Comments Submitted To:

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Mr. John Whipple (w/enclosure)
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Comments Submitted From:

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Date Submitted: December 23, 2003

Executive Summary Comments

1. On page 2 under the tabulation in the last paragraph.

    a. Under Diversion the Rate (cfs) should be Maximum Rate (cfs).
    b. Under Diversion the Maximum Rate (cfs) for the Fruitland- Cambridge Irrigation Project should be 83 instead of 100. It would then be equivalent to the Hogback-Cudei project and other non-Navajo ditches in the Echo Decree at 1 cfs per 40 acres of irrigation land.

2. On page 3 the diversion Rates of 48, 13, and 40 in the table at the top of the page seem too high for the acre-feet shown for diversion per year. If these were piped diversions then these rates over the course of a year would deliver far more acre-feet than shown. If they are diversion rates down a ditch that has evaporation and seepage losses then what is the conversion used to get from acre-feet diversion to cfs? Piped average cfs diversion I get would be 31, 6.5 and 20 instead of what's in the table. Two of them seem to be double the amount necessary and is not required even if only for 6 months.

3. On page 4, paragraph 1 I assume the small amount of rights acquired under State law are the Helium plant appropriation, Kerr-McGee rights and the water rights on Apache Street in Farmington, NM for the Navajo school. The Helium plant appropriation was I believe to the Department of Mines of the Federal government and I am not aware they have obtained title to this right (appropriation). Perhaps these should be listed either here or elsewhere in these documents.

Page 5 paragraphs that state's "Under the Settlement, etc."

1. How is "Subject to non-impairment of non-Navajo water rights" enforced? Enforced by who? How determined?
2. Transfers of water uses by the Navajo Nation (Add-or contractees, lease's, etc. of Navajo Nation water rights to locations off Navajo lands would require approval of the State Engineer. This is currently not enforced by the State Engineer on Jicarilla contracted, or leased water to the power plants, Giant Refinery, San Juan Water Haulers Assn., and others.
3. Add to last sentence. Diversions off the river or lake must be reported monthly to the State Engineer and verifiable by him.

Page 9 at top of page it states "amount of diversion includes about 320,000 acre-feet per year for the Navajo Indian Irrigation Project" and this would be in 2040 after all of NIIP is developed to 110,630 acres. Why then isn't the diversion in the partial final decree and contract limited to this amount as long as sprinkler systems are in operation and then subordinated to 508,000 A-f per irrigation season of Mar 15 to Nov. 15 if flood irrigation is used?

Navajo Nation Water Rights Settlement Agreement Comments

Page 2

1.2 Add "on the Navajo Nations lands" (trust?)

1.4 Same as 1.2

2.2 Once this agreement or settlement agreement is signed agreement is given implicitly that parties are committed to the Appendix 1, partial final judgement and decree of the water rights of the Navajo Nation, Appendix 2, " A Bill" and Appendix 3, Contract between the United States and the Navajo Nation which includes any and all language in these appendice's as it is right now. Is this correct?

Page 4

2.9 Same as 1.2
2.10 Add "Navajo" to Nation
3.1 This confirms what I have commented on under 2.2
8.2 File No. 2848 is the Hammond Conservancy District's water and should not be included here. As noted 2847 is the File No. actually in the combined permit listed and if the water in it is not included it should be so stated.

Partial Final Judgement and Decree of the Water Rights of the Navajo Nation Comments

Page 2

a. Remove "average" and remove "during any period of ten consecutive years" Add, "Periods of irrigation shall be from March 15 through November 15 of each irrigation use year".

Page 3 Section 2

a. On page 23 of Appendix 2, A Bill, under Section 203 (4) it states the NIIP canal can be used to convey water for the Navajo- Gallup Water Supply Project and **other** non-agricultural purposes. This apparently could include any power plant uses (Navajo owned or existing APS and PNM plant water). It opens the door for diversions above the 320,000 A-f required for full NAPI acreage irrigation up to the 508,000 A-f in this settlement. This could open the door for Berinallio and Albuquerque to access water from Navajo Lake down to the Teepee junction and over the continental divide to Abiqui Reservoir. The diversion from November 15 thru March 15 should be made clear if there is to be any.
This also allows other users of this canal other than Navajo's to use it for free. See also (C) On page 24 of Section 203 for costs.

Page 3 Section 2 b.

Flow Rate of 48.1 cfs is at which diversion point? This is unclear and needs changed.

Page 4 Section 2 (C) Flow Rate unclear

Section 2 (e) Remove "Average" and remove "during any period of ten consecutive years" Define irrigation and diversion months such as April 15 through October 15 of each irrigation year.

Page 5 Section 2 (f) Remove "average" (both diversion and depletion) and remove "during any period of ten consecutive years" Define irrigation and diversion months such as April 15 through October 15 of each irrigation year. Change Maximum diversion flow Rate to 83 instead of 100 to reflect 1 cfs per each 40 acres of irrigated land comparable to Echo Decree ditches.

Page 6 Section 3 (a) 40 cfs for 14,500 A-f per year would be double the amount required in cfs. Why?

Section 3 (b) 55 cfs for 14,500 A-f per year would be over double the amount required in cfs. Why?

Section 4 (a) If this New Mexico State District Court has no jurisdiction to enforce or challenge the settlement contract then I would assume the State Engineer has no authority to even administer diversions supplied by water from the settlement contract.

Page 7 Section 4 (a) The language states the Secretary of the Interior has "water rights acquired by the Secretary of the Interior and held by the United States pursuant to New Mexico State Engineer File No's 2848, 2849, 2873, 2917 combined, and 3215". This is not correct. Those File No.'s only gave the Department of the Interio, Bureau of Reclamation (BOR), the right to build a reservoir and store water and build conveyance works to deliver and store a beneficial user's water right. The contracts the BOR makes with contractees is not for supplying their water under their water right under New Mexico State law. That water has not been appropriated or adjudicated to the Secretary of the Interior as a water right. Enclosed find a legal brief prepared for me in another matter that substantiates what I have just commented on above. Please have your lawyers look this over and advise you about this. File 2848 is not a part of the combined as listed above. File 2847 is part of the combined. Remove "during any period of ten consecutive years" and " during the ten consecutive years". Substitute "Storage" for "Water" Right in all the language.

Page 8 Section (b) Define irretrievably lost. As I understand in the Jicarilla settlement it was only by an act of congress.

Page 8 Section 4 (C) This should be removed altogether.

Page 9 Section 5 This is adjudicating the United States a water right. Should not be in Navajo Nation's water right adjudication.

Page 10 Section 5 Comments same as Page 7 Section 4 (a) about File No's and water rights.

Page 14 Section 6, C, 1. Remove last sentence beginning with "The Navajo Nation's diversion, etc."

Page 17 Section 7, A, 2, b Same as on page 14 section 6,C, 1.

Page 20 11. All of the 129 pages of these documents hinges on this Section titled "Conditions." If the State Engineer can enforce anything I would be surprised.

Page 20 12. This section "Disclaimers" is also very important. This allows the State Engineer to disclaim he arrived at anything according to state law.
Page 21 Section 12 Combined permit does not have 2848 in it. It does have 2847 instead. No water right has been adjudicated to the United States in this SJRB yet.

Section 14 Add- Diversions of water, in this decree from the San Juan River or Navajo Lake, will be reported monthly and due by the 10th day of the following month of the diversion. This reporting beginning six years after the fact is a joke. Actually reporting yearly on diversions from the river or lake is a joke. Only monthly reports in diversions can be useful to the State Engineer and other non-Navajo users.

Page 22 Section 15 Top of page uses language "the Navajo Nation shall not allow changes in the exercise of rights that would impair non-Navajo Nation water rights." Who decides this detriment?

Page 23 Section 17 Language that states "or by reallocation of project water and subsequent contract, etc," means the Navajo nation can use its water rights to go down the San Juan Chama project to Albuquerque, Santa Fe, etc.

APPENDIX 2, A BILL COMMENTS

Page 22, Section 203-(a) (2) Need to remove "Average" and remove "during any period of ten consecutive years." This ten-year average is not in compliance with New Mexico State Water law. The state allows no carryovers as water rights are per year, used or not, and you cannot take more than your right each year. This would be unadministratable as to how it would relate to the amount of water available to other non-Navajo users in the basin.

APPENDIX 3, CONTRACT BETWEEN the UNITED STATES and the NAVAJO NATION COMMENTS

Page 4, 1 (H)

File 2848 is not part of the combined permit. File 2847 is part of the combined permit.

Page 7, Section 4 (a) Remove "on average, during any period of ten consecutive years."

Page 7, Section 4 (a) (i) same as above.

Submitted By Robert E Oxford

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BEFORE THE STATE ENGINEER
STATE OF NEW MEXICO

In the Matter of the Application For Permit To Divert Surface Water From The Rio Grande For Municipal, Industrial, and Related Purposes For The City of Albuquerque's Drinking Water Project	)	File No. 4830

PROTESTORS' OXFORD AND B. J. RESOURCES PRE-HEARING BRIEF

COMES NOW Protestors, ROBERT E. OXFORD, BETTE J. OXFORD and B. J. RESOURCES (hereinafter collectively referred to as "Protestors"), and submits the present Pre-Hearing Brief in the above referenced matter.

Accordingly, Protestors state:

Pages 6-24 should be looked AT
Secretary of the Interior NOT A beneficial
User so CAN't develop AN APPROPRIATION
and get A water Right AS you state
on page 7, 4, (a) of the Partial Decree
The BOR probably has A storage right.

