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.	)	No. CV 96-888 Hon. James J. Wechsler Presiding Judge Stream System Issue SS-97-104 United States Interest

STATE OF NEW MEXICO'S REPLY TO UNITED STATES' CONSOLIDATED RESPONSE IN OPPOSITION TO THE STATE OF NEW MEXICO'S AND THE CITY OF LAS CRUCES' MOTIONS AND MEMORANDA IN SUPPORT OF SUMMARY JUDGMENT

COMES NOW Plaintiff State of New Mexico ("State") in reply to the United States Consolidated Response in Opposition to the State's and the City of Las Cruces' Motions and Memoranda in Support of Summary Judgment, and states as follows:

I. Introduction:

Pursuant to the Court's October 12, 2012 Order on Next Issues and Schedule for Litigation Regarding the United States' Rio Grande Project, four parties - - the United States, the State, the City of Las Cruces and the Pre-1906 Claimants - - filed motions for summary judgment on the issues of the amounts of water and priority date(s) for the United States' Rio Grande Project right. Certain parties, electing to not file summary judgment motions, filed responses to the summary judgment motions in which they now assert legal theories of their own, as to the amounts of water and priorities for the United States' Rio Grande Project right. *See* responses of Elephant Butte Irrigation District ("EBID"), the City of El Paso ("El Paso") and

the New Mexico Pecan Growers.[1]

Rule 1-056 (D) NMRA requires that:

> A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.

None of the memoranda submitted in opposition to the State's Motion for Summary Judgment - - including the United States' Consolidated Response - - controvert the numbered undisputed material facts listed in the Memorandum in Support of State of New Mexico's Motion for Summary Judgment on the Amounts of Water and Priority Dates for the United States' Rio Grande Project Right ("State's supporting memorandum") as required by Rule 1-056 (D).[2] Accordingly, all of the material facts set forth by the State are deemed admitted. Given that the State's listed undisputed material facts are not controverted, the only issue before the Court is the legal effect of those facts. "If the facts are not in dispute, but only the legal effect of the facts is presented for determination, then summary judgment may properly be granted." *Koenig v. Perez*, 1986-NMSC-066, ¶ 10, 104 N.M. 664, 666, 726 P.2d 341, 343. *See also State ex rel. Martinez v. City of Roswell*, 1992-NMCA-102, ¶ 30, 114 N.M. 581, 588, 844 P.2d 831, 838 (facts to which parties were in agreement were dispositive as to whether the City had rebutted the State's prima facie showing of entitlement to summary judgment.).

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[1] In its responses to the State's and the United States' summary judgment motions, *amicus* El Paso County Water Improvement District No. 1("EPCWID") has failed to comply with the Court's order requiring that it identify the party whose position it supports. *See* April 13, 2012 Order Regarding Motion of EPCWID to Make Filing in Stream System Issue 104. Instead, EPCWID has submitted its own argument opposing the positions of both the State and the United States. EPCWID has not complied with the Court's order and the State is not replying to EPCWID's filing.

[2] On pages 4 through 7 of its response, the United States purports to respond to the "state of New Mexico's statement of undisputed material facts." In fact, the United States responds to the executive summary of the State's theory of the case, on pages 1 through 3 of its supporting memorandum. The United States has failed to contest any of the State's listed undisputed material facts on pages 3 through of 11a of the State's supporting memorandum.

Based on the material facts admitted by the United States and other respondents, the State's supporting memorandum establishes a prima facie case for summary judgment as follows:

(1) 1891 N.M. Laws, chapter 71, Section 1 required that every person, association or corporation constructing any ditch, canal or feeder for any reservoir taking water from any natural stream file in the office of the probate clerk of the county in which such projects were situated a sworn statement showing the name of the reservoir, point of diversion, names of the owners and other requisite information concerning the project and expressly provided that "no priority of right for any purpose shall attach to any such construction, change or enlargement until such record is made." The United States filed no sworn statements concerning construction of the Rio Grande Project, pursuant to 1891 N.M. Laws, chapter 71, Section 1. State's Undisputed Material Facts nos. 8 and 9;

(2) Even if 1891 N.M. Laws, chapter 71, § 1 did not apply to the United States, construction of the Rio Grande Project was not authorized by the Secretary of the Interior, as required by the Reclamation Act of 1902 and the February 25, 1905 Rio Grande Project Act, until, at the earliest, December 2, 1905. State's Undisputed Material Facts nos. 6 and 7;

(3) Subsequent to the Secretary of the Interior's December 2, 1905 approval of construction of the Leasburg Diversion Dam and Canal, in conformance with 1905 N.M. Laws, chapter 102, § 22, the United States provided notice to the Territory of New Mexico of its intended appropriation of surface waters of the Rio Grande for the Rio Grande Project by the letter that it submitted to the New Mexico Territorial Irrigation Engineer, dated January 23, 1906. That letter specified utilization by the Rio Grande Project of 730,000 acre-feet of surface waters diverted from the Rio Grande per annum and storage of such water for the Project at a

dam near Engle, New Mexico, with capacity of 2,000,000 acre-feet. State's Undisputed Material Fact nos. 6, 7, 10 and 11;

(4) Pursuant to 1907 N.M. Laws, chapter 49, § 40, the United States provided an additional supplemental notice of its intended appropriation of surface waters of the Rio Grande for the proposed Rio Grande Project, by the letter it submitted to the New Mexico Territorial Engineer dated April, 1908. That letter specified utilization by the Project of all the unappropriated waters of the Rio Grande and its tributaries and storage of water for the Project at a dam near Engle, New Mexico, with capacity of 2,000,000 acre-feet. State's Undisputed Material Facts nos. 12 and 13;

(5) The Rio Grande Compact, approved by the State of New Mexico on March 2, 1939, contains provisions modifying elements of the United States' Rio Grande Project right. Specifically, the Compact provides for (a) a maximum storage amount for the Project of 2,638,860 acre-feet, thus increasing the amount of storage specified in the United States' 1906 and 1908 notices by 638,860 acre-feet and (b) a normal annual release of Project water of 790,000 acre-feet, placing limits on the Project's ability to store water when annual releases of usable water exceed this amount. State's Undisputed Material Facts nos. 14 and 15.

There is no genuine issue as to the material facts set out in the State's supporting memorandum and the United States in its response fails to show why the State is not entitled to judgment as a matter of law. The State therefore respectfully requests that the Court grant its Motion for Summary Judgment.

II. Priority Dates:

The State's summary judgment motion asks the Court to adjudicate the following priority dates for the Rio Grande Project ("Project"):

Right to Store:

a. January 25, 1906 : Storage of water diverted from the Rio Grande not to exceed 2,000,000 acre-feet with the right to fill and refill.

b. March 2, 1939: Storage of water diverted from the Rio Grande not to exceed 638,860 acre-feet with the right to fill and refill.

Right to Release from Storage:

a. January 25, 1906: 730,000 acre-feet per year.

b. April 30, 1908: 60,000 acre-feet, or as otherwise provided for by the Rio Grande Compact.

A. There is a Clear Basis in Law for the Three Priority Dates for the Project Assigned by the State's Summary Judgment Motion

The United States objects to the assignment of multiple priority dates for its Project right, stating:

> [T]he State and the City propose to impose multiple priorities on what is and always has been one unified Reclamation Project. We are unaware of any other state-based storage rights with different priorities for the water stored and the water released." United States Response at 2.

