

  
Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**April 13, 2021**

**ORAL ARGUMENT IS REQUESTED**

**NO. S-1-SC-37068  
CONSOLIDATED WITH  
NOS. S-1-SC-37065, -37070, -37075, & -37076  
STATE OF NEW MEXICO, *ex rel.*,  
STATE ENGINEER,**

Plaintiff-Petitioner,

v.

**UNITED STATES OF AMERICA,**

Defendant-Respondent,

v.

**NAVAJO NATION,**

Defendant/Intervenor-Respondent,

v.

**SAN JUAN AGRICULTURAL WATER USERS  
ASSOCIATION; HAMMOND CONSERVANCY  
DISTRICT; BLOOMFIELD IRRIGATION DISTRICT;  
VARIOUS DITCHES AND VARIOUS  
MEMBERS THEREOF,**

Defendants-Petitioners.

and

**B SQUARE RANCH, LLC; BOLACK MINERALS**

**COMPANY a/k/a BOLACK MINDERALS COMPANY  
LIMITED PARTNERSHIP; ESTATE OF TOM BOLACK  
a/k/a THOMAS FELIX BOLACK, Deceased; BOLACK  
MINERALS FOUNDATION; TOMMY BOLACK REVOCABLE  
TRUST; ESTATE OF JUANITA VELASQUEZ, Deceased;  
DAVID A. PIERCE; MAXINE M. PIERCE; DAVID M. DRAKE;  
and SHAWNA DRAKE,**

Defendants-Petitioners,

and

**MCCARTY TRUST; STEPHEN ALBERT MCCARTY,  
Trustee; and ESTATE OF MARY MCCARTY  
a/k/a MARY LOUISE MCCARTY, Deceased,**

Defendants-Petitioners,

and

**ALBUQUERQUE BERNALILLO COUNTY WATER  
UTILTY AUTHORITY AND CITY OF GALLUP,**

Defendants-Petitioners,

and

**GARY HORNER,**

Defendant-Petitioner.

**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY  
AUTHORITY'S AND CITY OF GALLUP'S MOTION FOR  
RECONSIDERATION**

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**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY  
AUTHORITY’S AND CITY OF GALLUP’S MOTION FOR  
RECONSIDERATION**

COME NOW the Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) and the City of Gallup (“City” or “Gallup”) pursuant to Rule 12-404 (A) NMRA, and respectfully move the Court to reconsider its Order of March 29, 2021, quashing the Water Authority/Gallup Petition for Writ of Certiorari and as grounds therefor state:

1. The Water Authority is a political subdivision of the State of New Mexico which provides water supply and wastewater treatment to approximately 700,000 citizens of New Mexico in the City of Albuquerque and Bernalillo County, under state permits issued by the New Mexico State Engineer, and Declarations filed with the Office of the State Engineer;

2. The City of Gallup is a New Mexico municipal corporation which provides water supply and water treatment to residents of Gallup, New Mexico, and surrounding areas, under permits issued by the New Mexico State Engineer, and Declarations filed in the Office of the State Engineer, and will manage surface water provided by the Navajo Gallup Water Supply Project (“NGWSP”) to the City of Gallup, southern chapters of the Navajo Nation, and communities in McKinley County, New Mexico;

3. The Water Authority and Gallup were parties to the *inter se* proceedings

to adjudicate the water rights claims of the Navajo Nation;

4. The Navajo Nation’s claims were resolved by a Settlement Agreement among the United States, the Navajo Nation, and the State of New Mexico on April 19, 2005, and adopted by the district court following an *inter se* proceeding;

5. The Opinion of the Court of Appeals adjudicating the Navajo claims in the above referenced matter contains reasoning and language that the State of New Mexico “lacks any ownership claim” in water within its borders, *State ex rel. State Engineer v. San Juan Agricultural Water Users Ass’n*, ¶ 11, 2018-NMCA-053, 425 P. 3d 723, and that the Settlement Agreement “preempts” state law. *Id.* at ¶¶ 13-14;