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TABLE OF POINTS AND AUTHORITIES

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I. The subject Application should be rejected because it does not conform to the requirements of state law or the rules and regulations of the state engineer.

The subject Application should be rejected because it is not filed on the standard forms required by the sate engineer. Further, said Application fails to provide the required maps, field notes, plans and specifications, made from actual surveys and measurements, to show the method of practicability of construction of the subject works. In fact, the Application clearly states the diversion works to be built have not yet been determined.

But perhaps most significantly, the subject Application is not an application to "appropriate" water, as required by law, rather it is an application to "divert" water. Of the utmost significance is the fact that Albuquerque has never filed an application with the state engineer to "appropriate" the subject water.

§ 72-5-1 NMSA 1978 (1997 Repl.) [**Application for permit; rules; surveys, etc.**] provides

> "Any person, association or corporation, public or private, the State of New Mexico or the United States of America, except as provided in Section 15 [72-5-33 NMSA 1978] of this act, hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations, shall, in addition to providing the form and manner of preparing and presenting the application, require the applicant to state the amount of water and period or periods of annual use, and all other data necessary for the proper description and limitation of the right applied for, together with such information, maps, field notes, plans and specifications as may be necessary to show the method of practicability of the construction and the ability of the applicant to complete the same. . . . All such maps, field notes, plans and specifications, shall be made from actual surveys and measurements, and shall be duly filed in the office of the state engineer at the time of filing of formal application for permit to appropriate; provided, that upon the filing in the office of the state engineer of a notice of intention to make formal application for a permit to appropriate certain public waters the state engineer may allow a reasonable time, to be

specified by him and noted upon his records, for making the surveys, measurements, maps, plans and specifications hereinbefore provided and required for a formal application, and if applicant shall file such formal application and map, plans and specifications and other necessary data within the time so specified, his priority of application shall date from the time of filing such notice of intention. . . . ." Emphasis added

Further, § 72-5-3 NMSA 1978 (1997 Repl.) [**Application; amendment; refiling.**] provides

"The date of receipt of such formal application in the state engineer's office shall be endorsed thereon and noted in the record. If the application is defective as to form, or unsatisfactory as to feasibility or safety of plan, or as to the showing of ability of the applicant to carry the construction to completion, it shall be returned with a statement of the corrections, amendments or changes required, within thirty days after its receipt, and sixty days shall be allowed for the refiling thereof. If refiled, corrected as required within such time, the application shall, upon being accepted, take priority as of date of its original filing, subject to compliance with the further provisions of the law and the regulations thereunder. Any corrected application filed after the time allowed [shall] be treated in all respects, except as to filing fees, as an original application received on the date of its refiling; provided, that the plans of the construction may be amended at any time upon the approval of the state engineer, except that a change in the proposed point of diversion of water from a stream or watercourse shall be subject to the provisions of Section 72-5-24 NMSA 1978 as amended and the rules and regulations of the state engineer." Emphasis added.

The subject Application should be rejected and returned to the Applicant because it is clearly not in conformance with the requirements of New Mexico law, or the rules and regulations of the state engineer.

II. Albuquerque has established no valid right to the subject water.

A. Albuquerque apparently asserts that its right to the subject water is based upon a contract with the BOR for San Juan-Chama Project water.

Pursuant to the subject Application, Albuquerque states that

"**Source of Supply**: Colorado River water apportioned for beneficial consumptive use to the State of New Mexico by the Colorado River Compact, 45 Stat. 1057, 1064 (1928) and the

Upper Colorado River Basin Compact 63, Stat. 31 (1949) as provided by contract with the U. S. Bureau of Reclamation (Contract No. 14-06-500-810, and Amendment No. 1) which will be fully consumed by diverting an equal amount of 'native' Rio Grande water. The 'native' Rio Grande water will be returned to the Rio Grande. The priority date claimed is no later than November 24, 1922, the date the Colorado River Compact was signed." (Application, page 1, sec. 2) Emphasis added.

Further, the subject Application states

"**Quantity of Water Diverted From Rio Grande**: Approximately 94,000 acre-feet per year (ac-ft/yr) on a yearly average at a near constant rate of about 130 cubic feet per second (cfs) with peak diversions of up to 103,000 ac-ft/yr at a rate of up to about 142 cfs. *Generally the diverted water will be comprised of about 50 percent San Juan-Chama (SJC) water* and 50 percent 'native' Rio Grande water. The 'native' Rio Grande water diverted by the City will not be consumptively used, but returned to the river at the City's Southside Water Reclamation Plant (SWRP) below Rio Bravo Bridge . . . ." (Application, page 1, sec. 3) Italics added for emphasis.

B. Neither the Colorado River Compact nor the Upper Colorado River Basin Compact provide any basis for Albuquerque's right to the subject water.

Neither the Colorado River Compact (45 Stat. 1057, §§ 72-15-5 - 9 NMSA 1978 (1922[1])) nor the Upper Colorado River Basin Compact (63 Stat. 31, §§ 72-15-26 - 28 NMSA 1978 (1949[2])) makes any reference whatsoever to the San Juan-Chama Project, the City of Albuquerque, any water transfer from the Colorado River Basin to the Rio Grande Basin, any contract between the BOR and the City of Albuquerque, or any manner of water right or contractual water right in or for the City of Albuquerque.

The reference in the subject Application to the Colorado River Compact and

[1] The Colorado River Compact was signed on November 24, 1922. It was ratified by the New Mexico legislature in 1923. It was proclaimed effective by the president of the United States on June 25, 1929. Arizona did not ratify said Compact until 1944.

[2] The Upper Colorado River Basin Compact was signed on October 11, 1948.

Upper Colorado River Basin Compact is simply an attempt to provide a basis for a water right for the subject water, where in fact no legitimate basis exists; sleight of hand, if you will. Additionally, said reference in the subject Application to the Colorado River Compact and the Upper Colorado River Basin Compact appears to be a completely unfounded attempt to bootstrap a 1922 priority date for the subject alleged water right.

C. Neither the BOR nor Albuquerque have established a valid right to the subject water.

Of more significance is the reference in the subject Application to the BOR - Albuquerque Contract (No. 14-06-500-810), allegedly for water to be delivered via the San Juan-Chama Project.

However, neither the United States Bureau of Reclamation (BOR) nor the City of Albuquerque has to date established (pursuant to New Mexico law) a valid water right with respect to such water.

Albuquerque is intentionally vague with respect to the basis for the right to the subject water. In fact, the permit the BOR holds with respect to the San Juan-Chama Project provides no valid water right with respect to such water; Albuquerque has never established a water right to such water pursuant to New Mexico law; and the subject Application to Divert also establishes no valid water right to such water pursuant to New Mexico law.

The subject Application provides

"Additional Data and Explanations: This Application involves the release of 48,200 ac-ft/yr of the City's SJC contract water from Heron Reservoir for storage and subsequent release from Abiquiu Reservoir pursuant to PL 87-483 and PL 97-140 and contracts with the U. S. Department of the Interior, Bureau of Reclamation and the U.S. Army Corps of Engineers. . . ." (Application, page 2, sec. 10.) Emphasis added.

Apparently, both the subject Application and the subject BOR-Albuquerque Contract rely on PL 87-483 (76 Stat. 96), June 13, 1962, as the basis for the subject water right in the federal government. In that regard, the subject Application: simply presumes that Albuquerque's right to divert the subject water from the Rio Grande is based on a contract with the BOR for water with respect to which the federal government allegedly acquired a water right pursuant to said PL 87-483.[3]

However, with respect to federal water projects, the federal government is only a storer and deliverer of water. The water right itself is appurtenant to the land and must be acquired by the beneficial user in accordance with state law. Therefore, in the present case, the BOR may have established the right to store and deliver the subject San Juan-Chama water, but Albuquerque must be required to establish its own right to use such water pursuant to New Mexico law.

However, Albuquerque has never established its own right to use the subject water, according to New Mexico law. In New Mexico, a water right is established by first making an application to appropriate water, and ultimately being granted a license to appropriate such water. This Albuquerque has never done, and does not do here pursuant to the subject Application.

[3] There is no provision in New Mexico law to "contract" water. However, New Mexico law does allow that a valid (proven and beneficially used) water right may be leased. Therefore, the subject BOR contract is unlawful, as are any contracts, or leases, of such water that Albuquerque may have entered into with third parties.

1. The United States has established no valid right to the subject water.

a. Federal law specifies that with regard to federal reclamation projects the federal government is a storer of water and not the owner of the water right; the water right itself belongs to the water user.

With respect to federal reclamation projects, the federal government is a storer of water, while the water right itself is held appurtenant to the land to be irrigated, that is, the water right is held or owned by the actual landowner or water user. The federal government will construct a storage project and charge those benefitting from such storage project their proportionate share of the construction and operation costs associated with such facilities.

Accordingly, Federal Reclamation Law specifically provides that:

> "The right to the use of water acquired under the provisions of this Act [of June 17, 1902 - 32 Stat. 388] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372 (1902). Emphasis added.

Again, it is emphasized that the landowner or water user, not the federal government, is the owner of the water right itself. A municipal or industrial water user would similarly own the water right and contract with the federal government for storage and delivery of such water from a federal water project. At least that is the concept upon which federal reclamation law is based and upon which the courts have based their decisions.[4]

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[4] The rights of the United States as storer of water in western projects have been distinctly understood to be simply that of 'a carrier and distributor of the water.' *Ickes v. Fox*, 1937, 57 S.Ct.

