ENDORSED
FILED IN MY OFFICE THIS
JUN 13 2007
Juanita M. Duran
CLERK DISTRICT COURT
PATRICK MAREZ

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ANDREW LEO LOPEZ, WILLIAM M. TURNER
CONSERVANCY TAXPAYERS ASSOCIATION

Plaintiffs,

v. No. CV-2007-04228

THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT, JOSE U. OTERO, GARY PERRY, WILLIAM M. TURNER, AUGUSTA MYERS, JAMES C. ROBERTS, HECTOR GONZALES AND JIMMY WAGNER,

Defendants.

MOTION TO DISMISS PURSUANT TO RULE 1-012(b)(6) NMRA

COMES NOW the Middle Rio Grande Conservancy District ("MRGCD"), by and through its attorneys of record, Law & Resource Planning Associates, P.C., and moves the Court, pursuant to Rule 1-012(b)(6) NMRA, for an Order dismissing the Complaint. As grounds for this motion, the MRGCD states that the Plaintiffs have failed to state a claim for which relief may be granted and the Complaint should be dismissed as a matter of law.

BACKGROUND

The MRGCD is a conservancy district, duly established pursuant to the laws of the State of New Mexico and declared as a conservancy district by the Bernalillo County District Court sitting as the Conservancy Court. NMSA 1978, § 73-14-13 (1965). It is a political subdivision of the State of New Mexico. "[T]he district shall be a political subdivision of the state and a body corporate with all the powers of a public or municipal corporation." The MRGCD is governed by a seven member Board of Directors, elected for staggered four-year terms. NMSA 1978, § 72-14-19 (1996); NMSA 1978, § 72-14-21 (1975).

The creation of Districts for the election of the Board of Directors was done by the Legislature in 1975. *Id.* The Legislature determined that the most populous of the counties in the District, Bernalillo County, would have three Board members, and that each of the remaining three counties, Socorro, Valencia, and Sandoval, would have one Board member each. A final Board member would be elected at large, with a total of seven Board members. *Id.*

The last election of three Board members took place on June 5, 2007, with the election of one Board member from Socorro County, one from Bernalillo County, and the at-large member. It is this election that Plaintiff and current Board member William A. Turner, along with the two other Plaintiffs, sought to enjoin, arguing that the composition of the Board violates both the State and Federal Constitutions and the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq*. In addition, the Plaintiffs continue to seek the dissolution of the current duly elected Board of Directors, and the appointment of one of the Plaintiffs as a "receiver" to manage the MRGCD.

As a political subdivision of the State of New Mexico, the MRGCD is tasked with a variety of missions, including flood control, construction of drainage and irrigation works, deliveries of irrigation water, and drainage of water logged lands. NMSA 1978, § 73-14-4 (1927). Its budget primarily comes from the assessment of *ad valorem* taxes upon landowners benefited by the activities of the MRGCD. NMSA 1978, §§ 73-16-10 and 73-16-15 (1927). As a tax upon property, the assessments levied by the Board of Directors fall directly upon the property owners who benefit from the activities of the MRGCD. The greater the property ownership, the larger amounts the landowner will pay. For these reasons, the legislature limited the franchise to "qualified electors," that is, those who own property within the benefited area and have provided proof of such ownership or who are the legal or equitable title holders to property on tribal lands, and who are over the age of majority. NMSA 1978, § 73-14-20 (1999).

Currently, the MRGCD delivers irrigation water to over 52,000 acres of land in the Counties of Socorro, Valencia, Bernalillo and Sandoval. The water deliveries are apportioned to the counties as follows: Sandoval County – 3,050 acres of land; Bernalillo County – 6,400 acres of land; Valencia County – 23,110 acres of land; and Socorro County – 19,740 acres of land. The total number of benefited acres in the MRGCD is 240,905 acres of land broken down by county as follows: Sandoval County – 50,765 acres of land; Bernalillo County – 52,395 acres of land; Valencia County – 61,865 acres of land; and Socorro County – 75,850 acres of land. In terms of the number of irrigators, the county breakdown is as follows: Sandoval County – 1,076 irrigators; Bernalillo County – 2,430 irrigators; Valencia County – 3,658 irrigators; and Socorro County – 895 irrigators.[1] These demographics, however, are constantly in flux leaving the legislature with a dilemma on how to populate the Board.

The most populated County, Bernalillo, currently has only about 25% as much irrigated land as Valencia County, which has the highest amount of irrigated land. Bernalillo County's benefited area is almost equal to that of Sandoval County, and only about 66% as large as that of Valencia County. The total number of irrigators in Bernalillo County is about 66% of the totals in Valencia County. Thus, utilizing several indicators of usage of the works and services provided by the MRGCD, Bernalillo County, the most populous county, is not the greatest user. In terms of benefited area, Bernalillo comes in a distant third. Socorro County, with the greatest number of benefited acres, has only one member of the Board. Contrary to the assertion by the Plaintiffs in this proceeding, Bernalillo County may be overrepresented rather than underrepresented.

