

Update: Lower
Rio Grande
Litigation
&
Water Rights
Administration

Elephant Butte Irrigation
District

Thursday, December 14,
2017



Overview of Topics for Discussion

TX v. NM & CO (including US Complaint against NM)

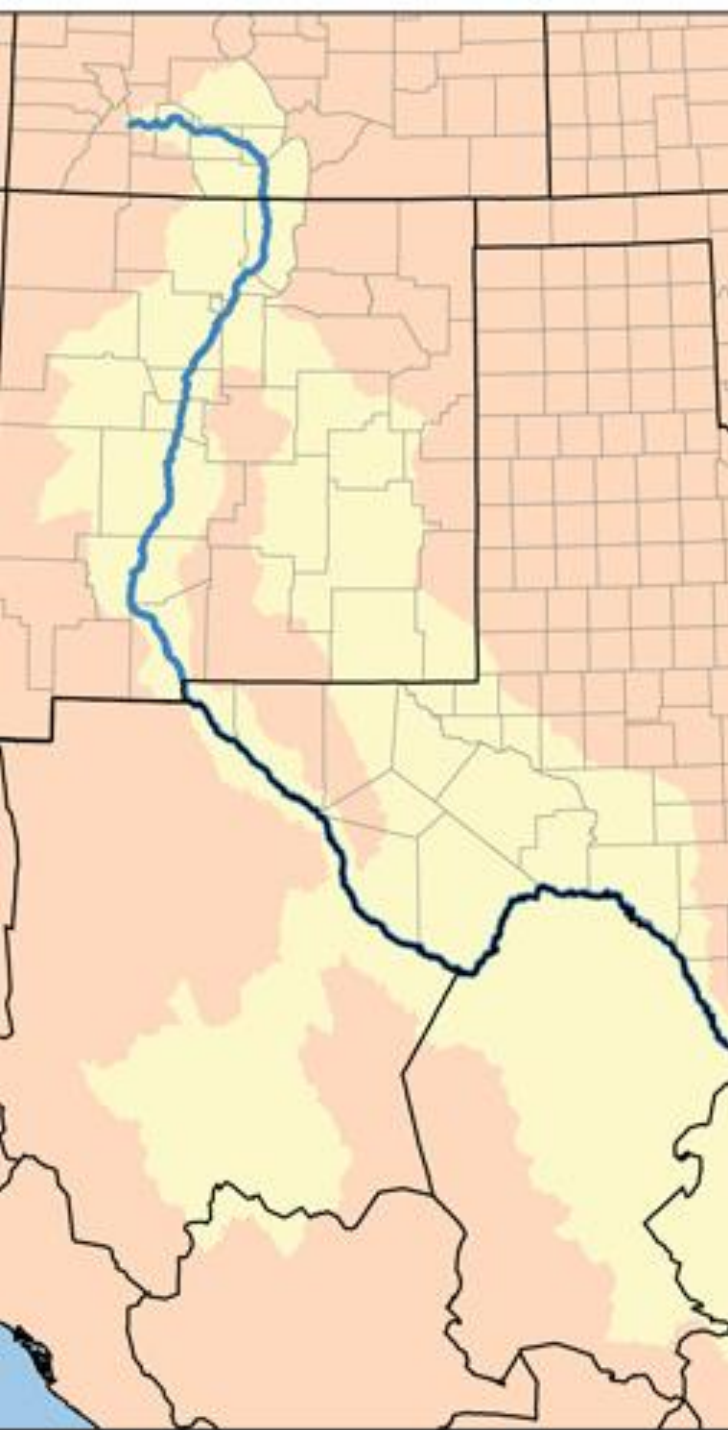
- Brief History of the Case
- Current Status Update

Adjudication of Lower Rio Grande

- Recent Decisions
- Current Status Update

Lower Rio Grande Water User Group Activity

- Who, what, and why



The core of the TX Complaint

- Texas asked the court for three primary remedies:
 - “Declare the Rights of the State of Texas to the waters of the Rio Grande Pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act”;
 - “Issue its Decree commanding the State of New Mexico to deliver waters of the Rio Grande in accordance with the Rio Grande Compact and the Rio Grande Project Act and cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project”;
 - Award Texas damages and “other relief” for the injury suffered as a result of past and continuing violations.

