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REACHING THE JOINT SETTLEMENT BETWEEN EL PASO AND NEW MEXICO: AN UPDATE ON EL PASO V. REYNOLDS AND THE COOPERATION NOW EMPHASIZED BETWEEN EL PASO AND NEW MEXICO

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INTRODUCTION

The ruling by the United States Supreme Court in *Sporhase v. Nebraska* spurred many states to re-examine their ability to protect their citizens in terms of long-range water planning. *El Paso v. Reynolds* prompted southern New Mexico to be one of the first areas to examine water planning within such a diverse cultural and economic area. This paper attempts to show how the El Paso litigation has spurred this process.

BACKGROUND OF THE EL PASO WATER SUIT

- September 5, 1980 - The City of El Paso through its Public Service Board files suit in New Mexico

District Court against the State of New Mexico, claiming the state's Water Embargo Statute was unconstitutional because it violated the Commerce Clause of the United States Constitution.

- September 11, 1980 - New Mexico State Engineer Reynolds declares the Lower Rio Grande underground water basin which stretches from the New Mexico/Texas state line up the Rio Grande to a place near Radium Springs.
- September 12, 1980 - New Mexico State Engineer Reynolds declares the Hueco underground water basin in the proximity of the Texas/New Mexico state line on the east side of the Franklin Mountains near the New Mexico community of Chaparral.
- September 12, 1980 - El Paso files applications for permits to drill 266 wells asking for 246,000 acre-

feet of water from the Lower Rio Grande Basin for export into Texas.

- September 18, 1980 - El Paso files permits for 60 wells requesting 50,000 acre-feet of water in the Hueco Basin for export into Texas.
- April 21, 1981 - The State Engineer denies all permit applications based on the Embargo Statute.
- May 15, 1981 - Federal District Judge Howard Bratton allows Elephant Butte Irrigation District to intervene in the federal suit. Elephant Butte Irrigation District (EBID) is responsible for the delivery of water from the Rio Grande project to 90,640 acres within the district boundaries, most of which now lie in the Lower Rio Grande Basin. EBID could be the most affected entity because the pumping El Paso proposes could impact its surface water delivery to its constituents.
- July 2, 1982 - The United States Supreme Court rules in *Sporhase v. Nebraska* that water is a good in commerce and, therefore, falls under the Commerce Clause of the United States Constitution. All western states, including New Mexico, must now reanalyze restrictive water transfer statutes.
- January 17, 1983 - Federal District Court Judge Howard Bratton rules that New Mexico's Embargo Statute is unconstitutional and violates the Commerce Clause.
- February 22, 1983 - The New Mexico legislature repeals the embargo statute and passes a new state law establishing the procedure for out-of-state export of New Mexico groundwater. For the first time, the law examines the conditions under which exports would be allowed and also takes into account public welfare and conservation of water within the state as considerations to be reviewed by the State Engineer.
- August 3, 1984 - Federal District Court Judge Howard Bratton rules that most of the provisions in New Mexico's new export law are constitutional and points out that there may be problems with applying the public welfare and conservation of water criteria to out-of-state transfers only.
- April 4, 1985 - Following the guidance of Judge Bratton, the New Mexico legislature adds the conditions of public welfare and conservation of water as criteria to the application and transfer of water rights within the state as well.
- November 18, 1986 - Administrative hearings begin in Las Cruces on El Paso's applications to drill wells in the Hueco Basin under the new export statute.
- December 23, 1987 - The State Engineer rules that El Paso is unable to show that it has an insufficient water supply to meet its needs for the next 40-year period and denies all applications. The decision notes El Paso's ability to obtain water by contract from the Rio Grande Project through the El Paso Irrigation District.
- January 13, 1988 - El Paso appeals the New Mexico State Engineer's decision to the New Mexico District Court before the Honorable Manuel Saucedo.
- March 4, 1989 - Judge Saucedo dismisses El Paso's applications because of their failure to properly appeal from the State Engineer's decision.
- April 6, 1989 - El Paso files an appeal from Judge Saucedo's dismissal to the New Mexico Court of Appeals. The case subsequently is assigned to a facilitator to determine whether the case may be resolved.
- March 6, 1991 - After extensive negotiation sessions with the facilitator, George Perez, the City of El Paso, Elephant Butte Irrigation District and New Mexico State University reach a settlement.

THE EL PASO SETTLEMENT AGREEMENT

Under the Settlement Agreement, the City of El Paso agreed to the following:

- to withdraw its litigation in state and federal courts;
- to withdraw all its pending well applications in New Mexico;
- to withdraw all protests to applications by New Mexicans for appropriation and transfer of water within the Lower Rio Grande basin;
- to withdraw its counterclaims and crossclaims in the stream adjudication proceedings on the Rio Grande south of Elephant Butte Reservoir;
- to meet its water demand, the supply should come from 1) conservation, 2) surface water, and 3) groundwater;
- to study the Canutillo Wellfield in the vicinity of the New Mexico state line to determine whether and to what extent pumpage from that wellfield is affecting Rio Grande Project water supply and to identify appropriate measures to be undertaken; and
- to continue using groundwater, including drilling new wells, but to do so consistent with its new priority goals.