[1] At the hearing on June 4, 2007, Plaintiffs indicated that this controversy would be resolved as a matter of law, and that they would rely on MRGCD figures regarding qualified electors and benefited acreages. These are those figures.

ARGUMENT

While their Complaint is not a model of clarity, Plaintiffs appear to raise Constitutional challenges to the election based upon the Fourteenth and Fifteenth Amendments to the United States Constitution[2] and upon the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*[3] As will be discussed, neither the United States Constitution nor the Voting Rights Act is implicated in an election of a special district, such as the MRGCD, and there have been no constitutional or statutory violations. Furthermore, the remedies sought by the Plaintiffs are not appropriate.

I. Voting Rights Act of 1965

The Voting Rights Act of 1965 is the statutory mechanism for the enforcement of the Fifteenth Amendment of the United States Constitution, which provides that suffrage shall not be abridged due to the race, color, or previous condition of servitude of the voter. The Act was intended to create expansive remedies to rectify disfranchisement on a pervasive scale, based on race discrimination, and to provide new remedies to prevent pockets of voter discrimination in specific areas of the country. *South Carolina. v. Katzenbach*, 383 U.S. 301 (1966).

There is nothing in the Plaintiffs' Complaint that hints that any problems with apportionment of the Districts of the MRGCD is based upon racial discrimination so as to implicate the Voting Rights Act of 1965. Even if such an allegation had been made in the Complaint, the Petitoners are not the proper parties to bring such an action. Any action for injunctive relief, such as that sought by the Plaintiffs, is brought by the Attorney General of the

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[2] Plaintiffs claim to base their Complaint, in part, upon the Fourteenth and Fifteenth Amendments of the New Mexico State Constitution. Complaint at page 2. There is no Fourteenth or Fifteenth Amendment to the New Mexico Constitution. Furthermore, Articles XIV and XV of the New Mexico Constitution have nothing to do with elections or apportionment.

[3] Plaintiffs never specify which section of the Voting Rights Act is alleged to have been violated. The Voting Rights Act is a lengthy statute that covers many aspects of elections, including the imposition of literacy tests and poll taxes.

United States in a federal district court, not by a private litigant in a state court. The section specifying injunctive remedies under the Act, 42 U.S.C. § 1973j(d) provides as follows:

> (d) Civil action by Attorney General for preventive relief; injunctive and other relief
>
> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 1973, 1973a, 1973b, 1973c, 1973e, 1973h, 1973i, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under subchapters I-A to I-C of this chapter to vote and (2) to count such votes.

Not only is an action for injunctive relief brought by the Attorney General of the United States, any such action must be brought in the federal district court. 42 U.S.C. § 1973j(f). Obviously, this action is not commenced by the Attorney General of the United States. Equally obvious, this action is not commenced in the federal district court. Regardless of whether the Complaint states any claims for voter disfranchisement based upon race or color, this action must be dismissed because it is not commenced by the proper Plalintiff and it is not commenced in the proper court.

II. Equal Protection Under the Fourteenth Amendment to the United States Constitution

The primary complaint of the Defendants appears to be that there are substantially more qualified electors in Bernalillo County as there are in the other three remaining counties comprising the MRGCD.[4] Of course, there are also three times as many Board members representing Bernalillo County as well. This circumstance, as alleged by the Plaintiffs, "fails to comply with the fundamental requirement of proportional representation" in violation of the

[4] A qualified elector is defined under the statute as one who owns property within the benefited area and has provided proof of such ownership or who is the legal or equitable title holder to property on tribal lands, and who is over the age of majority. NMSA 1978, § 73-14-20 (1999).

United States Constitution. The Plaintiffs have failed to recognize and appreciate that the MRGCD is a special district and not subject to the same electoral rules as are applicable to other government entities, and thus their Complaint must be dismissed.

The United States Supreme Court long ago considered the question of whether a special district, such as a conservancy district or irrigation district, must adhere to the "one man, one vote" dictates of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Because these types of districts are special-purpose units of government that affect definable groups of constituents, they are not subject to the same constraints on apportionment as other general purpose governmental units. *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

In *Salyer*, the United States Supreme Court considered whether a water storage district in California whose statutory authority was to plan and execute projects for the "acquisition, appropriation, diversion, storage, conservation, and distribution of water" could constitutionally limit voting in the district to landowners. The precise question answered by the Supreme Court was whether the legislature had violated the "one man, one vote" tenets of the Fourteenth Amendment by limiting voting to specified persons, even though the actions of the district affected other persons in the district in addition to the landowning voters. The Court determined that the statutory framework did no violence to the United States Constitution due to the special nature of the district's activities and its disproportionate effect on the populace.

