

**STATE OF NEW MEXICO  
COUNTY OF SANDOVAL  
THIRTEENTH JUDICIAL DISTRICT COURT**

**LION’S GATE WATER,** )  
 )  
 **Plaintiffs,** )  
 )  
 **vs.** )  
 )  
 **NEW MEXICO STATE ENGINEER,**)  
 )  
 **Defendant.** )  
 )  
 \_\_\_\_\_ )

**D1329-CV-07-00596**

**Hon. George P. Eichwald  
District Judge**

**PLAINTIFF’S PROPOSED FINDINGS OF FACT AND CONCLUIONS OF LAW**

COMES NOW, Lion’s Gate Water, by and through its attorneys of record, and submits is proposed findings of fact and conclusions of law. In any appropriate “Findings of Fact” a trier of the facts receives “Proposed Findings of Fact and Conclusions of Law” from all parties and then makes his “Findings of Fact” based upon all input and deliberate analysis.

**FACTS<sup>12</sup>**

1. The court has jurisdiction over the subject matter and the parties to this proceeding
2. Venue for these proceedings is proper.
3. Lion’s Gate Water is seeking to salvage wet water currently lost to evaporation.
4. Evaporation is not beneficial use, therefore the water is not currently being appropriated.
5. The US appropriates water for beneficial use in the same manner as an individual as is evidenced by the Opinion of the Territorial Attorney General in 1905-1906 to David M.

<sup>1</sup> EXTENSIVE FACTUAL HISTORY OF THE RIO GRANDE PROJECT ATTACHED AS APPENDIX A

<sup>2</sup> EXTENSIVE PROCEDURAL HISTORY OF THE CASE ATTACHED AS APPENDIX B

White, Territorial Engineer. New Mexico Territorial Attorney General Opinions 1905-1906, No. 326.

6. US was required to follow the rules and regulations of the Territorial Engineer. That is evident from the Attorney General Opinion No. 209 of 1952 that states:

[U]nder the power that you have to make rules and regulations necessary to administer the duties devolved upon your office, it is my opinion that you have the power to make rules and regulations which may affect the Bureau of Reclamation, a department of the United States, **when it has reserved unappropriated waters and that you may require it to file proofs of completion of works and meet any other requirements provided by your rules and regulations.** *I can see no reason why the Bureau of Reclamation should not be subject to reasonable rules and regulations promulgated by the State Engineer.* Attorney General Opinion No. 209, No. 5559, Letter from Joe L. Martinez, Attorney General to John H. Bliss, State Engineer dated July 2, 1952, Reports of the Attorney General 1951 (*emphasis added*)

7. There was no distinction between a person and the US Bureau of Reclamation with regard to the appropriation of water under the New Mexico Water Code in the time period that the Rio Grande Project came into existence. In fact, Frank W. Clancy, Attorney General, wrote in Opinion Letter No. 1506 to James A. French, State Engineer that:

I am unable to see why any distinction should be made between the government reclamation service and other persons in the practice as to passing upon application to appropriate waters. Attorney General Opinion No. 1506, Letter from Frank W. Clancy, New Mexico Attorney General to James A. French, State Engineer dated April 23, 1915, Reports of the Attorney General 1915

I.

8. It is uncontroverted that the U.S. Bureau of Reclamation is not a beneficial user of water. *State of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation District, et al.* Cause No. CV-96-888<sup>3</sup>. In which the State Engineer argued that the U.S. Reclamation Service (U.S. Bureau of Reclamation) was not a beneficial user of water.

---

<sup>3</sup> <http://www.ose.nm.us/water-info/CourtOrders/order-cv-96-888.pdf>

9. It is uncontroverted that under the Constitution of New Mexico a non-beneficial user of water cannot even make application to store, divert, or use water.
10. Prior to 1900 approximately 31,424 acres were under irrigation in the Lower Rio Grande within New Mexico. 14 major private and community ditches and innumerable small acequias in New Mexico, which diverted directly from the Rio Grande, served these lands. Others such as the Franklin Ditch (1889) were constructed in Texas. These lands were irrigated from the normal (non-flood) flow of the Rio Grande.
11. By letter dated January 23, 1906, B.M. Hall, a consultant and Supervising Engineer of the Reclamation Service addressed to Territorial Engineer David L. White, requested the reservation of 730,000 acre feet of water per year for irrigation within what is commonly known as the Rio Grande Project. (The Reclamation Service was a federal department established within the Division of Hydrography in the U.S. Geological Survey. The Reclamation Service separated from the U.S.G.S. in 1907 and in 1923 was renamed the U.S. Bureau of Reclamation)
12. Two days later on January 25, 1906, B.M. Hall filed Application No. 8 with the Territorial Engineer for a permit to only store 2,000,000 acre feet of water behind a dam to be constructed at the Engle (Elephant Butte) dam site. This dam site had been selected by Arthur Powell Davis, Chief Engineer of the Irrigation Service in May of 1902<sup>4</sup> over the proposed International Dam Site four miles north of El Paso. The International Dam Site was described in detail in the report of the International (Water) Boundary Commission.<sup>5</sup>
13. Application No. 8 was filed pursuant to the requirements of the Reclamation Act of June 17, 1902 (32 Stat., 388) to **only** store 2,000,000 acre feet.

---

<sup>4</sup> Arthur Powell Davis, 1917, Irrigation Works Constructed by the United States Government, John Wiley & Sons, Inc., New York, p. 238.

<sup>5</sup> Proceedings International (Water Boundary) Commission, United States and Mexico, 1903, vols. 1 and 2.

14. The Reclamation Act did not authorize the reservation of water for irrigation projects by the Federal Government. Instead, the Reclamation Act required that:

“Nothing in this act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water ... or any vested right acquired thereunder, and the Secretary of the Interior... shall proceed in conformity with such laws....”<sup>6</sup>

15. The United States Supreme Court ruled that under the Reclamation Act of 1902 that:

§ 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it acquire water rights or vested interests therein. Arizona v. California et.al. 373 U.S. 546, 83 S. Ct. 1468 (1963)

16. Hall’s January 23, 1906 letter stated an intention by the United States to utilize “a volume of water equivalent to 730,000 acre feet per annum (afa) requiring a maximum diversion of storage of 2,000,000 miner’s inches” at the Elephant Butte reservoir site pursuant to Chapter 102 of the 36<sup>th</sup> Territorial Legislative Assembly approved March 16, 1905.