However, the federal government has the right like any other landowner to acquire water rights for its own purposes, assuming that the federal government actually puts such water to beneficial use.[5] But in such case, the federal government will be required to abide by state law in the acquisition or appropriation of such water.

b. State law governs the distribution of water from a federal project and the acquisition of water rights by the federal government.

412, 300 U.S. 82, 95, 81 L.Ed. 525, rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L.Ed. 855.

In constructing reclamation project, property right in water right is separate and distinct from property right in reservoirs, ditches, or canals, in that water right is appurtenant to land owner of which is the appropriator, and is acquired by perfecting an "appropriation", that is, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *State of Neb. v. State of Wyo.*, Neb. & Wyo. 1945, 65 S.Ct. 1332, 325 U.S. 589, 614, 89 L.Ed. 1815.

Where in action to adjudicate water rights to the Truckee River in Nevada the United States sued for benefit of both Pyramid Lake Indian Reservation and the Newlands Reclamation Project the project landowners and not the government received the beneficial interest in water rights confirmed to the government and the government was not thereafter at liberty to simply reallocate water rights decreed to the reservation and the project as if it owned those rights. *Nevada v. U.S.*, Nev. 1983, 103 S.Ct. 2906, 463 U.S. 110,77 L.Ed. 2d 509, rehearing denied 104 S. Ct. 210, 78 L.Ed. 2d 185,186, on remand 720 F.2d 622.

Federal government's diversion, storage, and distribution of water at reclamation project pursuant to 43 U.S.C. § 372 and contracts with landowners did not vest in United States ownership of water rights which remained vested in owners as appurtenant to land and wholly distinct from property of government in irrigation works, while government remained carrier and distributor of water with right to receive sums stipulated in contract for construction and annual charges for operation and maintenance of works. Under 43 U.S.C. § 372, rights and water users are not determined by contract, but by beneficial use. *Ickes v. Fox*, 1937, 57 S.Ct. 412, 300 U.S. 82, 81 L.Ed. 525, rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L.Ed. 855. See also, *State of Neb. v. State of Wyo.*, Neb. & Wyo. 1945, 65 S.Ct. 1332, 325 U.S. 589, 89 L.Ed. 1815.

By filing notices of intent to appropriate and thereafter impounding water of Rio Grande River, pursuant to authority granted by 43 U.S.C. § 372, United States did not become owner of water in its own right. *Hudspeth County v. Conservation and Reclamation Dist. No. 1 v. Robbins*, C.A. Tex. 1954, 213 F.2d 425, certiorari denied 75 S.Ct.. 56, 348 U.S. 833, 99 L.Ed. 657.

Under 43 U.S.C. § 372, United States is not owner of water, government is carrier or trustee for owners. *Holguin v. Elephant Butte Irrigation Dist.*, 1977, 575 P.2d 88, 91 N.M. 398.

[5] The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice. *U.S. v. West Side Irrigating Co.*, D.C. Wash. 1916, 230 F. 284.

The principles that the distribution of water from federal water projects and the acquisition or appropriation of water by the federal government are governed by state law is deep-seated in western reclamation law.[6]

Accordingly, Federal Reclamation Law specifically provides that:

> "Nothing in this Act [of June 17, 1902 - 32 Stat. 388] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, or the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, nothing herein shall in anyway affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U.S.C. § 383 (1902).

In *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (C. A.N.M. 1981), the Court quoted the United States Supreme Court decision in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), where:

> "the Supreme Court found that under § 8 [43 U.S.C. § 383], water rights needed for reclamation projects had to be acquired by the Secretary of the Interior in strict conformity

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[6] State law governs the distribution of water from federal projects unless Congress expresses a different approach. The state controls the use of water because it does not part with ownership, but only allows the usufructuary right to water. *Jicarilla Apache Tribe v. U. S.*, C. A.N.M. 1981, 657 F.2d 1126.

Federal law specifically defers to state appropriation laws in determining right of the United States to appropriate water within a state. *Northport Irr. Dist. v. Jess*, 1983, 337 N.W. 2d 733,215 Neb. 152.

Under 43 U.S.C. § 383, the Secretary of the Interior must follow state law as to appropriation of water and condemnation of water rights; if state law does not allow for the appropriation or condemnation of the necessary water, the Secretary is not to initiate project. *California v. U.S.*, Cal. 1978, 98 S.Ct. 2895, 438 U.S. 645, 57 L.Ed. 2d 1018, on remand 509 F.Supp. 867.

43 U.S.C. § 383 not only recognizes the constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out provisions of said section, shall proceed in conformity with such laws. *Burley v. U.S.*, Idaho 1910,179 F. 1,102 C.C.A. 429, 33 L.R.A. (N.S.) 807.

State's restrictive five-year requirement for completion of irrigation appropriations was binding on United States, engaged in reclamation project. *Pioneer Irrigation Dist. v. American Ditch Ass'n.*, 1931,1 P.2d 196,50 Idaho 732.

with state law. 'Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." 438 U.S. at 665, 667, 98 S.Ct. at 2996. However, the Court indicated that 'state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary.' 438 U.S. at 668, n. 21, 98 S.Ct. at 2997, n. 21. (Emphasis in original.)" *Jicarilla Apache Tribe v. U. S.*, C. A.N.M. 1981, 657 F.2d 1126, at 1137. Emphasis added.

Further, the McCarran Amendment 43 U.S.C. § 666 (1952) provides that:

"Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit. * * *" Emphasis added.

c. The United States holds permits with respect to 1,550,000 acre-feet of water from the San Juan Basin, but such permits do not constitute valid water rights under New Mexico law.

Between the years 1955 and 1968, the New Mexico state engineer granted permits to the United States for more than 1,550,000 acre-feet of New Mexico water per year from the San Juan River Basin (the San Juan, Animas and La Plata Rivers). Such permits were apparently granted to the United States in anticipation of the United States constructing the Navajo, San Juan-Chama, Animas-La Plata and Hammond federal water projects. (Please see the document entitled "Authority regarding the waters of the San Juan River Basin in New Mexico Issued to the United States, the Department of the Interior or the Bureau of Reclamation by the New Mexico State Engineer." Said document is attached hereto as Exhibit A and is

hereby incorporated herein by reference.)

It should be kept in mind that while the New Mexico state engineer granted said permits to the United States for amounts in excess of 1,550,000 acre-feet per year, New Mexico is only entitled to 647,000 to 838,000 acre-feet per year pursuant to the Upper Colorado River Basin Compact.

However, as previously indicated, the United States is a storer and carrier of water with regard to federal water projects and has no authority to hold the subject water rights. Such water rights are to be held or owned by the individual landowner receiving water or otherwise by the particular municipal or industrial water user.

The actual documents filed by the United States were entitled "APPLICATION FOR PERMIT To Appropriate the Public Surface Waters of the State of New Mexico." As is the case with all "applications to appropriate" New Mexico water, upon endorsement by the state engineer, the subject "application" becomes a "permit" to construct the contemplated facilities only. No "water right" is established under New Mexico law until a "license to appropriate" is issued by the state engineer after the contemplated facilities are actually constructed, inspected and the subject water applied to a beneficial use.[7]

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[7] § 72-5-13 NMSA 1978 (1997 Repl.) [**Issuance of license to appropriate water.**] provides

> "On or before the date set for the application of the water to beneficial use, the state engineer shall cause the works to be inspected, after due notice to the owner of the permit. Upon the completion of such inspection, the state engineer shall issue a license to appropriate water to the extent and under the condition of the actual application thereof to beneficial use, but in no manner extending the rights described in the permit: provided, that the inspection to determine the amount of water applied to beneficial use shall be made at

Therefore, while the subject permits granted the United States the authority to construct the subject facilities, no water right ever vested in the United States with respect to such permits since no "license to appropriate" was ever issued and because the United States never applied, and never intended to apply, the subject waters to a beneficial use in its own right (with the possible exception of File No. 2873, for Navajo Reservoir evaporation).[8]

Any water rights associated with the subject projects would need to be acquired by, and accrue to the benefit of, the ultimate beneficial users of the subject water. The subject federal water projects having potential storage and delivery benefits to such ultimate water users, such ultimate water users may choose to contract with the United States for the storage and delivery of such water pursuant to such federal water projects.

But, the very foundations upon which such federal water projects, and the federal reclamation law, are based, are that: the water rights lie with the ultimate water user and are to be based solely on beneficial use;[9] the subject water rights are to be acquired, and the subject waters are to be distributed in strict conformance

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the same time as that of the constructed work, if requested by the owner, and if such action is deemed proper by the state engineer."

[8] File No.s 2917 and 3215 are especially egregious since no facilities were ever contemplated under these File no.s. Their whole purpose was to tie up all other unappropriated water so that anyone wanting to use water from the San Juan Basin would have to obtain the right to use such water from the United States.

[9] 43 USC Sec. 372

with state law;[10] such ultimate water users are free to choose whether to contract with the United States for the benefits realized from the creation of the subject water projects; and the ultimate water users contract with the United States for the storage and delivery of water, rather than for water rights, or for the water itself.

d. The BOR holds no valid permit to use San Juan-Chama water.

Albuquerque does not specifically state, but, apparently relies upon the BOR's alleged rights associated with the San Juan-Chama Project as the basis for their authority to divert and use the subject water. Such reliance assumes that the BOR has a valid permit to appropriate water. Protestors assert that the BOR has no valid permit to use the subject water.