The core of
the US
Complaint:

“New Mexico has allowed the diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary of the Interior or are using water in excess of contractual amounts.”

EBID's Position: The Operating Agreement

- Offsets effects of NM groundwater depletions on EP1 with surface water
- Maintains EBID farmers' access to groundwater
- 1951-1978 baseline condition
- Prototyped in 2006, fully implemented in 2008
- State of New Mexico didn't like it, filed suit in federal court (NM v Reclamation, EBID, and EP1)
- Texas didn't appreciate that, filed in US Supreme Court
- US intervened on behalf of Texas
- EBID's position has always been that the OA resolved potential claims by Texas, and it should have been left alone to avoid the current interstate battle



Brief Procedural History of TX v. NM

- NM filed motions to dismiss TX Complaint and US Complaint in Intervention
- EBID and EPCWID#1 filed motions to intervene
- After full briefing on all issues, the Special Master heard argument in August 2015
- After Argument, the SM released a draft Report, which the parties and amici commented on, and a revised report was then issued.



Special Master's Final Report:



Special Master Gregory Grimsal's report to SCOTUS was submitted in final form on February 9, 2017 recommending:

- The State of New Mexico's Motion to Dismiss the Complaint of the State of Texas is DENIED.
- The State of New Mexico's Motion to Dismiss the Complaint in Intervention of the United States is GRANTED IN PART to the extent that the United States cannot state a claim under the 1938 Rio Grande Compact; but said Motion is DENIED to the extent that the United States has stated a claim under federal reclamation law, as to which the Court exercises its original but not exclusive jurisdiction under 28 U.S.C. §1251(b)(2).
- Elephant Butte Irrigation District's Motion to Intervene is DENIED.
- El Paso County Water Improvement District No. 1's Motion to Intervene is DENIED.
- SCOTUS ordered Special Master's report filed on March 20 – briefing on exceptions took place this summer, with the final briefs being filed Sept. 1

Current Status of Case

Order entered by SCOTUS Oct. 10, 2017:

1. NM Motion to Dismiss TX Complaint: **DENIED**
2. Motion of EBID to Intervene: **DENIED**
3. Motion of EPCWID#1 to Intervene: **DENIED**
4. Motions of Amici NMSU and NMPG to file briefs regarding exceptions: **GRANTED**
5. “The exception of the United States and the first exception of CO to the First Interim Report of the SM are set for oral argument in due course.”

**The oral argument calendar is full for the remainder of this year, so we do not expect to be set until after the first of the year*



Lower Rio Grande Adjudication

- Recent Decision by Judge Wechsler granting priority date of March 1, 1903 to United States for Rio Grande Project
- After issuing decision, Judge asked participating parties: “What’s next?”
- Parties engaged in discussions on that issue and reported to the court that more time was needed
- All parties eventually agreed that more time was still needed, and a formal request for a stay of all pending proceedings was submitted & granted
- Along with the stay request, a request for a confidentiality order was submitted, it was also granted





What's Happening Now

Not much in the Courtroom thanks to agreement of the major participating parties to stay the case to allow for confidential “discussions”

We are not ready to call this “settlement discussions” yet, but we are hoping to head that direction eventually

The Lower Rio Grande Water User Group had been meeting for a few years, recently OSE and EBID joined those meetings, which is why the request to stay was so widely supported

Who makes up the LRGWU?

- Members:
 - New Mexico Pecan Growers
 - Southern Rio Grande Diversified Crop Farmers Assoc.
 - Camino Real Regional Utility Authority (CRRUA)
 - City of Las Cruces
 - New Mexico State University
 - Public Service Company of NM (PNM)
- Non-Members who are participating*:
 - EBID
 - OSE/ISC/NMAG (State of NM)

**Updates are provided regularly to others, such as the US*





What (specifically) is the LRGWU and participating parties trying to do?

