ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.
v.
THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenors.

No. CV 75-184
SAN JUAN RIVER
ADJUDICATION SUIT

Claims of the Navajo Nation
Case No.: AB-07-1

GARY L. HORNER'S REPLY TO THE UNITED STATES' RESPONSE TO MOTIONS SEEKING TO INVALIDATE BUREAU OF RECLAMATION WATER RIGHTS

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**

2. Title of the present document: **GARY L. HORNER'S REPLY TO THE UNITED STATES' RESPONSE TO MOTIONS SEEKING TO INVALIDATE BUREAU OF RECLAMATION WATER RIGHTS.**

3. Descriptive summary of the relief sought: **This document represents Mr. Horner's reply to THE UNITED STATES' RESPONSE TO MOTIONS SEEKING TO INVALIDATE BUREAU OF RECLAMATION WATER RIGHTS.**

4: Number of pages of the present document: **17**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully replies to THE UNITED STATES' RESPONSE TO MOTIONS SEEKING TO INVALIDATE BUREAU OF RECLAMATION WATER RIGHTS, which was filed in the present matter on May 10, 2013 ("US Response to Motions re US Water Rights").

As and for good cause for said Reply I state:

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I. Introduction.

A. Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I do not seek an order cancelling the United States' "permits."

As an initial matter, the United States argues that:

> "The Motions' challenge to Reclamation's permits echoes a substantively identical motion orchestrated by Mr. Horner —and disposed of by this Court without express consideration — during the expedited *inter se* sub-proceeding addressing the water rights settlement for the Jicarilla Apache Nation. *See* RICHARD AND VICKEY AUSTIN'S MOTION TO CANCEL THE PERMITS ISSUED TO THE UNITED STATES FOR THE RIGHT TO USE WATER OF THE STATE OF NEW MEXICO WITHIN THE SAN JUAN BASIN (Oct. 21, 1998).
>
> "The Court should reach the same result here because the Objectors ask this Court to decide an issue which the Court has no need —nor any legitimate reason — to reach." US Response to Motions re US Water Rights, pp. 2-3.

As the United States is well aware, pursuant to the ORDER GRANTING JOINT MOTION TO STRIKE AUSTINS' REVISED OBJECTION AND ALL SUBSEQUENT DOCUMENTS FILED TO DATE BY THE AUSTINS IN THE JICARILLA EXPEDITED INTER SE PROCEEDING, entered in the present matter on December 3, 1998, the Court struck without any consideration whatsoever all of the substantive documents filed by the Austins simply because the Austins had the limited assistance of counsel - me. (If you can believe that. I know I could not believe it.) The point here is that the substance of such documents was never considered by the Court, and the striking of such documents then, certainly cannot be used as any manner of precedent or estoppel now.

Moreover, pursuant to GARY L. HORNER'S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION, filed in the present matter on April 15, 2013 ("Horner's Motion re Federal Law, Permits and Contracts"), I do not seek an order

canceling the United States' "permits." I understand that such a request would not be appropriate in the present expedited *inter se* proceeding. However, the Settling Parties rely extensively on said "permits" as a basis for the water rights for the Navajo Nation pursuant to the Navajo Settlement and Proposed Decrees. In that regard, pursuant to Horner's Motion re Federal Law, Permits and Contracts, it was entirely necessary and appropriate to address said "permits" in detail. Therefore, pursuant to Horner's Motion re Federal Law, Permits and Contracts, I demonstrate that said "permits" do not in fact exist, and that they provide no legitimate bases for the water rights of the Navajo Nation. Further, I do go so far as demonstrating that said "permits" should in fact be cancelled at some point in time, when and where the issue of the cancellation of such "permits" is appropriate for consideration.

B. The United States acknowledges that no "permits" exists, but continues to argue that such "permits" do exist.

Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I demonstrate conclusively that the filings with the State Engineer made by, or on behalf of, the United States with respect to the waters of the San Juan Basin do not constitute valid "permits" issued by the State Engineer. Pursuant to the US Response to Motions re US Water Rights, the United States concedes this point. Specifically, the United States acknowledges that:

> "The interest created pursuant to NMSA 72-5-33 is commonly referred to as a 'permit,' even though the statute does not expressly provide for a permit. Thus, in this memorandum the United States uses the term 'permit' to refer to that interest." US Response to Motions re US Water Rights, p. 2, Footnote 1.