On June 17, 1955, a NOTICE OF INTENTION TO MAKE FORMAL APPLICATION FOR PERMIT To Appropriate the Natural Public Surface Waters of the State of New Mexico was filed with the New Mexico state engineer, regarding the San Juan-Chama Project, for (an average annual diversion of) 235,000 acre-feet of water. The "applicant" with respect to said Notice of Intention was the State of New Mexico, by John H. Bliss, State Engineer. Said Notice of Intention was assigned a File No. of 2847. Said Notice of Intention stated that: the source of the water supply would be the San Juan River and tributaries; which are tributaries to the Colorado River; located in Upper San Juan County: to be used for municipal,

[10] 43 USC Sec. 383, See also *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978) and *Jicarilla Apache Tribe v. U. S.*, C. A.N.M. 1981, 657 F.2d 1126, at 1137.

industrial, and irrigation purposes; as a supplemental supply for 225,000 acres; in the Rio Grande and Cimarron drainage basins. John H. Bliss, the New Mexico state engineer, endorsed said Notice of Intention on the same date (June 17, 1955).

On September 27, 1957, said Notice of Intention was assigned to the United States Department of the Interior by letter from the New Mexico Interstate Stream Commission. Said letter, signed by S. E. Reynolds, Secretary, stated that:

> "Pursuant to an action of the New Mexico Interstate Stream Commission at a meeting on September 5, 1957 Notices of Intention No. 2849 and 2847, both filed by the State of New Mexico on June 17, 1955 and Notice of Intention No. 2873, filed by the State of New Mexico on January 17, 1956 are hereby assigned to the United States Department of the Interior; provided, that prior to June 1, 1958 a proper officer of that department files with the State Engineer of New Mexico formal application to appropriate water, accompanied by plans of development substantially in accordance with the Bureau of Indian Affairs report entitled 'Navajo Project, New Mexico, Supplemental Report (March 1957) to Feasibility Report (January 1955)' and the Bureau of Reclamation report entitled 'San Juan-Chama Project, Colorado-New Mexico, November, 1955.'"

On March 6, 1958 an APPLICATION FOR PERMIT to Appropriate the Public Surface Waters of the State of New Mexico was filed on behalf of the United States of America, Department of the Interior c/o Regional Director, Region 4, Bureau of Reclamation for 1,118,800 acre-feet (delivered to the land) of unappropriated water. Said Application for Permit was made with respect to the aforementioned Notice of Intention and others. Therefore, said Application for Permit indicated a File No. of "2847, 2849, 2873, 2917 Combined."

An Endorsement of State Engineer appears on said March 6, 1958 Application for Permit, signed by S. E. Reynolds on June 17, 1958. Said endorsement states that

> "It is hereby acknowledged that the attached plans for proposed works to develop and use 1,118,800acre feet of water per annum from the San Juan River and its tributaries above Navajo Dam have been submitted in compliance with Section 72-5-31, New Mexico Statutes

Annotated, 1953 Compilation."

Section 72-5-6 NMSA 1978 (1985 Repl.) provides that

> "The state engineer shall determine . . . whether there is unappropriated water available for the benefit of the applicant. If so, and if the proposed appropriation is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state, the state engineer shall endorse his approval on the application, which shall become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed and the time within which such water shall be applied to beneficial use . . . . "

The endorsement of State Engineer on the March 6, 1958 Application for Permit, while acknowledging that certain plans had been submitted, merely represents a permit to construct the San Juan-Chama facilities. Certainly the United States never applied the subject water to beneficial use, never intended to apply the subject water to beneficial use on behalf of the United States, never received a "license to appropriate" the subject water, and never established a valid water right pursuant to New Mexico law.

e. With respect to federal reclamation projects, congress intended state and local interests to acquire only storage space.

The general purpose of the Federal Reclamation Law is the reclamation of arid lands. Therefore, the Federal Reclamation Law generally authorizes the Secretary of the Interior to build irrigation projects, as opposed to projects for the development of municipal and industrial water supplies. In that regard, 43 U.S.C. § 390b. [**Development of water supplies for domestic, municipal, industrial, and other purposes**] specifically provides that

"(a) Declaration of policy
"It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes . . . ."

However, Congress recognized the need for the federal government to assist states and local interests in developing such municipal and industrial water supplies. Accordingly, said 43 U.S.C. § 390b. (a) continues, stating that

". . . the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

It should be recognized that while the Secretary of the Interior was generally charged with the construction of irrigation projects, the construction of navigation and flood control projects was generally the responsibility of the Secretary of the Army through the Army Corps of Engineers.

However, where multiple purpose projects (including municipal and industrial purposes) were contemplated, Congress made it clear that while reference may be made to municipal and industrial water supply projects, what was to be provided was in fact <u>storage space</u> in the particular reservoirs. In that regard, said 43 U.S.C. § 390b. continues

"(b) <u>Storage in reservoir projects</u>; agreements for payment of cost of construction or modification of projects
"In carrying out the policy set forth in this section, it is provided that <u>storage may be included in any reservoir project</u> surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: Provided, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: Provided <u>further, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local</u>

interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: . . . ." [Title 43 - Public Lands; Chapter 12 - Reclamation And Irrigation of Lands by Federal Government; Subchapter I - General Provisions; Sec. 390b. Development of water supplies for domestic, municipal, industrial, and other purposes; SOURCE- (Pub. L. 85-500, title III, Sec. 301, July 3, 1958, 72 Stat. 319; Pub. L. 87-88, Sec. 10, July 20, 1961, 75 Stat. 210; Pub. L. 99-662, title IX, Sec. 932(a), Nov. 17, 1986, 100 Stat. 4196.)] Emphasis added.

Further, making it clear that Congress intended that such state and local interests were to be provided with storage space in such projects, Congress passed Pub. L. 88-140 (77 Stat. 249) on October 16, 1963. The purpose of said Act was declared to be "An act defining the interest of local public agencies in water reservoirs constructed by the Government which have been financed partially by such agencies." Said Pub. L. 88-140 has been codified at 43 U.S.C. § 390c. - f. 43 U.S.C. § 390c. [**Water reservoirs; interest of States and local agencies in storage space**] provides

"Cognizant that many States and local interests have in the past contributed to the Government, or have contracted to pay to the Government over a specified period of years, money equivalent to the cost of providing for them water storage space at Government-owned dams and reservoirs, constructed by the Corps of Engineers of the United States Army, and that such practices will continue, and, that no law defines the duration of their interest in such storage space, and realizing that such States and local interests assume the obligation of paying substantially their portion of the cost of providing such facilities, their right to use may be continued during the existence of the facility as hereinafter provided." [TITLE 43 - PUBLIC LANDS; CHAPTER 12 - RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT; SUBCHAPTER I - GENERAL PROVISIONS; Sec. 390c. Water reservoirs; interests of States and local agencies in storage space; SOURCE- (Pub. L. 88-140, Sec. 1, Oct. 16, 1963, 77 Stat. 249.)] Emphasis added.

Then, apparently in recognition of the confusion that may have existed as to what rights were actually being acquired by such state and local interests in such federal projects, Congress specifically authorized the revision of any existing leases and agreements to evidence that only storage space was provided pursuant to such leases and agreements. In that regard, 43 U.S.C. § 390f. [**Revision of leases or**

agreements to evidence conversion of rights to use of storage rights]

specifically provides

> "Upon application of any affected local interest its existing lease or agreement with the Government will be revised to evidence the conversion of its rights to the use of the storage as prescribed in sections 390c to 390f of this title." [TITLE 43 - PUBLIC LANDS; CHAPTER 12 - RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT; SUBCHAPTER I - GENERAL PROVISIONS; Sec. 390f. Revision of leases or agreements to evidence conversion of rights to use of storage rights; SOURCE- (Pub. L. 88-140, Sec. 4, Oct. 16, 1963, 77 Stat. 250.)] Emphasis added.

Therefore, it must be absolutely clear that the City of Albuquerque never acquired any form of water right from the BOR, pursuant to the subject San Juan-Chama contract, basically because the BOR never itself acquired any right to the subject water, except for the right to store and deliver such water. The only right acquired by Albuquerque pursuant to said contract was the right to the storage space in the particular reservoirs and structures, and perhaps the right to use a certain portion of the capacity of the subject delivery facilities (tunnel etc.) Any water right with respect to the subject water must be acquired by Albuquerque pursuant to New Mexico law (appropriation), and this Albuquerque has to date failed or refused to do.

f. Section 72-5-33 NMSA 1978 provides no valid water right in the federal government with respect to the subject water.

Apparently in 1907, the Territorial legislature in New Mexico granted the United States the authority to tie up the waters of New Mexico associated with

federal water projects. (§ 72-5-33 NMSA 1978[11])

Accordingly, the United States tied up all of the unappropriated waters of the

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[11] § 72-5-33 NMSA 1978 (1997 Repl.) [**Federal reclamation projects; appropriation for.**] provides

"A. Whenever the proper officers of the United States, authorized by the Federal Reclamation Law of June 17, 1902, 32 Statutes at Large 388, or acts amendatory thereof or supplementary thereto, to construct federal reclamation project works for the utilization of waters within the state, notify the state engineer that the United States intends to utilize certain specified waters, the waters so described and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice shall not be subject to further appropriation under the laws of the state for a period of three years from the date of the notice, within which time the proper officers of the United States shall file plans for the proposed works in the office of the state engineer for his information, and no adverse claim to the use of such water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the state, except as to such amount of water described in such notice as may be formally released in writing by the secretary of the interior as the officer of the United States duly authorized; provided that:"

"(1) in case of failure to file plans of the proposed works within three years as required in this section, the waters specified in the notice given by the United States to the state engineer shall become public waters subject to general appropriations; and"

"(2) even if plans are filed within three years as required by this section, in the event the United States congress, the secretary of the interior or a court of competent jurisdiction, in a nonappealable final judgment, determines that the planned federal reclamation project will not be constructed, the water withheld under the provisions of this section for the federal reclamation project shall be released by operation of state law and shall become public water subject to general appropriations and the provisions of this section."

