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WATER RIGHTS TRANSFERS: KEY TO WATER PLANNING

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INTRODUCTION

Drought, or what some people have called a return to normal weather patterns in New Mexico after several years of wetter than average conditions, has had a huge impact on all citizens in the State of New Mexico in the last several years. Nearly every day, newspapers across the State contain articles on drought, water shortages, dry streams and low reservoirs, water rationing, conservation, low levels of snow pack, or below normal precipitation.

Municipalities have been among those most impacted by the return to drought conditions. Several municipalities, including Alamogordo, Santa Fe, and

Las Vegas, have had to resort to severe measures such as rationing and surcharges in the last several years or they would have literally run out of water. All three of those municipalities rely heavily on surface water so they are particularly vulnerable in times of drought. Municipalities also have special considerations related to the health, safety, and welfare of hundreds of thousands of people, industry, and commerce worth millions of dollars which rely on the cities for safe drinking water and sanitation.

Irrigated agriculture has fallen on hard times. Elephant Butte Irrigation District, Middle Rio Grande Conservancy District, Carlsbad Irrigation District, Arch Hurley Irrigation District, and many acequias have

been forced to cut back drastically on the allotment of water to their farmers.

Fish, wildlife, and plants have also suffered. Many rivers and reservoirs are at all-time lows, and in some cases, dry, adversely affecting fish and wildlife. Insects like the bark beetle are killing drought-stressed trees, creating fire danger and changing our landscape for years to come. Recreational pursuits, such as skiing, rafting, and camping, have additionally been affected from the water shortages, as national forests close to protect from fire danger. In recognition of all of this, Governor Richardson has made water one of the top priorities of his administration.

The purpose of this presentation is to discuss the increasing importance of water transfers in water planning. The lack of water in the State of New Mexico makes it increasingly evident that prudent water rights planning must almost always take into account transfers of surface or groundwater rights. This paper will analyze the current trends in water administration, explain the procedure and the particular problems that arise in undertaking a successful water rights transfer, and will focus on the needs of the State of New Mexico's municipalities in planning for sufficient water supplies in the future.

Background of New Mexico Water Administration

New Mexico has had a nearly 100-year history of water administration. The current surface water code was enacted in 1907,¹ but a territorial water code was first created in 1905. The groundwater code was enacted in 1931.²

Surface waters have long been allocated by compacts between New Mexico and its neighboring states. New Mexico is party to nine interstate compacts, with the first entered into only ten years after New Mexico became a State. Nearly all interstate streams crossing New Mexico were divided by compact by 1951, one-half century ago. These compacts include:

- (a) Colorado River Compact – 1922
- (b) La Plata Compact – 1923
- (c) Rio Grande Compact – 1938
- (d) Rio Costilla Creek Compact – 1945
- (e) Pecos River Compact – 1949
- (f) Upper Colorado River Basin Compact – 1949
- (g) Canadian River Compact – 1951
- (h) Rio Costilla Creek Compact amended – 1963
- (i) Animas-La Plata Project Compact – 1969

The United States Supreme Court, having original jurisdiction over interstate compact cases, has been active in resolving disputes in interstate compacts in which New Mexico is a party. In fact, five of New Mexico's nine compacts have been the subject of United States Supreme Court litigation, including the Colorado River Compact, the La Plata Compact, the Rio Grande Compact, the Pecos River Compact, and the Canadian River Compact. In addition, two other interstate streams, the Vermejo and the Gila, have been divided, or equitably apportioned, by the United States Supreme Court between New Mexico and its neighboring states.

After taking out interstate delivery obligations, New Mexico's share of surface water in its stream systems has long been fully or over-appropriated.

Unlike surface water, groundwater has not been allocated by interstate compact or equitable apportionment with New Mexico's neighboring states. Groundwater in New Mexico is not subject to State Engineer jurisdiction unless and until the State Engineer "declares" a groundwater basin with reasonably ascertainable boundaries. The State Engineer then exercises jurisdiction over the declared underground waters of that basin.

Today over 99 percent of the State's groundwater is under the State Engineer's jurisdiction in declared basins. These declared basins cover over 80 percent of the State's geography. Several aquifers within New Mexico are interstate aquifers. For instance, the Ogallala aquifer, that underlies several states in the Great Plains, is available in a relatively small part of New Mexico.

