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

DISTRICT COURT
DOÑA ANA COUNTY, NH

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

No. CV-96-888
Hon. James J. Weschler
SS 97-104: United States' Interests

**VERDE'S COMMENTS ON THE UNITED STATES' AND STATE OF NEW MEXICO'S
SEPARATE REPORTS REGARDING STREAM SYSTEM ISSUE SS-97-104**

COME NOW, Verde Santa Teresa LLC, Verde Realty Operating Partnership, L.P.,¹ Verde Railroad Land LLC, Verde Intermodal Industrial Park LLC and Verde Border Industrial Park LLC (collectively, "Verde"), by and through the undersigned and, pursuant to this Court's order filed March 20, 2012, hereby respectfully submit these Comments regarding the filings made by the United States and the State of New Mexico on March 16, 2012.

As the Court indicated at the March 7, 2012, hearing, the first two issues to be heard under this Stream System Issue are those identified as issue numbers 5 and 8 in the United States' Response to the State's Offer of Judgment to Settle the United States' Rio Grande Project Water Rights filed January 5, 2012. The State of New Mexico and the United States have agreed that the "threshold" issue presented by these two issues is: "What is the source or sources of water for the United States' Rio Grande Project right?" Verde agrees that this is an appropriate articulation of the issue, with the sole caveat that, as Verde has asserted in the past—and continues to assert—the United States does not have or even really claim a traditional "water

¹ Verde Realty Master LP was joined to the adjudication suit. On July 1, 2006, that entity changed its name to Verde Realty Operating Partnership, L.P.

right” created by the appropriation *and* beneficial use of water. Nonetheless, the issue as articulated by the United States and the State of New Mexico is sufficiently broad to include the position of Verde and therefore is an appropriate threshold issue leading to the ultimate determination of United States’ rights to the storage and release of water under the Rio Grande Project.

The dispute between the United States and the State of New Mexico is entirely procedural and appears to boil down to whether it would be appropriate for the Court to consider a Rule 12(b)(6)-style motion. Of course, whether a Motion to Dismiss is proper can only be determined based on the content of the motion itself. No party should be allowed to obtain an order suspending the rules of Civil Procedure. It is true that the procedures in an adjudication suit are unique, but it cannot be the case that Rule 12(b)(6) motions are *per se* inappropriate. Indeed, the *United States itself* filed such a motion in the Expedited Inter Se Proceeding (Claims of the Estate of Nathan Boyd), Case No. RN-97-2413, Subfile No. LRR-28-099-1001. That motion was directed at the claims made by the Estate of Nathan Boyd and was ultimately successful in disposing of *all* of the issues in that proceeding.

Whether labeled a Rule 12(b)(6) motion or simply briefing on threshold legal issues, it seems clear that there are purely legal claims that could be resolved as a matter of law on briefing by the parties. The State of New Mexico’s offer identified the points of diversion that form the basis of the United States’ right to divert to storage, impound and store water (Elephant Butte Reservoir and Caballo Reservoir), its right to release water from storage (the same) and its right to divert at river diversion dams (Percha, Leasburg and Mesilla Dams). All of these points of diversion divert surface water. The United States’ response did not dispute these points of diversion or identify others. Nonetheless, it claims certain rights in “tributary groundwater” and

“tributary inflows and return flows, whether on the surface or in the ground.” It is thus apparent that the United States is making a purely legal claim to groundwater apart from the actual appropriation and beneficial use thereof. Whether such a claim is valid under New Mexico law is an appropriate subject for initial briefing or Rule 12(b)(6) motions and would certainly promote judicial efficiency. If there were such a right then all parties would be required to develop complex hydrologic models tracing the molecules of surface water into the ground and then back again at considerable cost and time. Were the Court to rule that such a right does not exist or modify its scope, this would save the Court and all parties tremendous time and expense.

In addition to the claim to groundwater that may be resolved on legal briefs, the United States raises another issue of law that Verde suggests be included in any initial briefing. The United States, after agreeing to the statement of issue, argues 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.

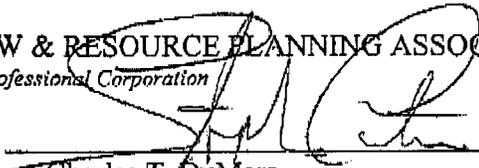
U.S. Proposal, at 2. This paragraph is perplexing. It asserts that the United States is apparently not agreeing to be bound by the issues legated in subproceeding as to the scope of its water right. The implication is that there is yet another kind of water right in the United States—one subsumed in the phrase the United States’ “delivery obligation”—and that the issue of this delivery obligation is reserved for future litigation. Although it is far from clear, the United States appears to argue that, regardless of the source of water for its state-law project “water

right” (same caveat applies), a “congressional mandate” (i.e., federal law) may in some way preempt the application of state law to the determination of its rights and therefore the entire exercise in this subproceeding is otherwise preempted. On this claim, see 43 U.S.C. § 483 (being a portion of Section 8 of the Reclamation Act and requiring the Secretary, in carrying out the Act, to “proceed in conformity with such [state] laws” regarding “the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder”); *California v. United States*, 438 U.S. 645, 665 (1978) (concluding that, as part of the “cooperative federalism” exemplified by the Reclamation Act, “the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law.”); and *United States v. City of Las Cruces*, 289 F.3d 1170, 1190 (10th Cir. 2002) (“Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States.” (quoting S. Rep. No. 82-755, at 3 (1951))). Verde respectfully requests that the initial briefing requested by the State also include the question whether any federal law preempts the normal application of New Mexico state law to the determination of the United States’ project right as described in the State’s offer.

The most basic point here is that in ordinary civil litigation a party cannot request and receive an order precluding the other party from *filing* motions to dismiss. More importantly, even if the proposed 12(b)(6) motion, or initial briefing on legal issues, does not fully dispose of any aspect of the issue, the eventual order from this Court would likely identify the factual issues necessary for complete resolution. Thus, allowing these filings promotes judicial efficiency. An order on a Motion to Dismiss under rule 12(B)(6) that narrows the factual issues would be invaluable to the parties and judicial efficiency in determining this threshold issue.

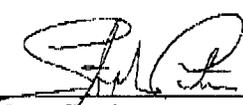
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2012, a true and correct copy of the foregoing pleading was served by first-class mail on the following recipients whose names appear on the official service list for Stream System Issue 104, as prepared by the Court and updated March 7, 2012.


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