"B. If it is determined pursuant to the provisions of this section that a planned federal reclamation project will not be constructed:"

"(1) upon receipt of an application, the state engineer shall give first preference for any appropriation of released water under a repayment contract with the United States or its agencies, provided the water users under the repayment contract apply to appropriate the water within one year of being released;"

"(2) the appropriation by the water users shall be presumed to be consistent with the public welfare of the state and conservation of water within the state; and"

"(3) the appropriation of water under this section by water users under a repayment contract shall bear the priority date of the original notice to appropriate such water."

"C. The provisions of this section apply to all pending notices, permits issued pursuant to such notices, prospective notices and permits issued pursuant to prospective notices filed under this section."

"D. Nothing in this section shall affect the water rights of any senior appropriators in New Mexico or any Indian Tribe."

Rio Grande River Basin in 1908, before New Mexico ever became a State (1912).[12]

In 1941, the New Mexico legislature apparently decided that New Mexico's water laws did not apply to or affect any federal reclamation project. (See § 72-9-4 NMSA 1978)[13]

Then between 1955 and 1968, the United States tied up all of the unappropriated waters of the San Juan Basin in New Mexico pursuant to the above listed File No.s.

To date, the issue of the control and administration of such waters plagues New Mexico. The United States apparently continues to take the position that the United States has control over such waters such that such waters can only be used by virtue of contracts with the United States. Unfortunately, the state engineer either agrees with the United States on such matters, or is unbelievably slow in

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[12] "On June 17, 1902, the Reclamation and Irrigation Act was passed by Congress authorizing the construction of irrigation dams and works. [43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 (1970)] The Rio Grande Project was passed by Congress in 1905. [Act of February 25, 1905, ch. 798, 33 Stat. 814.] The Territorial Legislature in New Mexico in 1907 passed a comprehensive water code in which it was provided that the United States under the Reclamation Law could give notice to the state of its intention to utilize certain specified unappropriated water and that water would not be subject to appropriation by others, provided the federal government proceeded thereafter to construct irrigation works under the Reclamation Law. [Ch. 102, § 22, 1905 N.M. Laws, § 75-5-1, N.M.S.A. 1953.]"

"The reclamation Service (now Bureau) gave notice to the New Mexico State Engineer in 1906 that the federal government intended to appropriate 730,000 acre-feet of water per year from the unappropriated waters of the Rio Grande which water would be impounded for the Rio Grande Project. In 1908, the claim was expanded to cover all of the unappropriated waters of the Rio Grande and its tributaries." *Holguin v. Elephant Butte Irrigation District*, 91 N.M. 398, 575 P.2d 88 at 89.

[13] § 72-9-4 NMSA 1978 (1997 Repl.) [**Federal reclamation projects unaffected.**] provides

"Except as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978] of this act nothing herein shall be construed as applying to or in anyway affecting any federal reclamation project heretofore or hereafter constructed pursuant to the act of congress approved June 17, 1902, known as the Federal Reclamation Act, or acts amendatory thereof or supplementary thereto."

challenging the United States with respect to the control of such waters.

The state engineer has clearly taken the position for years that no unappropriated water remains in the subject river basins, for appropriation and use by the citizens of New Mexico, based upon the existence of the subject permits issued to the United States. Accordingly, the state engineer appears to not comprehend his jurisdiction or authority with respect to such waters.

The result, with respect to the orderly administration of the waters of the state, is simply chaos. For example, in the San Juan Basin, the State of New Mexico should be entitled to 838,000 acre-feet per year pursuant to the Colorado River Compact and the Upper Colorado River Basin Compact, but the state engineer has refused to allow any further appropriations of such water, due to the existence of the subject BOR permits, even though the use of such water has rarely exceeded 400,000 acre-feet in any year. That means that over one half of New Mexico's San Juan Basin water has simply been flowing downstream for use in California and Arizona since the 1960's, while the state engineer refuses to allow New Mexican's to use such water. This is not a small problem.

However, said §§ 72-5-33 and 72-9-4, clearly violate the very essence of the New Mexico Constitution, federal law, and every court case that has ever remotely addressed such issues. The New Mexico Constitution, New Mexico law, federal law and the relevant cases are all firmly founded upon the concept of beneficial use. Further, the New Mexico Constitution, New Mexico law, federal law, and the relevant cases all clearly state that while the federal government is a storer and

deliverer of water, the actual water right is appurtenant to the land or the ultimate water user. Further, federal law clearly defers to state law with respect to the appropriation of water for, and the distribution of water from, federal projects.

The concept of said §§ 72-5-33 and 72-9-4 whereby the federal government is allowed to tie up the water for federal projects, essentially giving the federal government the right to such water and exclusive control over the use of such water, clearly violates the New Mexico Constitution and the very essence of federal reclamation law (as well as all of those cases).

g. Public Law 87-483 provides no valid water right in the federal government with respect to the subject water.

Albuquerque apparently relies significantly on Public Law 87-483 (76 Stat. 96), June 13, 1962 as the basis for the federal government's right to the subject San Juan-Chama water. Specifically, the subject Application provides

> "Additional Data and Explanations: This Application involves the release of 48,200 ac-ft/yr of the City's SJC contract water from Heron Reservoir for storage and subsequent release from Abiquiu Reservoir pursuant to PL 87-483 and PL 97-140 and contracts with the U. S. Department of the Interior, Bureau of Reclamation and the U.S. Army Corps of Engineers. . . ." (Application, page 2, sec. 10.) Emphasis added.

Pub. L. 87-483 generally authorizes the construction of the Navajo Indian Irrigation Project and the San Juan-Chama Project. Further, said Pub. L. 87-483, [General], Sec. 11. significantly provides that

> "(a) No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian Irrigation project and the San Juan-Chama project authorized by sections 2 and 8 of this Act, of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of this Act. . . . ." Emphasis added.

Pursuant to said Pub. L. 87-483, Sec. 11, the United States is clearly attempting to assert absolute control over all of the water of the San Juan River above, and stored in, the Navajo Reservoir.

At this point, consideration should be given to the New Mexico state engineer File No.s 2847, 2849, 2873 and 2917. (Please refer to Exhibit A attached hereto.) While File No.s 2847, 2849 and 2873 are associated with the San Juan-Chama Project, the Navajo Indian Irrigation Project ("Navajo Project" or "NIIP"), and the Navajo Reservoir evaporation respectively, File No. 2917 (for 225,000 acre-feet per year) is not associated with any specific project.

On March 6, 1958, the United States, for the first time, made Application to Appropriate certain San Juan Basin waters pursuant to said File No.s 2847, 2849, 2873 and 2917. It is stressed that no separate permits were ever issued, or applied for, with respect to said file numbers.

The significance of combining said four separate File No.s into a single permit becomes clear when viewed in the light of said Pub. L. 87-483 Sec. 11. The United States was clearly trying to tie up and control all of the water of the San Juan River in New Mexico above, and including, the Navajo Reservoir. And, the New Mexico state engineer was on board.

Congress recognized that once a dam was built on a river, water users below the dam would benefit from the regulated flow of water. Further, Congress apparently recognized that, simply as a matter of human nature, <u>after</u> a dam was built, the flow was regulated and the water users were receiving the benefits of the

regulated flow, it would be difficult to get such water users to enter into contracts with the United States to pay for such dam, when they already had their own rights to the water, and they could apparently simply receive the benefits of the dam without paying for such benefits. In that regard, reclamation law requires that such contracts with the United States be entered into before the construction of such projects will be initiated.[14]

But, when the United States came early on to build the projects that would regulate nearly the entire flow of such rivers as the Rio Grande and the San Juan, many contracts could not be entered into before the projects were built, simply

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[14] 43 USC Sec. 390b

"(a) Declaration of policy

"It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

"(b) [Storage in reservoir projects; agreements for payment of cost of construction or modification of projects] provides

"In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: Provided, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: Provided further, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: . . . ." [Title 43 - Public Lands; Chapter 12 - Reclamation And Irrigation of Lands by Federal Government; Subchapter I - General Provisions; Sec. 390b. Development of water supplies for domestic, municipal, industrial, and other purposes; SOURCE- (Pub. L. 85-500, title III, Sec. 301, July 3, 1958, 72 Stat. 319; Pub. L. 87-88, Sec. 10, July 20, 1961, 75 Stat. 210; Pub. L. 99-662, title IX, Sec. 932(a), Nov. 17, 1986, 100 Stat. 4196.)]

because much of the water was at that point unused and most of the future users of such water were simply unknown.

Therefore, the United States attempted to tie up all of the unappropriated water of such rivers and require that all (existing and) future users enter into contracts with the United States for such water in order to be able to use any of such water. The problem is this scheme of tying up all of the water and forcing all future users to enter into contracts with the United States for such water makes the United States the absolute lord over all of the water, destroys the ability of the state engineer to effectively administer the waters of the state, and simply violates everything.

In that regard, all of the cases, reclamation law, and even Congress itself, clearly state that, while the United States is a storer and deliver of water, the United States does not own, or control the distribution of, the water itself.

