



-- LOWER RIO GRANDE STREAM ADJUDICATION – Stream System Issues Update

(June 16, 2011)

Proceedings in the Lower Rio Grande Stream adjudication are currently focused on five separate Stream System Issue and Expedited *Inter Se* sub-proceedings, which are proceedings to resolve issues which could directly affect the water rights of all or a significant number of water right owners. These are:

- **Stream System Issue No. 101: Irrigation Water Requirements**
 - ✓ To determine the amount of water to be adjudicated for irrigation water rights.
 - ✓ After a year and a half of pretrial procedures and preparations, trial on Stream System Issue No. 101 began last week in the Third Judicial District Court in Las Cruces on June 6, 2011. The trial was scheduled to last three weeks, and there were four main participating parties: the State of New Mexico, the New Mexico Pecan Growers, the Southern Rio Grande Diverse Crop Farmers Association and Elephant Butte Irrigation District.
 - ✓ Three days into the trial, on June 8, the four main parties agreed on a settlement in principle regarding the irrigation water requirements. The settlement provides for a base “farm delivery requirement” of 4.5 acre-feet per acre for acreage irrigated with groundwater or surface and groundwater combined. Farmers could receive up to 5.5 acre-feet per acre with proof they had used such an amount in the past. Water rights transferred out of agriculture would transfer at a lower amount of 2.6 acre-feet per acre.
 - ✓ The settlement agreement is to supersede a 2008 agreement on irrigation water requirements between the State and the New Mexico Pecan Growers that provided for a separate, higher farm delivery requirement for mature pecan orchards than for other crops. The new settlement resolves the conflict that had developed over the prospect of separate amounts of water based on crop type.

- ✓ On Monday of this week, June 13, 2011, the parties presented the settlement to Pro Tem Judge Jerald Valentine, who agreed to stay the trial proceedings until June 24 in order to allow the parties to prepare a final judgment for the court. Any further proceedings on the settlement agreement are to be determined on June 24.

- **Stream System Issue No. 102: EBID's Claim to a Groundwater Right From 5 Deep Wells on 90,640 Acres of Member Lands**
 - ✓ To determine rights associated with 5 wells drilled by EBID during the 1970s

 - ✓ EBID was sued in 1978 by individual farmers over harm alleged to have been caused by diversions from its 5 deep wells. Under a settlement agreement, EBID ceased diversions from the wells but reserved the ability to use the underlying water rights for other purposes.

 - ✓ Stream System Issue 102 was settled in October 2010 by a stipulated subfile order, providing for the right of EBID to divert 9,500 acre-feet per year during times of short surface water supply for irrigation of assessed lands in the district, with a priority date of 1973.

 - ✓ Under the subfile order, EBID agrees that it has no other right to divert and use water from the Lower Rio Grande Underground Water Basin (*but see* Stream System Issue 104, below, for additional claims to groundwater as Rio Grande Project supply by the United States Bureau of Reclamation).

- **Stream System Issue No. 103: Priority, Transferability, and Beneficial Use of Water From Domestic Wells**
 - ✓ The motion to designate this issue was filed by EBID. The State opposed designation on the grounds that no specific controversy for litigation was identified.

 - ✓ EBID's initial purpose appears to have been to raise the issue of the constitutionality of the domestic well statutes, a matter pending on appeal in the Bounds case, which the adjudication Court declined to consider.

- ✓ EBID now asserts that it is concerned with the question of whether domestic well subfile orders should specify a specific amount of water, instead of the maximum amount allowed under the permit or historical beneficial use, whichever is less.
 - ✓ Proceedings in Stream System 103 are currently stayed due to the parties' concentration on other pending stream system issues.
- **Stream System Issue No. 104: The Interests of the United States Deriving From the Establishment of the Rio Grande Project**
- ✓ Designated in January 2010 in response to requests from persons claiming rights senior to the Rio Grande Project.
 - ✓ Also prompted by the collapse of an earlier-announced agreement-in-principle between the State and the United States on an Offer of Judgment for the United States' Rio Grande Project right.
 - ✓ The collapse of the Offer of Judgment resulted from changes to the document made by the two Project irrigation districts, EBID and El Paso No. 1, including:
 - ❖ The addition of rights to groundwater as a source of Project supply; and,
 - ❖ A claim to a 19th century priority date, decades older than the United States' 1906 notice of intent to the New Mexico Territorial Engineer to appropriate waters of the Rio Grande for the Project.
 - ✓ The changes to the Offer of Judgment were driven by:
 - ❖ A 2008 Operating Agreement for the Rio Grande Project between the United States and the two Project irrigation districts, which has the effect of significantly reducing EBID's surface water supply. This has greatly increased the need of EBID members to rely on groundwater for irrigation; and,
 - ❖ Subfile orders entered for City of Las Cruces and New Mexico State recognizing groundwater rights with priority dates senior to the 1906 Notice of Intent for the Rio Grande Project.

- ✓ In the order designating Stream System Issue 101, the Court stayed proceedings pending further order of the Court to allow negotiations on an Offer of Judgment between the State, the United States and the two irrigation districts to continue.
 - ✓ Those negotiations are at an impasse, largely due to the United States' unwillingness to address the State's concerns about the Operating Agreement.
 - ✓ At a status conference on April 5, 2011, the Court agreed that if there were no progress in negotiations by the next status conference, the Court would lift the stay and institute a trial schedule for the stream system issue. The next status conference is set for August 18, 2011.
- **Stream System Issue 105: Expedited *Inter Se* on the Claims of the Estate of Nathan Boyd**
- ✓ Prompted by claims submitted in the LRG Adjudication by Scott Boyd, the administrator the Estate of Nathan Boyd, his great-grandfather. Scott Boyd claims that, in the 1890s, Nathan Boyd acquired a right to a major portion of the water subsequently appropriated by the United States for the Rio Grande Project.
 - ✓ In 1893, Nathan Boyd organized the *Rio Grande Dam and Irrigation Co.* for the purpose of building a dam and storage reservoir on the Rio Grande River near the present location of Elephant Butte Dam to provide water for irrigation of lands in New Mexico and Texas. In 1895 the company obtained the rights of way needed to commence construction.
 - ✓ In 1896, due to concerns over claims of the Mexican government that Mexican farmers were being harmed by reduced flows in the Rio Grande caused by upstream diversions, the United States government placed an embargo on further entry onto public lands to build irrigation projects on the Rio Grande and commenced legal action to enjoin the Rio Grande Dam and Irrigation Company's Elephant Butte project.
 - ✓ After years of litigation, in 1909 the United States Supreme Court upheld a decision of the New Mexico Territorial Supreme Court that the Rio Grande Dam and Irrigation Company had forfeited its right to build a dam at Elephant Butte.
 - ✓ Because the Boyd claims are to large amounts of water utilized by the Rio Grande Project, the State, United States, EBID, Las Cruces and other parties urged the

Court to rule on the validity of the claims. In response, the Court designated the claims as an expedited *inter se* proceeding. The expedited *inter se* for the Boyd estate claims were designated by the Court on February 1, 2011.

- ✓ The Court will hear argument on dispositive motions to dismiss filed by the United States and the City of Las Cruces on the Boyd claims at a hearing on August 18, 2011. The State has concurred in the motions to dismiss. If Mr. Boyd prevails on the motions, the Court will set a full trial schedule on the issue.