17. Application No. 8 is notably incomplete for many reasons, not the least of which is that it fails to identify the existing irrigation works that were to be served by the Elephant Butte Dam and Reservoir as required by Item 11 of the Application. Application No. 8 also fails to identify any of the many irrigation canals and acequias constructed between 1844 and 1900 that became part of the Rio Grande Project even though many of the canals and acequias are shown in the 1896 Follet Survey and the 1903 French Survey Maps.

18. The Territory adopted a new Water Code that entered into force on March 19, 1907

19. On April 4, 1908, Vernon Sullivan, Supervising Engineer for the U.S. Reclamation Service (formerly the Irrigation Service) wrote the Territorial Engineer and reserved all unappropriated water on the Rio Grande and its tributaries from his Phoenix, Arizona office.

20. Application No. 8 was never amended to include a description of where all unappropriated water or even the “730,000 afa” of water reserved by B.M. Hall in his January 23, 1906

---

<sup>6</sup> A Brief History of the Bureau of Reclamation, Bureau of Reclamation History Program

letter, would be used, as required by Item 8 on the Application. An examination of Application No. 8 shows also that there is no indication of how much land would be irrigated under the Rio Grande Project, where the water will be used, the location of other points of diversion mentioned in the Application, or of irrigation works that were already in place within the proposed area of the Rio Grande Project such as the Franklin Ditch system constructed in 1889, and the irrigation works of the Rio Grande Dam and Irrigation Company, a New Mexico Corporation, which intended to impound 235,000<sup>7</sup> acre feet of water as required by Item 8 of the Application.

21. Section 40 of Chapter 49 of the 1907 water law, states

“ Whenever the proper officers of the United States ... shall notify the Territorial Engineer that the United States intends to utilize certain specified water, the waters so described, and unappropriated, and not covered by applications ... shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which period the proper officer of the United States shall file plans for the proposed work in the office of the Territorial Engineer for his information. Provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the territorial engineer shall become public waters, subject to general appropriations.”

22. While the United States could reserve water it intended to utilize under Sec. 40 of the 1907 Water Code the notice described in that statute did not constitute appropriation. Any person, association, or corporation, public or private (which would include the United States Government) could only acquire the right to the beneficial use of water (appropriation) by making an application to the Territorial Engineer. 1907 Law of New Mexico, 37<sup>th</sup> Legislative Assembly, Chapter 49, § 40. The United States never filed an application that described all the unappropriated water of the Rio Grande Stream System as was required for anybody seeking to appropriate water.
23. An examination of Application No. 8 and the correspondence related to it demonstrates that not only is Application No. 8 incomplete and deficient on its face but no sufficient plans

---

<sup>7</sup> Follet Survey 1896

were submitted within three years of the January 25, 1906 filing of Application No. 8 (or the April 4, 1908 notice which was illegal under the Reclamation Act) as required by Section 40 of the 1907 Water Law and Item 10 on the Application. Based on these deficiencies, as well as others the Application No. 8 was never approved by the Territorial or SE. The failure of the U.S. Reclamation Service to complete and obtain approval of an application in accordance with the Water Codes of 1905 and 1907 is an incontrovertible fact.

24. The 1907 Laws of New Mexico, Chapter 49, Section 24 states:

Any person, association or corporation, public or private, hereafter intending to acquire the right to the beneficial use of any waters, shall before commencing any construction for such purposes, make an application to the territorial engineer for a permit to appropriate, in the form required by the rules and regulations established by him.

25. The US never filed an application to place water of the Rio Grande to beneficial use that would fulfill the requirements of Section 24, nor could it. They only filed Application No. 8 for storage of water that was grossly incomplete and never approved.

26. The January 25, 1906 Application No. 8 filed by B.M. Hall must be considered as nugatory and void. Item 11 of the Application is entitled "Other reservoirs and canals, name or number, location and size and capacity of each." By 1900, extensive irrigation works and diversion structures existed within the Lower Rio Grande both in New Mexico and Texas. Beginning in 1844, there were permanent irrigation canals established with well over 30,000 acres irrigated in the lower Rio Grande. In 1896, W.W. Follett had already catalogued acequias and ditches up and down the length of the Rio Grande. The Dona Ana Bend Colony Map of 1898 shows innumerable small acequias diverting directly to farms contiguous to the Rio Grande. The 1898 U.S. Geological Survey Water Supply Paper 10 contains photographs of major irrigation canals. None of these are indicated in Items 10 or 11 of Application No. 8. Furthermore, B.M. Hall wrote to Mr. F.H. Newell, the Chief Engineer of the Reclamation Service, on July 14, 1904<sup>8</sup> from his office in El Paso, Texas,

---

<sup>8</sup> Letter dated July 14, 1904 from B.M. Hall to Mr. F.H. Newell, received July 18, 1904 from the National Archives

that he was "...hard at work on estimates for storage, mud accumulation and irrigation water from the International Reservoir (four miles upstream of El Paso) and the Elephant Butte Reservoir." Hall worked in the area for a number of years and certainly knew of the Rio Grande and Irrigation Company dam and canals that had been nearly completed at Leasburg and the works called the English Canal and the RGDIC's dam that had been under construction at their Leasburg site and did not include any appropriations by the Rio Grande Dam and Irrigation Company<sup>9</sup> or their diversion and distribution network; as Item 11 of the application requires. As further direct proof of B.M. Hall's knowledge is a letter from W.W. Follett, Consulting Engineer, with the Reclamation Service, to Arthur Powell Davis, the Acting Director of the Reclamation Service dated November 22, 1907 referring to a letter that transmitted information regarding the Rio Grande Dam and Irrigation Company to B.M. Hall<sup>10</sup>. This shows that B.M. Hall knew of existing "other reservoirs and canals" amounting to 235,000 acre feet of storage owned by the Rio Grande Dam and Irrigation Co. but chose to not disclose their existence in Items 4, 5, 6, 7, 8, 10, and 11 of Application No. 8.