Therefore, while Pub. L. 87-483 authorized the construction of the San Juan-Chama Project, Sec. 11 of said Pub. L. 87-483 simply cannot stand, which provides that

> "No person shall have . . . the use for any purpose . . . of water stored in Navajo Reservoir or of any other waters . . . originating above Navajo Reservoir . . . except under contract . . . ." with the United States.

2. Albuquerque has established no valid right to the subject water.

The nature of the subject Application "to Divert" San Juan-Chama contract

water is inappropriate. Neither New Mexico State law nor any rules and regulations applicable to the office of the state engineer recognize an "application to divert" water. Such an "application to divert" water apparently assumes that a right to the subject water has been established in the proposed diverter by other means. New Mexico law is clear that a water right is established by an application to "appropriate" water followed by the issuance of a "license to appropriate" such water. Such "appropriation" procedure has never been accomplished with respect to the subject water. Accordingly, no valid and legitimate right to the subject water has ever been established under New Mexico law.

a. The nature of the subject Application "to Divert" San Juan-Chama contract water is inappropriate.

Protestors assert that the subject Application to "divert" water is inappropriate, in that it is not authorized by state or federal law. State law provides for applications to appropriate water (§ 72-5-1 NMSA 1978 (1985 Repl.)), or applications to change point of diversions (§ 72-5-24 NMSA 1978 (1985 Repl.)). The subject application is neither.

Section 72-5-1 NMSA 1978 (1985 Repl.) provides that

> "Any person, association or corporation, public or private, the State of New Mexico or the United States of America . . . intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the state engineer for a permit to appropriate . . . ." Emphasis added.

Therefore, Protestors seek the dismissal of the subject Application to divert,

due to the fact that said Applications to "divert" water is not recognized under New Mexico law.

b. Albuquerque has never made application to "appropriate" the subject water and therefore, has never established a valid right to the subject water under New Mexico law.

In New Mexico a water right is established (short of by virtue of a court order) by: filing an "application to appropriate" certain public waters with the state engineer; receiving a "permit to appropriate" such waters, which is actually a permit to construct the necessary diversion and/or storage works; "applying the water to beneficial use;" having the works and the application of water to beneficial use inspected; and finally, receiving a "license to appropriate" the subject water.[15]

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[15] N.M. Const. Article XVI, Sec. 2 [**Appropriation of water.**] provides "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Emphasis added.

§ 72-5-1 NMSA 1978 (1997 Repl.) [**Application for permit; rules; surveys, etc.**] provides "Any person, association or corporation, public or private, the State of New Mexico or the United States of America, except as provided in Section 15 [72-5-33 NMSA 1978] of this act, hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations, shall, in addition to providing the form and manner of preparing and presenting the application, require the applicant to state the amount of water and period or periods of annual use, and all other data necessary for the proper description and limitation of the right applied for, together with such information, maps, field notes, plans and specifications as may be necessary to show the method of practicability of the construction and the ability of the applicant to complete the same. The state engineer may require additional information not provided for in the general rules and regulations, in any case involving the diversion of five hundred cubic feet of water per second, or more, or in the construction of a dam more than thirty feet high from the foundation. All such maps, field notes, plans and specifications, shall be made from actual surveys and measurements, and shall be duly filed in the office of the state engineer at the time of filing of formal application

This procedure is quite explicit in both the New Mexico statutes and the rules and regulations of the state engineer. There simply is no reference whatsoever in New Mexico law or the rules and regulations of the state engineer with respect to an application to "divert" water. The procedure for establishing a right to use water is clearly the above described "appropriation" procedure.

Albuquerque has never made application to "appropriate" the subject water and clearly is not making an "application to appropriate" the subject water pursuant to the subject Application. None of the requisite steps are contemplated with the subject Application.

Rather, Albuquerque appears to erroneously rely on the federal government having established a valid right to the subject water through the San Juan-Chama Project. However, as indicated above, the federal government has never established such a valid right to the subject water, because the federal government has never

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for permit to appropriate; provided, that upon the filing in the office of the state engineer of a notice of intention to make formal application for a permit to appropriate certain public waters the state engineer may allow a reasonable time, to be specified by him and noted upon his records, for making the surveys, measurements, maps, plans and specifications hereinbefore provided and required for a formal application, and if applicant shall file such formal application and map, plans and specifications and other necessary data within the time so specified, his priority of application shall date from the time of filing such notice of intention." Emphasis added.

§ 72-5-13 NMSA 1978 (1997 Repl.) [**Issuance of license to appropriate water.**] provides "On or before the date set for the application of the water to beneficial use, the state engineer shall cause the works to be inspected, after due notice to the owner of the permit. Upon the completion of such inspection, the state engineer shall issue a license to appropriate water to the extent and under the condition of the actual application thereof to beneficial use, but in no manner extending the rights described in the permit: provided, that the inspection to determine the amount of water applied to beneficial use shall be made at the same time as that of the constructed work, if requested by the owner, and if such action is deemed proper by the state engineer." Emphasis added.

put such water to beneficial use, and never intended to put such water to beneficial use.[16]

Thus, Albuquerque has never established a valid right to the subject water in its own right, and is not proceeding in a manner to do so pursuant to the subject Application.

c. Any right Albuquerque may have had in the subject water has been lost by nonuse for more than 40 years.

Although Albuquerque entered into the subject contract with the United States in 1963, and the United States began diverting San Juan Basin water through the San Juan-Chama Project about that time, Albuquerque has to date never diverted or used the subject water from the Rio Grande River.

§ 72-5-28 NMSA 1978 provides that water rights will be forfeited in New Mexico for nonuse.[17] Section 72-1-9 NMSA 1978 provides that a municipality may

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[16] N.M. Const. Article XVI, Sec. 3 [**Beneficial use.**] provides "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

[17] § 72-5-28 NMSA 1978 (1998 Supp.) [**Failure to use water; forfeiture.**] provides

"A. When the party entitled to use the water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner; and provided that periods of nonuse, when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period; and provided, further, that the condition of notice and declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965."

"B.. Upon application to the state engineer at any time and a proper showing of

hold water rights for a period of 40 years without forfeiting them for nonuse, if they are held under a proper water development plan.[18] Protestors are not aware of a

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reasonable cause for delay or for nonuse or upon the state engineer finding thatit is in the public interest, the state engineer may grant extensions of time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated."

"C. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall be computed as part of the four-year forfeiture statute."

"D. A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the four-year period for the period of the exemption, and the period of exemption shall be included in computing the four-year period."

"E. Periods of nonuse when the nonuser of acquired water rights is on active duty as a member of the armed forces of this country shall not be included in computing the four-year period."

"F. The owner or holder of a valid water right or permit to appropriate waters for agricultural purposes appurtenant to designated or specified lands may apply the full amount of water covered by or included in the water right or permit to any part of the designated or specified tract without penalty or forfeiture."

"G. Periods of nonuse when water rights are acquired and placed in a state engineer-approved water conservation program, by an individual or entity that owns water rights, a conservancy district organized pursuant to Chapter 73, Articles 14 through 19 NMSA 1978, a soil and water conservation district organized pursuant to Chapter 73, Article 20 NMSA 1978, an acequia or community ditch association organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation district organized pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate stream, commission shall not be computed as part of the four-year forfeiture period."

[18] § 72-1-9. NMSA 1978 (1997 Repl.) [**Municipal, county and state university water development plans; preservation of municipal, county and state university water supplies.**] provides

"A. It is recognized by the state of New Mexico that it promotes the public welfare and the conservation of water within the state for municipalities, counties, state universities and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. The state further recognizes the state engineer's administrative policy of not allowing municipalities, counties and state universities to acquire and hold, unused water rights in an amount greater than their reasonable needs within forty years and recognizes that this administrative policy was incorporated into law by Chapter 2 of Laws 1983."

"B. Municipalities, counties, state universities and public utilities supplying water to municipalities or counties shall be allowed a water use planning period not to exceed forty years, and water rights for municipalities, counties, state universities and public utilities supplying water to such municipalities or counties shall be based upon a water development plan the implementation of which shall not exceed a forty-year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water

proper water development plan propounded by Albuquerque and approved by the state engineer, and the subject 40 year planning period is up.

Further, it was decided a long time ago that the diversion of the subject water through the San Juan-Chama Project, pursuant to the subject BOR - Albuquerque contract, and then, Albuquerque' failure to divert and use such water from the Rio Grande for forty years, constituted waste.[19]

Therefore, any right Albuquerque may have acquired with respect to the subject water should be forfeited due to Albuquerque's failure to use such water during the last 40 years.

E. The United States holding said permits for 1,550,000 acre-feet of water, and requiring potential users to contract with the United States before such water can be used, is possibly extortion.

The United States has held such permits for more than 1,550,000 acre-feet of San Juan Basin water for more than 40 years. During most of that time the New Mexico state engineer has refused to allow any additional appropriations of water

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development plan or for preservation of a municipal, county or state university water supply for reasonably projected additional needs within forty years."

[19] If this water remains stored with the annual excess added to storage for the 40 years until it is needed by the City [of Albuquerque] population, 93% of all the water stored will be lost to evaporation. . . . ." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 at 1133 (1981).

* * *

"We conclude that neither the Bureau [of Reclamation] nor the City [of Albuquerque] may store water in violation of congressional directives, especially in light of the fact that storage [in Elephant Butte Reservoir] would result in a great amount of waste due to evaporation."

"It is for this reason, therefore, that the judgment of the district court declaring the contract of August 6th, 1979 [regarding the storage of Albuquerque's San Juan-Chama Project water in Elephant Butte Reservoir], invalid, null and void is to be affirmed." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 at 1145 (1981).

from the San Juan Basin, stating that such waters were already fully appropriated. The only reason such waters could be considered fully appropriated is because of the 1,550,000 acre-feet of water permitted to the United States. But, as indicated herein above, the United States has no legal right to hold and not use such water.

