COURT OF APPEALS, STATE OF COLORADO

Case No. 98CA1442

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

EUGENE LOBATO, *et al*.,

Plaintiffs-Appellants and Cross-Appellees,

vs.

ZACHARY TAYLOR, as Executor of the Estate of Jack T. Taylor, Jr., Deceased, *et al*.,

Defendants-Appellees and Cross-Appellants,

and

J. HOY ANDERSON, *et al*.,

Defendants-Appellees.

David H. Miller, Esq. (#8405)
MILLER, LANE, KILLMER & GREISEN, LLP
730 17th St., Suite 600
Denver, Colorado 80202
(303) 534-6400

Attorney in cooperation with Amicus Curiae

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

The American Civil Liberties Union Foundation of Colorado ("ACLU"), through the law firm of MILLER, LANE, KILLMER & GREISEN, LLP, submits this Brief Amicus Curiae, pursuant to Colorado Rules of Appellate Procedure 29, in the belief that it will aid the Court in its decision in this case.

I. INTRODUCTION

The Defendants-Appellees ("Taylor") have stated to this Court that the within action is not a *"cause celebre,"* but rather a simple case of claims to "*profits a prendre,*" where "private individuals [are attempting] to acquire the natural resources from privately-owned property." Taylor's Response And Objection To Appellants' Motion For Certification Of Appeal To Colorado Supreme Court Pursuant To C.R.S. §13-4-189 at 1-2. Nothing could be farther from the truth.

Rather, this case is about whether Taylor, a private party, will succeed in a land- grab of enormous proportions, without being required to follow the basic principles of due process of law. More precisely stated: will Taylor be permitted to walk away with the real property rights of over a thousand members of a community in southern Colorado, when he failed to reasonably and meaningfully inform them that their property interests were at stake in a Torrens Title action; which action was brought to divest the community members from their long standing rights to the use of the land in question.

For eighteen years now this action has raised issues of great importance, not only concerning the settlement and development of our own state and much of the rest of the western part of this country, but issues also having to do with the fundamental principles of

constitutionally required due process of law. Due process is a right that has been a central issue in this case from the day it was filed so many years ago.

In 1994 the Supreme Court of Colorado addressed some of the issues raised in this litigation. Its decision specifically called to the lower court's attention the controlling questions concerning the due process rights of the plaintiff community property owners. Unfortunately, on remand the district court neglected to properly implement the state supreme court's decision concerning the due process issues before it.

From the constitutional perspective of the ACLU, this case raises the basic question of what notice an individual is entitled to before his property rights may be taken from him, and how our courts will procedurally protect known property rights under our system of law. It is the position of the ACLU that the plaintiffs in this case were entitled to personal notice before their vested property rights were extinguished in Taylor's Torrens Title action brought in 1960. Not having received such notice, their rights remain intact. For under our legal system, no vested property right can be removed without the property holder receiving reasonable and meaningful notice, as well as an opportunity to be heard about the claim at issue. These two requirements (of notice and a hearing) define the benchmarks of procedural due process. Where as here, no such notice is provided, any subsequent proceeding is a nullity concerning the property interests of the uninformed party.

On remand, the court below failed to take into account and properly apply this Court's well-crafted due process decision issued in 1994, which confirmed the above principles. *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994). The result is that the case is now again before the Colorado appellate courts.

In 1992 the ACLU submitted to the Colorado Supreme Court a brief, amicus curiae, addressed to the due process issues then before the Court. Now, seven years later, the arguments in that brief still apply. Instead of repeating the principles set forth in that brief, by this reference the ACLU incorporates that prior filing here. Brief Of Amicus Curiae [ACLU] In Support of Petitioners, dated September 21, 1992. Courtesy copy attached at Appendix 1.

The record now, however, includes the subsequent proceedings in the district court, and most importantly--for the purposes of this brief--the trial court's decision on the due process issues. Order, October 8, 1998 ("October Order"),[1] R. 3293, as well as its decision on the merits, dated June 12, 1998 ("June Order"). R. 5593.

