

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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LION'S GATE WATER AND
WILLIAM M. TURNER,
ITS TRUSTEE, ACTING IN HIS OFFICIAL
CAPACITY AND NOT INDIVIDUALLY,

PLAINTIFF,

CIV - 04 - 0929 MCA

Civ: No. _____

v.

GALE NORTON, SECRETARY OF THE
U.S. DEPARTMENT OF INTERIOR,
ACTING IN HER OFFICIAL CAPACITY
AND NOT INDIVIDUALLY,

DEFENDANT.

**COMPLAINT AND PETITION FOR PRELIMINARY AND PERMANENT
INJUNCTION, DECLARATORY JUDGEMENT, AND WRIT OF MANDAMUS**

Plaintiff, William M. Turner, Trustee for Lion's Gate Water, a Canadian, express business trust and real party in interest, ("Plaintiff") pursuant to FRCP Rule 1-017 and the Doctrine of Privity, hereby sues the Honorable Gale Norton, Secretary of the United States Department of Interior and for its Complaint against Defendant hereby state and alleges as follows:

INTRODUCTION

This is an action for a writ of mandamus, declaratory judgement, and injunctive relief declaring that the Defendant must contract with the Plaintiff and for such further relief based upon such judgment as may be necessary or proper and enjoining, permanently and *pendente lite*, any contract between the Secretary of Interior pursuant to the provisions of 43 U.S.C. 1524(f) with any other entity not now qualified to contract under existing law.

1. Plaintiff, Lion's Gate Water, is an express Canadian, discretionary, limited liability, common law business trust created in Vancouver, British Columbia on April 22, 2002 by that certain Contract and Declaration of a Trust and United States place of business is 610 Gold Avenue, Southwest – Suite 111, Albuquerque, New Mexico 87102
2. The sole Trustee of LGW is William M. Turner, an American Citizen, whose legal residence is 1527 Granite Street, Northwest, Albuquerque, New Mexico 87104.
3. Defendant, Gale Norton, is the Secretary of the U.S. Department of Interior. Pursuant to 43 U.S.C. 1524(f) she has the mandatory duty to contract 18,000 acre feet of water on the Upper Gila River to water users in New Mexico.

JURISDICTION AND VENUE

4. Canada is a long-time most-favored-nation trading partner with the United States and most favored nation status is accorded to Canadian companies doing business in the United States.
5. Plaintiff is a U.S. Federal Taxpayer with Taxpayer Identification Number: 46-6118678.
6. Plaintiff's sole business in the United States is the trading, commercialization, and beneficial use of water resources within the State of New Mexico.
7. Jurisdiction is property under 28 U.S.C. 1331 where the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
8. Jurisdiction is proper under 28 U.S.C. 1361 where the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

employee of the United States or any agency thereof to perform a duty owed to the plaintiff

9. Jurisdiction is proper under 28 U.S.C. 2201(a) in a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

10. Jurisdiction is proper under 28 U.S.C. 2202 in which further necessary or proper relief based on a declaratory judgment or decree may be granted.

11. Jurisdiction is property under the Administrative Procedures Act 5. U.S.C. 551 *et seq.* which grants the Defendant delegated authority to conclude the contract authorized by 43 U.S.C. 1524(f)

12. Venue is proper in this judicial district under 28 U.S.C.1391 based on diversity of citizenship and as the Gila River rises in southwestern New Mexico and the 18,000 acre feet of water in controversy has been set aside by the Congress under 43 U.S.C. 1524(f) for use by water users in New Mexico.

FACTS

The Applications – Appeal – and Administrative Proceedings

13. On February 26, 2003, Plaintiff began its substantial investment when it filed with the Office of the State Engineer (“OSE”) its initial Application for Permit to appropriate the Public Surface Waters of the State of New Mexico (“Application”) pursuant to Section 72.1.1 *et seq.*, N.M.S.A. (1978)

14. Rules and regulations for the issuance of a permit subsequent to an application are well established.

15. Upon information and belief, there was no ambiguity in the application and it complies in every way with due process notice.

16. Plaintiff, in an effort to clarify its initial Application, amended its Application several times, culminating in the Seventh Amended Application filed on April 22, 2003.

17. Pursuant to Sections 72-5-4 and 14.11.1 NMSA 1978 (1987), Plaintiff published a notice of its application in the Silver City Daily Press once a week for three consecutive weeks ending on May 8, 2003.