New Mexico has many mined groundwater basins. Mined basins are those in which water withdrawals exceed recharge to the aquifer, resulting in a diminishing water level. Although not fully appropriated like New Mexico's surface waters, a good share of New Mexico's fresh groundwater has already been appropriated. New appropriations of groundwater still occur, but with less frequency and generally in smaller quantities than in the past. Brackish groundwater appropriations will occur more frequently in the future.

Because surface water is not available for new appropriations and because new fresh groundwater appropriations are becoming less frequent and more difficult, those seeking new or additional water rights will have little choice but to look at existing uses as a source of available water. Accordingly, transfers have become and will continue to be a critical element of

planning for water users and increasingly important for State administrators.

The Philosophy of Water Transfers

Water transfers are a reallocation of a finite resource. Two divergent and competing views exist in the use of water transfers as a source of available water. The first approach envisions private, open markets for water transfers, based upon economics effecting a reallocation of resources that provides the maximum benefit to the individual and thus society. In contrast, the second approach advocates protection of traditional uses with a strong public sector role in regulating transfers, and less emphasis on economics. The traditional uses that this second approach protects include acequia rights, agricultural rights, Native American cultural uses, and the environment.

The limited availability of water is also a lightning rod for the political debate regarding the growth of population and economic growth in the State of New Mexico. There exist two opposing arguments on the issue of growth. One side argues that growth must be limited because of scarce water supplies and the desire to not reallocate water resources. The other side postulates that because of the desire to prevent growth, the scarcity of water is conveniently used as an excuse or justification to achieve political goals. Almost inevitably, additional water rights can be obtained – the issue is the cost and the willingness to pay. This question will continue to be debated at the local and State levels.

Because of the existing statutory criteria in New Mexico, public welfare considerations are already part of the evaluation process of water transfers. Accordingly, New Mexico has started down the road with market-oriented policies that still must take into account public interest and public welfare. This policy allows the State of New Mexico to be flexible and to adjust to both ends of the water transfer debate. The future direction of transfers and water use will be guided by the executive, legislative, and judicial branches of State government.³

The Nature of a Transfer

There are four basic types of water rights transfers. The simplest form is a change in ownership of the water right. This leaves the purpose of use, place of use, and point of diversion of a water right

unchanged. An example of such a transfer is the sale of a farm and its appurtenant water rights.⁴

A second type of transfer involves a change in the point of diversion of a water right. A change in the point of diversion typically involves: 1) changing from one surface water point of diversion to another surface water point of diversion; 2) changing from one groundwater point of diversion to another groundwater point of diversion; or 3) changing from one surface water point of diversion to a groundwater point of diversion.⁵ In the later instance, the *Templeton*⁶ case provides specific criteria that must be followed to prevent impairment to other water users.

A third type of water transfer involves a change in the place of use of a water right.⁷ A change in place of use can be within the same water basin, transbasin, interstate, or internationally.⁸

The fourth type of water transfer is a change in the purpose of use.⁹ A change in purpose of use can exist with the same or a different water user, the same or different place of use, and the same or different point of diversion. The most common example of the change in purpose of use is a purchase of agricultural water rights and the conversion of those rights to municipal and industrial purposes.

Procedural and Substantive Requirements for Transfers

The procedural and substantive requirements for water rights transfers are the same for surface water and groundwater.

The procedure for water rights transfers is set forth by statute, and begins with an application to the Office of the State Engineer. To comply with statutory requirements, notice of publication must appear in a newspaper that is published and distributed in each county affected by the surface water diversion or in the county where the groundwater well will be located and in each county where the water will be or has been put to beneficial use or where other water rights may be affected, or if there is no such newspaper, then in some newspaper of general circulation in the county in which the surface water division or groundwater well will be located, at least once a week for three consecutive weeks.¹⁰

Protests to the application must be filed within ten days of the last date of publication.¹¹ In order to qualify as a protestor to such an application, an objector must have standing. Those who own water rights *and* object that the granting of the application will impair their

water rights have standing.¹² Standing is also conferred on objectors who claim that the granting of the application will be contrary to the conservation of water within the State or detrimental to the public welfare of the State, *and* show that the objector will be substantially and specifically affected by the granting of the application.¹³ With increased attention on water issues, more protests are creating greater administrative burdens on the process. Standing has not been strictly enforced according to statutory guidelines in the past. The Office of the State Engineer, and likely the courts and the legislature, are going to have to look carefully at this issue in the future, or protestants with no water rights or protestants who are not substantially and specifically affected will be able to effectively prevent transfers of water rights.