The United States is incorrect. The State's assignment of three priority dates for the Project is a function of multiple acts affecting the United States appropriation for the Project and is fully justified by undisputed facts. Similarly, multiple priority dates were adjudicated for the Carlsbad Project, the other Reclamation Project in New Mexico, based on multiple appropriations contributing to the right for that Project. *See* the December 10, 2004 Partial Final Decree in *State of New Mexico v. Lewis*, for the Carlsbad Irrigation District Sub-Section of the Pecos adjudication, attached as "Exhibit B" to Verde's Response to United States' Motion for Summary Judgment and Response to State of New Mexico's Motion for Summary Judgment,

adjudicating priority dates of 1888, 1906, 1915 and 1919 for various components of the Carlsbad Project right. [3]

As outlined in the State's supporting memorandum, the priority dates in the State's summary judgment motion and offer of judgment to the United States are premised on three distinct events: (1) the United States' notice of appropriation dated January 23, 1906; (2) the United States' supplemental notice of appropriation dated April, 1908; and, (3) the date of New Mexico's approval of the Rio Grande Compact, March 2, 1939. As is the case with the United States' adjudicated rights in the Carlsbad Project, it is not uncommon for the rights of a single entity to be assigned multiple priority dates, based upon differing dates of appropriation for components of their rights. *See Waters of the Umatilla River*, 168 P. 922, 925 (Or. 1917) (adjudicating priority dates of 1894, 1904 and 1905 for the United States' Umatilla Basin Project); *In re Water Rights of Crab Creek and Moses Lake*, 235 P. 37, 42 (Wash. 1923) (adjudicating multiple priority dates for the same water right owner based on dates of notices of appropriations of water for irrigation of different tracts).

B. By Their Plain Language, New Mexico's 1905 and 1907 Notice Statutes Set the Priority for Appropriations by the United States

The United States asserts that "[t]he 1905 and 1907 New Mexico [notice] statutes provided for the filing of notices and not the appropriation of water, which may relate back to a first step to appropriate." United States at 5 – 6. This ignores the plain language of both the 1905 and 1907 statutes, providing for the filing of notices by the United States to utilize certain specified water "unappropriated at the date of such notice" and protecting such specified water from adverse claims. *See* State's Response in Opposition to the United States' Motion for

[3] The February 2, 1906 priority date for the Carlsbad Project right is based on the date of filing of the United States' notice for the Carlsbad Project. The other priority dates reflect the priority dates for existing storage rights acquired by the United States for the Carlsbad Project.

Summary Judgment ("State's response) at 5 – 6, disputing the United States' Fact No. 14, and 21 – 22.

C. The State's Assignment of the 1939 Date of the Rio Grande Compact for Components of the United States Project Right Is Consistent With Specific Provisions of the Compact and in Accord With State Law

The United States contends that "[t]he Compact did not modify the United States' appropriation of water for the Rio Grande Project." United States at 7. This ignores explicit provisions of the Compact concerning the storage amount for the Project and the normal amount of stored water available for release for use in the Project. Without the incorporation of Article I (k) of the Compact into the adjudication of the Project right, the United States' right to store water would be limited to the 2,000,000 acre-feet specified in its 1906 and 1908 notices. *See* State's supporting memorandum at 22 – 23, citing to the rule limiting the right of the appropriator to the amount of water claimed in the notice, and State's response at pages 6 – 8, disputing the United States' Fact No. 15. Similarly, Articles VII and VIII of the Compact designated the previously undetermined normal amount of water for release from Project storage. *See* Attachment G to Affidavit of Eluid L. Martinez, Exhibit 1 to City of Las Cruces' Brief in Support of Motion for Summary Judgment on Priority Date and Amounts of Water for United States' Rio Grande Project Right, October 4, 1940 letter from New Mexico State Engineer Thomas M. McClure to F. S. Merrian.[4]

There is, in fact, precedent for determining priority for the Rio Grande Project based on the approval date of the Compact. In *El Paso County Water Improvement Dist. No. 1 et al. v. City of El Paso*, 133 F.Supp. 894 (W.D. Texas, El Paso Division, 1955), *aff'd in relevant part*,

[4] "Although the original government reservation was for 730,000 acre-feet, the amount was subsequently amended to include all unappropriated waters of the stream. The amount reserved has thus been an undetermined amount until the drafting and signing of the Rio Grande Compact, March 18, 1938. At that time the normal release from storage for project use was fixed at an average of 790,000 acre-feet annually."

243 F. 2d 927 (5th Cir. 1957), *cert. denied*, 355 U.S. 820 (1957), discussed in the State's supporting memorandum, the west Texas federal district court rejected the contention of EPCWID and the United States that their rights for the Project in Texas were established by means of the 1906 and 1908 notices submitted by the United States to the State of New Mexico. Instead the court ruled that under Texas law, "all of the appropriative water rights advanced by the City are either without reality or else must yield to the paramount disposition made by the Rio Grande Compact," effectively holding that the priority of the Project in Texas was established by virtue of the Compact. *Id.* at 910.

In their notice of appeal from the court's ruling, EPCWID and the United States asserted that:

> [A]ll of the waters of the Rio Grande and its tributaries in New Mexico unappropriated under the general appropriation laws of the Territory at the time of the filing by the United States of the Notice of January 23, 1906, supplemented by the Notice of April _____, 1908, were by such notices definitely committed before May 31, 1939, the effective date of the Rio Grande Compact, to the primary service of the Rio Grande Project, including that portion thereof lying within the State of Texas. State's Memorandum in Support of Motion for Summary Judgment at 17.

The Fifth Circuit Court of Appeals upheld the district court's ruling and the United States Supreme Court denied certiorari. Since the storage amount and release amount for the Project were modified by the Compact, it is wholly appropriate to apply the approval date of the Compact to those modifications to the Project right affected by the Compact.

D. The General Law of Relation Back Does Not Entitle the United States to a 1903 Priority Date

In its response, the United States asserts that the Project's priority date is determined by application of the "common law relation-back doctrine of New Mexico and the Territory of New Mexico." United States at 11. The State addressed this contention in its response to the United States' summary judgment motion, providing specific reasons why actions taken by the United

States in 1903 did not satisfy the predicates necessary to establish a "first step" under the general law of relation back. State's response at 16 – 20.

As an initial matter, New Mexico's 1891 notice statute, 1891 N.M. Laws, chapter 71, § 1, in effect until 1905, required the filing of sworn statements with county probate clerks concerning construction of irrigation works, and provided that "no priority of right for any purpose shall attach to any such construction, change or enlargement until such record is made." In his 1901 treatise on the law of irrigation, Joseph R. Long addressed the purpose for the enactment of notice statues modifying the doctrine of relation back as follows:

> Questions of priority under this rule, as well as the original capacity, etc., of ditches, depended chiefly on oral testimony, – that is, on the memory of eye witnesses, often at fault through lapse of time,– so that confusion and insecurity of vested rights resulted. It was to obviate this confusion and insecurity that the statutes were enacted.
> JOSEPH R. LONG, A TREATISE ON THE LAW OF IRRIGATION § 39 (1901), copy attached as "Exhibit 1."

As with notice statutes other in western states, New Mexico's 1891 statute was enacted for the purpose of avoiding the confusion and uncertainty attendant to claims of priority under the general law of relation back.[5]

In its response, the United States argues that the 1891 statute is inapplicable for four reasons:

(1) "The Act only applies to 'constructing or enlarging any ditch, canal or feeder for any reservoir.' It does not apply to the construction of dams and reservoirs, and therefore is irrelevant to the construction of Elephant Butte dam and storage of water in Elephant Butte Reservoir.";

(2) "The [1891] Act does not affect any vested rights for any ditches used for the public," citing to language in § 2 of the 1891 notice statute;

(3) The "statute applies to 'every person, association, or corporation' and makes no mention of the United States or its officers, and,

[5] As noted in the State's supporting memorandum at 8, n. 3, New Mexico's 1891 notice statute was subject to Section 7 of the September 9, 1850 Organic Act Establishing the Territory of New Mexico, 9 Stat. 466, providing that "[a]ll the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and if disapproved shall be null and of no effect." Congress did not disapprove the statute.

