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## Cabeza de Vaca Land & Cattle Co., L.L.C. v. Babbitt, 58 F. Supp.2d 1226 (D. Colo. 1999)

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Lakewood argued that continuing the permit process was futile and futility excuses the requirement of a final agency decision before judicial review.

Lakewood argued that compliance with the Corps document request was burdensome and did not serve a legitimate purpose. In Lakewood's opinion the information requested by the Corps was too expensive and time consuming and would do nothing to advance the approval or denial of its permit application.

The court agreed that a plaintiff does not need to proceed with the application process if the procedures were so burdensome as to deprive plaintiffs of their property rights. However, the court stated that plaintiffs could not simply plead futility when faced with long odds or demanding procedural requirements. Without the establishment of futility, a claim that the application of government regulation was a taking of property was not ripe until the government reached a final decision on the application of the regulations to the property.

The court found the information requested by the Corps both necessary and legitimate to the permit review process. In reaching this conclusion, the court pointed to the facts that the Corps and three other agencies requested the information and that all the agencies felt the information critical to determining the consequences of the practicable alternative sites.

In conclusion, the court held that Lakewood's taking claim was not ripe for judicial review due to the absence of a final agency decision regarding its section 404 permit application and that Lakewood failed to establish futility in the permit process. Therefore, the court granted the government's motion to dismiss.

*Karen McTavish*

## UNITED STATES DISTRICT COURTS

**Cabeza de Vaca Land & Cattle Co., L.L.C. v. Babbitt, 58 F. Supp.2d 1226 (D. Colo. 1999)** (granting Babbitt's motion to dismiss based on lack of subject matter jurisdiction and dismissing Cabeza's cause of action).

This case concerned the Rio Grande River Compact ("Compact"), the connected Closed Basin Project ("Project"), and the Department of the Interior's ("DOI") administration of the Project. In 1938, Colorado, New Mexico, and Texas signed a compact in an effort to share water resources of the Rio Grande River. In accordance with that agreement, Colorado agreed to meet its obligations through the Closed Basin Project of the San Luis Valley. The Project's plan entailed drawing water from the Closed Basin aquifer to send to the Rio Grande.

The Reclamation Project Authorization Act of 1972 ("Act") authorized DOI to oversee the Project. Section 102(b) of the Act limited DOI's ability to draw water from the aquifer. Project facilities could not cause more than a two-foot drop in water tables allocated for irrigation or in domestic

wells lying outside Project boundaries. Section 102(b) also protected artesian flows, which existed prior to the Project. The Act also enabled an Operating Committee to monitor DOI and its compliance with section 102(b) limitations.

Cabeza claimed DOI violated the Act and harmed neighboring landowners through unauthorized draw-downs of the water table and reductions in artesian flows. The court heard primarily procedural arguments on subject matter jurisdiction in this case. Cabeza brought the case under a private right of action it claimed the Act provided. Babbitt countered with an argument that the court lacked subject matter jurisdiction because the United States did not waive sovereign immunity under the Act. Cabeza alternatively argued that DOI acted *ultra vires*, depriving them of sovereign immunity. The court established that the party asserting jurisdiction had the burden of proof.

The court first pointed out that the United States and its agencies and employees could not be sued without consent or express waivers of sovereign immunity. The court noted that an implied private right of action did not create a waiver of sovereign immunity. Since Cabeza failed to cite an express waiver of sovereign immunity within the Act, it did not have a private right of action.

Next, the court examined the *ultra vires* doctrine. The court defined actions as *ultra vires* when governmental officials and employees acted “completely outside [their] authority,” when they failed to do business “the sovereign has empowered [them] to do,” or were “doing it in a way that the sovereign has forbidden.” The court explained that *ultra vires* actions did not occur simply because the official or employee made a mistake of fact or law while exercising delegated power. The court stated that to determine whether an official has acted *ultra vires*, a court should analyze the statutes or regulations defining the official’s duties.

Cabeza asserted the DOI Secretary “failed to meet his statutory obligations to . . . the Project” and that the Operating Committee “failed in their duty to determine whether the Project . . . compli[ed] with section 102.” The court, following Tenth Circuit precedent, stated that even if Cabeza’s allegations proved true, they “are but examples of erroneous conduct falling within the statutory authority of federal officers” of the Project.

Finally, Cabeza presented two other arguments, both of which the court denied. The court rendered its holding in two parts: first, it granted Babbitt’s motion to dismiss for lack of subject matter jurisdiction, and second, it dismissed Cabeza’s action.

*Jennifer Lee*