27. A Treaty with Mexico dated May 21, 1906 guarantees Mexico 60,000 acre-feet annually.

28. The total amount of water required for the Rio Grande Project (730,000 afa) and the Mexican Treaty obligation (60,000 afa) equals 790,000 acre feet annually.

29. The Rio Grande Compact, adopted in 1938, requires a delivery of 790,000 afa of water to irrigate the agricultural acreage within the Rio Grande Project from Elephant Butte to Fort Quitman, Texas and meets the afore-stated delivery requirements to Mexico.

30. A review of Application No. 8 shows on its face that neither the Territorial Engineer, nor the SE, ever approved Application No. 8. Thus, the U.S. does not have an approved permit to use the water the SE claims the U.S. enjoys and never met the requirements and conditions established in Section 40 of the 1907 Water Code.

---

<sup>9</sup> Letter dated July 21, 1903 to the Attorney General of the United States by U.S. Congressman B.S. Rodey stamped as received by the by the U.S. Department of Justice on July 28, 1903 from the National Archives.

<sup>10</sup> Letter dated November 22, 1907 from W.W. Follett to A.P. Davis, Acting Director of the United States Reclamation Service.

31. The Territorial Engineer's Rules and Regulations of May 6, 1907 required that plans, maps and specifications must be filed and that there was an absolute set of criteria that those plan maps and specifications must adhere to.
32. The US only filed the seven sheets of drawings by the end of the three-year deadline cited in the SE Motion for Summary Judgment.
33. The US did not file any specifications for the project until 1917 after the project was completed.
34. These seven drawings do not facially meet the requirements of size of the 1907 Rules, Regulations and Requirements for Filing Claims to Water Rights and General Instructions for Obtaining Same for both Ditches and Reservoirs under Law of 1907. There are no specifications. They are never stamped approved. They could not have met the requirements of the Laws of 1905 or 1907, or the 1907 Rules, Regulations, and Requirements of the Territorial Engineer as uncontroverted testimony of an expert witness states.
35. Furthermore, an examination of Application No. 8 and several other early Applications shows that it was the custom of the Territorial Engineer (TE) to make notations in his own hand on the face of applications when the TE received documents responsive to items in applications and conditions for approval were satisfied; such as the filing of plans and specifications for works that were required by Item 10 and were a condition for permitting pursuant to Section 40 of the 1907 Act. Application No. 8 shows that the Territorial Engineer did note the filing of plans for the Leasburg Dam on April 1, 1909 and returned the plans for revision on November 1, 1909. There is no application for the Leasburg Dam in the SE files. Furthermore, there is no notation by the Territorial Engineer on the face of

Application No. 8. that indicates receipt of any plans for Elephant Butte reservoir within three years of its 1908 notice or ever, nor were any applications filed by the U.S. for any other reservoirs that were part of the Rio Grande Project other than Elephant Butte ever.

36. In fact, there is abundant correspondence in the file from the Territorial Engineer requesting the plans and indicating that whatever was submitted did not meet the specifications required by the Territorial Engineer. For example, on April 23, 1917, Rio Grande Project Manager, L.M. Lawson wrote James A. French, the SE of New Mexico and stated “No drawings have ever been made up of the size required in the state regulations.” The first accepted drawings of Elephant Butte Dam and spillway and some blue print duplicates and two copies of specifications that were mailed to James A. French, the SE on September 3, 1917 over 6 years after the statutory deadline and **after** the dam was completed. These plans and specifications hardly encompass the volume of plans that should have been provided within 3 years following the application and **before** the dam was constructed.
37. Prior to September 7, 1917, no plans for the construction of the Elephant Butte Dam were submitted in acceptable form to the SE. The first set of plans submitted by for the Rio Grande Project found in the file of the SE was in an August 1912 Report that contained drawings dated August 1912 and December 1912 for Elephant Butte Dam that was received on September 7, 1917, a year after the dam was completed and 11 years after the filing of Application No. 8 and nine years after the nugatory April 4, 1908 notice and six years after the statutory deadline for filing plans and specs.
38. Furthermore, the Fifth Biennial Report by the SE for years 1920 to 1922 shows that many early applications were approved but that Application No. 8 was never approved during that

period, and therefore, no permit for the appropriation of water was ever issued to the U.S. Reclamation Service.

39. It is uncontroverted fact from the record and from argument on the Motion for Summary Judgment that neither any Territorial nor State Engineer ever signed or issued a Certificate Construction for Elephant Butte Dam nor has the State Engineer proffered any documentary evidence or argument to the contrary.
40. The fact that the U.S. Reclamation Service failed to timely file plans for Elephant Butte Reservoir in accordance with Section 40 of the 1907 is ultimately proven by a letter from then SE Herbert Yeo dated March 23, 1927 to the U.S. Reclamation Bureau. Yeo's letter confirms that the U.S. first filed plans for Elephant Butte on September 7, 1917 and for that reason the U.S. never met the requirements for approval of Application No. 8 as required by Section 40
41. Herbert W. Yeo's letter should be given immense credibility and weight as it represents the best contemporaneous knowledge of the events. His life as an engineer was spent nearly entirely in the Lower Rio Grande. Yeo was employed by the Reclamation Service from 1906 to 1917 which covered the period from the initial Reclamation Service application for Elephant Butte Dam through its completion in May 1916. Yeo was a contemporary and colleague of B.M. Hall and W.W. Follett, who all worked for the Reclamation Service from their El Paso office. Yeo was also the New Mexico SE from July 1926 through June 1930.
42. Yeo's letter of March 23, 1927 represents the final official opinion of the SE and combined with an absence of any evidence of approval of the U.S. Bureau of Reclamation's Application No. 8, on which the SE bases its contention that all the water in the Rio Grande stream system are fully appropriated; raises a material issue of fact whether (1) the conditions for approval of Application No.8 were met and thus (2) whether the U.S. has a valid permit for the Rio Grande Project and (3) whether the U.S. ever met the requirements

of Section 40 of the 1907 Water Code in order to appropriate any of the surface water in the Rio Grande or any unappropriated water as alleged by the SE.