(4) Even if applicable to the federal government, no federal statute subjected the United States to territorial law regarding the control, appropriation, use, or distribution of water prior to the passage of the 1902 Reclamation Act. United States at 14 – 15.

With respect to the United States' first argument, construction of a system of canals for delivery of water released from storage was an integral part of the Rio Grande Project. The United States' 1906 and 1908 notices reference downstream diversion dams. The document relied upon by the United States as providing authorization for the Project by the Secretary of the Interior approved the construction of the Leasburg Canal for delivery of water diverted from the Rio Grande at the Leasburg Diversion Dam. *See* the State's Undisputed Material Facts Nos. 6 and 7. Other canals, in addition to the Leasburg Canal, were constructed by the United States for the Project. *See* State's Reply to the City of El Paso at 8, concerning construction of the West Side Canal. Since the Rio Grande Project required construction (or enlargement) of a system of canals for delivery of water, the 1891 notice statute clearly applied to the Project.

The United States' second argument for why the 1891 statute did not apply, that the Act "did not affect any vested rights for any ditches used for the public," also fails. Although existing ditches ultimately were acquired by the United States and integrated into the water delivery system for the Project, the United States acquired no vested rights to the use of water by these acquisitions. *See* Exhibit 20 to State's Response to United States Motion for Summary Judgment. The United States' acquisition of existing ditches in no way excused it from the obligation to comply with the 1891 notice statute.

Third, the United States appears to argue that the language describing entities to file notice under the statute - - "every person, association or corporation" - - did not apply to the United States. As to the apparent contention that that the 1891 statute did not apply to the United States, Section 8 of the Reclamation Act requires the United States to stand in the same

shoes as any other appropriator.[6] As discussed in the State's response, the United States complied with a South Dakota statute containing language describing entities required to file notices similar to New Mexico's 1891 notice statute in connection with its appropriation for the Belle Fourche Reclamation Project. This indicates the United States' acquiescence in the applicability to the United States of such state and territorial laws pertaining to appropriation of water. State's response at 15 – 16.

With respect to the United States' fourth argument, that no statute subjected the United States to territorial law regarding appropriation of water prior to the passage of the 1902 Reclamation Act, the United States now claims a priority date of March 1, 1903 for the Project, after enactment of the Reclamation Act. The Reclamation Service clearly was subject to state and territorial laws pertaining to the appropriation of water at that that time.[7]

The United States also asserts that "the State ignores the central premise of the doctrine of relation: if intent through physical first steps precede statutory notice requirements, the right relates back to the date of the first steps." United States' response at 12. In its response to the United States' Motion, the State disputes, as a matter of law, that the actions taken by the United States in 1903 constituted a "first step" under the general law of relation back and incorporates this argument into its reply. State's response at 16 – 20. Additionally, the United States' characterization of the "central premise of the doctrine of relation" overlooks the central function

[6] "According to Representative Mondell, the principal sponsor of the reclamation bill in the House, once the Secretary determined that a reclamation project was feasible and that there was an adequate supply of water for the project, "the Secretary of the Interior would proceed to make the appropriation of the necessary water *by giving the notice and complying with the forms of law of the State or Territory in which the works were located* . The Secretary of the Interior could not take any action in appropriating the waters of the state streams 'which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands.'" (emphasis added in quoted opinion) (internal citation omitted). *California v. United States*, 438 U.S.645, 666, 98 S.Ct. 2985, 2996 (1978).

[7] The State disputes the United States' assertion that it was not required to follow state law in the acquisition of non-federal reserved water rights prior to 1902. "Generally, water rights must be obtained by appropriation under state water law, even if those rights are developed in land owned by the federal government." *State ex rel. State Engineer v. Comm'r of Public Lands*, 2008-NMCA-004, ¶ 15, 145 N.M. 433, 440, *cert. denied*, 145 N.M. 531 (2008), *cert. denied*, 129 S.Ct. 2075 (2009).

of the "first step" in establishing relation back of a right to the use of water: "giving notice . . . of the building of the contemplated system for the irrigation of land." *Farmers' Dev. Co. v. Rayado Land & Irrigation Co.*, 1923-NMSC-004, ¶ 26, 28 N.M. 357, 369, citing to KINNEY ON IRRIGATION (2d Ed.), § 747. In an early case discussing the doctrine of relation back, *Fruitland Irrigation Co. v. Kruemling*, 162 P. 161 (Colo. 1916), the Colorado Supreme Court noted that the primary purpose of the first step is to provide notice to others of the intended appropriation, writing:

> Certainly the first step demanded by the rule is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue and within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such a character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand upon the water supply involved. *Id.* at 165.

Assuming that the United States' initial surveying work at Elephant Butte in 1903 put anyone on inquiry as to the possible construction of a reclamation project at Elephant Butte, such inquiry would have established that: (1) The United States Reclamation Service was engaged in investigations to consider whether to construct either a proposed storage dam and reservoir near El Paso, Texas, diverting no water for irrigation of lands in New Mexico, or a possible storage dam and reservoir at the Elephant Butte site; (2) Congress had not authorized construction of reclamation projects to irrigate lands in Texas; and, (3) the Secretary of the Interior had not determined that construction of a reclamation project at Elephant Butte was practicable, as required by Section 4 of the Reclamation Act to initiate construction of reclamation projects.[8] Such inquiry would not have uncovered the "fixed purpose" required by the relation back

[8] "That upon the determination of the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same . . . ." 32 Stat. 390.

doctrine on the part of the United States to diligently pursue and acquire a right to the use of water for the Rio Grande Project at Elephant Butte.

E. The United States is Judicially Estopped From Claiming a Priority Date for the Project Earlier than January 25, 1906

The United States contends that this is the first time the United States' Project right is being adjudicated and that, since none of the United States' prior assertions that the 1906 and 1908 notices were the basis for the Project right led to a court judgment recognizing the United States' Project water rights, the United States cannot be said to have "successfully assumed" this position in a prior judicial proceeding. United States Response at 13 – 14. This hair splitting misses the mark. The cases cited by the State necessarily required a determination that the United States had appropriated water for the Project, and in those cases the United States succeeded in persuading the courts to adopt its position that the water for the Project was appropriated by virtue of its 1906 and 1908 notices. *See Bean v. United States*, 163 F. Supp. 838 (Ct. Cl. 1958) (the United States appropriated water for the Rio Grande Project by means of the 1906 and 1908 notices and plaintiffs failed to acquire rights to that water); *Hunter v. United States*, 159 Ct. Cl. 356 (1962) (appropriations of water for the Project made by the 1906 and 1908 notices necessarily included the right to incidental seepage). Since, in earlier judicial proceedings, the United States successfully assumed the position that its rights for the Project were established by virtue of its 1906 and 1908 notices, it is judicially estopped from asserting a contrary position in this proceeding.

F. Priority for the United States' Storage Right is Based On the Storage Capacity Specified in Its Notices and the Date of the Expanded Storage Amount Effected by the Rio Grande Compact

The United States response contends both that it "is entitled to a 2,000,000 acre-feet storage right with a priority of 1903, not 1906" (United States Response at 15 – 16) and that

"[w]hen Project construction began, the potential storage volume was 2.6 million acre feet [maf]. That is the dam that was eventually built to hold the entire flow of the river. Under the doctrine of relation, the 2.6 maf of storage relates back to 1903 when first steps were taken to appropriate water for the Project." United States at 16. Since the United States failed to file a sworn statement as required by 1891 N.M. Laws, chapter 71, § 1 and since, in any event, the United States' actions in 1903 did not constitute a first step in the appropriation of water as a matter of law, either one of these conflicting contentions must be denied.