The Blacks Law Dictionary, Fifth Edition, defines "extortion" as:

> "The obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C.A. § 871 et seq.; § 1951."
> "A person is guilty of theft by extortion if he purposely obtains property of another by threatening to: . . . (4) take or withhold action as an official, or cause an official to take or withhold action; or . . . (6) testify to provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor. Model Penal Code, § 223.4."

Extortion is possible when it is observed that the United States is requiring parties to enter into contracts with the United States before any such party may have access to such water.

For instance, the municipalities of San Juan County have been unable to appropriate any more water for their future needs from the subject rivers because, according to the state engineer, the waters of the San Juan Basin were already fully appropriated. The state engineer told said municipalities that the only water available for their future use was that held by the United States. The United States told said municipalities that the only water available for their future use was that water associated with the Animas-La Plata Project ("ALPP").[20]

Further, the United States would only allow such municipalities to use such

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[20] The United States purports to hold 49,510 acre-feet of water rights under File No. 2883 (Application for Permit to Appropriate endorsed by state engineer on May 12, 1959) associated with the Animas-La Plata Project. Said Animas-La Plata Project has been considered for decades and was authorized by Congress in 1968.

water if they entered into a repayment agreement with the United States. Accordingly, the City of Farmington, the City of Aztec, the City of Bloomfield, the San Juan County and the Rural Water Users Association have jointly formed an organization called the San Juan Water Commission (SJWC). The SJWC has now entered into a repayment contract with the United States for water associated with the ALPP.

It should also be noted that the SJWC and its member entities have been granted the right by the United States to use such water now, even though the ALPP has yet to be built. In fact, the ALPP is not required for the delivery of such water to such entities since the water is currently flowing in the Animas River and is available to said entities without the construction of any of the ALPP facilities.

Thus, the United States may have extorted money from said entities by virtue of its illegally holding and withholding the subject water rights and by demanding that no entity can use such water unless and until it enters into a contract with the United States to pay for an ALPP that would only cut their throats by diverting enormous quantities of water upstream from such entities.

F. The New Mexico state engineer granting said permits for 1,550,000 acre-feet of water to the United States, and then refusing to allow other users to appropriate such water, is possibly collusion.

The Black's Law Dictionary, Fifth Edition, defines "collusion" as:

"An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. *To miyosu v. Golden*, 81 Nev. 140, 400 P.2d 415, 417. A secret

combination, conspiracy, a concert of action between two or more persons for fraudulent or deceitful purpose."

The possible collusion between the United States and the New Mexico state engineer is apparent when it is considered that the New Mexico state engineer granted such 1,550,000 acre-feet of water to the United States without any indication that the United States intended to put any of the subject water to beneficial use, and that the New Mexico state engineer has since that time rejected nearly all applications to appropriate the surface waters of the San Juan Basin in New Mexico.

Further, the New Mexico state engineer has refused to try to get such water back from the United States or otherwise cancel such permits although it is fundamental, pursuant to the Constitution and laws of the State of New Mexico and the rules and regulations of the New Mexico state engineer, that it is unlawful to hold such water without putting it to beneficial use.

III. There is currently no basis for any priority date associated with the subject Application.

The subject Application states that "The priority date claimed is no later than November 24, 1922, the date the Colorado River Compact was signed." Emphasis added.

However, as indicated above, neither the Colorado River Compact nor the Upper Colorado River Basin Compact makes any reference whatsoever to the San Juan-Chama Project, the City of Albuquerque, any water transfer from the

Colorado River Basin to the Rio Grande Basin, any contract between the BOR and the City of Albuquerque, or any manner of water right or contractual water right in or for the City of Albuquerque.

There is simply no basis whatsoever for tying the priority date for any Albuquerque water right to the Colorado River Compact.

With respect to the establishment of priority dates for water rights in New Mexico, the N.M. Const. Article XVI, Sec. 2 [**Appropriation of water.**] provides

> "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Emphasis added.

Further, § 72-1-2. NMSA 1978 (1997 Repl.) [**Water rights; appurtenant to land; priorities.**] provides

> "Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon, or until the severance of such right from the land in the manner hereinafter provided in this article. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of the water initiated thereafter shall relate back to the date of the receipt of an application therefore in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder."

Thus, the priority date for the subject (San Juan-Chama/Albuquerque) water will be established by the date of the application to appropriate the subject water. As indicated above, no such "application to appropriate" water has yet been made by Albuquerque with respect to the subject water, and the United States has not

established a valid right to the subject water in its own right pursuant to New Mexico law.

Therefore, no priority date has yet been established for Albuquerque's right to the subject water. Such priority date will be established at such time as Albuquerque makes a proper "application to appropriate" the subject water.

IV. All existing water users in the San Juan Basin have rights senior to the San Juan-Chama Project diversions and must be protected.

Since Albuquerque (and the other San Juan-Chama Project water users) have not yet established a priority date with respect to the subject water, all existing water users in the San Juan Basin have priority dates senior to Albuquerque (and the other San Juan-Chama Project water users).

This is extremely significant in that the diversion of water from the San Juan River Basin into the San Juan-Chama Project facilities must not impair the ability of existing water users in the San Juan Basin to use their properly established water rights.

The diversion of the subject waters from the San Juan Basin into the San Juan-Chama Project without the establishment of a valid water right and priority date appears to threaten senior water users of the San Juan Basin, and the public welfare and the conservation of water in the State. Certainly, the San Juan-Chama Project must be operated such that no impairment will occur to the right to use the waters of the San Juan Basin by existing San Juan Basin water users.

The state engineer must protect the existing (senior) water users of the San Juan Basin from the unauthorized, and/or junior water rights users of San Juan-Chama Project water in the Rio Grande River Basin.

V. Notice of the subject Application must be published in San Juan County.

Notice of the subject Application must be published in San Juan County.

§ 72-5-4 NMSA 1978 (2001 Suppl.) [**Notice ; Publication.**] provides

> "Upon the filing of an application that complies with the provisions of this article and the rules established thereunder, accompanied by the proper fees, the state engineer shall instruct the applicant to publish thereof, in a form and in a newspaper prescribed by the state engineer, in some newspaper that is published and distributed in each county affected by the diversion and in each county where the water will be or has been put to beneficial use, or if there is no such newspaper, then in some newspaper of general circulation in the stream system, once a week for three consecutive weeks. The notice shall give all essential facts as to the proposed appropriation; among them, the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time when the application shall be taken up by the state engineer for consideration. Proof of publication as required shall be filed with the state engineer within sixty days of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules within the time required, the application shall be treated as an original application filed on the date of receipt of proofs of publication in proper form." Emphasis added.

The waters for the subject San Juan-Chama Project are diverted from the San Juan Basin in Colorado, that is before such waters even enter New Mexico. Such waters are diverted upstream from all existing water users in San Juan County, New Mexico. Therefore, the diversion of such waters obviously adversely affects all existing water users in San Juan County, resulting in less water available for diversion and use by such existing San Juan County water users.

The subject Application was first filed on May 18, 2001, and then again on June 26, 2001. A letter to the Applicant regarding the requirement of Notice by

Publication was issued by the state engineer on July 3, 2001. However, such letter failed to require that notice of the subject Application be published in a newspaper in San Juan County. Accordingly, no such notice was ever published in San Juan County with respect to the subject Application. The failure to notify the water users of San Juan County of the subject Application must be considered a failure of due process.

The failure to provide notice of the subject Application to the water users of San Juan County should be considered a failure of jurisdiction for the state engineer to consider the subject Application. The consideration of the subject Application should, at a minimum, be suspended until such time as the water users of San Juan County are properly notified of the subject Application. If no such notice is given, any action by the state engineer with respect to the subject Application should be regarded as null and void for want of jurisdiction.[21]

VI. The jurisdiction of the state engineer with respect to the diversion of the subject water in Colorado must be established.

The state engineer has asserted that he has no jurisdiction with respect to federal water projects in general. The state engineer has asserted that he has no jurisdiction with respect to the diversion of New Mexico water in Colorado associated with federal water projects. However, the state engineer has asserted

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[21] It should also be noted that the notices that were actually published, were not published until November 2001, and that proofs of such publications were filed with the state engineer as late as February 11, 2002, well after the sixty day time limit set forth in said § 72-5-4.

that somehow senior New Mexico water rights holders will be protected with respect to such diversions. It must be magic, because if the state engineer has no jurisdiction, it will certainly not be the state engineer who will be protecting senior water right holders.

These jurisdiction issues must be resolved, their significance cannot be overstated. At issue is the control over the distribution and use of the waters of the San Juan Basin in New Mexico associated with: the diversion of the headwaters of the San Juan River in Colorado amounting to 100,000 to 235,000 acre-feet per year pursuant to the subject San Juan-Chama Project; the diversion of the waters of the San Juan River at Navajo Dam associated with the contract with the Navajo Tribe for 508,000 acre-feet per year of water (and associated File No. 2849 for 630,000 acre-feet per year) for the Navajo Project (NIIP); generally, all of the waters of the San Juan River above and including Navajo Reservoir pursuant to Sec. 11 of the above mentioned Pub. L. 87-483; all of the water of the San Juan River below Navajo Dam pursuant to Permit # 3215 for 362,080 acre-feet per year, allegedly for Navajo Reservoir seepage and return flow; the reduction of the flows of the San Juan River through Navajo Dam to 250 cubic feet per second for most of the year to be implemented as early as this fall, to allegedly accommodate two endangered fish species; and the diversion of up to 195,000 acre-feet of water per year from the Animas River in Colorado for the Animas-La Plata Project.