43. There is also a question of fact whether the letter dated March 30, 1911 tendered by the SE relates to the delivery of plans for the Elephant Butte Reservoir for five reasons. 1) The March 30, 1911 letter does not reference either Application No. 8 or the Elephant Butte Reservoir, 2) there is no notation on Application No. 8 of receipt of plans for Elephant Butte Reservoir on that date as was the custom at the time, 3) the March 23, 1927 letter from SE Yeo proves clearly that the U.S. did not deliver any plans for Elephant Butte Reservoir until September 7, 1917. 4) No certificate of construction was ever signed by the New Mexico SE. 5) Furthermore, the SE has failed to produce any accepted plans prior to September 7, 1917. A review of other contemporaneous applications demonstrates that it was customary for the SE to note compliance with conditions for approval such as receipts of drawings for dams. None of the referenced documents indicate approval of the Rio Grande Project or any of its structures by Territorial or SE's within the statutory three-year period from the January 23, 1906 date of Application No. 8.
44. The tenor of the correspondence at the time suggests that the U.S. Reclamation Service had little regard for the Territorial Engineer, which may explain the strained tone in much of the correspondence between the two at the time.
45. The SE has produced a copy of the *City of Albuquerque v. S.E. Reynolds* case evidently for the purpose of proving that both the SE and the City of Albuquerque admit that the waters of the Rio Grande are fully appropriated. Of course, their stipulation in that case is only the law of that case and it is a self serving and gratuitous recognition of its own fiction. It is not supported by any factual evidence or legal analysis and it is certainly not admitted in the present case and can be given no putative value and appears to be incorrect. The SE has gratuitously admitted and stipulated and broadcast to the world that the Rio Grande is fully appropriated. Saying it is true does not make it true without a high level of factual proof. A fact only becomes a true fact when determined by a court after weighting all the facts

bearing on the issues and the facts described above only raise overwhelming doubt as to the veracity of the affidavit of SE Steve Reynolds dated February 14, 1975.

46. In *State of New Mexico v. Meyers*, 64 N.M. 186, 326 P.2d 1075(1958) the State Engineer and Meyers entered into a stipulation prepared by the SE that all of the waters of the Rio Grande were fully appropriated . However, the stipulation regarding the full appropriation of the Rio Grande was stricken from the signed stipulation and initialed before it was filed with the Court.
47. Based upon the weight of the evidence collected following the LGW Application and the absence of any factual evidence beyond conclusory statements provided by the SE, LGW now believes the U.S.' Application No. 8 was never properly filed by the U.S., nor ever approved by the Territorial Engineer and the waters reserved were never legally appropriated by the U.S. in accordance with to the requirements of State Law, as required by the Reclamation Act of June 17, 1902.
48. Most importantly, the late filing of the plans in 1917 would not suffice to satisfy the requirement that plans be filed with three years, because Section 40 of Chapter 49 of the 1907 water law, states:

***Provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the territorial engineer shall become public waters, subject to general appropriations.” (emphasis added)***

**Which means that the reserved water reverted back to the public domain, by operation of law. The US never appealed this act of law, and neither the SE, nor the Court can do anything to ignore that law ran its course. Unless the SE can prove that plans were filed within 3 years. This Court cannot ignore the law that states that US only had 3 years to file plans and the US failed to do that.**

49. Evidence that the water reverted to the public domain is found in the post-1911 applications for permits and licenses to appropriate have been granted by the SE. In fact, following the alleged reservation of all the unappropriated waters of the Rio Grande, the

SE granted at least six (6) further permits and licenses to appropriate water on the Rio Grande Stream System. The known permits are SP-01565, SP-1121, SP-2549, SP-1845, SP-1306 and SP-1380. The SE can attempt to ignore that these applications and licenses exist, but this Court cannot ignore that fact.

### CONCLUSION

“Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law” Hanson v. Turney, 2004-NMCA-069, 136 N.M. 1, 94 P.3d 1, 3 (NM App. 2004), citing Self v. United Parcel Service, Inc., 1998-NMSC-046, 970 P.2d 582, 126 N.M. 396, 399. In determining whether a factual dispute exists, courts must resolve all reasonable inferences in favor of the nonmovant and must read the pleadings, affidavits, depositions, answers to interrogatories, and admission in the light most favorable to a trial on the merits. *Garcia-Montoya*, 2001-NMSC-003, ¶ 7. In dealing with Motions for Summary Judgment in *de novo* proceedings arising from an appeal of a decision of the SE, guidance can be found in Judge Kennedy’s concurrence and dissent in *Montgomery v. N.M. State Engineer*, 2005-NMCA-071, 137 N.M. 659, 114 P.3d 339, in which he states “[t]he district court in *de novo* review should demonstrate that it has **independently** decided the case on the facts before it, not affirm by summary judgment the assumptions the State Engineer makes to justify its ultimate decision.” (*emphasis added*) In the present case, it is clear that there are many unsettled facts upon which the Court must rely solely upon the opinions of the State Engineer to reach its decision to grant summary judgment. Summary Judgment is not proper if the proper weight is given to the disputed facts between the parties, and the Motion should be denied.

Respectfully Submitted,

---

Robert S. Simon, Esq.  
A. Blair Dunn, Esq.  
610 Gold Avenue, Southwest – Suite 111  
Albuquerque, New Mexico 87102  
Tel. 505-843-7643  
Fax 505-246-2232

Certificate of Mailing

I, A. Blair Dunn certify that on February 3, 2009, I mailed a copy of the above Motion to: Barbara Brill, at P.O. Box 25102, Santa Fe, N.M. 85104-25102, and other interested parties by U.S. postage prepaid first class mail.