In response to the assignment of a priority date of 1939 for the additional 638,860 acre-feet of storage provided for in the Rio Compact in the State's summary judgment motion, the United States notes that "there is no mention in the Compact of a Rio Grande Project priority date." United States Response at 16. As discussed in the supporting memorandum to the State's Motion for Summary Judgment, in addition to establishing the priority date, a function of a notice of appropriation is to limit the right of the appropriator to the amount of water claimed in the notice. State's supporting memorandum at 22 – 23. The United States never supplemented its notices to specify a quantity of storage in excess of the 2,000,000 acre-feet specified in its 1906 and 1908 notices. If, as the United States contends, the date of the Compact cannot be utilized as the basis for the additional storage amount in excess of 2,000,000 acre-feet specified in its notices, there is no basis in law for a decree adjudicating this additional amount of storage. Given the amount of water designated for storage by the Compact, such a result would be nonsensical. Where specific provisions of the Compact serve to define or condition the Project right, it is entirely appropriate to integrate these provisions into the adjudication of the Project right. See discussion of *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, above.

In its response, the United States goes on to claim that "[t]he reason priority is absent from the Compact is because priority is irrelevant for Compact purposes. New Mexico is obligated under the Compact to ensure deliveries of surface water into Elephant Butte and 'the delivery obligation of New Mexico is superior to the rights of the claimants alongside the Rio Grande upstream from Elephant Butte Dam.'" United States at 16 (quoting *Elephant Butte Irr. Dist. v. Regents of New Mexico State University*, 115 N.M. 229, 236, 849 P.2d 372. 378 (1993)). The State agrees that priority is irrelevant to New Mexico's delivery obligations under the Compact. This is why the State's summary judgment motion provides, with respect to the amount of water for storage, that the United States may "continuously fill and refill, consistent with the provisions of the Rio Grande Compact." State's Summary Judgment Motion at 2. New Mexico's delivery obligations at Elephant Butte are defined by the Compact and the United States and Project members cannot assert priorities against water right owners upstream from Elephant Butte Dam. The right of the Project to store water is limited by the amount of New Mexico's deliveries to Elephant Butte as provided for by the Compact. The United States, however, provides no explanation for why specific provisions of the Compact that newly defined or conditioned the elements of the Project right should not be assigned the date of the Compact for purposes of priority.

III. Amounts of Water:

A. Where Conditions Apply to the Amount of Water Available for Release from Storage it is Appropriate to Include Such Conditions in the Adjudication of the Storage Right

The United States contests paragraph B (2) of the State's summary judgment motion providing that "[a] normal annual release of 790,000 acre-feet, or as otherwise provided for by the Rio Grande Compact, may be made from usable water in Project storage." Instead, the United States argues that "[t]he right to release water from storage is not an element of a water

right; the right to release Project water is contractual and governed by federal law." United States' Response at 17. Here again, the United States denies the applicability of specific provisions of the Compact to the Court's determination of the Project right.

As discussed in the State's supporting memorandum, and again in its response to the United States' summary judgment motion, Article VIII of the Compact provides for a "normal release of 790,000 acre-feet" and Article VII, by increasing the amount of water available for storage upstream in New Mexico, limits the amount of water available for Project storage where this normal annual release is exceeded. State's supporting memorandum at 30 – 31, State's response to the United States at 20. The United States correctly points out that the 790,000 acre-feet normal release is designated in Article. VIII of the Compact as a baseline to define New Mexico's obligation to release debit water from upstream storage. But the United States ignores the constraints Article VII places on its right to store water, and the increased ability of New Mexico to store water upstream, when releases of usable water from storage exceed the normal amount of 790,000 acre-feet per year. *See* State's Undisputed Material Fact No. 16. Acknowledgment of the 790,000 normal annual release amount designated in the Compact in this Court's determination of the Project right will not prohibit releases of usable water in excess of that amount, as the United States appears to contend. It will, however, incorporate a condition on releases of Project water that is "necessary to define the right and its priority." NMSA 1978, § 72-4-19 (1907).[9]

[9] In other contexts, the United States does not hesitate to acknowledge that the normal annual release amount for the Project is defined as 790,000 acre-feet. The 2008 Operating Agreement for the Project, entered into by the United States, EBID and EPCWID, copy of relevant portion attached as "Exhibit 2,"contains the following provision:

> **1.1 Normal Annual Release**
>
> A Normal Annual Release from Project Storage for all authorized uses is 790,000 acre-feet as measured at the first gauging station downstream from Caballo Dam. It is possible that during any Water Year the aggregate quantity of water released for EBID and EPCWID, and for the United

The United States complains that the State has cited to no authority holding that a water right involving storage and application to beneficial use must be further defined by a right of release. United States' response at 17. In fact, in appropriate circumstances, conditions on releases from storage are contained in adjudication orders for storage rights in other stream adjudication in New Mexico. For example, in the adjudication of the Mimbres Stream System and Underground Water Basin, the Court's decree for the storage right at Bear Canyon Reservoir, which impounds water tributary to the Mimbres River for irrigation of downstream lands, provides for release from storage of specified water above a certain elevation "during such periods and at such rates as designated by the Mimbres River Water Master." *See* December 13, 2010 Order Voiding and Correcting Subfile Orders for Storage of Water in Bear Canyon Reservoir, *Mimbres Valley Irrigation Co. v. Salopek et al.*, No. 6326, N.M. 6th Judicial Dist. Ct., copy attached as "Exhibit 3." Conditions on release amounts are also included in New Mexico State Engineer permits for storage projects.[10] The United States does not cite, and the State is unaware of, any rule of law precluding adjudication of conditions on amounts of water for release from storage. The State does not argue with the United States' assertion that its releases water from storage are made under contracts with the districts in the Project entered into pursuant to Reclamation law. This, however, does not remove the necessity of adjudicating the Project storage right in a manner consistent with the provisions of applicable law, including the Rio Grande Compact.

States (pursuant to the Convention of 1906), including release of carryover water for EBID and EPCWIC, may be more or less than the Normal Annual Release of Project Water from Project Storage of 790,000 acre-feet.

[10] See, for example, conditions of State Engineer Surface Permit No. 2838, approved August 29, 1989 ("The diversion and consumptive use of water from San Juan Coal Company's Dam C as described under this permit and the points of diversion authorized by permit 2838 . . . combined under this permit shall not exceed 446 acre-feet per annum."), copy attached as "Exhibit 4."

