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DISTRICT COURT
DOÑA ANA COUNTY, NM

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

STATE OF NEW MEXICO, ex rel.)
Office of the State Engineer,)

Plaintiff,)

vs.)

ELEPHANT BUTTE IRRIGATION)
DISTRICT, et al.,)

Defendants.)

CV-96-888
Hon. James J. Wechsler
Presiding Judge

Stream System Issue
SS-97-104
United States Interest

NEW MEXICO STATE UNIVERSITY'S
MEMORANDUM BRIEF IN SUPPORT OF MOTION TO DISMISS
THE UNITED STATES' OWNERSHIP CLAIMS TO GROUNDWATER

Introduction

The Court's April 13, 2012 Order directs the parties to address the issue of "what is the source or sources of water for the United States' Rio Grande Project." This is a legal question. In adjudicating the United States' claims to the waters of the Lower Rio Grande in New Mexico, the Court must determine the United States' legal interests in waters appropriated for beneficial use by irrigators within the Rio Grande Project in New Mexico. For two reasons, the Court should reject the United States' claims to ownership of groundwater as a source of supply for the Rio Grande Project. First, New Mexico law requires appropriation of water to beneficial use in order to establish a water right, something the United States has not done. The United States can identify no points of diversion of groundwater and cannot demonstrate its beneficial use of groundwater. Second, even if the United States could show that groundwater is a legal source of

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supply for the Rio Grande Project, the legal right to the use of such water is not held by the United States. Any water right to the use of such waters is vested in members of Elephant Butte Irrigation District ("EBID").

Argument

New Mexico law governs the adjudication of the United States' interests in the waters of the Lower Rio Grande. In enacting water legislation, Congress has historically deferred to the operation and effect of state water law, particularly in western states where the doctrine of prior appropriation has created valuable private property interests. *See California v. United States*, 438 U.S. 645, 653-70, 678-79 (1978). "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

In creating the Reclamation Service, Congress specifically required that water rights for Reclamation projects be acquired under state law. Section 8 of that Reclamation Act of 1902 provides "... the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with..." the laws of the State or Territory in which the project is located. *See* 43 U.S.C. §§ 372, 383. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1184 (10th Cir. 2002) (Tenth Circuit noted under Section 8 of the Reclamation Act of 1902 Bureau of Reclamation must obtain water rights under state law). The Act further requires that "the right of the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372, 383.

I. The United States did not appropriate groundwater for the Rio Grande Project.

In New Mexico, the doctrine of prior appropriation applies to both surface water and groundwater. See *Yeo v. Tweedy*, 34 N.M. 611, 624, 286 P.970 (1929). The doctrine was codified by the Territorial legislature with respect to surface water in 1907, Laws 1907, Ch. 49, and in 1931 by the State legislature with respect to groundwater, Laws 1931, ch. 131. See *Pecos Valley Artesian Conservancy District v. Peters*, 50 N.M. 165, 182, 173 P.2d 490 (1945).

A right to appropriate water, whether from surface or groundwater, requires a diversion and application of water to beneficial use. See *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 444, 493 P.2d 409 (1972) (“[w]e hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes.”) “Ground water, like surface water, must be appropriated and applied to beneficial use before a vested water right will result.” *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 21, 143 N.M. 142 (internal citation omitted).

Although the United States concedes that it has no groundwater points of diversion, it argues that because surface water percolates into the ground the United States should be awarded a water right to recapture such percolated groundwater. However, as the State argues, there is no legal basis for that conclusion. New Mexico water law is clear that once water has percolated underground it loses its character as surface water. E.g., *State ex rel. Reynolds v. King*, 63 N.M. 425, 321 P.2d 200 (1958) (Court rejected argument of appellant that he had a right to groundwater that had percolated downward from a lake on his property that was fed by surplus surface waters); *Application of Langenegger*, 64 N.M. 218, 326 P.2d 1098 (1958) (Court upheld the State Engineer’s denial of application seeking to change the point of diversion from surface

water to wells to be drilled in the shallow aquifer). Under New Mexico law, surface water that percolates underground becomes the public groundwater of the State.

