

Briefing on the 2008 Compromise and Settlement Agreement Between the United States, Elephant Butte Irrigation District and El Paso County Water Improvement District #1.

Steven L. Hernandez, Esq.

Dr. J. Philip King

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The State of New Mexico, through the Attorney General (NMAG), has now filed suit and sued EBID as a defendant in their lawsuit against the United States. The NMAG is seeking to overturn an agreement reached in litigation regarding the allocation of surface water in the Rio Grande Project to which the state is not a party.

The Operating Agreement Settlement was developed through negotiation among the three contracting parties to the Rio Grande Reclamation Project to end decades of escalating litigation focusing on the division of Rio Grande Project Water between the two districts. Contracts entered into in the early 1970's required the three parties to agree on an Operating Agreement to set forth how the Project Water Supply would be allocated between the two districts.

The Operating Agreement was necessitated in part by the fact that groundwater pumping in the two states was affecting the available Project surface water supply. This scenario, in other areas of the country, led to Supreme Court decisions holding the upstream state at fault for depleting the surface water supply to the downstream state. The Texas district, El Paso County Water Improvement District No. 1 (EPCWID), claimed that if this case were to go to the United States Supreme Court (USSC), their position would be that the base line for determining depletions by the downstream state would be the date of the Rio Grande Compact. (1938) Instead, the Operating Agreement recognized the NM groundwater pumping period 1951-1978 as the baseline condition, and looked at increases in depletions from that point in time. In effect, thousands of acre feet of groundwater pumping by the upstream state of NM will be allowed. Depletions in New Mexico above this baseline level would be offset with reductions in EBID's surface water allocation, thus keeping EPCWID whole.

Increased pumping by EBID constituents as well as New Mexican municipalities, industry, mutual domestic water providers, and individual domestic wells has increased the depletions in New Mexico over the baseline condition. The intention of the Operating Agreement is to guarantee the downstream Texas district their Project water orders, regardless of adverse pumping effects in NM. This in turn allows flexibility in groundwater use by EBID constituents in NM as well as depletions by all Southern New Mexico water users that are affecting the Project surface water supply.

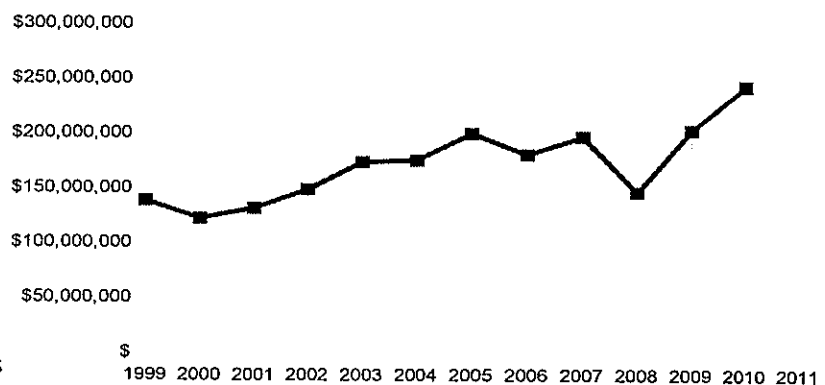
The NMAG's objections were outlined in their presentation to this committee on June 26, 2012 and made the following points.

1. Reallocation of 170,000 af in full supply years. **Response:** The allocation method used by Reclamation prior to 2006 did not address the impacts of increased depletions in New Mexico on Texas. This was a glaring problem recognized by the NMAG and the New Mexico legislature when they appropriated several million dollars for litigation against Texas over the waters of the Rio Grande in the early 2000s. Based on USSC decisions in *Kansas v. Colorado*, the *Arkansas River* and *Texas v. New Mexico (Pecos River)*, New Mexico was in an extremely vulnerable position as an upstream state depleting the surface water supply to a downstream state. In fact, the Office of the State Engineer (OSE) used the same 1951-1978 baseline as the target for administration in his 2004 Active Water Resource Management (AWRM) draft regulations, and this baseline would have been achieved by cutting off

irrigators' access to groundwater. The Operating Agreement allows flexibility in groundwater use in New Mexico, but impacts on Texas are made up with surface water, which reduces the allocation to EBID as the guarantor.