6. Both statements conflict with federal and state law and with 150 years of precedent, practice, and reliance on New Mexico’s ownership of water resources, are erroneous and require reconsideration;

7. If not corrected, the language will create confusion over State permitting authority; impede efforts by stakeholders to address important water management issues like surface land subsidence, groundwater depletion, and drought management by shortage sharing; and burden the administration of water rights;

8. Positions of participating counsel were requested on April 12, 2021. The San Juan Water Commission concurs in the Motion. The San Juan Acequias,

Jicarilla Apache Nation, and B Square Ranch *et al.* do not oppose the Motion. The United States and Ute Mountain Ute Tribe take no position on the Motion, reserving the right to respond if one is provided. Mr. Gary Horner opposes the Water Authority/Gallup's Motion because it only addresses issues related to those parties. No other responses were received.

WHEREFORE, the movants pray the Court to vacate its March 29, 2021, Order quashing the Water Authority/ Gallup Petition for Writ of Certiorari, reinstate the Water Authority and City of Gallup Writ of Certiorari, and resolve the issues raised in the Writ by correcting erroneous points of law requiring reconsideration.

Respectfully submitted,

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By:

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**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY  
AUTHORITY'S AND CITY OF GALLUP'S BRIEF IN SUPPORT OF  
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**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY  
AUTHORITY’S AND CITY OF GALLUP’S BRIEF IN SUPPORT OF  
MOTION FOR RECONSIDERATION**

COME NOW the Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) and the City of Gallup (“City” or “Gallup”) (collectively “Defendants-Petitioners”), through their undersigned counsel, and submit this Motion for Reconsideration of the Supreme Court’s Order of March 29, 2021, quashing certiorari in this matter.

**SUMMARY OF PROCEEDINGS**

This certiorari proceeding concerns the New Mexico Court of Appeals’ Opinion in *State ex rel. State Engineer v. San Juan Agricultural Water Users Ass’n.*, 2018-NMCA-053, 425 P. 3d 723, addressing appeals from a Settlement Agreement resolving claims to water by the Navajo Nation in the San Juan River system in northwestern New Mexico. The Court of Appeals’ Opinion of April 3, 2018, made incorrect legal statements which should be corrected by the New Mexico Supreme Court. Certiorari was accepted by the New Mexico Supreme Court on August 13, 2018. The Writs were quashed as improvidently granted on March 29, 2021.

The issues involve water rights for the Navajo Nation Reservation, established by the Treaty of June 1, 1868, 15 Stat. 667, 671 (“Treaty of 1868”). On March 13, 1975, a general stream system adjudication was filed on the San Juan system. *See* NMSA 1978 § 72-4-13 *et seq.* (1907). [RP 0018575-0018578]. The United States

was joined on behalf of the Navajo Nation pursuant to the waiver of sovereign immunity provided by the McCarran Amendment, 43 U.S.C 666 (1952). Protracted settlement negotiations followed. A settlement agreement was signed by the United States, the Navajo Nation, and the State of New Mexico on April 19, 2005 (“Settlement Agreement”). [RP 0000845-0000881]. The Settlement Agreement included a proposed Partial Final Decree. [RP 0000882-0000948]. The Settlement Agreement was followed by Congressional enactment of the Omnibus Public Land Management Act of 2009, Northwest New Mexico Rural Water Projects Act, Pub. L. No. 111-11, §10301, 123 Stat. 991.

On January 3, 2011, the United States, the State of New Mexico, and the Navajo Nation (“Settling Parties”) moved for adoption of the Settlement Agreement and entry of the Partial Final Decree. [RP 0000841-0000948]. The district court initiated proceedings to enable parties with an interest to file a Notice of Intent to Participate and to hear *inter se* objections.

