

FILED

THIRD JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF DOÑA ANA

2012 MAR 16 PM 4: 21
DISTRICT COURT
DOÑA ANA COUNTY, NM

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STATE OF NEW MEXICO *ex rel.*,)
NEW MEXICO STATE ENGINEER,)
)
Plaintiff,)
)
vs.)
)
ELEPHANT BUTTE IRRIGATION)
DISTRICT, *et al.*,)
)
Defendants.)

No. CV-96-888
Honorable James J. Wechsler

Stream System Issue
SS-97-104
United States Interests

UNITED STATES' PROPOSAL FOR THRESHOLD ISSUE.
RE: STATE'S SUBFILE OFFER OF JUDGMENT TO SETTLE
THE UNITED STATES OF AMERICA'S RIO GRANDE PROJECT RIGHTS

At the pre-trial hearing on March 7, 2012, regarding Stream System Issue no. 104, the Court requested a recommendation from the United States and the State of New Mexico framing the issue of the scope and source of water supply for the Rio Grande Project (Project). The United States further understands the Court's request as framing a threshold issue incorporating issue numbers 5 and 8 identified in the *United States' Response to State's Offer of Judgment to Settle the United States' Rio Grande Project Water Rights*, filed January 5, 2012, and a proposal on how to proceed in litigating the issue.

Issue No. 5 states:

Does the Project water right include tributary groundwater hydrologically connected to the Rio Grande?

Issue No. 8 states:

5/16/12

Should the Project water right include a right to all tributary inflows and return flows, whether on the surface or in the ground, to ensure delivery of Project water downstream to Texas and to Mexico?

The United States and New Mexico have conferred and agreed to the threshold issue:

What is the source or sources of water for the United States' Rio Grande Project right?¹

In agreeing to litigate this issue, however, the United States contends that a determination of the source of Project water supply does not completely dispose of Issue No. 8. Issue No. 8 regarding the source of Project water to "ensure delivery of Project water downstream to Texas and to Mexico" involves the congressional mandate to deliver water from whatever Project source(s) to all Project beneficiaries, which in New Mexico includes the obligation to protect and ensure state line deliveries. A right to deliver Project water to the state line for Project beneficiaries and Mexico may be appropriate for inclusion in the "Other" paragraph in the Offer of Judgment and eventual decree. But, regardless of where it appears in the Offer and decree, it is necessary to define the Project right. Therefore, this issue of the delivery obligation is reserved for future litigation, as are all other issues previously identified.

New Mexico proposed commencing litigation with a Rule 12 motion. The United States contends that a Rule 12(b)(6) motion to dismiss for failure to state a claim is inappropriate. The United States' proposed issues no. 5 and 8 -- and now the proposed restatement of the issue -- set forth objections to the State's Offer of Judgment, but they are not pleadings purporting to state a

¹ Due to the amount of time required to reach agreement on the statement of the issue, the United States and the State were not able to seek the viewpoints of all Participating Parties before the filing date. The United States requests that the other Participating Parties be allowed a period of one-week to submit their comments on the stipulation and separate reports contained herein.

cause of action. Rather, the framing of the issue as the source(s) of Project water recognizes that relief may be granted. In stream adjudications in New Mexico, one of the elements that courts determine is the source or sources of water for a claimed right. Thus, this element of the water right must be decreed. While the State may and apparently intends to argue the legal merits of the source of Project supply, their argument is more appropriate for a motion for summary judgment, not Rule 12 dismissal.

Further, the United States contends that sources of water for the Project right should be determined in the context of relevant facts. Consequently, given the lack of data or modeling before the Court concerning the hydraulic connection between surface water and the aquifer in the lower Rio Grande, we propose the following schedule to adequately present these facts:

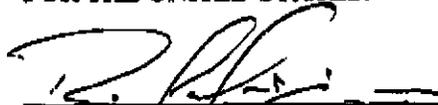
120 days to file expert witness reports.
 180 days to complete discovery.
 30 days later Participating Parties file summary judgment motions.
 30 days later Participating Parties file responses to summary judgment motions.
 15 days later Participating Parties file replies on summary judgment motions.
 Hearing on dispositive motions.

Should the Court decide there are disputes of material fact precluding judgment as a matter of law, an evidentiary hearing will be set;

30 days after denial of summary judgment United States prepares proposed joint pretrial statement. Statement shall include Participating Parties' final witness lists, including all fact and expert witnesses, and final trial exhibit lists.
 15 days later Objections to testifying witness lists or final trial exhibit list/motions in limine due.
 15 days later Responses to objections/motions in limine due.
 To be determined Court issues pretrial order.
 To be determined Final pretrial conference and hearing on pretrial motions and motions in limine.
 To be determined Trial.

Respectfully submitted this 16th day of March 2012.

FOR THE UNITED STATES:



R. LEE LEVINGER
Attorney, U.S. Department of Justice
Environment and Natural Resources
Division
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Phone: (303) 844-1364
Fax: (303) 844-1350

CERTIFICATE OF SERVICE

I, Noorjahan Gillow, do hereby certify that on this 16th March, 2012, mailed a true and correct copy of the *United States' Proposal for Threshold Issue, Re: States' Subfile Offer of Judgment to Settle the United States of America's RIO Grande Project Rights* to the parties and counsel of record properly addressed.



Noorjahan Gillow, Paralegal