

FILED

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

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DISTRICT COURT
DOÑA ANA COUNTY, NM

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

**STATE OF NEW MEXICO'S AND CITY OF LAS CRUCES' JOINT REPLY TO
RESPONSE OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1
TO UNITED STATES' RESPONSE TO STATE'S OFFER OF JUDGMENT**

COME NOW Plaintiff State of New Mexico ("State") and the City of Las Cruces ("City") in joint reply to the Response of El Paso County Water Improvement District No. 1 ("EP No. 1") to United States' Response to the State's Offer of Judgment to Settle the United States' Rio Grande Project Rights ("Response") and state as follows:

1. In its Response, and in particular with the claim that the Rio Grande Project priority date should be based on the 1848 date of the Treaty of Guadalupe Hidalgo, EP No. 1 exceeds its permissible role as *amicus curiae* by introducing claims not placed at issue by the parties to this proceeding. See EP No. 1's Response, pp. 3-4, and the Joint Response of the State of New Mexico and the City of Las Cruces in Opposition to El Paso Water Improvement District's Motion to Make Filings in Stream System Issue 104. All such claims should be stricken by the Court as exceeding the scope of EP No. 1's role as *amicus curiae* in the Lower Rio Grande stream adjudication.

2. As a substantive matter, EP No. 1 wrongly contends that, pursuant to the 1848 Treaty of

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Guadalupe Hidalgo, "the United States acquired ownership and dominion over all of the present State of New Mexico, including all of the surface and sub-surface water" and that "the United States set aside and still holds all of the Rio Grande water which was legally unappropriated by the date of the 1906 and 1908 notices." Response at pp. 3-4. The contention that the United States "set aside" water appears to be a claim that the United States either retained water to itself or has a federal reserved water right. EP No. 1 cites to no authority in support of the novel theory that the United States' acquisition of public lands in the American Southwest resulting from the Treaty of Guadalupe Hidalgo effected a federal reservation of water rights or a retention of the State's public waters.

Statutes and case law are uniformly contrary to such a theory. As a result of public land laws enacted in 1866 and 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain. The "effect of these acts [was] not limited to rights acquired before 1866. They reach into the future as well and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." California Oregon Power Co. v. Beaver Portland Cement, 295 U.S. 142, 155, 55 S.Ct. 725, 728 (1935). This well-settled law flatly contradicts the suggestion that the United States retained an interest in the State's public waters.

Any suggestion of a federal reserved rights claim is equally groundless. The federal reserved water rights doctrine:

[R]equires a claimant to establish two elements in order to demonstrate the existence of a federal reserved water right: (1) that the federal government withdrew the land from the public domain and reserved it for a federal purpose and (2) that a certain amount of water is necessary to accomplish the purpose for

reserving the land 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. Commissioner of Public Lands, 2009-NMCA-004, ¶¶ 14-15, 145 N.M. 433, 440 (internal citations omitted), *cert. denied*, 145 N.M. 531, *cert. denied*, 129 S.Ct. 2075.

Also see Gutierrez v. Albuquerque Land and Irrigation Co., 188 U.S. 545, 553, 23 S.Ct. 338, 341 (1903) (purpose of Congress was to recognize legislation of territories as well as states with respect to the regulation of the use of public waters). In its Response, EP No. 1 identifies no withdrawal and reservation of land in the Rio Grande Project for a federal purpose. Its priority date claim, which the United States itself does not assert, is contrary to the controlling legal authority with respect to the predicates required to establish a reserved water right.


In arguing for an 1848 priority, EP No. 1 seeks to displace the economy founded on state law and administration in New Mexico. EP No. 1's claim is contrary to the basis for a reservation of water which the United States Supreme Court held to be "an exception to Congress' explicit deference to state water law." United States v. New Mexico, 438 U.S. 696, 715, 98 S.Ct. 3012 3021 (1978). The Court emphasized that the federal reserved right doctrine must be applied cautiously, observing that application of the doctrine frequently requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." 438 U.S. at 705. In this instance, EP No. 1 seeks to circumvent the priorities adjudicated to Las Cruces, New Mexico State University, and numerous private interests, jeopardizing their rights and interests.

3. In addition to its spurious priority date claim, and again without citation to legal authority, EP No. 1 asserts an additional claim as to the source of Rio Grande Project water, a claim raised by none of the parties, that goes far beyond the United States' claim to "tributary groundwater." This all-encompassing additional claim alleges that "the United States has rights

to all sources of water within the Project, inclusive of tributary inflow, underflow of the river, return flows, surface and subsurface waters to the extent necessary to satisfy Project purposes and obligations.” Response at 5. As with its priority date claim, EP No. 1’s unsupported source of water claim should be stricken as exceeding the scope of EP No. 1’s role as an *amicus*.

4. Additional assertions contained in EP No. 1’s Response are addressed in the State’s replies to similar assertions in the responses filed by various Participating Parties

Respectfully submitted,

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