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**Court Rules Source of Water for the Rio Grande Project is Limited to Surface Waters; *State of New Mexico, ex rel. Office of the State Engineer v. Elephant Butte Irrigation District, et al.***

By [Susan Bisong](#)

In a recent ruling in the Lower Rio Grande Adjudication, *State of New Mexico, ex rel. Office of the State Engineer v. Elephant Butte Irrigation District et al.*, CV No. 96 888, Judge James Wechsler has granted the State of New Mexico's Motion to Dismiss the United States' Claims to Groundwater and denied the United States' Motion for Summary Judgment as to whether the scope of the Rio Grande Project water should be defined as "(1) all the surface water in the lower Rio Grande, and (2) water in the ground hydrologically connected to surface waters in the lower Rio Grande."

The court held that the source of water for the United States' Rio Grande Project ("the Project") was limited to surface waters. The Court did not specifically rule on or reject the claim that such surface waters could include recaptured flows.

In its motion for summary judgment, the United States argued that it has historically used and is legally entitled to not only the surface water below San Marcial, New Mexico, but also the water in the ground hydrologically connected to surface waters in the lower Rio Grande. Specifically, it argued that return flows are part of the Project supply because the Project was designed and authorized to utilize such flows, and importantly, such flows have historically been delivered and beneficially used since the Project's construction in the early part of the 20<sup>th</sup> Century.

The Rio Grande Project includes Elephant Butte and Caballo Dams and Reservoirs, a power generating plant and four diversion dams in New Mexico and Texas. Project water is captured and stored in Elephant Butte and Caballo reservoirs and released for authorized Project purposes into a distribution and drainage system of hundreds of miles of canals, drains and laterals. The Project supplies water to beneficiaries in New Mexico and Texas, to the City of El Paso through a federal contract, and Mexico through an international treaty. Throughout the course of the project, water is diverted, reused and recaptured, including tributary ground water captured in drains and appearing as surface flows.

Water stored behind Elephant Butte Dam, when released and diverted downstream, provides irrigation service to 155,000 acres of land comprising EBID in New Mexico (88,000 acres) and El Paso County Water Improvement District No. 1 (EPCWID) in Texas (67,000 acres). After the U.S. Bureau of Reclamation delivers Project water to EBID and EPCWID, these districts are contractually obligated to deliver Project water to the irrigators in their districts. The water not consumptively used in irrigation returns to the Rio Grande in large quantities of return flows.

The Rio Grande Project was authorized by the 1905 Project Act, which expanded the 1902 Reclamation Act by allowing for the Elephant Butte Dam for purposes of irrigation in Texas. Notices from the federal government to the New Mexico Territorial Engineer dated 1906 and 1908 indicated the federal government's intent to utilize all of the waters of the Rio Grande and its tributaries for the Project. Moreover, the Tenth Circuit Court of Appeals in *New Mexico v. Bracker*, 199 F.2d 426, 427 (10<sup>th</sup> Cir. 1952) has recognized that purpose of the project "was to supply water to fulfill the obligations of a treaty entered into with the Republic of Mexico . . . and to irrigate approximately 200,000 acres of arid land in New Mexico and Texas."

The United States argued that the only way it has historically met and may continue to meet its treaty obligations to Mexico and contractual obligations to EBID and EPCWID, is through use of a combination of surface flows, tributary groundwater and return flows. In addition, the court recognized that "[t]he Project relies upon reuse of water in order to execute the Project's purpose of storing, releasing and delivering the waters of the Rio Grande for irrigation in New Mexico and Texas and fulfill the United States' treaty obligations in Mexico."

Despite this recognition, the court did not issue a ruling as to whether Rio Grande Project water includes project return flows (the surface water applied to project lands that returns or seeps into the ground, and is re-diverted for use by project beneficiaries). Instead, it declined to rule on the issue, viewing it as an issue of enforcement of the Project right, and left it to the United States to bring an administrative proceeding with the State Engineer "to protect its right from other appropriations." The court reasoned that the determination of whether Project water retains its identity as Project water is a condition-specific and technical inquiry, while the scope of the adjudication is more limited to defining the elements of the right.