The *Salyer* court reasoned that while the water storage district was vested with some typical governmental powers, it had relatively limited authority. *Id.* at 728. The primary purpose of the district, indeed the reason for its existence, was to deal with water-related matters. It had no other general governmental powers. Not only was its authority limited by statute, but

its actions disproportionately affected landowners. All of the costs associated with the district "are assessed against land by assessors in proportion to the benefits received." *Id.* Under these circumstances, the *Salyer* court held that it was quite understandable that the statutory framework for the election of the board of directors focused not on people per se, but on landowners as those who reaped the primary benefits of the district and who shouldered the costs involved. The statutory provisions for electing directors recognized that the very existence of the district was likely dependent upon those with the most at stake having the greatest voice in the control of the organization. *Id.* at 731.

While the *Salyer* Court acknowledged that the apportionment might have been done differently if the Court had been enacting the statute in question, it held that the question before it was whether "any state of facts reasonably may be conceived to justify" the method by which the voting franchise was allocated. *Id.* Because landowners have such a stake in the operation and financing of the district, it was appropriate to give those landowners a voice in the operation of the district.

The Court further held that it was appropriate to give landowners with larger amounts of land an even greater say in choosing the board of directors, based upon their land ownership. The statutory voting scheme enacted by the California legislature afforded those landowners with more land a larger say in the organization, based upon the assessed value of their land holdings. While some small landowners had only one vote in the election, wealthier landowners, based upon land values, had the equivalent of 37,825 votes. Again, the *Salyer* court held that this passed constitutional muster due to the nature of the organization. Each acre of land had the same assessed value, such that the smallest landowner paid at the same rate as the largest.

Because the large landowners had the greatest liability for payment for the benefits provided by the district, their votes carried the most weight in the election of the board.

On the same day that the *Salyer* opinion was announced, the Supreme Court also issued its opinion in *Associated Enterprises, Inc. v. Toltec District*, 410 U.S. 743 (1973). In that opinion, the Court considered whether the establishment by referendum of a watershed improvement district was constitutionally valid when the vote was limited to owners and occupiers of lands. In holding that there were no violations of the Due Process clause, the Court observed that the statute allowing the creation of the improvement districts "was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented." Having been so elected, the legislature then enacted a statute that allowed the creation of the districts by specified voters. The Supreme Court opined that "the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly." *Id.*

Less than ten years later, the Supreme Court decided *Ball v. James*, 451 U.S. 355 (1981), wherein the Court considered whether it was constitutional to limit voters and to apportion their voting power according to the number of acres owned when electing directors of an agriculture improvement and power district. Employing the same reasoning used in *Salyer,* the Court allowed the statutory method of limiting voters and apportioning voting power. The Court noted that in *Salyer*, it had been confronted with the question of "whether the statutory voting scheme based on land valuation at least bore some relevancy to the statute's objectives." *Id.* at 364. Concluding that there was a reasonable relationship between the voting mechanisms and the statutory objectives of the district, the Court found that the method chosen by the legislature did no violence to the Fourteenth Amendment. As in *Salyer*, the Court found that the district might

not exist if the subscribing landowners had not been assured a special voice in the conduct of the organization. *Id.* at 371.

In the case at bar, the legislature clearly tried to accommodate the most populous county in the MRGCD by granting Bernalillo County three Directors on the board. On the other hand, it is clear that at least two of the other counties, while less populated, have more benefited acres and more acres under irrigation than does Bernalillo County. Under the statutory framework, each of the remaining three counties elects one director, while all four counties participate in the electing of a seventh, at large, director. Here, the legislature chose not to take the more radical step presented in *Salyer*, *Associated Enterprises*, and *Ball* of granting electors weighted votes based on acreage owned. Instead, it took the more egalitarian approach of giving each land owner one vote, regardless of the size of the parcel owned.

Under *Salyer* and its progeny, the scheme selected by the legislature for voting for special districts such as the MRGCD is only unconstitutional if wholly irrational. Because all of the MRGCD's receipts come from assessments based on amounts of land and land values, the legislature's choice in apportioning districts bears some relevancy to the statute's objectives, particularly given that irrigation and population patterns will shift over time. There is a reasonable relationship between the voting system and the objectives of the district. There is no constitutional violation arising from the method that the legislature has chosen to apportion the vote.