18. On March 14, 2003, Plaintiff began to publish the notice of its application in the Silver City Daily Press.

19. Upon information and belief, Mr. "Tink" Jackson of the State Engineer, Deming Office contacted Mary Ybarra, General Manager of the Silver City Daily Press and ordered, directed or otherwise indicated that the Silver City Daily Press should refrain from publishing any further notices of the application by Plaintiff.

20. Upon information and belief, this interaction between Mr. Jackson and Ms. Ybarra resulted in the discontinuance of the publication.

21. Plaintiff, after learning of this interference, began publishing its notice again on April 21, 2003.

22. Due to its desire to provide even more accurate information, Plaintiff withdrew the second notice and added additional material.

23. The notice was finally published on April 24, May 1, and May 8, 2003.

24. Following each publication sequence, the Silver City Daily Press mailed an affidavit of publication to the State Engineer, Deming Office.

25. None of the original affidavits can be found in the State Engineer files despite a motion in the administrative hearing office to compel their production.

26. On May 19, 2004, counsel for Plaintiff notified the Risk Management Division of the State of New Mexico of a Tort Claim/Property Rights Deprivation/Violation.

27. As of the date of this complaint, the Risk Management Division has not responded.

28. No protests to the application were received.

29. Plaintiff's Application requested an appropriation of surface water from the Gila River to be diverted from an infiltration gallery or a Ranney well at a point near Red Rock in Grant County immediately downstream of the Red Rock Box Canyon.

30. The amount requested is inclusive of the 18,000 acre feet per year specifically allocated to for use by "water users" in New Mexico under 43 U.S.C. 1524(f)(1) and (f)(2)

31. In 36 years, there have never been any applications for the 18,000 acre feet by a water user in New Mexico.

32. The State Engineer of New Mexico summarily rejected the application and all amendments.

33. Beginning on March 21, 2003 and ending on April 30, 2003, Plaintiff appealed the rejection of the application and each amendment for a trial *de novo* to the New Mexico District Court for the Sixth Judicial District under cause:CV-2003-73 pursuant to Section 72-7-1, NMSA 1978 (1907) and N.M. Const., Art. XVI, §5.

34. After 30 days, decisions of the New Mexico State Engineer become final agency action.

35. On June 5, 2003, 45 days after the rejection of the first application and 36 days after the date of filing of the 7th amendment, the State Engineer set aside its rejection.

36. At hearing on Tuesday, July 15, 2003, the State Engineer argued that the matter should be returned to its agency for an administrative hearing despite the fact that the period for setting-aside its action had become final.

37. At hearing, Mr. Jonathan Sperber, representing the office of the State Engineer in answer to a question from the bench regarding the time frame necessary to conclude the administrative hearing said that it normally took a month to get to a pre-hearing conference and six months to get the matter heard.

38. On August 4, 2003, Judge Quintero denied all of Plaintiff's appeals and remanded the matter back to the State Engineer for an administrative hearing.

39. The State Engineer set the matter for an administrative hearing before its Hearing Unit.

40. Since August 4, 2004, Plaintiff has insisted that all matters including the validity of its published notice be decided upon in the hearing as a matter of finality and equity.

41. Plaintiff has had to initiate a number of procedural steps to ensure that due process is protected.

42. Among the motions that Plaintiff has made is a motion for the production of the three original affidavits mailed to the State Engineer, Deming Office.

43. Upon information and belief, in order to avoid the production of the notices, the State Engineer himself issued a "Limiting Order" on July 8, 2004 that would not require production of the affidavits.

44. In a status telephone conference on July 14, 2004, the Hearing Officer, Mr. Louis O'Dell informed Plaintiff's Trustee, Plaintiff's attorney, Mr. Lee Peters, Esq.; Mr. Victor Kovach, legal assistant to Mr. O'Dell; and Mr. Sperber, attorney for the State Engineer, that he had had a meeting with the State Engineer, Mr. John D'Antonio, concerning the case and that Mr. D'Antonio had issued the "Limiting Order."

45. Plaintiff's Trustee pointed out in the strongest terms possible that he had engaged in *ex parte* communications on the merits of the case and such *ex parte* communications were a violation of Constitutional due process.

