution broadly states that the waters of the state "be subject to appropriation for beneficial use, in accordance with the laws of this state." The Court held the Legislature constitutionally delegated the task of administering water rights to the State Engineer.

Third, the Court addressed Tri-State's claim that AWRM regulations violated procedural due process requirements. The Court held there was no violation for three reasons. First, to prevail, Tri-State needed to establish the regulations deprived it of liberty or property without affording Tri-State adequate procedural protections. According to the Court, because a water right involves a right to use water, not to own water, regulation of water rights is an exercise of police power, not deprivation.

Second, regulation of water rights by the State Engineer, where permissible, upholds the system of prior appropriation. Because AWRM regulations established a system for the administration of priority dates, the Court held it upheld prior appropriation and accordingly, *inter se* adjudication was not required.

Finally, a claim is ripe for review only when a party presents an actual controversy stemming from non-speculative harm. Tri-State claimed a lack of water would destroy its property. The Court, however, held Tri-State's claim was not yet ripe for review, because the State Engineer had yet to make a priority determination as to Tri-State's rights and Tri-State had yet to appeal any forthcoming determination.

Finally, the Court addressed Tri-State's argument that the AWRM regulations were impermissibly vague. The Court explained a statute violates due process when it is so vague that people of ordinary intelligence guess at its meaning and differ as to its application. Applying this standard, the Court held the statute was not impermissibly vague because it provided an express hierarchy with corresponding examples and gave sufficient notice to those the statute would potentially affect.

Accordingly, the Court (i) reversed the appeals court's decision regarding the separation of powers claim; (ii) affirmed, in part, the appeals court's speculative due process decision; and (iii) held the statute was not impermissibly vague.

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