---

A.Blair Dunn

## APPENDIX A

### HISTORICAL FACT SHEET

1. 1659 – Irrigation began in the vicinity of Juarez, Mexico with the establishment of a mission in 1659. Long prior to 1880 about 25,000 acres of land had been put under irrigation in the Juarez Valley and by 1880 20,000 residents were living in that valley.
2. 1880 – Beginning about 1880, the Mexican government complained to the United States that its water was being taken by appropriations upstream on the Rio Grande.
3. 1889 – Dam and reservoir above El Paso projected to be known as the International reservoir. Silt in the Rio Grande by W.W Follett, IBC.
4. June 10, 1889, - First samples of Rio Grande at El Paso were collected and analysed by the U.S. Geological Survey under direction of Major Anson Mills.
5. 1889 – First flow measurement taken by U.S. Geological Survey
6. April 29, 1890. Congress passed a concurrent resolution authorizing the President to negotiate with Mexico.
7. February 1, 1895 – Letter from Secretary of the Department of Interior to The Commissioner of the General Land Office acknowledging receipt of January 21, 1895 letter submitting for approval the articles of incorporation of the Rio Grande Dam and Irrigation Company together with a map showing the location of a proposed reservoir site on account of which a right of way is claimed under provisions of the Act of March 3, 1891 (26 Stat., 1095) The letter also discussed placement of monuments to witness such destroyed corners was affirmed by the Secretary of Interior on October 10, 1894. Letter also approved the articles of incorporation.
8. May 6, 1896, agreement between U.S. and Mexico which provided for a joint commission to conduct investigations.
9. November 25, 1896 – Report of Commission submitted. This report contained the W.W. Follett report. The report concluded that in New Mexico prior to 1880 there were 563 canals taking from the Rio Grande and irrigating 183,000 acres.
10. March 18, 1897 – An Act Creating a Commission of irrigation and water-rights. C.B. 127; Approved March 18, 1897 enacted by the Thirty-Second Legislative Assembly of the Territory of New Mexico.
11. May 7, 1897, Acting Attorney General, Holmes Conrad filed petition for an injunction against the private Rio Grande Dam & Irrigation Company
12. May 1897 to January 1, 1897 occasional samples for silt determination were taken at El Paso
13. May 19, 1887 – 49,650 shares of Rio Grande Dam and Irrigation Stock Certificate issued to The Rio Grande Investment Company.
14. May 24, 1897 – RIO GRANDE DAM AND IRRIGATION COMPANY transfers 49,650 shares of stock to Mr. Boyd. (
15. November 1, 1897 Letter from the Commissioner General of the U.S. Land Office in Washington to the Register of the U.S. Land Office in Las Cruces referred to in LGWS80 referring to a reservoir site (presumably the RIO GRANDE DAM AND IRRIGATION COMPANY site for Elephant Butte).
16. E.P. Osgood Preliminary Report Page 3. W.W. Follett Report (1896) or Sen. Doc. 229 (55 Cong. , 2nd Session, 1898), efforts toward irrigating these lands were initiated in

1889 and filings made in 1893 and 1895 for Elephant Butted Dam proposing that under the entire works, “over 230,000 acres of bottom lands and about 300,000 acres of mesa lands will be under ditch. The applications spoken of by Osgood were filed by the New Mexico Dam and Irrigation Company, a private company.

17. E.P. Osgood Preliminary Report Efforts had been underway since about 1890 to bring some 230,000 acres under the Elephant Butte Reservoir.
18. 1890s – E.S. Osgood Preliminary Report Pages 2 & 14 – The Rio Grande Project is tentatively placed at 155,000 acres. Also E.P. Osgood Final Report, 1928, Page 3.
19. 1890 – E.S. Osgood, Preliminary Report, Page 4, 12th Annual Report & 11th Ann. (Early data; warning sounded) USGS In 1890, the U.S. Geological Survey, was responsible for hydrological studies as an agency. When the Reclamation Service was authorized by Congress on June 17, 1902, it became a distinct department within the U.S. Geological Survey and Newell was its first director.
20. 1895-1924 Maps – Hydrograph of the Rio Grande at San Marcial and El Paso Bureau of Reclamation
21. February 1, 1895, Secretary of Interior approved under act of March 3, 1891 (26 Stat. 1095), a right of way over the public lands for the Rio Grande Dam & Irrigation Company to construct a large irrigation dam across the Rio Grande near Elephant Butt in New Mexico, and at substantially the same place where the present Elephant Butte Dam of the Government project is not located.
22. May 6, 1896 – Agreement between Mexico and the US provided for a joint commission to report on irrigation issues.
23. November 25, 1896, The commission issued its report that supported Mexican contentions in substance, and recommended construction by the U.S. of a reservoir to insure a water supply for the Mexican lands.
24. 1896 – Maps filed by Rio Grande Dam & Irrigation Company with the Interior Department
25. December 5, 1896, - Secretary of the Interior at request of Secretary of State issued order forbidding the approval or application for rights of way for irrigation purposes over public lands of the headwaters of the river.
26. December 5, 1896, Letter from D.R. Francis to Commissioner of General Land Officer directing Commissioner to suspend action on any and all applications for right of way through public lands for purposes of irrigation by using the waters of the Rio Grande River, or any of its tributaries, in the State of Colorado or in the Territory of New Mexico.
27. May 1897, Water Sampling at the El Paso gauging station was taken over from the U.S.G.S. by the IBWC of which Gen Anson Mills, is Commissioner
28. May 22, 1897 – Letter from U.S. Attorney for New Mexico to U.S. Attorney General in Washington stating that RGD&IC planned to begin work on their Elephant Butte dam site and that he had filed a petition with the third judicial district and that a hearing upon the matter is set for the first Monday in June 1897 (June 7, 1897).
29. May 24, 1897, the U.S. sued the company in the District Court of the Territory, Third District to prevent it from building its proposed project based on the bogus reason that the dam would obstruct the navigable water ways of the United States. The decision was dismissed by the Trial Court and affirmed by the Territorial supreme court 9 N. Mex. 292, 174 U.S. 690) The decision was reversed by the U.S. Supreme Court and remanded