One of the triggers to litigation leading to the negotiated Operating Agreement was that in 2006, the Bureau of Reclamation unilaterally and rather haphazardly implemented carryover accounting, which allowed each district to keep water unused in one year for use in subsequent years with no limit on the amount that could be carried over. This is to the advantage of EPCWID and the detriment of EBID. Reclamation formalized this 100% of a full year's allocation would be allowed to accumulate as carryover in 2007. Litigation in two federal district courts ensued with the refusal of the State of NM to intervene. The negotiated 2008 Operating Agreement limited carryover to 60 percent of a full supply which is 305,000 AF for EBID and 233,000 AF for EPCWID. Any water carried over in excess of those caps goes directly into the account of the other district. EBID has received about 100,000 AF of EPCWID water since 2008 and 2009 by this capping mechanism. EBID's strategy is to use its surface water when it is available to reduce the draw on groundwater in times of plenty so that the groundwater will be available in times of drought. EPCWID depends heavily on its ability to carry over its surface water to stabilize its water supply, as it lacks the robust groundwater system through which EBID buffers its surface water supply fluctuations. The current apparent disparity in allocation between the two districts is caused primarily by carryover water. EPCWID has built a reserve of roughly 224,000 AF, while EBID has 20,000 AF of carryover. Carryover is 85 percent of EPCWID's allocation, and it is water whose use they have conserved in prior years. In their calculations, the NMAG count this as new water each year, which dramatically skews the equity calculation and assumes the availability of water that does not exist.

2. Value in damages due to lost water ranges from several hundreds of millions of dollars to two and a half billion dollars. **Response:** Agricultural production in EBID has not declined due to the operating agreement. In fact the general trend in economic production has gone up since the



agreement, even in times of severe and sustained drought. The chart shown indicates that agricultural receipts from non-livestock farming in Dona Ana County have gone up in every year since the Operating Agreement, except 2008, which was an off year for pecans coupled with relatively low pecan prices. While the NMAG's economic damage estimates cover a broad range, they are clearly not representative of reality.

3. The 2008 Operating Agreement, exacerbated by the drought, is the main reason for the low allotments of water to EBID district members since 2008. **Response:** The drought is the key reason for EBID's low allotments, and similarly low allotments occurred in the drought of the 1950s through the 1970s, decades before the Operating Agreement. The offsetting of the impacts of groundwater pumping in New Mexico with surface water does reduce EBID's allotment somewhat, but drought is clearly the driving force.

4. During recent full supply years, the new operations resulted in EBID farmers receiving only two-thirds of the surface water they normally would have received (2 feet per acre rather than 3). 2011 was even worse. **Response:** This statement again fails to recognize that carryover is now a part of Project operations. In the years they refer to as full supply, very little inflow came in to Elephant Butte Reservoir as Compact delivery, but EPCWID had banked carryover water for just such an event. In 2011, most of the water released was EPCWID carryover, and it is not allocated to EBID.
5. As a result of the reduced surface water allocations, EBID farmers are having to pump additional groundwater. This has resulted in a double impact to the aquifer: 1) reduced surface water available to recharge the aquifer; and 2) increased groundwater pumping. **Response:** Reduction in surface water allocation in EBID has always triggered heavier groundwater use, going back to 1951. EBID constituents are working with a conjunctive surface water – groundwater system that does have feedbacks and controls, and always has, regardless of the Operating Agreement.
6. The amount of surface water taken from New Mexico in full supply years is equivalent to about two to three times the water Albuquerque consumes in a year or about 15 times what Las Cruces consumes. **Response:** Again, the numbers the NMAG site for the change in allocation to EBID are clearly skewed by starting from an indefensible baseline (the ad hoc method employed by Reclamation before 2006), and failing to recognize carryover, thus creating water in the calculation that never existed.

The bottom line is:

- The Operating Agreement reduces the allocation of surface water to EBID to offset impacts of groundwater uses in NM on Texas water as it flows through NM. All groundwater use in NM is offset, and the state of NM needs to focus on establishing equity within the state, as EBID is now bearing the burden for all groundwater depletion in the NM portion of the Rio Grande Project.
- The two districts and Reclamation have made several changes to the allocation and operational rules in the Operating Agreement since 2008, and they continue to work constructively on issue. Most recently in 2012, the parties adjusted the basis for allocation to EBID because of the persistent drought, reflecting the historical decline in available water for a given level of release in consecutive years of severe shortage. The Operating Agreement is a living document and is intended to be revised as new problems emerge. This is done once a year by the engineers for the three parties to the Rio Grande Project.
- The New Mexico Attorney General (NMAG) has secured money from the ISC to join EBID as a defendant and litigate against EBID. The NMAG has made no suggestion for an alternative allocation scheme, and the one prior to 2006 was simply not defensible. The NMAG is starting a war with no clear objective or exit strategy and the impact of any damages would be against EBID members.
- EBID has raised the issue of the United States discretion in making releases from the reservoirs in a counterclaim. More specifically, EBID raises issues regarding releases of water to Mexico. EBID has received no support from NM on this issue.