B. There is No Legal Basis for According Full Faith and Credit to the Texas Adjudication Decree

In the supporting memorandum to its motion for summary judgment, the United States asserted that "New Mexico should give full faith and credit to the Texas judicial decision and decree" for the Texas facility of the Project. United States supporting memorandum at 28. The State's response provided practical and jurisdictional reasons for why according full faith and credit to the Texas decree in the New Mexico adjudication is not warranted. State's response at 29 – 30. In its response to the State's summary judgment motion, asserting that "New Mexico state law doctrines cannot be used to undermine the historic deliveries of water under the Rio Grande Compact," the United States continues to urge the Court to give full faith and credit to the right to a diversion allocation at Project diversion dams in Texas of up to 376,000 acre-feet per year, plus delivery to Mexico. United States' response at 3 – 4.[11]

The State's response noted that "it makes no sense that the Texas adjudication decree, involving rights developed in Texas pursuant to Texas law, should govern this New Mexico stream adjudication court's determination of the United States' appropriation of New Mexico water under New Mexico law, or mandate inclusion in the New Mexico adjudication of a Texas based water right for water uses in Texas." State's response at 30. Additionally, to the extent the United States and others contend that the Texas decree must control in determining rights to the use of water in New Mexico, this is incorrect as a matter of law. "[O]ur courts have recognized water rights as real property interests to which all the rules of real property apply." *Walker v. United States*, 2007-NMSC-038, ¶ 39, 162 P.3d 882, 893. Neither the State of New

[11] In its response, the United States also, and without clarifying explanation, notes that Section 8 of the Reclamation Act provides that "nothing [in the Act] shall in any way affect any right . . . of the Federal Government. . . in, to, or from any interstate stream or waters thereof." United States response at 11. This provision does not accord special status to the United States' interests in reclamation projects providing water for irrigation of lands in two or more states: "[T]he interstate stream provision of Section 8 was intended to make clear that the Reclamation Act should not be construed to affect a then-pending equitable apportionment dispute between two states in the Supreme Court." *United States v. City of Las Cruces*, 289 F.3d 1170, 1184 (10th Cir. 2002).

Mexico nor water right owners in New Mexico in general were parties to the Texas adjudication.[12] Any jurisdiction asserted under the Texas decree over property in New Mexico is therefore *in rem*, not *in personam*. Under both Texas and New Mexico law, *in rem* decrees purporting to affect title to out-of-state property are not entitled to full faith and credit. *Willis v. Willis*, 1986-NMSC-035, ¶ 7, 104 N.M. 233, 235 ("In rem decrees which affect title to out-of-state property ordinarily are not entitled to full faith and credit, res judicata, or comity considerations."); *McElreath v. McElreath*, 345 S.W.2d 722, 733 (Tex. 1961) ("It seems settled that the situs state is not required to give full faith and credit to the judgment of a sister state which purports to act in rem and would directly affect the title to land in the situs state."). This is not to say that the rights of the Project are not protected under New Mexico law. Consistent with Section 8 of the Reclamation Act, historic deliveries of water by the Project in New Mexico have been made pursuant to New Mexico law. As previously noted by the State in this proceeding, remedies are available under New Mexico law to protect the United States' Project right as ultimately adjudicated.[13] There is, however, no basis in law to grant full faith and credit to the Texas decree.

II. Conclusion:

The United States has failed to establish a genuine issue as to any of the material facts set forth by the State. As a matter of law, based on the undisputed facts, the State is entitled to

---

[12] In addition to the United States, EPCWID, and the City of El Paso, the Texas decree adjudicates the claims of only five additional claimants, none of whom are situated in New Mexico.

[13] In its response to the United States' and the State's Motions for Summary Judgment, the Verde entities assert that "the United States does not have the right to enforce its priority date against junior users" because it is not a beneficial user of water. Verde response at 16 – 17. Verde cites to the Partial Final Decree in *State of New Mexico ex rel. State Engineer v. L T Lewis*, et al., adjudicating to the United States a right to diversion and storage only. Verde response at 10. The State, which agrees with most of Verde's response, does not agree with this analysis and notes that the court in the *Lewis* case ruled that "[t]he United States, on behalf of the member s of CID and in order to protect the United States' diversion and storage rights in connection with Project water, has the right to issue priority calls." January 7, 2002 Decision and Order, *State of New Mexico ex rel. State Engineer v. L T Lewis*, et al., Cause Nos. 20294 and 22600 Consolidated, at 7, copy of pertinent part attached as "Exhibit 5."

judgment adjudicating the amounts of water and priority dates for the United States' right in the Rio Grande Project as described in the State's summary judgment motion. The State respectfully requests that the Court grant its Motion for Summary Judgment.

Respectfully submitted,

By: _____

Francis L. Reckard
Laurel A. Knowles
Special Assistant Attorneys General
P.O. Box 25102
Santa Fe, New Mexico 87504
(505) 827-6150 / 827-3887
Attorneys for the State of New Mexico
ex rel. Office of the State Engineer

A TREATISE

ON THE

LAW OF IRRIGATION

COVERING
ALL THE STATES AND TERRITORIES

WITH AN

APPENDIX OF STATUTORY LAW

BY
JOSEPH R. LONG, A. B., B. S., LL. B.
OF THE DENVER BAR

ST. PAUL
KEEFE-DAVIDSON LAW BOOK CO.
1901

the record of a notice, where there is no law authorizing the recording of such notice, is of no force or validity. It imparts no notice, and is not a step in making the appropriation. A certified copy of such record is therefore not admissible in evidence.[73]

The posting of a second notice is not an abandonment, but an assertion of the original claim, where the appropriator has diligently pursued the work of appropriation.[74]

§ 38. Same—What is a Sufficient Notice.

A notice of appropriation should, of course, contain all the recitals called for by the statute, and the posting of a notice which does not conform to the requirements of the statute confers no rights upon the person posting it as an appropriator of the water claimed.[75] But a substantial compliance with the statute will be sufficient. No particular form of notice is required, and it seems that the notice is sufficient if it contains enough to put other persons on inquiry as to the rights of the party posting it. Notices are liberally construed in favor of the party by whom they are posted.[76]

§ 39. Same—Appropriation Without Posting of Notice.

The statutes requiring the posting of a notice expressly provide that, by a compliance with the requirements as to posting the notice, and actually diverting and using the water, the right of the claimant or appropriator to the use of the water shall relate back to the time of posting the notice, but that a failure to comply with these requirements deprives the

[73] Cruse v. McCauley, 96 Fed. 369.

[74] Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571.

[75] Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408.

[76] Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571; Floyd v. Boulder Flume & Mercantile Co., 11 Mont. 435, 28 Pac. 450.

claimant of the right to the use of the water as against a subsequent claimant, who complies therewith. Several cases have arisen in which the rights of actual appropriators, who have not complied with the requirements of the statute, have been adjudicated. To determine rightly the effect of noncompliance with the statutes, it is important to keep in mind the purpose of the legislatures in enacting the statutes. Prior to the passage of these acts, the actual diversion of water, and its application within a reasonable time to a beneficial use, constituted a valid appropriation of water, and it was the well-established rule that, where the appropriator pursued the work of appropriation with reasonable diligence, his rights related back to the time of commencing the work. Thus, as between two appropriators diverting water at the same time, prosecuting the work with reasonable diligence to completion, and the one who first began work had the prior right, although the other may have completed his work first. This is known as the doctrine of "relation back," which will be further considered in a subsequent section.[77]

Questions of priority under this rule, as well as of the original capacity, etc., of ditches, depended chiefly on oral testimony,—that is, on the memory of eye witnesses, often at fault through lapse of time,—so that confusion and insecurity of vested rights resulted. It was to obviate this confusion and insecurity that the statutes were enacted. Notice was required to be posted at the place of intended diversion, to apprise others who contemplated the acquisition of water rights from the same stream that the claimant posting the notice had taken the initial step in making his appropriation, while a record of such appropriation was required in order to pre-

[77] See post, § 51.

serve reliable evidence of the appropriator's rights. It was not intended that one who failed to comply with the statutory requirements, but who, in the absence of any conflicting adverse right, had actually diverted water, and put it to beneficial use, should acquire no title thereby. The statutes did not change the rule as to what constitutes an appropriation, but their object was simply to preserve evidence of the appropriator's rights, and to regulate the doctrine of relation back.[78]