- for additional “inquiry into the question whether the intended acts of the defendants would diminish navigability of the stream and if so enter a decree restraining those acts to the extent that they will so diminish the flow and navigability (See U.S. v. Rio Grande Dam and Irrigation Co. (1989) 174 U.S. 690). The resulting remand resulted in a order in favor of the RGD&IC that was affirmed by the Territorial Supreme Court (10 N.M. 617, 184 U.S. 416) Again the U.S. Supreme Court reversed the lower court and remanded with “directions to grant leave to both sides to induce further evidence.” (See U.S. v. RGD&IC (1902) 184 U.S. 416) For a third time the suit was placed on the docket of the NM trial court. Government amended its complaint, alleging that the statutory period of five years for construction required by the right of way set of March 3, 1891, had run, the requirement had not been met, and the rights, if any, the company had acquired were forfeited. Upon this new allegation the trial court found for the Government, and its decree was thereafter affirmed by the Territorial supreme court (13 N.Mex. 386) and by the U.S. Supreme Court (See RGD&IC v. U.S. (1909 13, N. Mex. 386, 215 U.S. 265)
30. June 7, 1897 – Hearing before court in 3rd judicial district.
  31. June 15, 1897 – Letter from Joseph McKenna, NM Attorney General to Secretary of War, Department of State, acknowledging receipt of his letter of June 11, 1897 and inclosing original papers in the matter of the suit of the Government against the RGD&IC
  32. June 21, 1897 – Letter from Register (name unreadable) of U.S. Land Office in Las Cruces to Commissioner General of the Land Office in Washington transmitting Application filed June 18, 1897 under Chapter 335, Act of February 16?, 1897, made by the RIO GRANDE DAM AND IRRIGATION COMPANY for reservoir sites, described as ‘U.S. Reservoir Surveys Nos. 38 and 39 situated in the bed of the Rio Grande, the tracts as specially designated with said reservoir sites are mentioned in your letter “C” Nov. 14, 1891.
  33. December 5, 1896 – Letter from D.R. Francis, Secretary of State to Commissioner of the General Land Office, Department of the Interior, made an order which forbade the approval of applications for rights of way for irrigation purposes over public lands on the headwaters of the river. This Embargo on the Upper Rio Grande, remained in force from 1896 until 1925.
  34. May 22, 1900 – Transfer of 49,650 shares of capital stock constituting all of the shares of the Rio Grande Dam & Irrigation company that were issued to The Rio Grande Investment Company on May 19, 1897 to Nathan Ellington Boyd and executed at their London Office.
  35. September, 1900, - IBWC takes over San Marcial Station
  36. June 17, 1902 Congress passes the National Irrigation Act (32 Stat., 388)
  37. June 17, 1902 – Chapter 1093. – An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands. Section 8. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior , in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect an right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the

provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.” (LGWS 85, Copy of the Session I. Laws, Ch. 1093.)

38. July 1902, Secretary Ethan Hitchcock establishes the Reclamation Service within the U.S. Geological Survey.
39. February 1, 1903 - Letter from President of the Commission of Irrigation of New Mexico to H.A. Hitchcock, Secretary of Interior recommending that the question of the Elephant Butte dam case might be settled by a cancellation of the map heretofore filed and approved under the Act of March 3, 1891, and all rights – which may have been acquired by reason of filing such map forfeited.
40. February 20, 1903 – Letter from E.A. Hitchcock to Secretary of State (255-96) indicating land granted to RGD&IC (Act of March 3, 1891, 26 Stat., 1096, 1102-2) may be subject to forfeiture because of default in matter of construction of its works, and it is suggested “whether it would not be wise for your Department to take steps with the Interior Department to the end that the license be canceled.”
41. March 1903 – Beginning of investigations into construction of a Federal project.
42. January 26, 1904 – *Ex Parte* communication by letter from U.S. Attorney for New Mexico to Judge M.C. Burah c/o Dept. of Justice Washington, D.C. suggesting that the Secretary of the Interior could cancel rights of RGD&IC [to rights of way] and get rid of the law suit because the company had not acted for more than five years since the injunction was first granted against the company.
43. June 27, 1904 – Secretary of State John May suggested to Secretary of the Interior Ethan A. Hitchcock that this new legislation might be utilized to solve the difficulty with Mexico.
44. November 18, 1904 – Original agreement between Mexico, New Mexico, and Texas Delegations, preparatory to the starting of the Rio Grande Irrigation System, signed at the Irrigation Congress at El Paso, Texas. “The project for the International dam and the project for the dam at “Elephant Butte” will provide the supposed effects, which were expressed by Mr. Hall and presented yesterday at the session of the Convention, reference costs, sedimentation, evaporations, distance to bedrock and the practical transport of water to the ancient Mexican dam above El Paso, necessary for the previously irrigated surface lands, and said water will be proportioned to Mexico and delivered without cost at said delivery point.
45. 1905 E.P. Osgood Ground Water in the Rio Grande Valley, U.S.G.S. Water Supply Paper 141, C.S. Slichter
46. January 23, 1905 – Texas (Texas Session Laws, 1905, p. 151 passed laws facilitating the RGP.
47. February 25, 1905 (33 Stat., 814) Federal Congress extended it “to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the territory of New Mexico, on the Rio Grande, in the Territory of New Mexico.”
48. March 16, 1905- 1905 Water Code 36 Legislative Assembly – Chap 102 (New Mexico Session Laws, 1905, p. 109, 277 passed to facilitate the RGP.
49. May 28, 1905 Water sampling began at San Marcial by the U.S.G.S. 10 samples per month.
50. June 12, 1905 (34 State. 259), the provisions of the National Irrigation Act were

“extended so as to include and apply to the State of Texas.”

