

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC CO-OP., INC.,
Plaintiff,

v.

CHARLENE WEST, and all unnamed
Member/Owners of Socorro Electric
Cooperative, Inc., et al.,
Defendants,

And

CHARLES WAGNER, individually, and
As Representative of the class of "unnamed
Defendants", etc.,
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
Et al.,
Cross-Claim Defendants.

No. D-1314-CV-2010-0849
Judge: Mitchell

**WEST, WAGNER, et al. MEMORANDUM
RE: BINDING EFFECT W/O CLASS CERTIFICATION**

COMES NOW Charlene West, Charles Wagner, Charlene Wagner, Al Hickox,
Clark Hust, by and through the undersigned attorney and pursuant to the Order
Regarding Scheduling entered herein, hereby submit the following Memorandum of
Points and Authorities on the Issue of whether a decision as to the relief requested by
Socorro Electric will be binding upon Socorro Electric and all members of the coop [sic]

under New Mexico law, if the decision is made without certifying the matter as a class action.

The relief requested by Socorro Electric Cooperative, as stated in the “Prayer for Relief” is: (1) judgment that the members have no authority to enact changes to the SEC By-Laws that are in conflict with state law; (2) judgment that the SEC is a private entity and is not subject to the New Mexico Open Meetings Act; (3) judgment that the SEC is a private entity and is not subject to the New Mexico Inspection of Public Records Act; (4) judgment that the By-Law amendments requiring the SEC to abide by the New Mexico Open Meetings Act is null and void as a matter of law; (5) judgment that the By-Law amendments requiring the SEC to abide by the New Mexico Inspection of Public Records Act is null and void as a matter of law; (6) judgment that the By-Law amendment requiring the SEC to guarantee transparency and open records is null and void as a matter of law; (7) judgment that the Defendants have no authority to force the SEC to abide by the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act; (8) an injunction enjoining the Defendants from enforcing changes to the By-Laws requiring the SEC to abide by the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act; (9) an injunction enjoining the Defendants from invoking the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act during meetings of the SEC Board of Trustees; (10) an injunction enjoining the

Defendants from requiring the SEC Board to guarantee transparency and open records; and (11) an injunction enjoining the Defendants from requiring the Board to permit members and the press to participate in and be present during regular and special Board meetings (Complaint for Declaratory Judgment and Injunctive Relief, filed June 25, 2010).

The first seven requests for relief, due to their nature are analyzed together. Request No. 1 assumes a fact which is not addressed directly: namely that the “By-Law amendments” conflict with state law. As a general proposition, we do not disagree that by-law amendments which contravene state law are unenforceable. We do not agree that these by-law amendments in fact contravene state law. The analysis of this issue impacts Requests Nos. 2 and 3, in that the SEC is not bound by state law to comply with either the Open Meetings Act or the Inspection of Public Records Act. This is not the dispositive analysis: merely because an entity is not subject to the statutory requirements does not prevent the member/owners from agreeing to behave in conformity with the statutory provisions. Voluntary agreement to comply with statutes does not contravene state law, nor does it require a finding that the entity is, in fact, subject to those statutory provisions.¹

¹ If SEC was obligated to follow the Open Meetings Act and the Inspection of Public Records Act, then by-law amendments to the same effect would be redundant. State law would only be contravened if the by-law amendments sought to exempt the SEC from compliance with obligatory statutory provisions.

Thus, the issues relating to Requests for Relief Nos. 1 through 7, inclusive are not specific to any individual member/owners. Their resolution requires an analysis and decision regarding primarily legal issues, as the SEC, through Mr. Francish, has admitted in open court that the by-law amendments were duly and properly enacted, that is, there was no procedural irregularity which would call into question the efficacy of the vote itself. The question is not whether the amendments are invalid due to a procedural deficiency affecting the vote, but whether, as a matter of policy or substantive law, can the members agree to place the SEC voluntarily under the constraints reflected in the amendments.