The Water Authority and Gallup were parties to this action in district court with an interest in the amount of water adjudicated to the Navajo Nation. Both provide municipal, domestic, and commercial water supplies. The Water Authority conjunctively manages surface and groundwater for approximately 700,000 customers under Permit No. RG-960 *et al.* and with imported San Juan-Chama Project surface water from Permit No. SP-4830. The City of Gallup provides potable

water and wastewater treatment to the City and surrounding communities. Gallup is a participant in the Navajo Gallup Water Supply Project (“NGWSP”) which will provide renewable surface water to Gallup, southern chapters of the Navajo Nation, and other communities in McKinley County, all of which presently rely in declining and non-renewable groundwater sources. Construction of the NGWSP is underway, at an estimated cost of approximately \$1.5 billion.

The Water Authority uses surface water provided by the San-Juan Chama Project through an interbasin transfer. *See* P. L. No. 87-483, 76 Stat. 964. San Juan-Chama Project water is stored in Heron Reservoir and contractors take delivery of the water at the Reservoir’s outlet. After taking delivery, the Water Authority’s water is conveyed downstream and stored in Abiquiu Reservoir for subsequent release and use by the Water Authority. *See Carangelo v. Albuquerque Bernalillo County Water Utility Authority*, 2014-NMCA-032, 320 P.3<sup>rd</sup> 492.

The City of Gallup is a participant in the NGWSP, which will utilize surface water from the San Juan system for the City of Gallup, southern chapters of the Navajo Nation, and water-short communities in McKinley County. This will enable those entities to transition off of sole reliance on groundwater which is an over-depleted, nonrenewable resource in western New Mexico, will arrest groundwater level declines, and secure a sustainable future for McKinley County.



## QUESTIONS PRESENTED

The Court of Appeals affirmed the district court. However, it did so on the basis of two findings that were not considered by the parties or the district court or contained in the record. The questions are:

**1. Whether the Court of Appeals erred in holding that the State has no ownership claim to its water.**

The Court of Appeals held:

First, water is a commodity that can move in interstate commerce, and does so as the San Juan River crosses several state boundaries. Thus, it is ultimately subject to the control of the federal, not the state, government. *See Oneida Indian Nation v. City of Oneida*, 414 U.S. 661, 667, 670 (1974); *cf. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 597 F. Supp. 694, 704 (D.N.M. 1984) (stating that a state may not impermissibly burden transfer of interstate water). Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water.

2018- NMCA-053, ¶ 11, 425 P.3d. 723.

\*\*\*

**2. Whether the Settlement Agreement preempts state law.**

The Court of Appeals held:

Against this backdrop, the Settlement Agreement interpreted by the district court herein was approved by Congress well prior to Appellants' state law challenges, and thus, federal preemption disposes of many of their arguments, to wit: ... *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 758-59 (E.D. Va. 2011) (noting that once a compact has been adopted, it is "transform [ed] into federal law at which time its interpretation and construction presented federal, not state questions").

2018-NMCA-053, ¶ 14, 425 P.3d. 723.

## SUMMARY OF ARGUMENT

The principles enunciated by the Court of Appeals are in conflict with federal and state law as set forth in the Water Authority/Gallup Brief in Chief of November 20, 2018, and require reconsideration. While they could be interpreted as *dicta*, and are without basis in the record, they are likely to cause confusion and unnecessary litigation, may impede efforts to address surface land subsidence and groundwater depletion, and will burden the administration of water rights.

## ARGUMENT

### POINT I

#### **THE COURT OF APPEALS ERRED IN REASONING THAT NEW MEXICO LACKS ANY OWNERSHIP INTEREST IN WATER WITHIN ITS BOUNDARIES AND SHOULD BE RECONSIDERED**

The Court of Appeals' reasoning is in conflict with federal law. It should be reconsidered. Prior to 1866, rights to the use of water on the public domain were retained by the United States. In enacting the Public Land Acts of 1866, 14 Stat. 153 (1866) and 1870, 16 Stat. 218 (1870), and the Desert Land Act of 1877, 19 Stat. 377 (1877), Congress severed ownership of the United States in all non-navigable waters from the public domain, extinguished federal ownership, and explicitly recognized that state law controlled the use of those waters. *See Oregon v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *California v. United States*, 436 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978).