The substantive statutory criteria to grant an application to transfer is also governed by statute.¹⁴ The applicant must first prove the validity and the extent of the existing water right. The applicant's burden is lightened if the water right has been adjudicated. Adjudicated rights are assumed to be *prima facie* evidence of the validity and the extent of the water right. The burden is then on the protestant to show otherwise. An applicant must also prove that there is unappropriated water available for appropriation. The applicant must then prove that there will be no impairment to existing water rights because of the water transfer. To protect existing uses, only the consumptive use is allowed to be transferred. The issue of impairment to existing water rights is decided on a case-by-case basis by examining the incremental effects of the proposed transfer. The impacts on fully or over-appropriated surface waters typically require offsets or purchases and transfer of existing surface water rights on a stream system so that there will be no new net depletion of surface water, keeping all existing water users whole. Drawdowns in existing wells are allowable, but when an acceptable level of drawdown becomes impairment is decided on a case-by-case basis, with factors including static water column, saturated thickness, drawdowns that would occur without the new well because of the existing well itself or other pumping in the area, and the age of the well (whether it would have to be replaced anyway).¹⁵

In some areas of the State, the Office of the State Engineer has adopted more specific criteria or guidelines by which to measure impairment to existing groundwater rights or the aquifer in general. The Office of the State Engineer has promulgated administrative

criteria in regions where it deems groundwater levels to be critical, including the Middle Rio Grande, Tularosa/Alamogordo, the Lower Rio Grande Basin, and the Estancia Basin.

Other substantive requirements are that the applicant must prove that the transfer is neither contrary to the conservation of water within the State nor detrimental to the public welfare of the State. Neither of these concepts is defined by statute, rule or regulation, so the exact elements necessary to prove each requirement are unknown. However, both requirements are increasingly raised by protestants in their attempts to prevent water rights transfers or to gain concessions from applicants.

An additional potential obstacle for water transfers is the 40-year water development planning statute, NMSA 1978, § 72-1-9 (1985). This statute allows municipalities and other named public entities to acquire and hold unused water rights for their "reasonably projected additional needs" for up to 40 years. The first issue, which is yet to be resolved, is whether a protestant to a water rights application has the right to challenge a municipality's 40-year water development plan. One side of the argument is that a 40-year municipal water development plan must be prepared and adopted by a municipality's governing body. The plan has significant financial ramifications; it affects the health, safety, and welfare of the community, and it greatly impacts the community's quality of life. These policy decisions that affect a municipality's future should be left to the governing body, with the Office of the State Engineer reviewing the plan to ensure it is acceptable for filing. By statute, this is not one of the criteria by which an application is evaluated and it should not be an issue for a protested hearing. On the other hand, some argue that protestants should be allowed to challenge a 40-year water development plan to ensure the water sought to be acquired is necessary.

If a municipality's 40-year water development plan is found to be a proper matter for protestants to challenge at hearing, the next issue will be the proper interpretation of the statute. One interpretation allows municipalities to determine the quantity of water that they can reasonably rely on in times of drought and to acquire new sources of water based upon reasonably projected additional needs. This interpretation is particularly essential for cities that rely heavily on surface water. The other interpretation that has been advanced limits municipalities by adding up water rights, whether or not they can be exercised in times of

drought, and compares them to a 40-year projected demand, and the difference is the limit of a transfer or new appropriation. These contrasting interpretations are present in several pending, protested applications. Adoption of the latter view would force municipalities to wait to address their water needs.

Emerging or Special Considerations for Water Rights Transfers

Many water rights transfers have unique considerations depending on the type of transfer sought.