"The principles of preclusion operate to promote finality in civil disputes by relieving parties of the burdens of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions." *Rosette, Inc. v. U.S. Dep't of the Interior*, 2007-NMCA-136, ¶ 32, 142 N.M. 717, 169 P.3d 704. Claim preclusion or res judicata "bars relitigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 2, 139 N.M. 637, 137 P.3d 577. Issue preclusion or collateral estoppel "prevents a party from re-litigating `ultimate facts or issues actually and necessarily decided in a prior suit.'" *Id.* ¶ 13 (emphasis omitted) (quoting *Adams v. United Steelworkers of Am.*, 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). See *Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830 ("[I]ssue preclusion relates to litigation of the same issue in successive suits[.]");

Blea v. Sandoval, 107 N.M. 554, 558, 761 P.2d 432, 436 (Ct. App. 1988) ("Under the doctrine of res judicata, a judgment on the merits in a *prior suit* bars a *subsequent suit* involving the same parties or their privies based on the same cause of action." *Alba v. Hayden*, 2010-NMCA-037, ¶ 6, ___ N.M. ___, 237 P.3d 767.

It would seem, then, that res judicata would prevent Socorro Electrical Cooperative, Inc. from relitigating the issues impacted by the relief which they request in Requests Nos. 1, 2 & 3. It would also seem that BOTH collateral estoppel AND issue preclusion, would prevent any non-participating members from relitigating the ultimate facts or issues actually and necessarily decided in this litigation. Therefore, the court's determination on these issues would be binding upon the SEC and all member/owners without certifying the matter as a class action.

Requests for Relief Nos. 8 through 11, inclusive, all seek injunctive relief against each of the un-named defendant member/owners. Rule 1-019 (NMRCiv.P.) addresses the joinder of parties by looking at the question of relief: 1-109 A (1) references persons to be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties. Can SEC obtain complete relief through an injunction which purports to enjoin individuals not made parties?

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citations omitted). *Bass Enterprises Prod. Co., v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 53, ___ N.M. ___, 238 P.3d

885. Does the failure to join all member/owners mean that those not joined are not “enjoined”, as to do so would violate their due process rights? It would appear that SEC cannot obtain complete relief in the absence of personal jurisdiction over all member/owners.²

Rule 1-019 has an alternative in determining whether additional persons need to be joined as parties: if a person claims an interest and is so situated that the disposition of the matter impairs or impedes his ability to protect that interest, or if the absence of that person would leave any of the parties subject to a substantial risk of incurring multiple or inconsistent obligations. 1-019 A (2). Thus we are directed back to the same question, slightly differently stated: Would the SEC be subject to substantial risk of inconsistent obligations as to the parties not joined?

Rule 1-109 itself reflects the perceived superiority of class actions in these situations: “This rule is subject to the provisions of Rule 1-023 NMRA”.

It would seem that injunctive relief against persons not parties violates fundamental principles of due process. With an “opt out” provision in a class action certification, those persons who do not feel the need to separately address either legal or factual issues, can avoid the burden of litigation. The class action designation (relief) sought by the Cross-Claim, while over-lapping in some measure, seeks relief beyond

² And in deed SEC appears to share this conclusion, to some degree, as they have named as defendants, all un-named member/owners of the cooperative and seek relief in the form of an injunction against each of them.

that sought by the SEC and specifically seeks to vindicate individual rights in a class-action certification, which otherwise could / would expose the SEC and possibly its board members to multiple or inconsistent obligations.

Conclusion

While mere declaratory relief may be afforded the SEC, and possibly the member/owners to a determination that the by-law amendments are a valid exercise of membership democracy and that the voluntary embracing of the Open Meetings Act requirements as well as the Inspection of Public Records Act requirements is not contrary to state law and is not otherwise prohibited and that the desire for openness and transparency in governance is also a valid expression of the will of the member/owners of the SEC, on balance, the issues of due process with respect to the injunctive relief sought by the SEC as well as the issues of personal rights sought to be vindicated by the member/owners in the Cross Claim, including claims against directors and former directors, etc. suggest that the class action certification is optimal for this litigation.

It may well be that injunctive relief cannot be made binding on individual member/owners unless they are individually served and given notice and a reasonable opportunity to respond. As a practical matter of case management, class action certification appears the best practice even if certain aspects of the relief sought by the SEC may be binding on member/owners who are not made parties.

Respectfully submitted this _____ day of January, 2011.

"Electronically filed" /s/ Stephen K. Kortemeier
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the date last written above a true and accurate copy of the foregoing was deposited with the USPS, first class postage prepaid thereon, addressed as follows;

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