Thus, while conceding that such "permits" do not exist, the United States continues to argue that such "permits" do exist.

II. There is no merit to the United States' argument that the Court should summarily dispose of the challenges to reclamation's permits without consideration of the merits.

Pursuant to US Response to Motions re US Water Rights, the United States argues that the Court should summarily dispose of the challenges to reclamation's permits without consideration of the merits. Specifically, the United States argues that:

> "There are at least four reasons why summary disposal is appropriate. First, the Objectors effectively ask the Court to adjudicate Bureau of Reclamation water rights, despite this Court's repeated and clear instruction that this expedited *inter se* sub-proceeding 'includes only the claims of the Navajo Nation.' *See e.g.*, ORDER STRIKING COMMUNITY DITCH DEFENDANTS' ANSWER AND COUNTERCLAIM at 3 (Feb. 15, 2013). Put more bluntly, the Objectors' challenges to the validity of Reclamation's permits are improper because Reclamation's claims to water rights are not before this Court.
>
> "Second, the Objectors' arguments are a collateral attack on State Engineer actions taken decades ago. New Mexico law has long disfavored such collateral attacks. *See e.g,. McDonald v. Padilla*, 53 N.M. 116, 119-20, 202 P.2d 970, 973 (N.M. 1948). Third, the permits have been relied on by Reclamation for decades in distributing water by contract to countless New Mexicans for use in their homes, farms and businesses. New Mexico law has long counseled that decisions underlying commercial transactions must not be disturbed. *See e.g., State ex rel. Bliss v. Dority*, 55 N.M. 12, 18, 225 P.2d 1007, 1011 (1950). Further, these beneficiaries of Project water have had no notice that the water upon which they rely will be placed at risk in this expedited *inter se* sub-proceeding.
>
> "The fourth, and perhaps most important reason, why the Court should summarily dispose of the challenges to Reclamation's permits is that the premise of the Objectors' arguments is fundamentally misguided. Contrary to Mr. Horner's repeated representations, Reclamation's permits do not 'authorize' or 'provide the basis' for the Navajo Nation water rights addressed in the Settlement. Rather, it is the Federal reserved water rights doctrine that both 'authorizes' and 'provides the basis' for the Navajo Nation's water rights. *See Winters v. United States*, 207 U.S. 564 (1908). Some of the challenged Reclamation permits play no role whatsoever in the settlement water supply. Those that do are part of the settlement only because as a matter of compromise the Navajo Nation has agreed to accept water from Reclamation project facilities in lieu of exercising its senior direct flow reserved water rights. Thus, the projects' role in the Settlement only benefits other water users by providing a source of water for the Navajo Nation that does not require additional water to be withdrawn from the San Juan River.
>
> "In short, the Objectors' challenge to Reclamation's permits should be summarily rejected because it is wholly outside the scope of this sub-proceeding and raises an issue which the Court has no legitimate reason to reach. Even if that were not the case, however, the Objectors' arguments have no merit." US Response to Motions re US Water Rights, pp. 3-5. Footnotes omitted.

A. To the extent the Settling Parties rely on the United States' alleged water rights as "authorizing" or "providing a basis for" the water rights of the Navajo Settlement and Proposed Decrees, such United States' water rights must be determined in the present matter *before* the water rights of the Navajo Nation are determined.

As indicated above, the United States' first point is that:

> "Objectors effectively ask the Court to adjudicate Bureau of Reclamation water rights, despite this Court's

> repeated and clear instruction that this expedited *inter se* sub-proceeding 'includes only the claims of the Navajo Nation.' . . . Put more bluntly, the Objectors' challenges to the validity of Reclamation's permits are improper because Reclamation's claims to water rights are not before this Court."

In fact, I do not ask this Court to adjudicate the BOR's water rights at this time. I have only addressed the BOR's water rights because the Settling Parties have asserted that the BOR's water rights "authorize" or "provide the basis" for the Navajo Nation's water rights addressed in the Navajo Settlement. In that regard, pursuant to Horner's Motion re Federal Law, Permits and Contracts, I have demonstrated that, in fact, the United States has no valid water rights in the San Juan Basin. Further, I have repeatedly argued, that to the extent the Settling Parties rely on the United States' alleged water rights as "authorizing" or "providing a basis for" the water rights of the Navajo Settlement and Proposed Decrees, such United States' water rights must be determined in the present matter before the water rights of the Navajo Nation are determined.

