MEXICAN DAM AND DITCH CO. ET AL. *v.* DISTRICT COURT OF FIRST JUDICIAL DISTRICT, IN AND FOR ORMSBY COUNTY, ET AL.

No. 2867

July 1, 1930. 289 P. 393.

1. WATERS AND WATER COURSES.
   Court *held* without jurisdiction to adjudicate relative rights of water users until after publication of notice in newspaper in each county in which stream system was located (Stats. 1915, c. 253, sec. 4).
2. WATERS AND WATER COURSES.
   State engineer may initiate on his own accord proceeding to adjudicate relative rights of appropriators of water on particular stream system (Stats. 1913, c. 140, sec. 18).
3. STATUTES.
   Certain sections of statute respecting water rights may be void without rendering entire act void (Stats. 1903, c. 4).
4. WATERS AND WATER COURSES.
   Legislature had authority to enact statute respecting water rights (Stats. 1913, c. 140, sec. 21).

   Under such statute, the state engineer considered certain maps and data respecting relative rights of appropriators of water on Carson River stream system.

C. J.–CYC. REFERENCES

STATUTES—36 Cyc. p. 976, n. 27.
WATERS—40 Cyc. p. 703, n. 91; p. 730, n. 88; p. 732, n. 12.

ORIGINAL PROCEEDING in prohibition by the Mexican Dam and Ditch Company and others against the District Court of the First Judicial District of the State of Nevada, in and for the County of Ormsby, and another. **Writ issued.**

Cantwell & Springmeyer and *Wm. M. Kearney*, for Petitioners:

The fact appears from the so-called "affidavit of compliance with jurisdictional requisites" that the state engineer did not comply with sec. 34 of the water law, as amended (Stats. 1915, p. 380), in giving notice. No mention whatever appears of the notice having been published in Churchill County, Nevada, where two weekly or semiweekly newspapers are regularly published. This

omission is fatally defective as to jurisdiction, as was said in the case of In Re Hegarty Estate (Nev.), 199 P. 81, 222 P. 793.

The state engineer is a statutory officer whose duties and powers are limited and prescribed by the statute which brings the department into existence. French v. Edwards, 20 L. Ed. 703; Ex Parte Farrell, 92 P. 787; Bandler v. Hill, 146 N. Y. S. 103; In Re Water Rights in the Humboldt River Stream System, 246 P. 692–4.

The water law is a special statutory procedure. It seems to be settled law that a special statutory procedure must be strictly followed to be effectual in its results. Imperial Land Co. v. Imperial Irrigation Dist., 161 P. 115; Mackenzie v. Douglas County, 159 P. 627.

In the present case the "affidavit of compliance with jurisdictional requisites" shows that the state engineer considered the Chandler findings void, yet he failed to initiate the required statutory proceeding in the manner provded by law, but on the contrary starts with a notice to the effect that he will use and consider certain maps and data that are in his office in arriving at his order of determination. None of the procedure provided by sections 18, 19, 20 and 21 of the water law were carried out. The fundamental entry of the order provided in sec. 18 to legally initiate the proceeding, and the notices provided in sec. 19, were entirely omitted. Nowhere in sec. 88a, relied on by defendants, is there any authority to dispense with these fundamental and jurisdictional requisites; it provides only a means of using data obtained otherwise than by starting at the bottom and making new surveys.

The pleadings conclusively show that no independent investigation was ever made by the state engineer in accordance with the terms of the statute in determining the rights on the Carson River stream system. It appears conclusively that the order of determination upon which the defendants seek to act is based, in large part, upon so-called "Chandler Findings" which were made in 1904 and 1905 under a statute which subsequently was declared unconstitutional, and which is

entirely different from the statute under which these proceedings now are taken.

M. A. Diskin, Attorney-General, and *Wm. J. Forman,* Deputy Attorney-General, for Defendants:

It is true that sections 18 and 19 of the water law of this state provide that an adjudication may be instituted by petition of a water user or by an order of the state engineer. There are, however, other means by which such an adjudication may be initiated under the present water law. In cases where maps, surveys, evidence and data are now filed with the state engineer from an adjudication started under one of the former water acts, under sec. 88a of the water law it is provided that the state engineer may give notice that he intends to consider these maps, data and evidence and make a final order of determination based upon such evidence and data and file it with the court. Under sec. 88b he may simply file with the court the data and evidence presented under the former water act.

Sec. 88a has been held constitutional by the federal court in the case of Bergman v. Kearney, 241 Fed. 884.