46. Plaintiff suggested that the Hearing Officer, should issue a *sua sponte* order vacating the "Limiting Order"

47. In response to this suggestion the Hearing Officer said that he should discuss this with the State Engineer.

Agreement to Accept the Offer of the Defendant to Contract for Gila River Water

48. On March 29, 2003, Plaintiff, in parallel with its application to the New Mexico State Engineer, filed its written acceptance of the mandatory statutory offer of the Secretary of the Interior to contract for the 18,000 acre feet of water plus evaporation losses from the surface of the reservoir behind the authorized but unbuilt Hooker Dam near Duncan, Arizona that has been reserved for New Mexico under the Central Arizona Project Act.

49. Plaintiff subsequently filed three additional written acceptances of Defendant's mandatory offer to contract on June 19, 2003, August 15, 2003, December 17, 2003 and filed by certified mail, return receipt requested.

New Mexico:

f) New Mexico users; water exchange contracts

(1) In the operation of the Central Arizona Project, the Secretary **shall** offer to contract with **water users** in New Mexico for water from the Gila River, its tributaries and underground water sources in amounts that will permit consumptive use of water in New Mexico of not to exceed an annual average in any period of ten consecutive years of eighteen thousand acre-feet, including reservoir evaporation, over and above the consumptive uses provided for by article IV of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340). Such increased consumptive uses shall not begin until, and shall continue only so long as, delivery of Colorado River water to downstream Gila River users in Arizona is being accomplished in accordance with this chapter, in quantities sufficient to replace any diminution of their supply resulting from such diversion from the Gila River, its tributaries and underground water sources. In determining the amount required for this purpose full consideration shall be given to any differences in the quality of the waters involved.

(2) The Secretary shall further offer to contract with water users in New Mexico for water from the Gila River, its tributaries, and underground water sources in amounts that will permit consumptive uses of water in New Mexico of not to exceed an annual average in any period of ten consecutive years of an additional thirty thousand acre-feet, including reservoir evaporation. Such further increases in consumptive use shall not begin until, and shall continue only so long as, works capable of augmenting the water supply of the Colorado River system have been completed and water sufficiently in excess of two million eight hundred thousand acre-feet per annum is available from the main stream of the Colorado River for consumptive use in Arizona to provide water for the exchanges herein authorized and provided. In determining the amount required for this purpose full consideration shall be given to any differences in the quality of the waters involved.

(3) All additional consumptive uses provided for in clauses (1) and (2) of this subsection **shall** be subject to all rights in New Mexico and Arizona as established by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in United States against Gila Valley Irrigation District and others (Globe Equity Numbered 59) and to all other rights existing on September 30, 1968, in New Mexico and Arizona to water from the Gila River, its tributaries, and underground water sources, and shall be junior thereto and shall be made only to the extent possible without economic injury or cost to the holders of such rights. (Emphasis added)

51. There are no parallel regulations to 43 U.S.C. 1524(f) that create any substantive law regarding the contracting procedure or administrative appeals procedure.

52. There is no requirement that the Defendant confer with water authorities in New Mexico regarding parties with whom to contract.

53. There is no statutory requirement that New Mexico water authorities recommend or approve any contract.

54. Upon information and belief, in January 2004, Mr. Jack Hiatt, Esq, attorney for Grant County, New Mexico, was contacted by John Utton, Esq, a contract attorney to the New Mexico State Engineer (Contract No. 01-550-2000-0010) acting on behalf of the New Mexico Interstate Stream Commission ("ISC"), who asked him to assemble a group of county and municipal government officials for the purpose of entering into a Memorandum of Understanding (MOU) for the purpose of creating a southwestern New Mexico regional water authority that would contract for the same 18,000 acre feet for which Plaintiff had already applied.

55. A series of meetings were held at the initiation of the ISC staff and their attorneys including meetings on or about January 11, 2004, January 26, 2003, February 24, 2004, March 29, 2004, April 9, 2004, April 21, 2004, and others.

56. Upon information and belief, these meetings were not advertised as required by the New Mexico Open Meetings Act and no minutes of the meetings were kept.