51. July 3, 1905 – Minnie and James Johnson Stock Subscription Agreement with Elephant Butte Water Users’ Association. Filed June 22, 1906 Stock Subscription No. 1 with legal description of 10 acres of land.
52. November 8, 1905 – Contract of Amalia Freudenthal, Morris Freudenthal and Minna Freudenthal with EBWU’A filed of Record July 12, 1906. Contract No. 1. filed in Dona Ana County. (Yeo Papers MS235, Box 5, Branson Library)
53. December 2, 1905 – Secretary of the Interior approved an allotment of \$200,000 for the construction of what is now the Leasburg diversion dam of the RGP.
54. January 23, 1906 – Letter from B.M. Hall to David L. White, Territorial Engineer reserving 2,000,000 acre feet of storage in Elephant Butte Reservoir for the Rio Grande
55. Project and 730,000 acre feet of annual diversion. *According to Osgood, Preliminary Report, Page 14, the annual diversion seems to have been worked out based on 155,000 acres and*

<i>Unavoidable regulatory loss, and waste from EB</i>	<i>115,000 ac ft</i>
<i>Reservoir spill or waste</i>	<i>109,000 ac ft</i>
<i>Total Waste</i>	<i>224,000 ac ft.</i>
<i>Average supply</i>	<i>980,000ac ft</i>
<i>Remainder for Use</i>	<i>756,000ac ft</i>

*The consumptive use Page 14 for the RGP was taken as 2.5 ac ft/ac The letter was received on January 25, 1906 together with the deficient Application No. 8.*
56. January 25, 1906, Application No. 8 filed and signed by B.M. Hall. Contains no reservation for annual diversion, no period of annual use, no location of the point of diversion except to say nine miles west of Engle N.M. and diversion dams at Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas, no indication of the (8) number or acres to be irrigated
57. , (9) no cost of the works, (10) no description of works for diversion, (11) no list of other reservoirs and canals, name or number, location and capacity of each; and no approval.
58. May 21, 1906, Treaty with Mexico (34 Stat. 2953) for 60,000 acre feet annually from Elephant Butte Reservoir, and Mexico waived all claims for damages, and all claims to any other water from the RGP between the Acequia Madre, at El Paso, and fort Quitman, Texas.
59. June 12, 1906 – (32 Stat. 259). Provisions of the National Irrigation Act were “extended so as to include and apply to the State of Texas.”
60. January 11, 1907 – Territorial Irrigation Engineer Report to the Governor.
61. March 4, 1907 – (34 Stat. 1357) \$1,000,000 was appropriated from the General Treasury toward construction of the Elephant Butte Dam.
62. 1907 – E.P. Osgood Final Report Water Reservoirs of the Rio Grande Valley, New Mexico (Mesilla Valley, etc) U.S. G.S. Water Supply Paper 188 , W.T .Lee
63. March 19, 1907 – 1907 Water Code L 1907 Chapter 49 Sec. 30 (Sect 5688 1915 Codification) New Mexico Session Laws, 1907, p. 71)
64. November 22, 1907, Letter from W.W. Follett, Consulting Engineer to the Reclamation Service from Washington D.C. to A.P. Davis, Acting Director of the Reclamation Service stating the Davis’s letter of November 6, 1907 that transmitted a copy of his previous letter of April 27, 1907 to Mr. B.M. Hall relative to the work of the Rio Grande Dam and Irrigation Company had been received. Follett went on thank Davis for is information

which has been of assistance in connection with a recent perusal of the correspondence on file in this office regarding the status of the RGD&IC.

65. ~April 4, 1908, Letter from Louis Hill to Vernon L. Sullivan, Territorial Engineer, reserving all of the un-appropriated water of the Rio Grande received and filed by the by the Territorial Engineer on April 8, 1908.
66. April 15, 1908 – Memorandum from Morris Bien Supervising engineer of the U.S.R.S. in Washington for R.S. Commissioner Newell stating that he obtained from Mr. Stoutemyer copies of the water right applications filed by the RGD&IC in 1894 and 1895 in connection with their Elephant Butte Dam and diversion canals. He further writes that “I have had Mr. Lemenager place upon our project map the location of the lines described in their applications.” He concludes by stating: “The water right applications are in our files if you care to examine them in detail.”
67. May 30, 1908- Letter from B.E. Stoutemyer to Vernon L. Sullivan, SE, from Carlsbad. Queries Sullivan regarding plans of M. P.H. Baily and associates regarding appropriation of water from the Rio Grande. He states nearly all land in the Mesilla Valley are signed up with the government and will eventually receive water from the Engle Reservoir. Seeks further information
68. 1909 E.P. Osgood Page 6 Irrigation in New Mexico OES Bull. 215, Vernon L. Sullivan, USDA
69. April 1, 1909 SEO apparently received tracings from the RS not to SEO specifications
70. October 27, 1909 Letter from Homer Gault (RS) to Vernon L. Sullivan asking for a set of tracings of the Leasburg Project Structure so the RS can redraw them to conform to rules of the TEO and also asking for a copy of the OSE rules.
71. October 30, 1909, TEO sends tracings to Gault.
72. November 18, 1909 – Letter from Homer J. Gault, Acting District Engineer for the RS to Vernon Sullivan transmitting to Sullivan a set of tracings of the Leasburg Project as built in four sheets
73. November 22, 1909 – Maps received by SEO and accepted for filing. *These were maps of the Leasburg Diversion Dam for which no application had ever been filed.*
74. 1910 – Construction of EB Dam was authorized by the Secy. of the Interior in 1910. Rio Grande Project intended to irrigate 25,000 acres in Mexico, about 67,000 acres in Texas and about 88,000 acres in New Mexico. Prior to construction of the RGP, a part of the American lands within the project both in New Mexico and Texas, had been irrigated from the RG. These areas aggregated about 41,000 in New Mexico and about 15,000 acres in Texas.
75. January 1910, additional maps were prepared by RS and filed in the SEO office though no date of receipt was marked on the maps.
76. May 23, 1910 – Secretary of Interior authorized construction of Elephant Butte Dam which was completed on May 13, 1916. The project included
77. Percha Dam (RM 28.0),
78. Leasburg Dam (RM 74.4), (1908)
79. Mesilla dam (RM 94.6),
80. International(Franklin) Heading, Tex. (RM 135.0),
81. Franklin feeder heading, Tex. (RM 147),
82. Guadalupe heading, Tex.(RM 162.0)
83. Island heading, Tex.(RM 162.5),