The Desert Land Act of 1877 provided the final expression of federal law on this point. It was construed in *Oregon v. Beaver Portland Cement Co.*, *supra*, where the United States Supreme Court held:

What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, *subject to the plenary control of the designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since “Congress cannot enforce either rule upon any state,” *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming v. Colorado*, 259 U.S. 46, 465. (emphasis added).

295 U.S. at 163-64.

The Court of Appeals’ opinion is also in conflict with state law. The State owns the water in the public domain in trust for the people, who acquire rights to it upon application to the State Engineer as administrator of the State’s water resources. *See, e.g.*, N.M. Const. art. XVI, § 2; NMSA 1978, §§ 72-2-1(1907); 72-5-3(1907); 72-12-3 (1931). This principle was succinctly expressed in *Vanderwork v. Hewes*, 1910-NMSC-031, ¶ 5, 15 N.M. 439, 110 P. 567. That case concerned an early construction of the scope of the surface water code of 1907. The Court held: “[a]ll natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the territory of New Mexico, belong to the public,

and are subject to appropriation for beneficial use.” *Id.* at ¶ 4. The same holding appears in *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P. 2d 983:

All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. §§ 75-5-1 and 75-11-1. *The state as owner of water has the right to prescribe how it may be used.*

*Id.* at ¶ 23. (emphasis added).

The Court of Appeals’ decision confused the Commerce Clause and the interstate law of equitable apportionment with a state’s ownership of its water resources. See ¶¶ 11-13, 2018-NMCA-053. Neither constrain New Mexico’s ownership and administration of its public waters, in common with the other 18 western states. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982), has no precedential value for the idea that Western states do not own their water resources in trust for their citizens. To the contrary, the entire basis of *Colorado v. New Mexico* is that state permitted rights form the basis of a state’s equitable interest in interstate water that crosses its borders. These “equities,” as evidenced by the state based water rights of the Vermejo Conservancy District, Kaiser Steel Corporation, Phelps Dodge Corporation, and C.S. Cattle Co. in New Mexico, were recognized by the *Colorado* Court as the complete measure of the equitable apportionment on the Vermejo River because they had been lawfully acquired and exercised pursuant to

New Mexico law prior to any development in Colorado. *See also Kansas v. Colorado*, 206 U.S. 46 (1907); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *State ex rel. Reynolds v. Luna Irrigation Co.*, 1969-NMSC-111, ¶ 5, 80 N.M. 515, 458 P. 2d 590.

The Court of Appeals' holding has the potential to adversely affect permit holders like the Water Authority and Gallup, whose water rights are based on permits issued by the State of New Mexico through the State's ownership of public water resources under N.M. Const. art. XVI § 2. The language in the Court of Appeals' Opinion is troublesome because it comes at a time when the Water Authority has made significant progress in addressing surface land subsidence and depleted groundwater supplies in the Rio Grande middle valley, and by Gallup in western New Mexico by conjunctive management of ground and imported surface water. These solutions are based on the existing permitting system. They are supported by practice and procedure which give finality to water permits achieved through administrative and court processes developed over decades. The Court of Appeals' Opinion creates an obstacle to addressing those water management issues and the looming question of shortage sharing under our existing law. It will create confusion in the administration of New Mexico water rights.

The issues presented are discrete, and may be resolved with existing federal and state precedent in the manner proposed by the Water Authority and Gallup.

## CONCLUSION

The Court should vacate its Order of March 29, 2021, quashing the Water Authority/Gallup Writ of Certiorari in this proceeding, reinstate the Writ, and proceed to oral argument and decision on the merits of the Writ of Certiorari.

## ORAL ARGUMENT REQUESTED

Oral argument is requested pursuant to Rule 12-319(B)(1) given the importance of these issues, to clarify any issue the Court has, to respond to contrary arguments, and to answer questions from the Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to Rule 12-307.2 NMRA, electronic copies of the foregoing were served this 13<sup>th</sup> day of April, 2021, via this Court's Electronic Filing System (Odyssey File and Serve).

*/s/ Jay Stein* \_\_\_\_\_  
Jay F. Stein, Esq.