

## May 19, 2011 – Decision on the Merits

On May 18, 2011, Judge Mitchell addressed the merits of the lawsuit filed by the co-op against the co-op's members in order to gain a declaratory judgment and injunctive relief from three of the bylaws passed by the members at the 2010 Annual Member's Meeting. His ruling, simply stated, held that there are no merits in the lawsuit or any argument argued for judgment or relief. Along the way, there were some memorable moments and a truly awful confrontation following the hearing.

Dennis Francish, attorney for the board, argued for the co-op. Paul Kennedy, attorney, was at the table but had nothing to say. The Plaintiffs led off citing that they were going to call as witnesses Trustees Bustamante, Wolberg, and Anaya and cited the matters to which they would testify. Lee Deschamps, attorney for defendants, said that if necessary, he would call Trustee Wagner to the stand and the issues to which he would testify. Attorney Tom Fitch acting per se, called for the rule which would remove prospective witnesses from the courtroom during arguments.

Attorney Francish filed a "Complaint for Declaratory Judgment and Injunctive Relief" on June 29, 2010. Attorney Kennedy filed a "Plaintiffs Brief on Primary Issues of Relief" on 3/30/2011 upon direction of Judge Mitchell at the 2/25/11 hearing. Both of these documents are public records available from the District Court in Valencia County. Judge Mitchell had requested the second brief on three issues:

1. Whether or not the Open Meetings Act applies to the Cooperative,
2. Whether any issues over and above the provisions should apply to the Cooperative; and,
3. Whether or not the inspection of public records relief requested by the Cooperative should be applied.

Enter Mr. Francish who holds that the Open Meetings Act does not apply to the Cooperative because the SEC is a private corporation such as the Ford Motor Co and as such "the Board of Trustees of a rural electric cooperative exercises all powers of the corporation except as are conferred to the members..." The members only have the right to elect trustees and change bylaws. Mr. Francish claims that the Open Meetings Act makes it essentially impossible for the Board to conduct significant, legitimate corporate business. He also claimed that when co-op members have been allowed to attend meeting, the results have been disastrous and that having the press present results in matters discussed at meetings being aired in the newspaper. There was also mention of the fellow taping the meetings and speculation as to what he was doing with the tapes.

On the issue of voluntary compliance with the Inspection of Public Records Act amendment to the bylaws and the issue of transparency, Mr. Francish argued that the IPR Act applies only to state agencies and the co-op only acknowledges its duties under the ruling in the case of "Schein v. Northern Rio Arriba Cooperative with no obligation to go any further.

Plaintiffs claim the bylaws are unworkable, illegal, etc. and the member passed bylaws should be thrown out.

Now it is the turn of the defendants who are Charlene West and unnamed member/owners of the SEC (and in the original filing the Mountain Mail and El Defensor Chieftain). Attorney Tom Fitch spoke first and eloquently. He ridiculed the statement that the SEC was like the Ford Motor Co. and cited the many entities other than governmental that have voluntarily placed themselves under the Open Meetings Act and the Inspection of Public Records Act without detriment. On the issue of "unworkable" bylaws, he raised the question of "unwilling" to comply with the bylaw changes and the lack of attention to the "spirit" of the bylaws. He then torpedoed the plaintiffs argument based on "Fratello v. Socorro Elec. Co-op, Inc. 107 NM 378, 381 (NMSC 1998)

Next up is Lee Deschamps of Deschamps & Kortemier. His argument is based on the brief filed on 4/13/2011. The members legally and properly passed these amendment and there is no question to this fact as Judge Mitchell has already ruled. The brief also cites the contract between the SEC and its members and the trustees attempt to renege on this contract by asking that properly passed bylaws be discarded. The following statement is worthy of quotation in full as it goes to the heart of the matter.

"No argument has been advanced that this exercise of corporate democracy is unavailing to place these restrictions on the governance of the SEC. It is plausible that the owners/members have such a high degree of distrust of the existing Trustees as to desire that their non-profit cooperation be conducted with the stated transparency .... it is for the owner/members to determine how the trustees conduct the business of the SEC. It is not the trustees "paternal" right to tell the owners/members what the trustees think is best for them and for the conduct of the SEC business. The owner members' Cross Complaint details only some of the perceived "wrongs" perpetuated, in part, by the lack of transparency and lack of open meetings which have been addressed by these amendments."

On the Inspection of Public Records Act and transparency amendments, Mr. Deschamps argues that the members have to right to extend transparency beyond the minimum expressed in "Schein." and to voluntarily amend their contract with the SEC.

Arguments finished. Proffer on what witnesses would say accepted doing away with the need for actual testimony.

JUDGE MITCHELL'S RULING and ORDERS: Bylaws passed by members stand as they are legal and proper. Duplication of bylaws to be omitted. (This resulted from overlapping bylaws passed at both the meetings in District 5 and District 3, October, 2009) The trustees and their attorneys will make them work as have so many other corporations. All actions taken at SEC meetings since 4/17/11 are invalid as the meetings did not comply with the OMA. The lawyers will meet to work out a method for handling . The judge also directed the SEC to contact the Attorney General' office for instructions on how to comply with the OMA. (Trustee Wagner gave the trustees copies of these instructions over a year ago.)

A clean copy of the SEC bylaws with the amendments passed April 17, 2010 is to be prepared. Judge Mitchell will take up the matter of attorney's fees. The co-op's lawyers had asked for "An order awarding the SEC's costs and reasonable attorneys' fees in bring this action." (From whom is not stated in the filing).

Attorney Tom Fitch raised the question of other bylaws passed by the members. As I understand it, these will also have to be put into action immediately.

Judge Mitchell set a date (not specified yet) for a hearing on the scheduling on Discover on the Cross Complaint and Request for Class Action. Attorneys Bill Ikard and Jordan Haedicke of Ikard Wynne & Ratliff who were also at the Defendants Table will be active in this phase of the court case.