In fact, in *State of New Mexico v. Lewis, et al.*, 141 N.M. 1, 150 P.3d 375 (2007 NMCA), the Objectors' (Tracy/Eddy) objections were in essence summarily rejected because their water rights had not yet been adjudicated in such matter (through no fault of their own). The *Lewis (2007)* Court reasoned that since Objectors' water rights had not been adjudicated in the subject matter (although they had been adjudicated in a previous adjudication), they could not prove the nature and extent of their own water rights. The *Lewis (2007)* Court further reasoned that Objectors could not prove that they had been injured or harmed by the subject settlement, since they could not prove the necessarily required element of the nature and extent of their own water rights. In that regard, the *Lewis (2007)* Court specifically stated:

> "It appears that Tracy/Eddy may have fallen victim to the inability or failure of the State and the irrigation entities over many years to complete an adjudication of the Pecos River surface and groundwater rights." *Lewis*, 141 N.M. 20, 150 P.3d 394. Emphasis added.

(*See* THE BID AND GARY L. HORNER'S RESPONSE TO THE JOINT MOTION FOR

ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, filed in the present matter on October 6, 2009, pp. 58-62.)

The point here is that unless the water rights of the United States have been previously established, by adjudication in the subject matter, the Settling Parties cannot assert the United States' water rights as the basis for the Navajo Nation's water rights. In that regard, pursuant to Horner's Motion re Federal Law, Permits and Contracts, I have demonstrated that, in fact, the United States has no valid water rights in the San Juan Basin.

B. The United States has shown no basis or authority for its argument that Objectors' arguments are disfavored collateral attacks on State Engineer actions.

As indicated above, the United States' second argument is that:

> "Objectors' arguments are a collateral attack on State Engineer actions taken decades ago. New Mexico law has long disfavored such collateral attacks. *See e.g,. McDonald v. Padilla*, 53 N.M. 116, 119-20, 202 P.2d 970, 973 (N.M. 1948)."

However, *McDonald* in no manner supports the United States argument. In *McDonald*, the Court was considering a challenge to a District Court judgment by the Town of Atrisco, who had not been a party to the previous proceeding where the subject judgment was entered. In *McDonald*, the Court stated:

> "The rule is that as against a collateral attack, a judgment is valid unless the contrary appears in the judgment roll, and the omission of every step in the proceedings except the entry of the judgment, does not overcome the conclusive presumption of regularity of a judgment when collaterally attacked, if the record does not affirmatively disclose the omissions." *McDonald v. Padilla*, 53 N.M. 116, 120, 202 P.2d 970, 973 (NMSC 1948).

In the present matter, there is no prior judgment that is being collaterally attacked. In fact, there has never been any adjudication of the water rights of the United States. Further, if the United States, by referring to the "State Engineer actions taken decades ago", is referring to the

State Engineer's actions taken with respect to the filings made by, or on behalf of, the United States, the record affirmatively discloses the infirmities of the State Engineer's actions.

Therefore, the United States has shown no basis or authority for its argument that Objectors' arguments are disfavored collateral attacks on State Engineer actions taken decades ago.

C. The United States' concerns that the BOR has relied upon such "permits" for decades, do not represent contested issues between me and the United States; rather, such concerns represent contested issues between the United States and the State.

As indicated above, the United States' third argument is that:

> "the permits have been relied on by Reclamation for decades in distributing water by contract to countless New Mexicans for use in their homes, farms and businesses. New Mexico law has long counseled that decisions underlying commercial transactions must not be disturbed. *See e.g., State ex rel. Bliss v. Dority*, 55 N.M. 12, 18, 225 P.2d 1007, 1011 (1950). Further, these beneficiaries of Project water have had no notice that the water upon which they rely will be placed at risk in this expedited *inter se* sub-proceeding.

First, I cannot find where, and it does not appear that, *Dority* states that "decisions underlying commercial transactions must not be disturbed." Therefore, the United States shows no authority for its subject argument. However, *Dority* does state that:

> "No right to the use of water from such sources was obtained by its use by defendants in violation of law, nor can it be. The statutory manner of securing such rights is exclusive. Pecos Valley Artesian Cons. District v. Peters, 50 N.M. 165, 173 P.2d 490. *State ex rel. Bliss v. Dority*, 55 N.M. 12, 18, 225 P.2d 1007, 1011 (1950).