Markets, Transactions, and Due Diligence

Because water rights are private property rights, value is determined on a market basis. Numerous factors must be taken into account in negotiating the price and the assumption of risk. The price of the water right is typically the starting point. The prospective purchaser will then undertake his due diligence to review the validity and extent of the water right. Whether a water right has been fully adjudicated in a final decree, partially adjudicated as between the individual and the State without an *inter sese* proceeding, declared, perfected, permitted, licensed, or had a proof of beneficial use filed are all important considerations. In addition, the chain of title must be reviewed for properly completed forms, instruments of conveyance, and notices of publication. The prospective buyer and seller can negotiate who will bear the risk and costs of an administrative proceeding before the State Engineer in which an application to transfer water rights can be approved, denied, or approved with specific conditions of approval.

Irrigation Districts

Irrigation districts typically have some nexus to the federal government, the State of New Mexico, and certain authority in the irrigation district itself. Generally, irrigation districts can change the place of use of irrigated land within their district without approval from the Office of the State Engineer.¹⁶ There are requirements, however, before such changes may take place. The change in place of use must be advertised, and the irrigation district must hold an open meeting to consider the proposed change in place of use. Members of the district that may be adversely impacted by the proposed change in place of use may protest at the meeting where the resolution is being

considered. The board of directors of the irrigation district must approve the change in place of use.

Recognizing the benefits of working together, the Elephant Butte Irrigation District (EBID) and the City of Las Cruces have started to establish, with the help of the Office of the State Engineer, an orderly process to transfer water from the irrigation district to municipal use. EBID recognized that some farmland was going to be lost to urbanization and risked decreasing the land base on its assessment roles. The City of Las Cruces is fully dependent on groundwater and needs to diversify its water supply to include surface water so it can use both sources of water conjunctively. Las Cruces' goal is to handle growth through surface water and to reserve as much groundwater as possible as a drought reserve.

Together, EBID, the City of Las Cruces, and the Office of the State Engineer lobbied for and had enacted a law that allows the formation of Special Water Users Associations (SWUA).¹⁷ SWUAs are allowed to lease annual allotments within an irrigation district. The amount of the annual allotment can vary from year to year, just as each individual farmer's annual allotment will vary. Assessments are paid by the SWUA to the irrigation district and the district stays whole because all assessments continue.

Administration over these leases is shared by EBID and the Office of the State Engineer. Regulations are being promulgated that will establish criteria for all transfers of annual allotments of project water to ensure all statutory criteria are met. The SWUA will submit an application to the Board of Directors of the irrigation district. Notice and opportunity to protest is allowed by persons owning water rights within the district whose rights may be impaired. The Board of Directors then considers the transfer in its normal course, considers claims of adverse impacts on other district members, and approves the lease if it finds it to be in the best interest of the district. The State Engineer then reviews the Board of Directors' decision to ensure compliance with the rules and regulations. The State Engineer must issue a decision within 30 days and his decision may be appealed to the district court to determine whether the State Engineer's decision was made in accordance with the rules.

An issue that must be resolved is the federal government's role, if any, in the transfer of water rights from irrigation districts. The Miscellaneous Purposes Act of 1920 allows the United States to regulate conversion of water rights from agriculture to other

uses in irrigation districts in which it holds title. EBID and the Carlsbad Irrigation District have repaid their share of construction obligations and have obtained title to certain portions of their respective projects. Accordingly, they argue that they should not be restricted by the Miscellaneous Purposes Act of 1920.

The El Paso County Water Improvement District No. 1 (EP#1), the counterpart of EBID in Texas on the Rio Grande Project, entered into a conversion contract with the federal government that acknowledged that the United States holds title to the project and gives the United States a *pro rata* payment from every conversion contract. EBID does not believe that the United States has authority to be involved with transfers or conversions because the District has repaid its construction obligations. The City of Las Cruces has become involved in this issue because of its role in leasing annual allotments of project water. These parties are now litigating these issues in New Mexico Federal District Court, that is, whether the Miscellaneous Purposes Act of 1920 relating to conversion contracts is applicable in districts that have fully repaid construction obligations.¹⁸

Leases – Temporary Transfers

Pursuant to New Mexico law, water rights can be leased. The statutory scheme that governs water leases is NMSA 1978, § 72-6-1 *et seq.* One of the limits to water leases is that the initial and any renewal term shall not exceed ten years. However, municipalities and other entities covered by the 40-year planning statute, NMSA 1978, § 72-1-9 (1985), can lease up to 40 years. Water rights owned by a water right owner under an acequia or community ditch or by the acequia or community ditch itself, may only be leased for ten years.