In the October Order the district court correctly held that Taylor had not exercised due diligence in providing adequate notice to certain named plaintiffs and others. *Id.* at 3297-3301. On the other hand, the district court wrongly concluded--without legal support--that class action treatment was inappropriate because the plaintiffs' claims were "unique." The court then erroneously dismissed with prejudice the vast majority of the plaintiffs, and the claims of the previously asserted plaintiff class.[2]

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[1] Citation to the Record on Appeal will be to "R. ___." Citation to the Transcript will be to "Tr. ___."

[2] Issues relating to the class claims and the errors of the district court concerning such matters are not addressed in the instant brief, but may be found by the Court not only in the Opening Brief, but also in the amicus curiae brief of the National Lawyers Guild. In passing, however, the entirely unsupported "finding" by the district court that class action status is inappropriate because "the circumstances of each claimant's identity are unique," is a finding difficult to square with principled decision making. R. 3300. Each claimant asserts the identical right from a common claim. Whether subclasses should be formed for plaintiffs in a class action because of their membership in a particular *group* asserting the claim is standard fare under Rule 23 practice. Rule 23(c)(4), Colo.R.Civ.Pro., itself provides: "When appropriate: (B) a class may be divided into subclasses and each subclass treated as a class . . .."

In dismissing plaintiffs, the court failed properly to determine whether certain plaintiffs were reasonably ascertainable, had Taylor used due diligence in satisfying the due process requirements which applied. The district court thus erred by ignoring the direct holding of the Colorado Supreme Court in its 1994 decision.

II. ARGUMENT

A. THE CONTROLLING DUE PROCESS TEST TO BE APPLIED WAS EXPLICITLY STATED BY THE COLORADO SUPREME COURT.

In 1994 the Colorado Supreme Court issued its lengthy opinion which clearly delineated the ground rules under which this case was to proceed. *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994). The Court made certain findings of facts, *id.* at 1213-1216, and addressed two questions: 1) whether adequate notice was provided in the 1960 Torrens action brought by Taylor, and; 2) whether the court of appeals erred by determining the res judicata issue before addressing the question of the adequacy of notice. *Id.* at 1218.

The Court's holding was unambiguous. It decided that on remand the due process question was to be answered first, before the res judicata issue could be resolved. The due process issue was to be addressed after the district court determined the adequacy of the notice given all reasonably ascertainable persons with identifiable interests in the property. *Id.* at 1229. The above decision reversed, in part, the holding of the court of appeals, and included instructions to remand for a proceedings consistent with the Colorado Supreme Court's decision. *Id.*

In reaching its opinion the Court left no question open about how the factual inquiry should be handled below. The Supreme Court traced the relevant due process considerations

from the seminal cases of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950), and *American Land Co. v. Zeiss*, 219 U.S. 47, 55 L. Ed. 82, 31 S. Ct. 200 (1911), through their United States Supreme Court progeny of *Walker v. Hutchinson*, 352 U.S. 112, 1 L. Ed. 2d 178, 77 S. Ct. 200 (1956); *Schroeder v. City of New York*, 371 U.S. 208, 9 L.Ed. 2d 255, 83 S. Ct. 279 (1962); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L. Ed. 2d 1880, 103 S.Ct. 2706 (1983) and; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988). *Rael v. Taylor*, 876 P.2d at 1224-1225.

The Court then interpreted those constitutional holdings in light of Colorado law in quiet title actions, and the similar holdings in Torrens cases from other jurisdictions. *Id.* at 1226-1227.

The Court summarized the lessons from those cases concerning the due process requirement which was incumbent upon Taylor in 1960:

> [A]n applicant for a decree to confirm and register title to property pursuant to the Torrens Act must exercise reasonable diligence under all the circumstances to ascertain the names of persons who claim interests in the property subject to the proceeding. The test for determining reasonable diligence is an objective test: that conduct a reasonably prudent applicant would undertake under all circumstances known or reasonably discoverable by the applicant at the time the application is filed to ensure that all interested parties are identified and served as named defendants.