It will be noted that the order by the state engineer, in the ordinary adjudication suit, under sec. 88a is taken care of by a notice to the parties that he will consider the evidence and data on file in his office. Both are notices to the water user that the proceeding is to be considered by the state engineer, and one is as effectual as the other in notifying the parties of such proceeding.

OPINION

By the Court, COLEMAN, J.:

This is an original proceeding in prohibition to restrain the respondent court from adjudicating the relative rights of appropriators of water upon the Carson River stream system.

The grounds relied upon to sustain the contention that the respondent is without jurisdiction are: (1) That no petition was ever filed with the state engineer by the water appropriators of the stream system requesting proceedings be instituted by that officer to have the water rights of such stream system determined. (2) In brief, that the state engineer did not make observations, maps, gather data, and otherwise comply with the law, but relied upon data obtained by A. E. Chandler, who acted as and gathered such information pursuant to a void law. (3) That the state engineer, on April 10, 1920, mailed notice to various parties of his intention to determine the rights of the appropriators of water upon said stream system, but that all of the then and present owners of lands and water rights along and upon said stream system were not so notified. (4) That the said state engineer did not include the entire Carson River stream system within the State of Nevada in his order of determination, and did not determine all of the existing rights in said stream system. And (5) that the United States of America, on May 11, 1925, and long prior to the institution of this proceeding in the respondent court, initiated proceedings in the District Court of the United States for the District of Nevada against the petitioners and all other users of and claimants to the waters of the Carson River stream system, to adjudicate, establish, and fix the relative rights of all parties and persons in and to the waters of said Carson River and its tributaries.

Upon the filing and reading of the petition, it was ordered that an alternative writ issue herein. In due time the respondent appeared, by the Attorney-General, and filed his return, wherein it is set forth that the Carson River has its origin in Alpine County, Cal., and flows through Douglas, Ormsby, and Lyon Counties, Nevada, and into Churchill County, Nevada, where its waters which are not used for irrigation disappear in the "Carson Sink." It then sets forth the various steps taken by various state engineers preliminary to an adjudication of the relative rights of the water

users along said stream system, alleging, among other things, that due notice had been given the water users thereon and that the state engineer had made an order of determination of such relative rights and caused a copy thereof to be filed with the county clerk of Ormsby County, Nevada, who is ex officio clerk of the district court of the First judicial district court of Nevada, in and for Ormsby County. It is further alleged that thereafter Glenn F. Engle, deputy state engineer, filed in said cause in said clerk's office an affidavit of jurisdictional requisites, a copy of which, marked "Exhibit A," is made a part of such return and filed therewith.

Other matters are set forth in the return, which it is not necessary to here refer to.

1. It is clear that the writ must issue as prayed. Section 34 of the water law, as amended (Stats. 1915, c. 253, p. 380), points out the procedure necessary to the obtaining of jurisdiction of the parties by the district court, subsequent to the filing of the "Order of Determination" with the county clerk. One of the necessary steps is the publication in some newspaper of general circulation, published in each county in which the stream system or any part thereof is located. It does not appear that this was done, in that no publication was ever had in such a paper published in Churchill County. Until this is done the district court cannot acquire jurisdiction to hear the matter and to enter a decree adjudicating the relative rights of all of the water users on the Carson River stream system.

2. There is no merit in the contention that no petition was presented to the state engineer signed by one or more water users, requesting that the rights of the users of the stream system be determined. The state engineer initiated the proceeding on his own accord, as he is expressly authorized by section 18, Stats. 1913, c. 140, to do.

Nor is there merit in the contention that the state engineer used maps and data procured by State Engineer Chandler pursuant to the Act of 1903 (Stats. 1903, c. 4, p. 24).

It is said that this act was declared unconstitutional and void by this court. We have not been cited to the case so holding, and know of none.

3. The act mentioned was expressly repealed by the act of 1907 (Stats. 1907, c. 18, p. 30), but the maps were made by the state engineer pursuant to its authority, prior to its repeal. Whether certain sections of the act were void under authority of Ormsby County v. Kearney, 37 Nev. 314, 142 P. 803, we need not determine, for certain sections might have been void and others be valid.

4. However, the state engineer considered the maps and data in question pursuant to statute (Stats. 1913, c. 140, sec. 21) which the legislature had authority to enact. 12 C. J. 982; Cooley's Const. Lim. (6th ed.) 450.

In view of the conclusion we have reached, we do not deem it necessary to consider the other points suggested.

In view of the failure to publish notice as pointed out, it is ordered that the writ issue as prayed.