As previously indicated, the United States cannot arguably assert any priority date earlier than 1955 with respect to any of such projects or permits.

However, all of these projects threaten existing senior water rights dating back to the 1880's.

Yet, the state engineer asserts he has no jurisdiction, but that somehow senior water rights holders will be protected. Without jurisdiction over these issues, the state engineer simply cannot protect existing senior water rights holders in the San Juan Basin (or Rio Grande Basin for that matter). The potential detrimental impact on senior water holders is staggering. New Mexico law must be followed if senior water rights holders are to be protected. The jurisdiction of the state engineer with respect to these issues must be resolved before we go any farther.

If the state engineer continues to assert a lack of jurisdiction with respect to such issues, the only logical conclusion is that the state engineer has no jurisdiction with respect to the subject Application.

VII. The San Juan-Chama Project constitutes an illegal diversion of water.

The diversion of water from the San Juan Basin to the Rio Grande Basin through the San Juan-Chama Project constitutes, and should be enjoined as, an illegal diversion of water.

§ 72-5-39 NMSA 1978 (1997 Repl.) [**Illegal application of water; injunction or other relief.**] provides

> "No person shall use the public waters of the state of New Mexico except in accordance with the laws of the state of New Mexico. No person shall divert water or apply it to purposes for which no valid water right exists. The state engineer may apply for and obtain an injunction in the district court of any county in which water is being diverted or

the land affected is located, against any person, firm or corporation who shall divert water or commence the construction of works by which to divert water, in violation of statute, or who shall cause or permit the application of said water upon lands or to purposes for which no valid water right exists. This provision shall in no way be construed to affect the existing right of a court of equity in the exercise of its general equity powers to grant relief to the state of New Mexico by injunction or otherwise. This section shall not apply to waters within the benefitted areas of a conservancy district unless the district refuses or fails to stop or correct the illegal use of water after notification by the state engineer." Emphasis added.

Further, § 72-8-5 NMSA 1978 (1997 Repl.) [**Diversion of water to other valleys; penalty.**] provides

"It shall be unlawful for any person, company or corporation to divert waters of any public stream in New Mexico for use for reservoirs or other purposes in a valley other than that of any such stream, to the impairment of valid and subsisting prior appropriations of such waters."

"Any violator of this section, shall upon conviction be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or imprisonment in the county jail for not less than one month nor more than three months, or both, in the discretion of the court."

As indicated herein above, neither the United States nor the City of Albuquerque has a valid water right with respect to the subject water. In fact, the subject water has been diverted from the San Juan Basin into the Rio Grande Basin, pursuant to the Albuquerque contract, but Albuquerque has not used or even diverted the subject water for approximately forty years.

Accordingly, the diversion of the subject water, from the San Juan Basin into and through the San Juan-Chama Project, with respect to which no valid water right exists, is illegal and should be stopped. If necessary, the state engineer should apply to the district court of San Juan County, New Mexico to enjoin the diversion of any of such water into and through the San Juan-Chama Project.

All existing San Juan Basin water users are threatened by the illegal

diversion of water into the San Juan-Chama Project. Certainly, all of those individuals and entities who have been denied the right to appropriate water from the San Juan Basin since 1955, based upon the "appropriation of all of the unappropriated water" of the San Juan Basin by the United States have been injured by the illegal diversion of such water. But additionally, any other potential future users of San Juan Basin water will be injured as their applications to appropriate water will be denied, unless and until the illegal diversion of the San Juan-Chama Project water is stopped.

VIII. The subject diversion of water from the Rio Grande River into the Albuquerque works constitutes an illegal diversion of water.

As indicated herein above, neither the United States nor Albuquerque have established a valid right to the subject water. Further, the subject Application to "divert" water is certainly not, nor is it intended to be, an "application to appropriate" water. Consequently, Albuquerque does not now have, and is not on a course to obtain, a valid permit to appropriate water.

§ 72-8-4 NMSA 1978 (1997 Repl.) [**Unauthorized use or waste of water; constructing works without permit.**] provides

> "The unauthorized use of water to which another person is entitled, or willful waste of surface or underground water to the detriment of another or the public, shall be a misdemeanor. It shall also be a misdemeanor to begin to carry on any construction of works for storing or carrying water until after the issuance of a permit to appropriate such waters provided that management of water for beneficial use shall not be considered waste."

Since Albuquerque has not established a valid right to the subject water, and

since Albuquerque is not on a course to establish a valid permit to appropriate the subject water pursuant to the subject Application, the diversion of the water from the Rio Grande into the Albuquerque works would constitute an illegal diversion and use of water pursuant to said § 72-5-39 NMSA 1978, and the construction of the subject diversion works would violate said § 72-8-5 NMSA 1978.

Submitted by:

_____ _____

ROBERT E. OXFORD, Protestor
301 Crandall
Aztec, New Mexico 87410
(505) 334-9270

Date

_____ _____

BETTE J. OXFORD, Protestor
301 Crandall
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Date

_____ _____

ROBERT E. OXFORD, for
B. J. RESOURCES, Protestor
301 Crandall
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Date

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by first-class postage, or delivered, to the following individuals this _____ day of April, 2002:

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ROBERT E. OXFORD

Exhibit A
Authority regarding the waters of the San Juan River Basin in New Mexico
Issued to the United States, the Department of the Interior or the Bureau of Reclamation
by the New Mexico State Engineer

File No.	Purpose	Diversion (ac-ft/yr) NOI	Diversion (ac-ft/yr) AtA	Document Title	Applicant	Date Document	Date Endorsement
2847	San Juan-Chama[1]	235,000		Notice of Intention[2]	State of New Mexico[3] [4]	June 17, 1955	
2848	Hammond	23,000		?[5]		June 17, 1955	
2848	Hammond		23,000	?[5]			
2849	NIIP[6]	630,000		Notice of Intention[2]	State of New Mexico[3]	June 17, 1955	
2873	Navajo Res. evap.	28,800		Notice of Intention[2]	State of New Mexico[7]	January 17, 1956	
2883	Animas-La Plata	49,510		Notice of Intention[2]	State of New Mexico[7]	May 1, 1956	
2883	Animas-La Plata		49,510	Application for Permit[8]	DOI[9]	April 14, 1959	May 12, 1959
2917	Miscellaneous[10]	225,000		Notice of Intention[2]	BOR[11]	September 16, 1957	
2847, 2849, 2873 & 2917 combined			All unappropriated water above Navajo Dam[12] 1,118,800	Application for Permit[8]	DOI[13]	March 6, 1958	June 17, 1958
3215	Undetermined[14]	200 ft^3/sec		Notice of Intention[2]	DOI[15]	August 28, 1967	August 18, 1967
3215	Undetermined		362,080[16]	Application for Permit[8]	DOI[17]	December 16, 1968	December 17, 1968
TOTAL			**1,553,390**				

1. The San Juan-Chama Project was not specifically stated. However it was indicated that the water would be used for municipal, industrial and irrigation purposes in the Rio Grande and Cimarron drainage basins.

2. NOTICE OF INTENTION TO MAKE FORMAL APPLICATION FOR PERMIT To Appropriate the Natural Public Surface Waters of the State of New Mexico

3. By the state engineer, John H. Bliss.

4. Assigned to the Department of the Interior by the apparent authority of New Mexico Interstate Stream Commission by letter from the state engineer, S. E. Reynolds, dated September 27, 1957 (NOI's 2847, 2849 & 2873).

5. I do not have a copy of this document.

6. The Navajo Indian Irrigation Project was not specifically stated. However it was indicated that the water would be used for irrigation, power and domestic purposes in San Juan County, South of the San Juan River in and adjacent to the Navajo Indian Reservation.

7. By the state engineer, S. E. Reynolds.

8. APPLICATION FOR PERMIT To Appropriate the Public Surface Waters of the State of New Mexico

9. United States of America, Department of the Interior c/o Regional Director, Region 4, Bureau of Reclamation.

10. Indicates that water will be used for "miscellaneous purposes including irrigation, domestic, industrial, mining, municipal, and power purposes" in "San Juan County, New Mexico."

11. United States of America, c/o Bureau of Reclamation, signed by E. O. Larson

12. See Public Law 87-483 (76 Stat. 96).

13. United States, Department of the Interior C/O Regional Director, Reg. 4, Bureau of Reclamation, signed by E. O. Larson, Regional Director, Reg. 4, Bureau of Reclamation

14. The NOI describes the source of the water supply as the "Natural flow of San Juan River and tributaries downstream from Navajo Reservoir, plus seepage and return flow from Federal reclamation projects." The use was described as "municipal and industrial" and the locations of the points of diversion were "yet to be determined."

15. United States, Department of the Interior, Bureau of Reclamation by Charles S. Rippon, acting Regional Director

16. The subject Application does not specify 362,080 acre-feet per year, rather the endorsement on the subject Application states"the diversion and beneficial use of 500 cubic feet per second of water from the natural flow of San Juan River and its tributaries downstream from Navajo Reservoir, including seepage and return flows . . . ." The figure of 362,080 acre-feet per year was apparently determined by converting 500 cfs to acre-feet for a period of one year. It should be noted the subject NOI only contemplated "200 sec. ft."

17. United States of America, Department of the Interior, signed by R. W. Gilbert, Acting Regional Director, Region 4