Moreover, I have not asserted a blanket challenge to all United States' contracts. Although, I have asserted that such contracts do not establish water rights. The water rights associated with such uses must be acquired in accordance with state law; that is, by the statutory appropriation procedures, and further, must be based upon the beneficial use of such water. In fact, it appears that the statutory appropriation procedures have not been followed with respect to the use of most of the water associated with such contracts, and further, that often such contracts

are not even based upon beneficial use.

My position has been that the State Engineer has so fouled up the process for the acquisition of water rights in this State for the last 100 years, that to deny those who have relied upon the State Engineer's positions (that water rights can be acquired by virtue of contracts with the United States) for the use of their water, would be a travesty indeed. Therefore, in this adjudication, there needs to be an appropriate means found to adjudicate water rights to those who have mistakenly been led to believe they were legally beneficially using such water.

On the other hand, the State has argued that:

> "The purpose of a water rights adjudication is to recognize existing water rights in a stream system, not to grant new appropriations. Applications for new appropriations of water are exclusively through an administrative proceeding before the State Engineer. . . . Whether there is water available for appropriation is a threshold determination in the State Engineer's evaluation of a water rights application, but not in an adjudication. . . . The delegation of this determination to the State Engineer is within the purpose of the Legislature's grant of broad powers to the State Engineer 'to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process'. . . . While the determination of available water supply is necessary in determining whether to grant a new appropriation, it is not a necessary determination in the Court's adjudication of existing rights. The Court is not granting new appropriations of water, but recognizing water rights that already exist." State's Response to 4/15/13 Motions, p. 5. Emphasis added.

In that regard, the State argues that "[t]he purpose of a water rights adjudication is to recognize existing water rights in a stream system, not to grant new appropriations." Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I have demonstrated that the Navajo Nation has *no existing* water rights, other than perhaps a small quantity of water rights that could be considered to be federal reserved water rights encompassed within the Proposed Supplemental Decree (they may also be able to find a small amount of pre-1907 water uses, that may have existed prior to the implementation of the 1907 Water Code, and thus, prior to the creation of the State Engineer's application process). But, the vast majority of the water associated with the Navajo Settlement and Proposed Decrees has never been "appropriated" pursuant to the State

Engineer's application process.

The State argues that pursuant to an adjudication proceeding, only "existing" water rights can be recognized. Therefore, according to the State, this Court could not recognize the vast majority of the water rights of the Navajo Settlement and Proposed Decrees. Apparently, according to the State's argument, the Navajo Nation must first go back and work its way through the State Engineer's application process, and obtain an "appropriation," essentially a "license" to appropriate the water it is currently using, before any such water right could be recognized in the present matter. (That would result in a priority date for the vast majority of the Navajo Nation's current uses of water of no earlier than 2013.)

Thus, the State argues that this Court has no jurisdiction to recognize any water rights associated with the Navajo Settlement, specifically any water rights for the Navajo Nation associated with the NIIP Project, the ALP Project, the Hogback and Fruitland Projects, and its DCMI uses of water.

Therefore, the concerns expressed by the United States above, do not represent contested issues between me and the United States. Rather, such concerns represent contested issues between the United States and the State.

D. The United States and I apparently agree that the BOR's "permits" do not "authorize" or "provide the basis" for the Navajo Nation's water rights.

As indicated above, the United States' fourth point is that the BOR's "permits" do not "authorize" or "'provide the basis" for the Navajo Nation water rights addressed in the Navajo Settlement. Specifically, the United States argues that:

> "Contrary to Mr. Horner's repeated representations, Reclamation's permits do not 'authorize' or 'provide the basis' for the Navajo Nation water rights addressed in the Settlement. Rather, it is the Federal reserved

> water rights doctrine that both 'authorizes' and 'provides the basis' for the Navajo Nation's water rights. *See Winters v. United States*, 207 U.S. 564 (1908). Some of the challenged Reclamation permits play no role whatsoever in the settlement water supply. Those that do are part of the settlement only because as a matter of compromise the Navajo Nation has agreed to accept water from Reclamation project facilities in lieu of exercising its senior direct flow reserved water rights. Thus, the projects' role in the Settlement only benefits other water users by providing a source of water for the Navajo Nation that does not require additional water to be withdrawn from the San Juan River." US Response to Motions re US Water Rights, p. 4.