In order to obtain a valid water rights lease, the lessor must file an application, subject to notice and protest. The grounds of protest are limited to impairment of existing water rights for water lease applications, although the State Engineer must ensure that the transfer is not contrary to the conservation of water within the State or detrimental to the public welfare of the State. At the termination of the lease, the water rights revert back to original purpose and place of use and point of diversion.

Transbasin Transfers

The most famous transbasin transfer in New Mexico is the San Juan-Chama Project. The San Juan-Chama Project diverts water from the Colorado River

Basin and transports it into the Rio Grande Basin. Another example is the transfer of water from the Pecos River Basin from Bonito Reservoir for use in the Tularosa Basin.

Transbasin transfers are expressly allowed by NMSA 1978, § 72-5-26 (1907). The same criteria applicable to intrabasin transfers also apply to transbasin transfers.

The issue of transbasin transfers within the State of New Mexico should be addressed in the regional water plans and the State Water Plan. With limited water resources, individual regions of the State may want to be parochial and limit transfers of water rights outside of a region. To maximize the use of the resource within the State and to encourage economic development, the State Water Plan should encourage the transbasin transfers of water to high demand areas.

Additionally, interstate compacts can and have affected intrastate transfers. For example, transbasin transfers are affected above and below Otowi gage as the Rio Grande Compact has been administered. Interstate compacts will have to be carefully reviewed as more pressure is brought to bear to move water across regions of the state to high demand areas.

Interstate and International Transfers

Because water is an article of commerce, embargos that prevent water from leaving the State are unconstitutional.¹⁹ New Mexico has a specific statute that allows transfers of water rights out-of-state, but only after application, notice, opportunity for protest, and consideration of specific criteria by the State Engineer.²⁰ Interstate or international transfers could also be limited by considerations in compacts, equitable apportionments, or other federal laws that have already allocated surface water resources among New Mexico, its neighboring states, and neighboring countries.

Native American Water Rights Transfers

Many existing and unresolved issues surround Native American water right transfers that will become of increasing importance in the future. Such transfers are likely to be in the form of leases. Issues must be resolved regarding the administration and regulation of these rights on and off reservations and pueblos.

The McCarran Amendment states that the states have the right to adjudicate federal reserved water rights on behalf of Native Americans in state adjudications and to administer those rights once

adjudicated.²¹ Nonetheless, state, federal, and tribal governments are seeking cooperative relations regarding the administration of federal reserved water rights of Native Americans. Who will regulate transfers and how transfers will be administered is an unresolved matter, and it will likely vary by tribe or pueblo.

Acequia and Community Ditch Approval of Transfers

Recent legislation provides the acequias and community ditches with the authority to approve or deny transfers to or from the acequias or community ditches under certain circumstances.²² The State Engineer cannot approve an application to transfer water rights unless the applicant has received permission from the acequia or community ditch and the acequia or community ditch has duly adopted applicable requirements. This restriction on the State Engineer's power applies to water rights held by individuals or the acequia or community ditch. The legality of these statutes has not been tested in court.

Water Banking

Water banks allow temporary transfers of water rights in an efficient and less burdensome way in terms of administration. Many western states, such as California, are encouraging water banks. The Office of the State Engineer's website has draft Lower Pecos River Basin Water Banking Regulations. Undoubtedly, water banks will be thoroughly debated and tried in New Mexico as vehicles to accomplish temporary, efficient transfers of water resources.

Restrictions on Transfers That May Result in Constitutional Violations

Laws that restrict transfers must be carefully tailored to avoid constitutional violations, including the commerce clause, equal protection, and the right of due process.²³ In addition, involuntary transfers of water rights through the Endangered Species Act can result in the taking of property without just compensation. This is not a transfer in the traditional sense, but it is a reallocation of resources vested under State law under the guise of federal environmental laws.²⁴

Additional Sources of Water have Some Potential to Ease the Demand and Need for Transfers, but None of These Will Satisfy All Additional Needs

The State of New Mexico has limited unappropriated water. One additional source of water is the desalination of brackish groundwater. This process has great potential to convert unusable, brackish water into potable water supplies for municipalities. As desalination projects are permitted and constructed in New Mexico, they will relieve pressure from existing fresh water sources, both in new appropriations of fresh water and in transfers.

