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DISTRICT COURT  
DONA ANA COUNTY, NM

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

**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 REPLY TO  
RESPONSES OF UNITED STATES AND OTHER PARTICIPATING PARTIES**

COMES NOW New Mexico State University ("NMSU") and replies to "United States' Response to the State's Offer of Judgment to Settle the United States' Rio Grande Project Rights" ("US Response"), as well as to issues raised in responses by other Participating Parties.

The purpose of the briefing directed by the Court's Order entered November 29, 2011 is to identify disputed material facts and/or issues of law. The Court has set a pretrial scheduling conference on March 7, 2012 to establish a schedule and procedures for litigating the identified factual and legal issues. If litigated all together, the legal and factual issues identified by the United States and other parties will result in lengthy, complex and time-consuming proceedings. Rather than embarking at this time to resolve all the wide-ranging issues raised by the US Response, NMSU requests that the Court identify the fundamental legal issues that may be disposed of efficiently as a matter of law and that, once resolved, will have the greatest impact in

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putting the federal claims to rest.

As described below, NMSU believes the two issues the Court should identify and set for briefing at this time are: (1) whether the source of water for the Rio Grande Project includes groundwater; and (2) whether the United States' interests in the Rio Grande Project vest ownership in the United States of any beneficial use water rights.

NMSU agrees with a number of other parties, including the State of New Mexico and the City of Las Cruces, that the question of whether project supply includes groundwater is an essential threshold legal issue. In particular, the second issue identified by the joint Reply of the State and City frames the question as follows:

Whether "tributary inflows and return flows . . . in the ground," however defined by the United States, constitute groundwater under New Mexico law? See US Response, Objection 8.

1. If yes, then has the United States any right to the use of that groundwater?
2. If no, then does the United States have any legally cognizable right to the use of "tributary inflows and return flows . . . in the ground" and if so, what is that right?

State and City General Reply at 2. NMSU believes that individual groundwater users in the Lower Rio Grande, including members of EBID, have appropriated groundwater for their own use and under their own ownership. The United States has no recognizable interest in this groundwater.

NMSU believes the second fundamental threshold legal issue is whether the United States' interests in the Rio Grande Project include ownership of beneficial use water rights. NMSU believes that the beneficial ownership interest in water used by EBID members, whether derived from surface water or groundwater, is held by those EBID members. Under long-

established New Mexico law arising from the first effort to adjudicate water rights in the Lower Rio Grande, the right to divert and utilize water vests in the individuals who place water to beneficial use, not entities organized to facilitate the distribution of water to such persons. *Snow v. Abalos*, 18 N.M. 861; 140 P. 1044 (1914).

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.*<sup>1</sup>

NMSU has a longstanding and significant interest in the resolution the United States’ ownership claims in the Lower Rio Grande. After the United States sought to adjudicate its claims in federal court by suing NMSU and other defendants, the defendants succeeded in moving the federal district court to abstain from hearing the claims, in deference to this Court. *United States v. Elephant Butte Irrigation District, et al.*, Cause No. 97-0803 JP/RLP (D.N.M. Aug. 22, 2000). Upon appeal by the United States to the Tenth Circuit, NMSU and the other defendants prevailed in sustaining the federal district court’s holding. *United States v. City of Las Cruces, et al.*, 289 F.3d 1170 (2002). NMSU agrees with the comments by the New Mexico Pecan Growers, Response at 2, the Southern Rio Grande Diversified Crop Farmers Association, Response at 1, and Verde, Response at 3 and 7, that the United States is not a beneficial user of project water and should not be decreed a water right for beneficial uses made by EBID members.

In conclusion, NMSU believes that judicial efficiency will best be served by setting these two issues for briefing and argument first, as a matter of law.

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<sup>1</sup> 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).

WHEREFORE, NMSU respectfully requests, in reply to the US Response, that the Court designate as threshold legal issues the two questions described herein.

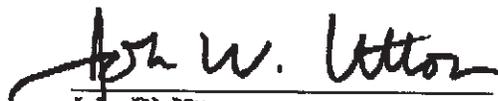
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BY:   
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**CERTIFICATE OF SERVICE**

I HEREBY certify that a copy of NMSU's Reply to Responses of the US and other Parties was mailed or emailed to the participating parties identified below on February 16, 2012.

  
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