The New Mexico Supreme Court has considered a similar question in the context of electing board members of acequia districts. In *Wilson v. Denver*, 1998-NMSC-016, 125 N.M. 380, the Court considered whether voting proportionately based upon numbers of water rights, rather than giving each person on the acequia one vote, violated the Equal Protection Clause of

the Fourteenth Amendment. Finding that the ditch associations exercise narrow functions, the Court concluded that voting was not constrained by the one-person, one-vote mandate of the Fourteenth Amendment. Quoting *Lower Valley Water and Sanitation Dist. v. Public Serv. Co. (In re Lower Valley Water and Sanitation Dist.)*, 96 N.M. 532, 537, 632 P.2d 1170, 1175 (1981), the Court stated that "[S]torage and delivery of water, without a concurrent power to control the use of such water, is not such a governmental function, even where the entity possesses a nominal public character." Similar to ditch associations, the powers of the MRGCD are limited to flood control, irrigation, construction of works, and drainage. The narrow functions of the MRGCD do not arise to the level of a central government, and thus the Equal Protection protections afforded voters in elections for general government offices do not apply. *See also In re Proposed MRGCD*, 31 N.M. 188, 242 P. 638, 688 (1923). ("The Fourteenth Amendment to the federal Constitution does not deprive the state of the power of determining whether the officers of the conservancy district shall be appointed or be elected by the people. . . . ").

III. The Court Has No Jurisdiction to Dissolve the Sitting Board of Directors

Even were Plaintiffs' Constitutional and Voting Rights Act claims viable, their requested remedy is not. As part of their requested relief, the Plaintiffs request that the Court "dissolve the board as unconstitutionally elected" and appoint one of them as a receiver to handle the day to day operations of the MRGCD until the Legislature can act to reapportion the districts. Thus, the Complaint is essentially a challenge to the last two elections in which the current Board members were elected. *See Hartley v. Board of County Commissioners of San Miguel County*, 62 N.M. 281 (1957). In *Hartley*, the Plaintiff sought injunctive relief to require election officials in an annexation election to accept certain ballots that had been rejected and to reject others which had been accepted and counted. The trial court dismissed the Complaint, which action was affirmed

by the Supreme Court. While acknowledging that the Plaintiff had styled his claim as one seeking equitable relief because fraud had tainted the election, the Supreme Court found that the action was essentially an election contest. As a statutory proceeding, the right of contest must be found in the Act itself. Finding no provision in the statute that allowed for the contest of an annexation election, the Court dismissed the Complaint finding that it had no subject matter jurisdiction. The Supreme Court affirmed.

This same reasoning was followed by the Supreme Court in *Wilson v. Denver*, 1998-NMSC-016, ¶10. "The right to contest an election is entirely statutory; such a proceeding was unknown at common law." Where the Legislature has not provided a right to contest an election, there is no such right. *Hartley*, 62 N.M. at 283. Under the statutory framework for conservancy district elections, no such right of contest has been provided. *See* NMSA 1978, §§ 73-14-73 through 73-14-92. The Court has no jurisdiction to dissolve the duly elected members of the Board of Directors of the MRGCD.

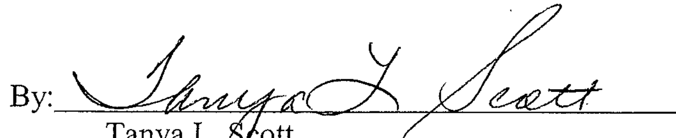
IV. The Plaintiffs' Remedy is Political, Not Legal

Because there is no constitutional violation in the legislative elective scheme, Plaintiffs' Complaint presents a purely political controversy that must be resolved through the legislative process. Any claims made by the Plaintiffs that the districts established for Board membership are not fairly apportioned are to be remedied by the political process, not the legal process. This is not a justiciable controversy involving property rights of the Plaintiffs.[5]

[5] Interestingly, we have recently completed a 60 day session of the New Mexico Legislature which allows the introduction of any bills. The next session will be a 30 day session allowing only budgetary items and those pursuant to the special message of the Governor. N.M. ST. CONST. ART. IV, Sec. 5.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

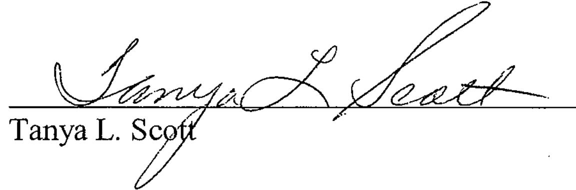


By:______________________
Tanya L. Scott
Charles T. DuMars
Attorneys at Law
Albuquerque Plaza, 201 Third Street NW, Suite 1750
Albuquerque, NM 87102
(505) 346-0998 / Fax (505) 346-0997

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading was mailed to all counsel entitled to notice on this 13th day of June, 2007 as follows:

Rudy A. Ortiz
Attorney for Plaintiffs
800 Gold Ave. SW
Albuquerque, NM 87102
(505) 242-1890



Tanya L. Scott