In accordance with these principles, it is held that one who fails to comply with the statutory requirements, but who actually diverts water and applies it to a beneficial use, in the absence of any conflicting adverse claim, acquires a valid title thereto, which cannot be divested by another appropriator, who complies with the terms of the statute after the former has completed his appropriation.[79] In such case, however, the completion, and not the commencement, of the work of appropriation determines the time when the right of the appropriator becomes vested; and as between two appropriators, neither of whom has complied with the statute, the one who first completes his ditch and uses the water has the superior right, although the other may have commenced work first.[80] As to the effect of the statutes then we observe that, where the statutory requirements have been complied with, the law of relation is the same as it was prior to the statutes, but the stat-

[78] See opinion of Buck, J., in Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[79] De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[80] Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

OPERATING AGREEMENT

FOR THE RIO GRANDE PROJECT

THIS OPERATING AGREEMENT (" Agreement ") is entered into this 10th day of March, 2008, by and among the United States of America, by and through the Bureau of Reclamation (" United States " or " Reclamation " or " USA ") acting pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 390, as amended and supplemented; the Elephant Butte Irrigation District (" EBID "), an irrigation district and a quasi municipal corporation in the State of New Mexico, incorporated and organized under New Mexico law, N.M.S.A. 1978, § 73 10 1 et seq. (1985 Repl. Pamp.); and the El Paso County Water Improvement District No. 1 (" EPCWID "), a political subdivision of the State of Texas, under Art. XVI, § 59 of the Texas Constitution (collectively, " the Parties " to this Agreement).

NOW THEREFORE, the Parties recognize the following terms and conditions to constitute an operational plan for the Rio Grande Project and the Parties agree as follows:

1 DEFINITIONS

When used in this Agreement, unless otherwise distinctly expressed or manifestly incompatible with the intent hereof, the following definitions shall apply:

1.1. Normal Annual Release

A Normal Annual Release from Project Storage for all authorized uses is 790,000 acre-feet as measured at the first gauging station downstream of Caballo Dam. It is possible that during any Water Year the aggregate quantity of water released for EBID and EPCWID, and for the United States (pursuant to the Convention of 1906), including release of Carryover Water for EBID and EPCWID, may be more or less than the Normal Annual Release from Project Storage of 790,000 acre-feet.

1.2. Project-Authorized Acreage

There are 159,650 authorized acres within the Project. Of the Project Authorized Acreage, 90,640 acres are within EBID and 69,010 acres are within EPCWID.

1.3. Project Storage

Elephant Butte Reservoir, Caballo Reservoir, and such additional storage facilities (less flood control space) as may be authorized by Congress or provided for pursuant to the Rio Grande Compact (Act of May 31, 1939, 53 Stat.785).

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EXHIBIT

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IN THE SIXTH JUDICIAL DISTRICT COURT
LUNA COUNTY
STATE OF NEW MEXICO

FILED IN OPEN COURT
DATE 12/13/10 at 12:05 pm
DISTRICT JUDGE
No. 6326
J. Norman Hodges,
Judge Pro Tempore

MIMBRES VALLEY IRRIGATION CO.,

Plaintiff,

v.

TONY SALOPEK, et al.,

Defendants,

STATE OF NEW MEXICO *ex rel.*
New Mexico Office of the State Engineer,

Plaintiff-in-Intervention.

ORDER VOIDING AND CORRECTING SUBFILE ORDERS FOR STORAGE OF WATER IN BEAR CANYON RESERVOIR

This matter having come before the Court on the Joint Motion of the State Engineer and the San Lorenzo Community Ditch to Void and Correct Subfile Orders For Storage of Water in Bear Canyon Reservoir, and the Joint Motion having been fully briefed, and argument having been presented before the Court on November 17, 2010, and the Court being fully advised in the premises and finding that the Joint Motion is well taken HEREBY GRANTS THE JOINT MOTION and ORDERS as follows:

A. Subfile Order 718, entered herein on January 18, 1981, is hereby declared and ordered to be void pursuant to Rule 1-060(B)(4) NMRA 2010.

B. The portions of Subfile Order 559, entered herein on November 1, 1983, providing that additional storage of water by the New Mexico State Game Commission in Bear Canyon Reservoir above assumed elevation 1048 up to assumed elevation 1062 be "subject to the

EXHIBIT
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rights permitted to the San Lorenzo Community Ditch Association" are also declared and ordered to be void pursuant to Rule 1-060(B)(4) and, in place of the voided provisions, and in conformance with the March 12, 1953 License No. 2086 of the New Mexico State Engineer, paragraph I (B) of Subfile Order 559 is hereby amended as follows:

" B. Purpose: Fish propagation and recreation

State Engineer File No.: 2086

Priority: July 15, 1935

Source of Water: Surface waters of the Mimbres River System, from Bear Canyon, a tributary of the Mimbres River.

Point of Diversion: Bear Canyon Reservoir, located in the SE1/4, Sec. 29, T. 16 S., R. 11 W.

Maximum Storage Elevation: Assumed elevation 1048, being equivalent to 6,084.2 feet above mean sea level. As a condition of storage to assumed elevation 1048 for the purpose set forth above, additional storage shall be maintained up to assumed elevation 1062, being equivalent to 6,098.2 feet above mean sea level, to be released during such periods and at such rates as designated by the Mimbres River Water Master, for use as a supplemental source of water for irrigation of lands with appurtenant water rights, as set forth in individual subfile orders and subsequent permits of the State Engineer, on the ditches below Bear Canyon Dam to and including the San Lorenzo Community Ditch.

Maximum Quantity of Water in Storage: Not to exceed 280 acre-feet for fish propagation and recreation. An additional 270 acre-feet may be stored as a supplemental source of water appurtenant to the lands described above."

J. Norman Hodges
District Judge by Designation

Respectfully submitted by:

Francis L. Reckard
Laurel A. Knowles
Special Assistant Attorneys General
New Mexico Office of the State Engineer

and

The Egolf Law Firm, LLC
Counsel for the San Lorenzo
Community Ditch Association

Approved:

Telephonically approved on December 2, 1010
Charles N. Lakins
Counsel for respective members of the
Grijalva, Montoya, Kenly and
Heuchling Ditches

Approved by e-mail on December 1, 2010
Beverly J. Singleman
Counsel for Intervenor Horace L. Bounds, Jr.

Telephonically approved on December 2, 2010
James H. Karp
Special Assistant Attorney General
NM State Game & Fish Department

29AUG89
332782 C

IMPORTANT - READ INSTRUCTIONS ON BACK BEFORE FILLING OUT THIS FORM

(DS)

APPLICATION FOR PERMIT TO CONSTRUCT A ~~FLOOD CONTROL DAM~~ Storage Impoundment

File No. 2838 Date of receipt ~~'88 NOV 1 PM 1 01~~ STATE ENG. HYDR. OFFICE SANTA FE, NEW MEXICO

1. Name of applicant San Juan Coal Company (Retention Dam C)
   Address P. O. Box 561
   City and State Waterflow, NM Zip code 87421

2. Dam hazard classification (SCS criteria) class (a)

3. Dam is to be located on: (a) Name of stream or watercourse unnamed tributary of the Shumway Arroyo.
   (b) Which is a tributary of San Juan River

4. Location of the intake structure of the principal spillway conduit from detention storage: San Juan County. (a) Northeast ¼ Northwest ¼ Southeast ¼ of Section 27, Township 30 North, Range 15 West, N.M.P.M. or (b) within ____ feet of X = ____ feet, Y = ____ feet, N.M.C.S., ____ zone, within ____ Grant.