Id. at 1227.

In a footnote to that summarization the Colorado Supreme Court even identified for the lower court where Taylor should have looked: "in the Costilla County records, referred to in Taylor's deed and the Gilpin agreement, referenced in the title examiner's report, and

noted in Taylor's own application." *Id.* at 1227, n. 26. This was the Court's interpretation of the stated principle that applicants in Torrens proceedings generally need not extend their search for information pertaining to reasonably ascertainable interested parties beyond information discoverable by diligent inquiry into relevant public records. *Id.*

B. THE DISTRICT COURT ERRED WHEN IT HELD, WITHOUT LEGAL SUPPORT, THAT DUE DILIGENCE WOULD NOT HAVE REQUIRED TAYLOR TO NAME ALL THE PROPERTY OWNERS IN COSTILLA COUNTY IN HIS TORRENS ACTION.

Instead of applying the state Supreme Court's explicit holding, however, the district court was swayed by Taylor's expert witness. He testified that instead of providing personal service to those named in the county records as landowners, and thus interested under the very terms of the 1863 Beaubien document and the subsequent Gilpin conveyance referenced in Taylor's Torrens applicant, all that a reasonable person need to have done was examine an abstract, showing who had a record interest in the land; inspect the land for current occupants; and list the names of persons having or claiming an interest in the property, along with such persons' addresses and the nature of their claims. R. 3295-3296.

Even as modified from the Colorado Supreme Court's direct pronouncement, one would nevertheless believe that given the terms of the Beaubien and Gilpin conveyances, all property owners in Costilla County, Colorado, would fall within the ambit of those "having or claiming any estate, interest, or claim" in the property. *Id.* at 3296. Shockingly, that is not what the district court found. The central error in the trial court's due process October Order appears where the court boldly asserted, without citing any legal support other than its unstated sympathetic adoption of Taylor's expert's testimony: "The court further finds that

due diligent [*sic*] would not require the defendant to name and serve all owners of property in Costilla County, but only those whose names are reasonable [*sic*] ascertainable." R. 3296.

The court's conclusion does not follow from its stated premise. All parties would probably agree that only those whose names are "reasonably ascertainable" should receive personal notice. Nothing in the district court's holding, however, indicates that all Costilla County landowners (or their successors in interest) were not reasonably ascertainable. In fact, the very point of the records of the Clerk and Recorder is to indicate who are parties with property rights located within the county.

The fact that providing adequate notice to reasonably ascertainable parties might create a large number of people who would have to receive personal notice and potentially create significant difficulties in the litigation for Taylor, is not an indication that the wrong test is being employed. *See Richards v. Jefferson County, Alabama*, 517 U.S. 793, 799, 803, 116 S. Ct. 1761, 1766, 135 L. Ed. 2d 76 (1996) (the allegation that invalidation of a government tax would have disastrous consequences for the county did not change the fact that failure to give adequate notice under *Mullane* precluded plaintiffs from being subject to the obligation).

In a case such as this, given the historical and documentary evidence discussed in depth in the Opening Brief and the Brief Of [The] Colorado Hispanic Bar Association As Amicus Curiae, it is clear that the rights implicated now touch directly on more than a thousand San Luis area property owners.

C. THE DISTRICT COURT IGNORED THE CENTRAL HOLDING OF *MULLANE*, THAT WHERE IDENTIFYING INFORMATION ABOUT THOSE AFFECTED BY A PROCEEDING IS OF RECORD, ACTUAL PERSONAL

NOTICE MUST BE PROVIDED.

The district court ignored the core due process teaching of *Mullane* and its line of cases when it followed the suggestion of Taylor's expert, instead of deciding the matter as a question of law, given the undisputed facts in the case.

The Colorado Supreme Court exhaustively described the reasoning in *Mullane* in its 1994 opinion. The lessons of *Mullane* have not dulled, but rather continue to be applied vigorously by the United States Supreme Court in cases decided within the last five years.