Even though it's not called "settlement discussions" we are actually trying to resolve pending litigation;

Discussion has largely focused on technical issues related to the LRG hydrology—most participating parties have committed technical staff and consultants to contribute to the process

Discussion has also explored avenues for settlement including settlement agreements, AWRM, expedited transfers, aquifer management and so on—what those may look like is unknown



[What to do?](#)

What does EBID want to see out of this process?

- Acceptance of some form of our DROP Policy/program (more on this to come...)
- Aquifer management that makes sense
- Recognition of EBID's rights and obligations under state and federal law
- Protection of continued groundwater pumping by our farmers (ie. Protection of the Operating Agreement)
- Greater collaboration with other stakeholders
- WHY?: To control our own destiny, of course!



Motivation for DROP

- Municipal and Industrial (M&I) water users withdrawal of groundwater affects the surface water supply of the Rio Grande Project, and therefore EBID's surface water allotment.
- EBID is the only authorized user of Rio Grande Project water in New Mexico.
- M&I users cannot continue or expand the use of hydrologically connected groundwater without further impairing EBID's surface water supply.
- DROP provides a market-based means for M&I users to square up with the Rio Grande Project



DROP in a Nutshell

- M&I users motivated to offset the impact of their groundwater use on the surface water supply of the Rio Grande Project enter into forbearance agreements with farmers.
- Farmers are paid by the M&I user through EBID to fallow land, eliminating the local hydrologic depletion that would have occurred on that land, taken to be 2.6 acre-feet per acre of fallowed land.
- M&I users continue to use their groundwater wells (or expand groundwater use), having offset their effect on the local hydrologic system and the Rio Grande Project.





Considerations

- Plaintiffs in Texas v. New Mexico seek to protect the Rio Grande Project water supply from depletions by “non-Project contractors.”
- DROP will allow M&I users to become Project contractors.
- Direct use of surface water for M&I use is probably not practical due to the highly variable supply of surface water.
- Depletion reduction directly addresses effect on interactive surface water-groundwater system and reduces stress on aquifer systems.
- Excessive or poorly planned following can threaten the viability of agriculture.

Contingencies

- Entry by farmers into DROP forbearance agreements is voluntary.
- Land entering program must have been irrigated four of the past five years, and must have surface water and groundwater rights.
- Farmers may enroll up to 20 percent of their land into forbearance agreements, though the EBID board has the ability to waive this limit.
- Lands under forbearance agreements are fallow, and not irrigated with surface water or groundwater.
- Surface water allotted to land under forbearance agreement will stay with the farmer who entered into the program for use on his cultivated land or transfer to other EBID lands.
- Farmers rotate land in the program through entire acreage, with a given parcel being fallowed for no more than three consecutive years.
- Land in the program must be maintained according to a land management plan.
- DROP will last for up to the term of the 2008 Operating Agreement.

EBID has lots of work in progress!

- We are continuing discussions both with the large LRG group of stakeholders and individually with stakeholders to do a better job of understanding concerns that need to be addressed
- We continue to work on developing real time information and data to assist us with expanding our understanding of the hydrology in the LRG
- We are taking that understanding and converting it to our proposals regarding what a reasonable settlement would look like to our farmers:
 - DROP
 - Development of Aquifer Management framework
 - Possibly soon the beginning of drafting AWRM DSR (district specific regulations)



WORK IN PROGRESS

The future of water administration in the LRG is uncertain

- Because of claims in TX v. NM (including US Complaint), the future of water administration is uncertain
- What is known is that water rights administration is going to require valid water rights
- What will be determined to be valid rights, and what rules regarding exercise of valid rights will exist in the future are both undetermined (these are some of the issues we hope to sort out in the LRGWU discussions)
- What is clear is that surface water will be protected from depletion by groundwater; in other words, surface water is the gold standard, groundwater is the silver standard

How does the future of water administration impact us locally?

- How do we protect our multi-billion dollar agriculture industry in the LRG?
 - Where will water for border and municipal growth come from?
 - Where will water for environmental projects come from?
 - Will water rights administration change the way we plan other types of projects?: flood control, species protection, clean water act compliance, development of new water projects/importing water, and so on???
- YES!



EBID is committed to communication, cooperation and collaboration