5. Drainage area characteristics: (a) drainage area 1530 acres; (b) 100-year, 6 hour precipitation 2.10 inches; (c) probable maximum precipitation (PMP), 6 hour storm 11.48 inches; (d) volume of run-off from the 100-year, 6 hour storm 186 acre-feet. (e) volume of run-off from the PMP, 6 hour storm 1377 acre-feet.

6. Properties of detention dam: (a) maximum height above foundation at downstream toe 15 feet; (b) length of crest 1800 feet; (c) width of crest 12 feet; (d) maximum width at base 105 feet; (e) slope of upstream face 3:1; (f) slope of downstream face 3:1; (g) elevation at crest of dam 5228 feet; (h) elevation of emergency spillway crest 5223 feet; (i) elevation of flow line of the intake structure of the principal spillway conduit NA feet; (j) characteristics of emergency spillway, (1) location of the spillway is on the Northwest end of the Dam, (2) width 35 (Bottom Width) feet, (3) maximum capacity 550 cubic feet per second, (4) freeboard above maximum high water line 2.54 feet, (5) cross-sectional area at maximum flow 285 square feet; (k) characteristics of principal spillway condult, (1) size, type and numer of gates NA (2) dimension NA feet, (3) length NA feet, (4) slope NA, (5) Manning coefficient NA, (6) maximum discharge capacity NA cubic feet per second, time to empty the detention reservoir NA hours, (96 hours maximum unless prior approval has been obtained); (l) construction material, etc. fine-grained sandy silts and clays and clayey and silty sands.
   (m) approximate volume of material in dam 42,000 cubic yards, (n) type of construction placed and compacted by scrpaers and sheepsfoot roller.

7.

Height Above Flow Line of Intake Structure	Area of Water Surface, Acres	Storage Capacity, Acre Feet	Remarks and Critical Points
0			Flow line of intake structure
5	51	107	Crest of Spillway
10	51	107	Crest of Dam

8. Additional data or explanations Construction Designs and specifications are included in the Report on the Investigation and Design of Retention Dam C.

9. Estimated costs: Detention dam and appurtenances ... $ 185,000
   Other constructed works ..... $ ____
   Total cost ____ $ 185,000

10. Estimated date to begin construction June 05, 1989
    Estimated date to complete construction June 23, 1989

11. Dam will be constructed under supervision of J. David Deatherage P. E.

12. Signature of Applicant John T. Atteberry VP & Gen Mgr

EXHIBIT 4

ACTION OF STATE ENGINEER

This application to construct a flood control dam is approved provided it is not exercised to the detriment of any others having prior, valid and existing rights to the use of waters of this stream system id. title.

and is not detrimental to the public welfare or contrary to the conservation of water within the state; and subject to the attached conditions of approval.

Witness my hand and seal this _____ day of August 29, A.D., 19 89.

S.E. Reynolds, State Engineer

By: Paul Saavedra

Paul Saavedra, Assistant Chief
Water Rights Division

Instructions

This form shall be filed in triplicate and accompanied by maps, plans, specifications, etc.

Section 1 - Fill in all blanks

Section 2 - Class (a). — Dams located in rural or agricultural areas where failure may damage farm buildings, agricultural land, or township and country roads.

Class (b).— Dams located in predominantly rural or agricultural areas were failure may damage isolated homes, main highways or minor railroads or cause interruption of use or service of relatively important public utilities.

Class (c). — Dams located where failure may cause loss of life, serious damage to homes, industrial and commercial buildings, important public utilities, main highways, or railroads.

Section 3 - Fill in all blanks

Section 4 - Fill in either part a or b

Sections 5, 6, 7 - Fill in all blanks

Section 8 - Fill in if necessary

Section 9, 10 - Fill in all blanks

Section 11 - Construction must be under supervision of registered engineer, consulting engineer firm or government agency.

Section 12 - Signature

FILING FEE - $10.00

CONDITIONS OF APPROVAL

Application No.: 2838 (Dam C)
Applicant: San Juan Coal Company

1. The [redacted] and consumptive use of water from San Juan [redacted] described under this permit and the points of diversion authorized by permit 2838 (approved by the State Engineer on February 8, 1989) combined under this permit [redacted] diversions shall be in accordance with and subject to the conditions of approval of said permit 2838, incorporated herein by reference.

2. Mr. J. David Deatherage, Professional Engineer supervising construction, shall submit a report to the State Engineer by the 10th day of each month. The report shall include a summary of progress, number of materials tests performed and summary of test results.

3. Construction shall be in accordance with approved plans and specifications. Any modification of the approved plans and specifications or design changes must be approved in writing by the State Engineer prior to undertaking such modifications.

4. Upon completion of construction, Mr. Deatherage shall submit to the State Engineer:

   a. a completion report which shall include description of problems encountered and their solution; summary of materials test data and construction photographs;

   c. as-built drawings; and

   d. a certificate that the dam constructed is safe for the intended use.

5. Proof of Completion of Works shall be due in this office on or before August 15, 1991.

DATE APPROVED: August 29, 1989.

S.E. Reynolds
State Engineer

by: Paul Saavedra
Paul Saavedra
Assistant Chief
Water Rights Division

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	Nos. 20294 and 22600 Consolidated
Plaintiffs,	
vs.	
	Hon. Harl D. Byrd District Judge *Pro Tempore*
L.T. LEWIS, et al., UNITED STATES OF AMERICA,	Carlsbad Irrigation District Section
	Carlsbad Basin Section
Defendants,	
and	
STATE OF NEW MEXICO, ex rel, State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	
Plaintiffs,	
vs.	
HAGERMAN CANAL CO., et al.,	
Defendants.	

DECISION AND ORDER

This Decision and Order Addresses The Issues And Matters Requesting Responses Set Forth in the Court's April 6, 2001 Order Re Claims of the United States of America Concerning Its Rights, Duties and Obligations Pertaining to the Diversion and Storage of Project Water and the Rights,

EXHIBIT
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Duties and Obligations of the Carlsbad Irrigation District in Connection With The Distribution of Project Water

THIS MATTER comes on for consideration by the Court in connection with the issues and matters specified in the Court's April 6, 2001 Order (Court's Order) concerning the respective rights, duties and obligations of the United States of America (United States) pertaining to the diversion and storage of water and the distribution of water by the Carlsbad Irrigation District (CID) to its members in connection with the Carlsbad Irrigation District Project (Project).

The Court has reviewed the following:

1. The Court's Order.

2. The UNITED STATES' RESPONSE TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER AND APRIL 6, 2001 (United States' Response) filed on August 1, 2001, insofar as it pertains to the Court's Order.

3. The CARLSBAD IRRIGATION DISTRICT'S RESPONSE BRIEF TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER and APRIL 6, 2001 ORDER (CID's Response) filed on August 1, 2001, insofar as it pertains to the Court's Order.

4. The STATE OF NEW MEXICO'S CONSOLIDATED RESPONSE TO THE COURT'S MARCH 20, 2001 AND APRIL 6, 2001 DECISION AND ORDERS AND THE ISSUES ORDERED TO BE BRIEF THEREIN (State's Response) filed on July 26, 2001 insofar as it pertains to the Court's Order.

5. PVACD's COMMENTS REGARDING 2001 ORDERS (PVACD's Comments)

filed on July 30, 2001 insofar as it pertains to the Court's Order.

6. The TRACYS AND EDDYS RESPONSE TO THE ORDER OF APRIL 5, 2001 (Tract/Eddy's Response) filed on August 1, 2001.

7. The BRANTLEYS' ANSWERS AND BRIEF RESPONDING TO THE COURT'S QUESTIONS IN APRIL OF 2001 (Brantley's Response) filed on August 1, 2001 insofar as it pertains to the Court's Order.