For example, in *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996), the Supreme Court unanimously applied *Mullane* in a case where tax payers were not given adequate notice that a lawsuit was pending. The Court held:

> [T]he right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

517 U.S. at 799, 116 S. Ct. at 1766 (citations omitted).

Richards is also interesting because in that case a prior action had resulted in a decision approving the tax. Plaintiffs who claimed not to have had proper notice of the previous law suit were alleged to have been subject to its results pursuant to the principle of res judicata. The Court rejected the assertion that the prior decision approving the tax applied to the plaintiffs since they were not given personal notice of the action and named specifically in the lawsuit. *Id.*

This finding is not surprising. In addition to the cases cited by the Colorado Supreme Court in *Rael*, cases regularly require actual notice when the name and address of the affected party is known or discernible from public records.

The case of *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982), has not yet been discussed by the courts or the participants, but it teaches the same lesson. In *Greene* a land owner who was trying to evict the tenants of a large housing project served notice of the proceeding by posting instead of by mail. That procedure was specifically permitted under the forcible entry and detainer statute which was in affect in the state at the time, much like notice by publication for "unknown" parties is listed under Colorado's Torrens Act as a permissible form of service.

Nonetheless, the United States Supreme Court held that posting was constitutionally inadequate:

> In this case appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes. In light of this deprivation, it will not suffice to recite that because the action is in rem, it is only necessary to serve notice "upon the thing itself." The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted."

Greene v. Lindsey, 456 U.S. at 1877, 102 S. Ct. at 1878-79.

D. DUE PROCESS REQUIRES A BALANCING OF COMPETING INTERESTS IN EACH CASE. HERE, THE PLAINTIFFS' INTEREST IN RECEIVING PERSONAL NOTICE OUTWEIGHS TAYLOR'S INTEREST IN GIVING NOTICE BY PUBLICATION SINCE INFORMATION CONCERNING THE IDENTIFICATION OF INTERESTED PARTIES WAS SPREAD UPON THE PUBLIC RECORDS AND THE SEVERITY OF THE DEPRIVATION FACING THE PLAINTIFFS WAS GREAT.

The principles of due process are not fixed. They vary from case to case depending on all the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47

L.Ed.2d 18 (1976). Due Process is "flexible" and calls for such procedural protections as required by the particular circumstances. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600.

In this case, the record is clear that the land at issue, the Mountain and Salazar Tracts, were part of an integrated system of vara strips and grant lands required for water, pasturing, and wood-gathering. The court below acknowledged that historical fact. *See, e.g.,* R. 5598-5599. In interpreting the reality of this particular form of land development the Court cannot avoid acknowledging that such property differs in a dramatic way from the lot-and-block descriptions of property in Denver or any other Colorado urban setting.

In the San Luis grant area each vara holder's ability to survive was dependent upon access to the Mountain and Salazar Tracts. *See, e.g.,*Tr. 364:24-365:5; Tr. 417:1-16; Tr. 562:8-10; Tr. 368:21-369:12; Tr. 563:2-21; Tr. 1255:18-1256:25; 1262L5-1265-1; Tr. 2009:13-2011:4; Tr. 2164:3-13; Tr. 1158:17-1159:13; Tr. 1165:12-24; Pl. Ex. 59(B).

The district court, for some unstated reason, focused on the fact that plaintiffs needed the Mountain and Salazar Tracts for grazing. R. 3297. The trial court neglected the evidence cited above that the tracts were also used for the other necessary settlement rights described in the Beaubien and Gilpin conveyances. What separates the right to graze sheep from the right to gather timber to build one's home or to warm one in winter is never addressed by the district court. And in fact, it cannot be rationally distinguished.

If the plaintiffs had a protected interest in feeding their livestock, they had and continue to have no less an interest in obtaining water, or gathering firewood or timber for building.