Furthermore, as argued by the State, the *Templeton* Doctrine does not apply in this instance. Under the *Templeton* doctrine, a senior surface water right owner may apply to the State Engineer for a permit to drill a well and appropriate groundwater as a supplemental source of water when the surface water supply is not sufficient to meet the surface senior's demands under specific facts and conditions. See *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 466 (1958); see also *Herrington v. State ex rel. State Engineer*, 2006-NMSC-014, ¶ 11, 139 N.M. 368 (Court in *Templeton* fashioned an equitable remedy to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well Through the well, the senior surface right owner can supplement existing surface supply, if any, by drawing upon groundwater that originally fed the surface water supply). Again, without groundwater points of diversion, the United States lacks at least one of the prerequisites under this doctrine.

II. The members of EBID are the beneficial owners of the water rights for irrigation within the Rio Grande Project.

Any claims to water rights by the United States under Stream System Issue No. 104 can only be asserted in the name of the water right owners who have put water to beneficial use and to whose lands the rights are appurtenant. One of the basic tenets of the prior appropriation doctrine is that beneficial use "shall be the basis, the measure and the limit of the right to the use of water." See *N.M. CONST.* art. XVI, §3; See also *Erickson v. McLean*, 62N.M. 264, 273, 308 P.2d 983, 988 (1957) (beneficial use of water is traditionally the use of water for some beneficial purpose in connection with land). Likewise, the language of the Reclamation Act itself states that the "right to the use of water acquired under the provisions of this Act shall be appurtenant

to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right." 43 U.S.C. 372 (1994). As the U.S. Supreme Court has recognized those who beneficially use the water on land appropriate the water, thereby establishing the right to its use. *See Nevada v. United States*, 463 U.S. 110, '125 (1983), *reh'g denied*, 464 U.S. 875 (1983). The individual members within EBID are the beneficial users of the irrigation water on land. The United States simply has put no project water or groundwater to beneficial use on any land.

The purpose of building reclamation projects throughout the West was not to establish the United States as the regional water baron. The United States Congress passed the Reclamation Act of 1902 to assist in settlement and irrigation of western lands by building projects to store water and then transport it to farm lands for beneficial use. *See Henkel v. United States*, 237 U.S. 43, 49 (1915); *United States v. Tulare Lake Canal Co*, 535 F.2d 1093, 1119 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), *reh'g denied*, 430 U.S. 976 (1977).

In the process of financing the construction and maintenance of water storage and delivery facilities under the Reclamation Act, the United States may have acquired the legal title to water rights. *See Middle Rio Grande Water Users Ass's v. Middle Rio Grande Conservancy Dist.*, 57N.M. 287, 300, 258 P.2d 391,399 (1953) (the United States may obtain water rights as security for debt obligation). But such acquisitions are "made not for the use of the government, but, under the Reclamation Act, for the use of the landowners...." *Ickes v. Fox*, 300 U.S. 82, 95 (1937), *reh'g denied*, 300 U.S. 640 (1937). Once repayment obligations are met, the interest of the United States in water rights within the project area is limited. The United States' interest in water rights within a reclamation project is described by the United States Supreme Court as "at most nominal." *Nevada*. 463 U.S. at 126.

As these cases show, the interests of the United States are that of carrier and distributor of water, whatever those rights may be under the applicable state law; but they are not that of the beneficial user. See *Ickes*, 300 U.S. at 95. The "beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the project to which these water rights [become] appurtenant upon the application of project water to the land." *Nevada*, 463 U.S. at 126; *Nebraska v. Wyoming*, 325 U.S. 589,614 (1945) ("The water right is appurtenant to the land, the owner of which is the appropriator."); *Holguin v. Elephant Butte Irrigation Dist.*, 91 N.M. 398,401-02, 575 P.2d 88 (1977) (finding that the United States did not own a sufficient interest in reclamation project water rights to make it an indispensable party in a suit over the water rights, but was indispensable nonetheless, because of treaty obligations), *overruled on other grounds by C.E. Alexander & Sons. Inc. v. DEC Int'l, Inc.*, 112 N.M. 89, 91, 811 P.2d 899, 901 (1991). Since the individual EBID members, not the United States, have applied water to beneficial use on the land, they are the beneficial owners of the rights.