8. NEW MEXICO STATE UNIVERSITY'S BRIEF ON QUANTIFICATION AND ALLOCATION ISSUES (NMSU's Response) filed on August 1, 2001 insofar as it pertains to the Court's Order.

Other than the Brantleys and the Tracy/Eddys, members of CID did not submit responses or memoranda briefs in connection with the matters set forth in the Court's Order.[1]

INTRODUCTION

Nothing contained in this Decision and Order shall be deemed or construed as a determination of any claim, contention or assertion of any party not specifically set forth herein under the designated portions captioned "Court's Decision" or "Court's Decision and Order".

Matters not specifically decided herein have not been determined because they are inconsistent with specific determinations of the Court or they are not well founded or determinations in connection therewith are not required at this time in order to dispose of the matters presently pending before the Court.

Matters are addressed in the same order set forth in the Court's Order.

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[1] The motion of the Carlsbad Water Defense Association, Inc. and certain of its members to file a memorandum brief as *amicus curiae* has been granted in part.

Pertinent determinations of the Court set forth in the Court's Decision and Order filed on October 22, 2001(Court's Decision) and the Court's Supplemental Decision and Order served on December 19, 2001 are incorporated herein by reference as though set forth in detail.

PERTINENT ISSUES AND MATTERS SET FORTH IN THE COURT'S ORDER

B. OFFER ISSUES THAT DO NOT REQUIRE THE SUBMISSION OF MEMORANDA BRIEFS AT THIS TIME

As indicated in the Court's Order, the issues set forth under this heading and the responses of the parties will be considered in connection with the Project (Offer) Phase of these proceedings.

C. MATTERS CONCERNING THE RESPECTIVE RIGHTS, DUTIES AND OBLIGATIONS OF THE UNITED STATES AND CID IN CONNECTION WITH THE DIVERSION, STORAGE AND DISTRIBUTION OF PROJECT WATER ABOUT WHICH THERE IS NO DISPUTE, AND, THEREFORE, DO NOT REQUIRE THE SUBMISSION OF MEMORANDA BRIEFS.

The Court's Order stated that there was no dispute concerning the following claim concerning the respective rights, duties and obligations of the United States pertaining to the diversion and storage of Project water and the rights duties and obligations of CID pertaining to the distribution of Project water, and, therefore, the Court did not request that memorandum briefs be submitted in connection therewith:

> 1. CID is required under State law as well as its 1932 contract with the federal government to distribute and apportion water in accordance with applicable reclamation law.
>
> 2. CID has the discretion to determine annually how much of the water supply and storage shall be made "available for distribution to its members and how much must be conserved for future years". The State and the Brantleys are, however, requested to specify claimed limitations upon the exercise of discretion by CID. Others may also respond. The State's claim that a factual

controversy is required to properly respond to this issue is not well founded

3. Available water to be distributed must be apportioned to each of the landowners or entrymen pro rata on the basis of lands assessed as provided in NMSA 1978, §73-10-16.

4. The State does not dispute that the language of the 1906 contract imposed certain limitations on deliveries of Project water to members of CID. The State, however, is requested to specify the claimed limitations. Others may also respond.

5. Project water must be distributed by CID on a proportionate basis and all units within the district treated equally. The State and CID are requested, however, to specify the manner of determining the proportion. Others may also respond.

6. CID has a continuing right to deliver Project water for distribution to all of its members.

7. Members of CID are required to pay certain sums in order to receive water.

Underscoring for emphasis added.

COURT'S DECISION

The State, CID and the Brantleys have responded as requested. Their responses to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties' requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

D. *ISSUES REQUIRING THE SUBMISSION OF MEMORANDA BRIEFS CONCERNING THE RESPECTIVE RIGHTS, DUTIES AND OBLIGATIONS OF THE UNITED STATES AND CID PERTAINING TO THE DIVERSION, STORAGE AND DISTRIBUTION OF PROJECT WATER*

ISSUE NO. 1

Under this issue the Court requested that memorandum briefs be submitted in connection with the matters set forth in the Court's Decision and Order concerning the water rights claims of CID members filed on March 20, 2001. The requested memorandum briefs were prepared and have been received. The briefs were considered in connection with the preparation of the Court's Supplemental Decision and Order served on December 19, 2001.

ISSUES RE CLAIMS OF CID

ISSUE NO. 2

Whether Project water rights are appurtenant to all of the claimed Project acreage appearing on the assessment rolls of CID, or acreage upon which water is devoted to beneficial use by individual members of CID?

COURT'S DECISION

The irrigation water rights of members of CID are appurtenant to the lands upon which they have been devoted to beneficial use subject to the provisions of NMSA 1978, §72-5-28 F. Please refer to the Court's Decision re **ISSUE NO. 1** set forth at pp. 5-7. See also NMSA 1978, §72-4-19.

The diversion and storage rights of the United States and the distribution rights of CID associated with the Carlsbad Project, which the Court has determined are held for the use and benefit of the members of CID, **are applicable to the entire Carlsbad Project**; Court's Decision at p. 6.

ISSUE NO. 3

The proper manner of determining the amount of water to be apportioned and distributed by CID to landowners by the board of directors of CID under NMSA 1978, § 73-10-16.

COURT'S DECISION

Please refer to the Court's Decision re Issue No. 1 at p. 6 and the Court's decision set forth in the Supplemental Decision and Order served on December 19, 2001 at p. 34.

The authority of the board of directors of CID to distribute water to its members is set forth in NMSA 1978, §§73-10-16 and 73-10-24 and is subject to the terms and conditions set forth therein. Water must be distributed and apportioned among CID members equitably and in accordance with applicable acts of Congress, rules and regulations of the Secretary of Interior and the provisions of contracts concerning the distribution of water by CID. See also NMSA 1978, §73-10-24 and §72-5-28 F.

ISSUE NO. 4

Is the right of CID to issue priority calls against junior users on the Pecos River Stream System exclusive or may the United States or members of CID also issue priority calls?

COURT'S DECISION

The United States, on behalf of the members of CID and in order to protect the United States' diversion and storage rights in connection with Project water, has the right to issue priority calls. CID, with the approval of the United States and on behalf of its members, has the right to issue priority calls in connection with the diversion and storage of Project water in order to protect its ability to distribute Project water to its members.

Since CID members (although they are the owners of water rights in connection with the

Project) do not individually divert or store water, there should be no need for them to issue a priority call. If, however, the United States or CID should fail or refuse to issue a priority call, when requested by the members of CID, members of CID may initiate appropriate action to require that the United States or CID issue a priority call, or, in the event the United States or CID fail or refuse to do so, members of CID, jointly, may be able to issue a priority call. The Court has been unable to find pertinent authority on the right of members of CID to issue priority calls and counsel have not referred the Court to citations of authority in support of or contrary to the Court's determinations in connection with this issue.

ISSUE NO. 5

Does CID have authority to transfer water rights of CID members from lands within the District to which water has been devoted to beneficial use to other lands within the District without obtaining a permit from the State Engineer or obtaining permission from its member(s)?

COURT'S DECISION

Please refer to the Court's Decision re the effect of NMSA 1978, §73-13-4 at pp. 7-9

ISSUE NO. 6

What is the proper interpretation of NMSA 1978, § 73-13-4? Is the statute limited in its application to lands "...which for any cause are not suitable for irrigation or capable of being properly irrigated.." and "...to other lands held by or within such District and which, in their judgment may be profitably and advantageously irrigated.. "?

COURT'S DECISION

NMSA 1978, §73-13-4 speaks for itself and is so limited.

Please refer to the Court's Decision re NMSA 1978, §73-13-4 at pp. 7-9.