Another alternative "source" of water is through aquifer storage and recovery. This does not create new water, but is more akin to water storage. Aquifer storage and recovery can work in some instances, but the timing and percent of recovery must be carefully evaluated. No applications for aquifer storage and recovery projects have yet been filed in New Mexico, although such an application has been considered by the City of Albuquerque and the City of Alamogordo.

Another alternative water source is available through the tertiary treatment and use of reclaimed waste water. The use of reclaimed waste water reduces demand on outdoor public recreation areas, parks, golf courses, cemeteries, construction, and other green spaces and non-drinking uses of water. Reclaimed water is extensively used today in the City of Alamogordo.

Some pressure on water supply can be reduced through conservation. Conservation can produce gains in both agriculture and municipal and industrial use, but not in the quantities that are currently needed.

CONCLUSION

As new appropriations of groundwater become less available and as there become fewer opportunities to obtain "additional" water from conservation and other non-traditional sources of supply, transfers will become more and more important for all forms of water resources planning.

ENDNOTES

¹ See NMSA 1978, § 72-5-1 *et seq.*

² See NMSA 1978, § 72-12-1 *et seq.* The State's first effort to enact groundwater code declared unconstitutional in 1929

³ This philosophical debate is discussed in more detail in *Public Policy Considerations in State Water Allocations and Management*, Charles T. DuMars (Adapted from the Proceedings of the Forty-Second Annual Rocky Mountain Mineral Law Institute 1996) and *The Current New Mexico Experience—Is the Water Market Working?* (Tim De Young, Water Law Symposium: A Legislative Briefing on New Mexico Water Issues, February 7-8, 1997).

⁴ See NMSA 1978, § 72-1-2.1 (1991)

⁵ See NMSA 1978, § 72-5-24 (1907), and NMSA 1978, § 72-12-7 (1931).

⁶ See *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1958).

⁷ See NMSA 1978, § 72-5-23 (1907) and NMSA 1978, § 72-12-7 (1931).

⁸ See NMSA 1978, § 72-5-26 (1907) and NMSA 1978, § 72-12B-1 *et seq.*

⁹ See NMSA 1978, § 72-5-24 (1907) and NMSA 1978, § 72-12-7 (1931).

¹⁰ See NMSA 1978, § 72-5-4 (1907) and NMSA 1978, § 72-12-3(D) (1931).

¹¹ See NMSA 1978, § 72-5-5 and NMSA 1978, § 72-12-3(D).

¹² *Id.*

¹³ *Id.*

¹⁴ See NMSA 1978, § 72-5-6 (1907) and NMSA 1978, § 72-12-3(D)(E) (1931).

¹⁵ A new approach to measuring drawdown levels in New Mexico is that of irrigation dynamic drawdown. This method was introduced for the first time at a hearing for the City of Alamogordo in October 2003 as a new means to assess impacts on existing wells. Irrigation dynamic drawdown analyzes the effects of a new well on existing wells *in a pumping condition* as opposed to in a static condition. A problem with irrigation dynamic drawdown is that it can protect inefficient or shallow wells and would bring in a whole new level of scrutiny to the construction and efficiency of every well by the State Engineer.

¹⁶ See NMSA 1978, § 73-13-4 (1935)

¹⁷ See NMSA 1978, § 73-10-48 *et seq.*

¹⁸ See *Elephant Butte Irrigation District v. United States, et al.*, No. 00-1309-BB, 2000 U.S. Dist.

¹⁹ See, e.g., *Sporhase et al. v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984).

²⁰ See NMSA 1978, § 72-12B-1 *et seq.* (1983).

²¹ See 43 U.S.C. § 666(a).

²² See NMSA 1978, § 72-5-24.1 (2003); NMSA 1978, § 73-3-4.1 (2003).

²³ See, e.g., note 19, *supra*.

²⁴ See *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (2001).