57. Upon information and belief, present at some or all of these meetings were Craig Roepke, an engineer with the ISC; John Utton, an attorney hired by the State Engineer to work on this matter; Henry Torres, Chairman of the Grant County Commission; Ed Wehrheim, Chairman of the Catron County Commission; Louise Paterson, Chairwoman of the Hidalgo County Commission; Dennis Armijo, Chairman of the Luna County Commission; Rodolpho S. Martinez, Mayor of the City of Bayard; Sam Baca, Mayor of

the City of Deming; David D. Diaz, Mayor of the Town of Hurley; Arthur Clark Smith, Mayor of the City of Lordsburg; Robert Garrison, Mayor of the City of Reserve; Joan E. Atencio, Mayor of the Village of Santa Clara; Terry Fortenberry, Mayor of the Town of Silver City; Archie Payne, Mayor of the Town of Virden; Rich Olsen, Coordinator for the Black Range Development Council; Rick Holdridge, Chairman of the Deming Soil and Water Conservation District; William Woodward, Secretary/Treasurer of the Grant County Soil and Water Conservation District; Jay Peterson, Chairman of the Hidalgo County Soil and Water Conservation District; Howard Hutchinson, Vice Chairman of the San Francisco Soil and Water Conservation District; Jack Hiatt, Esq, attorney for Grant County; Robert Scavron, Esq., attorney for Silver City; and others not named, to review the various versions of the MOU.

58. The March 5, 2004 issue of the New Mexico Business Weekly quotes Bill Hume, the Governor's Water Policy Adviser as saying: "Local governments should have a main voice in deciding who gets that water and where it will go."

59. Upon information and belief, at the March 29, 2004, Robert Scavron, Silver City Attorney mentioned that he had contacted Bill Hume, Governor's Water Policy Adviser who told him that under no circumstances would any private entity be allowed to have the 18,000 acre feet of water.

60. On September 3, 2003, Esteban Lopez, Chief Engineer of the Interstate Stream Commission was the guest speaker at the morning meeting of Business Roundtable Committee of Albuquerque Economic Forum at the offices of Jaynes Corporation office.

61. Present were William Turner, Steve Charness, Pauline Gubbels, Bob Grant, Brian Burnett, Mike Haynes, Mr. Kelleher, Jack Westman, Eileen Greve-Hilson, Cindy Murray and several others.

62. Mr. Lopez spoke of meetings going on between Arizona, New Mexico and the U.S. Bureau of Reclamation over the 18,000 acre feet of CAP water on the Gila to determine how to use it.

63. Mr. Lopez made no mention of Plaintiffs application.

64. Upon information and belief, the issues involved in this matter were discussed in telephone conference calls with Henry Torres, Jack Hiatt, and staff members of Senator Domenici and Senator Bingaman.

65. To allow New Mexico to apply for the 18,000 acre feet, changes in the Central Arizona Project Act were required which have been prepared for introduction as an amendment to the Arizona Water Settlement Act..

66. The MOU was agreed to by the New Mexico Interstate Stream Commission at a special meeting held on June 12, 2004, in Santa Fe, New Mexico.

67. At present, the New Mexico congressional delegation intends to introduce legislation that will make the State of New Mexico eligible to contract for the water.

68. that Plaintiff' regards the legislation *ex post* facto to purposively defeat the prior acceptance of Defendant's offer to contract by Plaintiff.

(Declaratory Judgment, Injunctive, and Further Relief - 28 U.S.C. § 2201, 2202)

69. Plaintiff re-alleges paragraphs 1 through 68 as if fully stated herein.

70. Federal law, 43 U.S.C. § 1524(f), requires the Secretary of Interior to contract with water users in New Mexico for the use of up to 18,000 acre feet on the Gila River plus evaporation losses from Hooker Dam which has not been built.

71. On information and belief, there have been no acceptances of the mandatory offer in 36 years since the Act was passed by Congress.

72. The Defendant has been operating in a manner contrary to law.

73. The New Mexico Interstate Stream Commission has been operating contrary to law in an effort to defeat Plaintiff's lawful application.

74. The New Mexico congressional delegation in concert with the New Mexico Executive Branch is involved in creating an *ex post facto* legal barrier that will enable the State of New Mexico to contract for the water that they cannot now contract for but Plaintiff can.

75. There exists an actual controversy in this Court's jurisdiction relating to the bad faith and illegal actions in an illegal coordinated conspiracy with State of New Mexico to create an administrative and legal barrier to the issuance of a contract with Plaintiff is a denial, without due process of law.