This issue was thoroughly briefed before and decided by the district court in the Pecos adjudication in determining the interests of the United States and the Carlsbad Irrigation District ("CID") in the Carlsbad Project. Judge Byrd held that the farmer members of CID are the owners of the water rights put to beneficial use by and through the diversion, storage and delivery works of CID. See *State of New Mexico ex. rel. State Engineer v. L.T. Lewis, et. al.*, Nos. 20294 and 22600 Consolidated, Opinion RE Threshold Legal Issue No. 3, filed on November 4, 1997. The court found:

[T]he beneficial ownership of Project water rights is vested in landowners in the Project measured by the amount of water devoted to beneficial use. Ownership of water rights in the Project are appurtenant to land in the Project upon which they are devoted to beneficial use. Project water rights are not owned by the United States or the CID.

Id. Although finding that the United States had no interest in “water rights,” the court did find that the United States and CID have certain ownership rights and interests in the physical works and in diverting and storing water. The court characterized these governmental rights and interests as the authority to divert and appropriate water for the use and benefit of landowners pursuant to the Reclamation Act and New Mexico law, and the right and interest in storage and distribution of project water to accomplish project purposes. The court stated that the “rights, interests, duties and obligations of the parties in connection with dams, reservoirs, storage and distribution facilities, and of the landowners to receive water therefrom are set forth in the agreements among the respective parties and New Mexico statutes pertaining thereto.” *Id.*¹ This is persuasive authority that this Court should adopt.

Conclusion

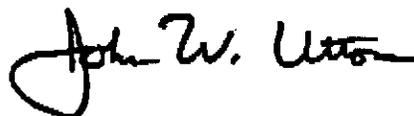
Just as Judge Byrd decided the federal interests in the Carlsbad Project as a matter of law, so this Court can determine the United States’ adjudicatory interests in the waters of the Rio Grande Project in New Mexico. The United States admits it does not divert groundwater and does not put any water to beneficial use. Under the governing law of the state of New Mexico, the right to use groundwater is established only through its diversion and application to beneficial use. Even if the United States had appropriated groundwater and included the construction of wells as part of the Rio Grande Project, the United States still cannot claim a water right from such a source. All water rights for irrigation within EBID, whether from surface or ground, belong to the EBID members. The Court should enter an order dismissing the

¹ In its reconsideration of the issue, the court left open the determination of what the government’s precise ownership rights and interests are; however, the court was clear in determining that the government’s rights are not water rights. Thus, the court followed long-established New Mexico law that vests water rights in the landowners who apply water to beneficial use. Ultimately, the rights and interests of CID and the U.S. were adjudicated by settlement decree as rights to diversion, storage and delivery of water for the benefit of CID members. See *State of New Mexico ex. rel. State Engineer v. L.T. Lewis, et. al*, 141 N.M. 1, 2007 NMCA 8, 150 P.3d 375 (Ct. App. 2006).

United States' claims to groundwater as a source of water for the Project, enter a ruling that the sole source of water for the Project is the public surface water of the Rio Grande and narrowly adjudicate the interests of the United States to its limited role of storing and distributing water for the benefit of water right owners within the project.

Respectfully submitted,

SHEEHAN & SHEEHAN, P.A.
Attorneys New Mexico State University
40 First Plaza N.W., Suite 740
Post Office Box 271
Albuquerque, New Mexico 87103
(505) 247-0411



BY: _____
JOHN W. UTTON