First, it should be clear to all by now, that I am not arguing that such "permits" establish a basis for the water rights of the Navajo Settlement and Proposed Decrees. It should be crystal clear to all, that I am asserting that such "permits" **do not** provide a basis for the water rights of the Navajo Settlement and Proposed Decree

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the Navajo Nation and the State rely extensively on such "permits" as the basis for the water rights of the Navajo Settlement and Proposed Decree. The only reason that I did not similarly address the position of the United States on such matter, was because by the time I filed Horner's Brief re Federal Law, Permits and Contracts (April 15, 2013), the United States had not filed anything at all regarding its position on the legal and factual basis for the Navajo Settlement and Proposed Decrees.

However, on April 15, 2013, the Navajo Nation and United States filed their JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION ("NN & US Memo re Settlement Motion"). Accordingly, for the first time the United States took positions, in writing, regarding the legal and factual bases for the Navajo Settlement an Proposed Decrees. Pursuant to said NN & US Memo re Settlement Motion, the United States argued that:

> "The Navajo Nation draws Project Water under the existing permanent contract BOR contracts and is permitted to use Project Water pursuant State Permit Nos. 2849, 2883, and 3215 as authorized by Congress in the 1962 Act, the Colorado Ute Settlement Act Amendments of 2000, *see* n. 22, *supra*, and the Settlement Act § 10701(b)(1)(B). NN & US Memo re Settlement Motion, p. 27. Emphasis added.

Further, the United States argued that:

> "As a result, the Navajo Nation's rights for water for NIIP and NGWSP are fulfilled or serviced by OSE Permit No. 2849, held by the United States, with a priority date of June 17, 1955 for those waters originating in the Basin above Navajo Dam, and by Permit No. 3215, also held by the United States, with a priority date of December 16, 1968, for inflow to the San Juan River below Navajo Dam. Partial Final Decree at ¶ 5(b). The water rights for the Navajo portion of ALP would be fulfilled or serviced by Permit No. 2883, held by the United States, with a priority date of May 1, 1956 for water from the Animas River." NN & US Memo re Settlement Motion, p. 49. Emphasis added.

Similarly, the United States argued that:

> "Under the Settlement, the water rights for NIIP, ALP and NGWSP are supplied by permits previously issued by the State. All of the water for NIIP is supplied from Permit 2749, held by the United States, to store water in the Navajo Reservoir. Partial Final Decree ¶ 5(b). All of the water for ALP is supplied from Permit 2883, held by the United States, which relies on releases from Lake Nighthorse when direct flows in the Animas River are not sufficient to meet project demands. *See* n. 22, *supra*. The water for the NGWSP is partially supplied from Navajo Reservoir and partially from inflows into the San Juan River below Navajo Reservoir pursuant to Permit No. 3215, with a priority date of December 16, 1968. *Id.* ¶ 5(b); Settlement Act § 10701(b)(1)." NN & US Memo re Settlement Motion, p. 50. Emphasis added.

Therefore, at the very least, the United States' assertion that the BOR's "permits" do not "authorize" or "provide the basis" for the Navajo Nation's water rights, is not consistent with its stated positions in the NN & US Memo re Settlement Motion. However, the United States' assertion, that the BOR's "permits" do not "authorize" or "provide the basis" for the Navajo Nation's water rights, would appear to be precisely the same as mine. Perhaps the United States' assertion that the BOR's "permits" do not "authorize" or "provide the basis" for the Navajo Nation's water rights should be regarded as an admission of such fact.

Unfortunately, neither the Navajo Nation, nor the State have joined the United States in such position. There appear to be some striking differences of position between the Settling Parties. However, although they take different positions, they never challenge each other's positions. The Settling Parties seemingly offer the Court a bucket full of disparate, twisted, conflicting arguments in support of the Navajo Settlement and Proposed Decrees. Apparently, the Settling Parties will be content if the Court will simply rummage through the bucket and pull

out any arguments it chooses (whatever it takes) as long as it approves the Navajo Settlement and Proposed Decrees.