WHEREFORE, pursuant to Count I hereof, Plaintiff requests that the Court enter a declaratory judgment providing that, by reason of the clear and unambiguous language of 43 U.S.C. 1524(f) the Defendant be commanded to do her non-discretionary ministerial duty and enter into contract negotiations with Plaintiff culminating in a contract and enjoining and restrain Defendant from entering into contract with others including the

State of New Mexico or any of its political subdivisions or instrumentalities and enjoining such Defendant under 28 U.S.C. § 2202 permanently and *pendente lite*, Plaintiff shall suffer immediate and irreparable harm and injury to its beneficial use of water, its agricultural commercial enterprise, and its investment, for which it is without adequate relief at law or otherwise due to the unconstitutional deprivation of its rights. and grant such further relief as may be necessary and proper under its judgment.

COUNT II

(Declaratory Judgment and Further Relief - 28 U.S.C. § 2201, 2202)

76. Plaintiff re-alleges paragraphs 1 through 75 as if fully stated herein.
77. Plaintiff believes that it has demonstrated by a preponderance of facts that its rights have been violated by determined efforts to frustrate its lawful applications for water in the Gila River including the 18,000 acre feet set aside for “water users” in New Mexico.
78. The efforts include the intent to establish *ex post facto* and non-transparent., administrative, legislative, judicial, and political measures.
79. Defendant is deliberately withholding contract talks leading to a contract to give time for New Mexico line-up its ducks through obstructive administrative action.
80. Defendant is pursuing unwritten political philosophy that is illegal.
81. Defendant is waiting for legislation that has been proposed and is expected to pass that is contrary to present domestic law, trade treaties ,and international law.
82. Defendant in concert with the State of New Mexico awaits for the judiciary to failure in its duty to uphold principles of local and national law, international law and equity.

WHEREFORE, pursuant to Count II hereof, Plaintiff has been discriminated against by the Defendant in favor of the State of New Mexico and its unwritten and discriminatory policies and has delayed timely response to issuance of a contract and has discriminated against Plaintiff and has denied Plaintiff fair and equitable treatment and its due process rights as a matter of U.S. Constitutional Law and international law; and that the Court, under 28 U.S.C. § 2202, grant such further relief as may be necessary and proper under its judgment.

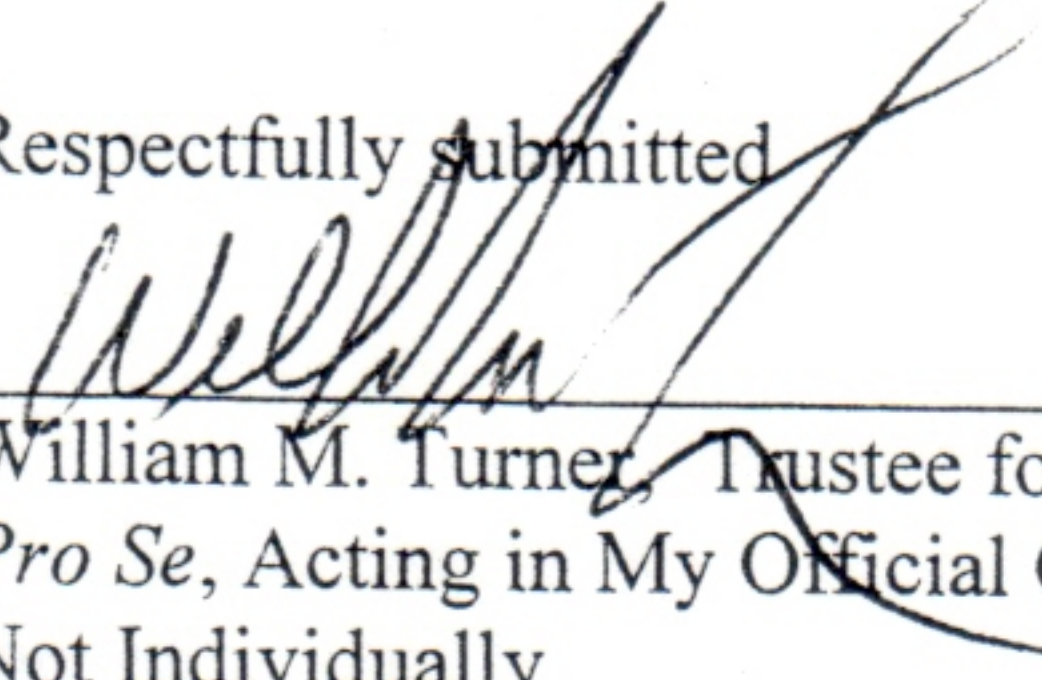
COUNT III

(Mandamus - 28 U.S.C. § 1361)