Elephant Butte Irrigation District

EBID had argued throughout the litigation that there was surface-water supply from the Rio Grande Project available to resolve El Paso's water needs. Forty-three percent of the water in the Rio Grande Project belongs to the El Paso Irrigation District. Elephant Butte Irrigation District urged El Paso to resolve its differences with its own irrigation district. To facilitate El Paso's use of surface water, EBID agreed to:

- withdraw its claims against El Paso in the stream adjudication in New Mexico and to withdraw its attack on El Paso's Canutillo Wellfield without prejudice.
- not assess any new fees on additional supplies of surface water for the region from upstream sources being transported through EBID's present system for delivery to Texas. Fees would still be assessed on basis of actual operation and maintenance costs attributable to the use of that water.
- look at releases of Rio Grande Project water on a year-round basis to help facilitate El Paso's use of surface water in its municipal plants year round. EBID has already outlined a route to take El Paso municipal water from the Rio Grande Project which would maintain water quality and facilitate delivery to El Paso's water treatment plants.

Joint Water Settlement Commission

The settlement agreement also stipulated that a joint water commission be established between parties to the agreement to promote coordination and cooperation with respect to common water resources interests. Half of the joint commission members would be appointed by El Paso and half would be appointed by the New Mexico parties.

The parties have consented to work together to study, identify and address common concerns and objectives with respect to water resources in the region including the possibility of securing additional surface-water supplies for the region from upstream sources.

The parties also agreed to study conveyance facilities to carry Rio Grande Project water by pipeline or other means from Caballo Reservoir to downstream points in Texas. They also will work cooperatively to maximize the utilization of waters in the Rio Grande Project to meet current and projected long-term agricultural and municipal needs of the region.

In addition, the parties agreed that, if consistent with applicable law, conserved water should be treated as the property of those responsible for the conservation.

PROGRESS OF THE JOINT WATER COMMISSION

The Joint Water Commission has met regularly since the settlement agreement was signed, and both sides have employed engineering firms to address water supply problems in El Paso and southern New Mexico.

The firm of Engineering-Science completed its report entitled *Surface Water Supply Alternatives for the City of El Paso and Southern New Mexico Users*. The report outlined the rationale for the City of El Paso to use surface water as its number one priority to meet future needs. It also suggested that a municipal surface water alternative could work in southern New Mexico as well.

Boyle Engineering was retained by the El Paso Public Service Board to submit an engineering report entitled *Water Resource Management Plan* on the feasibility of using surface water for El Paso's future growth.

The reports were exchanged between the New Mexico and Texas parties. The commission has decided to reconcile and integrate relevant elements of each report into a joint surface-water program through a three-phase study. It also hopes to have contracts in place by December 1, 1992 with the two engineering firms. The plan of study is outlined below.

Phase I - Determine Quantity of Surface Water Available

- quantify additional surface-water supplies which can be realized from changes in operation of the Rio Grande Project
- examine reduction of seepage and other losses in the system as well as a reduction of evaporation losses by changes in storage patterns in project reservoirs
- using existing data and information, quantify the amount of Rio Grande Project water available for municipal use considering current restraints on the water supply

Phase II - Evaluate and Formulate Conceptual Water Supply Plan(s)

- evaluate proposed construction of a lined canal from Caballo Dam to the American Dam to function as the main transmission facility to serve most project beneficiaries

- evaluate regional and/or individual water treatment plants in New Mexico and Texas
- evaluate the potential for water banking of surface water for the Mesilla Bolson
- evaluate the potential for water banking of surface water in the Hueco Bolson

Phase III - Perform Route and Location Studies of System Facilities

- evaluate use and lining of existing project canals and laterals for a regional conveyance canal
- prepare reconnaissance-level layout of a new conveyance channel from Caballo Dam to the American Dam without using existing project facilities
- evaluate alternative sites for the placement of regional and/or individual water treatment locations
- prepare preliminary assessment of environmental and regulatory constraints
- prepare preliminary layout of project water system
- select optimum project water system plan and prepare summary report

THE FUTURE OF THE JOINT WATER COMMISSION

The City of Las Cruces, Dona Ana County and the State Land Office will be joining the Joint Water Commission in addition to the City of El Paso, New Mexico State University and Elephant Butte Irrigation District.

The New Mexico entities will seek future funding from the legislature to continue to fund the engineering reports which will prove to be a key part of the overall regional water plan now being spearheaded by Elephant Butte Irrigation District.

On October 30, 1992 President Bush signed the Omnibus Water Bill which will transfer the rights-of-way currently held by the United States in the Rio Grande Project to Elephant Butte Irrigation District.

The transfer of the rights-of-way back to Elephant Butte Irrigation District will allow EBID to plan for multiple use of its existing conveyance facilities. In other words, some transmission facilities may now be able to be concrete lined and carry agricultural and municipal water in such a way that the water quality for the municipal supply can be kept higher. Without the involvement of the federal government who used to hold title to these conveyance facilities, the implementation of progressive changes and modernization of the facilities should be much easier to accomplish. Another important part of the District's participation in

upgrading its facilities will come about as the result of federal litigation against the United States regarding revenues from project lands.

Elephant Butte Irrigation District v. U.S. Department of Interior, CIV 90-0095-HB. On September 3, 1992 Judge Howard Bratton ruled that Elephant Butte Irrigation District is entitled to the benefits of the 1924 Fact Finders Act. The district will now have access to revenues from project lands for work on the irrigation system. It is hoped that these revenues can be used in projects undertaken by the Joint Water Commission.

CONCLUSION

After years of litigation, it is hoped that Texas and New Mexico interests may identify water planning efforts that benefit both regions. As long as each region respects the cultural and community values and makes decisions which benefit both sides of the state line, then individual elements of regional water plans may be integrated. As El Paso learned in the litigation, the people in southern New Mexico value the lifestyle and agricultural nature of the region and it is just as important to preserve that as it is important for El Paso to succeed as a major economic power in its state. Any final agreement on jointly utilizing Rio Grande Project supply to benefit both New Mexico and Texas interests will depend upon the respect of the values that each region holds important to itself.