III. To the extent that the application of §§ 72-5-33 and/or 72-9-4 allow the United States to forever tie up the waters of the State, without the beneficial use of such water, said Sections are unconstitutional as applied, because such application violates the beneficial use and prior appropriation provisions of the New Mexico Constitution

Section II of the US Response to Motions re US Water Rights ("THE CHALLENGES TO RECLAMATION'S PERMITS ARE WITHOUT MERIT") presents only one issue that I have not sufficiently addressed pursuant to Horner's Motion re Federal Law, Permits and Contracts. That is, the United States argues that:

> "Mr. Horner attacks both of these long-standing statutes [NMSA 72-5-33 and NMSA 72-9-4] as 'unconstitutional.' This is not the forum to decide the constitutionality of statutes that have been in effect for decades (and in the case of NMSA 72-5-33, more than a century), but in any event the New Mexico Supreme Court affirmed NMSA 72-5-33 against constitutional challenge in *City of Raton*, 678 P.2d at 1174. In doing so, the New Mexico Supreme Court observed that 'the legislature's distinction between federal reclamation projects and other areas of water use in this state is not at all unreasonable or arbitrary.' *Id.* at 1174-75. That distinction underlies both NMSA 72-5-33 and NMSA 72-9-4. Consequently, even if the constitutionality of those statutes could be challenged in this proceeding, the New Mexico Supreme Court's instruction would require this Court to affirm the statutes." US Response to Motions re US Water Rights, Footnote 3, pp. 5-6.

First, the United States provides no authority for its argument that "[t]his is not the forum to decide the constitutionality of statutes that have been in effect for decades". However, of greater interest is the United States' argument (from above) that:

> "the New Mexico Supreme Court affirmed NMSA 72-5-33 against constitutional challenge in *City of Raton*, 678 P.2d at 1174. In doing so, the New Mexico Supreme Court observed that 'the legislature's distinction between federal reclamation projects and other areas of water use in this state is not at all unreasonable or arbitrary.' *Id.* at 1174-75. That distinction underlies both NMSA 72-5-33 and NMSA 72-9-4. Consequently, even if the constitutionality of those statutes could be challenged in this proceeding, the New Mexico Supreme Court's instruction would require this Court to affirm the statutes."

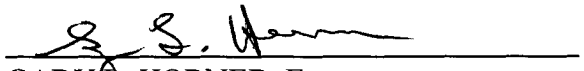
What the *Raton* Court actually said was:

> "In its Reply Brief, Raton cites N.M. Const. art. 2, § 18, and argues that if we interpret Section 72–9–4 as we do, it is a denial of equal protection to those New Mexico appropriators of water not affected by a federal reclamation project. Aside from the unacceptable practice of raising issues for the first time in reply

> briefs, *Montgomery v. Karavas,* 45 N.M. 287, 114 P.2d 776 (1941), '[t]o show a violation of equal protection, appellants must demonstrate that the legislation was clearly arbitrary and unreasonable .... Courts must uphold the efficacy of statutes unless they are satisfied beyond all reasonable doubt that the legislature went outside the Constitution in enacting the challenged legislation.' *Gallegos v. Homestake Mining Co.,* 97 N.M. 717, 722–23, 643 P.2d 281, 286–87 (Ct.App.1982). The legislature's distinction between federal reclamation projects and ***100 **1175** other areas of water use in this state is not at all unreasonable or arbitrary. It recognizes the federal interest in projects intended to conserve or preserve water availability. *See* 43 U.S.C. §§ 371–573 (Cum.Supp.1958 & 1983); NMSA 1978, § 73–18–2. Thus, even if properly raised, Raton's constitutional argument does not withstand the arbitrary and unreasonable test." *Raton v. Vermejo Conservancy District*, 101 N.M. 95, 99-100, 678 P.2d 1170, 1174-1175 (NMSC 1984).

So, what the *Raton* Court actually said was that § 72-9-4 does not violate the equal protection clause of the New Mexico Constitution (Art. 2, § 18). My assertion is that to the extent that the application of §§ 72-5-33 and/or 72-9-4 allow the United States to forever tie up the waters of the State, without the beneficial use of such water, said Sections are unconstitutional as applied, because such application violates the beneficial use and prior appropriation provisions of the New Mexico Constitution. The United States does not even address such assertion. Certainly, there is nothing in the *Raton* case that would require this Court to affirm the subject statutes with respect to my asserted constitutional challenge.

Respectfully, submitted by:



May 24, 2013
Date

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PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY - in accordance with the ORDER MANDATING ALTERNATIVE

METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge - that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court, this 24th day of May, 2013:

wrnavajointerse@nmcourts.gov

Further, pursuant to the Court's CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, entered in the present matter on November 19, 2012, that a true copy of the foregoing document was emailed to the following individuals, this 24th day of May, 2013.

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