

Tri-State Generation case: High Court sides with state engineer on water rules

By Tom Sharpe

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The New Mexico Supreme Court on Thursday reversed lower courts in a decision that reaffirms the water-rights authority of the Office of the State Engineer.

The case originated in 2007, when Tri-State Generation and Transmission Association — a wholesale electric-power supplier owned by 44 electric cooperatives in Colorado, Nebraska, Wyoming and New Mexico — sued John D'Antonio Jr., then state engineer.

It concerns D'Antonio's 2004 Active Water Resource Management regulations, written to address the concerns of the Legislature that water-rights adjudication in New Mexico was moving too slowly and that the state engineer needed more authority to administer water allocations.

The rules allowed the state engineer to identify water districts in need of management, to appoint a water master to manage those districts and to carry out interim priority management while waiting for courts to adjudicate those water rights.

Although the regulations were meant to protect senior water-rights holders from challenges of junior water-rights holders such as Tri-State, some traditional acequia associations and groups also complained that the new rules subverted existing laws.

Tri-State argued that the regulations violated the constitutional separation of powers and due process, and were unconstitutionally vague.

State District Judge Matthew G. Reynolds of Truth or Consequences found in favor of Tri-State, and the state Court of Appeals upheld him.

But on Thursday, in an opinion written by Justice Charles W. Daniels with the other four justices concurring, the high court reversed those decisions, siding with the state engineer.

The Supreme Court held that the Active Water Resource Management regulations do not violate the constitutional separation of powers limitations or due process, and that the rules are not unconstitutionally vague.

Scott Verhines, who took over the state engineer's position from D'Antonio 10 months ago, said he was pleased with the decision.

“The situation we find ourselves in, in New Mexico right now in the middle of this prolonged drought, is exactly what Active Water Resource Management was intending to provide tools to deal with,” he said. “So it gives us a running start going into next year if the drought persists and it gives us some tools ... “This drought is really hard on New Mexicans across the board right now, and there’s a lot of concern out there. People are mad at one another, and this gives us the ability to sort of pull the players together and work through solutions, hopefully avoiding a bunch of lawsuits, where we didn’t have the ability to do that before.”

Tri-State’s lawyer in the case, Sunny Nixon of the Rodey, Dickason, Sloan, Akin & Robb firm, was not available for comment.

Kyle Harwood, a former assistant city attorney specializing in water law, now in private practice but not involved in the case, said he was surprised by the unanimous decision favoring the Office of the State Engineer.

The Active Water Resource Management regulations “were seen as a way for the state engineer to actively manage water while these adjudications that go on forever continue to run their course,” he said. “Of course, there were lots of folks who were interested and curious about how the state engineer might actively manage water without having an adjudication court tell us all who owns how much with what priority dates ... What’s unknown, kind of in its details, is what it all means because the state engineer was practically prohibited from implementing [the regulations] because of the lawsuit.”