83. Plaintiff re-alleges paragraphs 1 through 82 as if fully stated herein.

WHEREFORE, Because of state, local, and Congressionally sponsored discrimination through non-regulatory and political measures against Plaintiff's lawful acceptance of the Defendant's offer to contract, Plaintiff requests the entry of a writ of mandamus, together with such further and necessary relief as the Court may deem just and equitable, commanding Defendant to enter into good faith contract negotiations leading to contract with Plaintiff in furtherance of Plaintiff's commercial plans for which it has made substantial capital investment.

Respectfully submitted



William M. Turner, Trustee for Lion's Gate Water
Pro Se, Acting in My Official Capacity and
Not Individually
610 Gold Avenue, SW - Suite 111
Albuquerque, New Mexico 87102

Telephone: 505-843-7643
Telefacsimile: 505-246-2232

CERTIFICATE OF DELIVERY

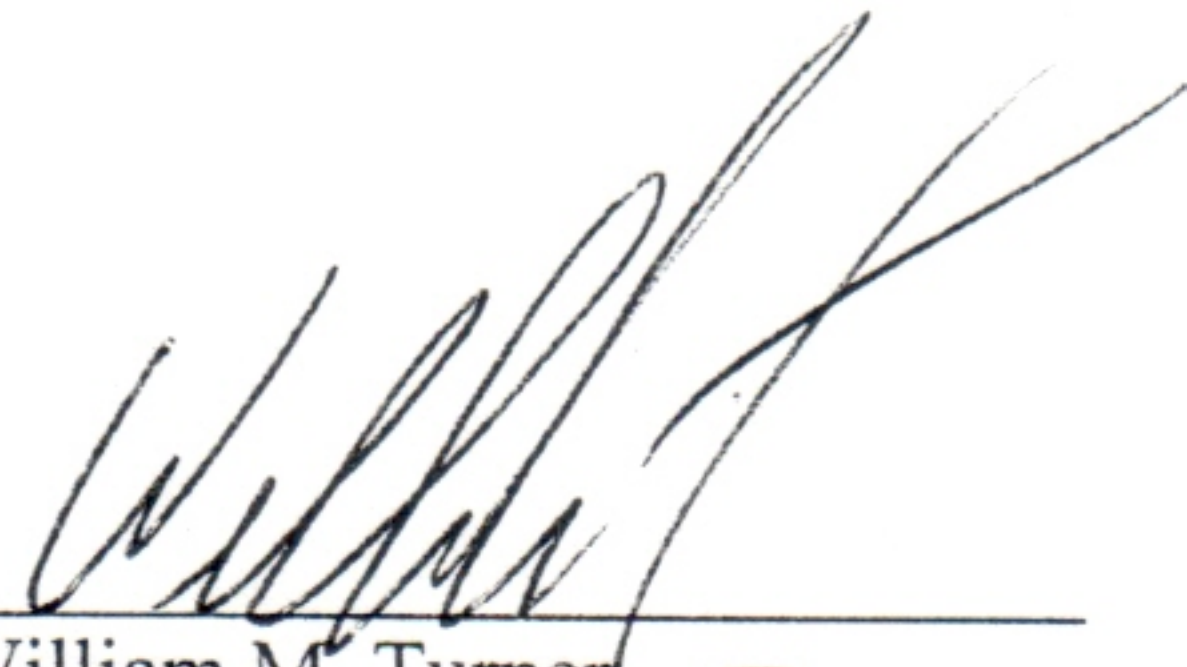
I, William M. Turner, hereby certify that I have, this 17th day of August 2004 mailed the hereinabove **Petition for Declaratory Judgement, Writ of Mandamus and Injunctive Relief** to the following Parties by U.S. Postal Service, Certified Mail, Return Receipt Requested, First Class Postage prepaid.

John Ashcroft
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Gale Norton, Secretary
United States Department of Interior
1849 C Street, N.W.
Washington DC 20240

And delivery by hand to:

Civil Process Clerk
U.S. Attorney's Office
201 3rd Street Northwest – Suite 900
Albuquerque, New Mexico 87102



William M. Turner