These interests are significant property rights in the due process balancing formula. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982):

> [T]he Court has acknowledged that the timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S., at 579. These include the importance of the private interest and the length or finality of the deprivation, *see Memphis Light, Gas & Water Div. v. Craft*, 436 U.S., at 19, and *Mathews v. Eldridge*, 424 U.S., at 334-335; the likelihood of governmental error, *see id.*, at 335; and the magnitude of the governmental interests involved, *see ibid.*, and *Wolff v. McDonnell*, 418 U.S., at 561-563.

For plaintiffs these interests encompass their ability to survive on the land as conveyed. In other words, the significance of their property right is as high as can be recognized at law.

For Taylor his interests were in efficiency, in the certitude of naming the right interested parties, and providing adequate notice. Those interests could have been met more cheaply and more completely by simply giving notice to all the property owners in Costilla County in 1960. The record demonstrates that they numbered well less than a thousand at the time. *Rael v. Taylor*, 876 P.2d at 1215, n.7.

Had Taylor's desire actually been to bring the necessary parties before the court in 1960, the easiest and the most complete method would have been personal service to those individuals identified in the public records as landowners in Costilla County. Under *Mullane* and its progeny that certainly would have been required. *See, e.g., Schroeder v. New York*, 371 U.S. 208, 212-213, 83 S.Ct. 279, 282-283 (1962) (the names of property owners were contained in the public records, and accordingly could have been easily ascertained so as to

meet due process notice requirements). That, however, was not what Taylor chose to do, and he must bear the consequences for his decision.

E. DUE PROCESS REQUIRES THAT THE PROCEDURES ADOPTED BE "FUNDAMENTALLY FAIR." TAYLOR'S DECISION TO GIVE PUBLISHED NOTICE INSTEAD OF ACTUAL NOTICE TO PLAINTIFFS WHOSE NAMES APPEARED AS PROPERTY OWNERS OF RECORD (OR WHO ARE SUCCESSORS IN INTEREST TO SUCH PROPERTY OWNERS) LEADS TO A FUNDAMENTALLY UNFAIR RESULT.

As the United States Supreme Court has said:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. . . . Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981). The relevant precedents in this case concerning the issue of notice are the decisions which stem from the *Mullane* line of cases.

The trial court, however, has mangled the *Mullane* analysis to the point that a family which may have utilized the Mountain and/or Salazar Tracts for over a hundred continuous years--from generation to generation to generation--relying on their settlement rights for basic necessities like water and firewood, would never be named or served in an action aimed at eliminating those rights, even though they had an acknowledged "identifiable interest" in the property rights. R. 3294 ("The Court finds that . . . the "Beaubien Document" provides the plaintiffs with such identifiable interest to satisfy the first prong of the objective test") *contrast with* R. 3296 ("The Court further finds that due diligent [*sic*] would not

require the defendant to name and serve all owners of property in Costilla County, but only those whose names are reasonable [*sic*] ascertainable").

Because the plaintiffs' property interests appeared of record in Costilla County, the district court's conclusion that the property owners were not "reasonably ascertainable" makes no sense, and lacks even the rudiments of fundamental fairness.

This Alice-In-Wonderland approach, that black is white and white is black, does not begin to pay deference to the explicit mandate of *Mullane*:

> Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less than likely than the mails to apprise them of its pendency.

339 U.S. at 318, 70 S.Ct. at 659.

If Taylor wanted to extinguish the plaintiffs' property rights, as a matter of fundamental fairness, he had to at a minimum name the plaintiffs in his action and provide individuals with record interests personal service of the proceedings. He failed to do that. Likewise, the trial court, in its application of the Colorado Supreme Court's decision also failed to recognize the vested property rights of the plaintiffs.

III. CONCLUSION

For the reasons stated above, and for the reasons set forth in Appendix I, attached hereto, the decision of the district court which dismissed plaintiffs' claims should be overturned, and the rights of the plaintiffs to their usufructory interests should be ordered and confirmed by the Court.

Dated this 8th day of March, 1999.