84. Tornillo heading, Tex.(RM 165)
85. The project was constructed for the irrigation of approximately 25,000 acres of land in the Republic of Mexico, as provided by the Treaty of May 21, 1906, approximately 67,000 acres in the State of Texas and approximately 88,000 acres in the State of New Mexico (LGWS37)
86. May 28, 1910 – Water sampling begins at San Marcial by U.S.G.S. (LGWS41, Page 2)
87. May 30, 1910 U.S. G.S stopped taking frequent samples of river at El Paso
88. July, 1910 Construction of works was commenced. See Proof of Completion of Works filed September 7, 1917.
89. February 2, 1910 – Map of the RPG received. *The map is very general and shows no specific plats of land, acreage or ditches, canals, diversion works, drains, or wasteways.*
90. December 29, 1910 – Reference to a letter from Territorial Engineer to W.M. Reed, U.S.R.S. the subject of which was approval of the La Joya Irrigation Project to appropriate 10,000 acre feet of water from the Rio Grande. (THIS PERMIT POST-DATED THE APRIL 1908 RESERVATION OF ALL OF THE UNAPPROPRIATED WATER) (LGWS35)
91. August 1, 1910 – All gauging stations taken over by the International Water Commission from the Boundary Commission. The IWC is a commission for the Equitable Distribution of the Waters of the Rio Grande.
92. January 27, 1911 letter from Charles D. Miller to Reed referring to plans filed with the SEO for the Rio Grande Project.
93. February 13, 1911 Letter from W.M. Reed, District Engineer to Charles D. Miller, Territorial Engineer stating that plans that had been filed are in compliance with the requirements of the law and regulations of the SEO office as to size and in all respects fo far as you were able at the date of your letter above mention to state. Letter recognizes that time in which to file plans expires in April 1911 and Reed wants to make sure they are satisfactory. Reed asks Miller for affirmative statement to protect the interests of the U.S.
94. February 15, 1911 Letter from Charles D. Miller, SE, to W.M. Reed stating there was an attached letter from Mr. C. Bonds regarding the Engle Project.
95. February 15, 1911 Charles D. Miller, SE advises Reed that the plans filed by the RS for the RGP did not comply with rules and regs adopted by the Territorial Engineer under the 1907 irrigation law. He advises reed that Miller will send rules and regulations. Miller states “If these rights were initiated under the 1905 law, the writer [Miller] would be unable to state whether or not your maps complied with that act, in as much as no rules and regulations were adopted by the Territorial Irrigation Engineer, but, if the question pertains to the 1907 law, I can advise you regarding same in detail. I think that the rules and regulations, which are being sent to you, outline fully what is required to be placed upon the maps and plans and specifications.
96. February 28, 1911 Night telegram from Reed (9PM) to Territorial Engineer stating “Rio Grande project plans and your letter dated February 24, 1911 received. Impossible to comply with regulations applying to mineral appropriation in some respects. Not considered that general regulations apply to Special notice filed by Government. Wire your views and state what necessary to meet requirements your office.
97. March 28, 1911 - Letter from W.M. Reed to Charles D. Miller transmitting plans for the Rio Grande Project in seven sheets, six of which were originally filed in your office

- under date of February 2, 1910, the seventh and additional one containing supplemental data. Tracing No. 2 shows Elephant Butte Dam. And plans for the Rio Grande Project so far as work has been done on the Leasburg unit As plans are worked out in detail additional sheets will be furnished from time to time.
98. March 30, 1911 – SEO Chief Clerk to Reed. Acknowledges receipt of plans and the seventh one filed on March 30, 1911 noting an addition on No. 2. *Also a tracing of a cross section of the Rio Grande is supposed to have been filed this date.*
  99. April 7, 1911 – Letter from Frank Pierce, Acting Secretary, to TE releasing 300,000 acre feet per year and a maximum diversion of 2,000,000 miners-inches per year at a point 12 miles above Fort Sumner, New Mexico on the Pecos River.
  100. June, 1913 – Construction of Elephant Butte Dam was begun. See Proof of Completion of Works filed September 7, 1917 (WRD 20)
  101. June 1913 – Construction of one fifth of works was completed. See Proof of Completion of Works filed September 7, 1917
  102. August 31, 1914 – Reference to letter from State Engineer to U.S.R.S. stating that a formal release in writing of 1000 ac ft per annum to any one appropriated was not filed therein.
  103. 1914 E.P. Osgood, Page 6 Designation of Irrigated Lands for the Rio Grande Project (duty water, water rights, etc) Board of Engineers USRS
  104. 1915, E.P. Osgood Page 6, Drawings of the Rio Grande Project, Mesilla & El Paso Valleys, Board of Engineers, USRS
  105. 1916, E;P. Osgood, Page 6, Profile Surveys of the Rio Grande etc, New Mexico, W.D. Henon, USGS
  106. May 13, 1916, Construction of works completed See Proof of Completion of Works filed September 7, 1917 *Never approved by State Engineer*
  107. March 17, 1917 – Letter from James French to L.M. Lawson, Project Manager for the Rio Grande Project requesting plans and specifications of the Elephant Butte Dam as finally constructed.
  108. March 23, 1917 – Letter from L.M. Lawson to SE referred to in the May 2, 1917 letter from TE to L.M. Lawson
  109. March 27, 1917 Letter from State Engineer to E.H. Baldwin, U.S.R.S., El Paso states: “Since the record under No. 8 in this office by the U.S.R.S. in connection with the Elephant Butte Project does not contain plans and specifications of the structure that was finally decided upon and built, this is to advise that we would like to have you file such plans and specifications as will show the detail construction actually carried out.”
  110. April 1916, Elephant Butte Dam, General Plan, Elevation and Sections Accession Number 17169)
  111. April 23, 1917 Letter from L.M. Lawson to James A French, State Engineer. Acknowledges request dated March 17, 1917 for as built plans of Elephant Butte Dam. Lawson states that and encloses a lithograph of the dam exactly as it was completed. **“No drawings have ever been made up of the size required in the State Regulations.”**
  112. May 2, 1917 Letter from James A. French to L.M. Lawson ACKNOWLEDGES April 23, 1917 letter and states plans to on tracing cloth 24” x 33” regarding Application No. 8, “Plans and Specifications of the Elephant Butte Dam.” Calls attention to Sections 5688 and 5689 of 1915 Codification. Also sent blank form for Issuance of Certificate of Construction to be filed out and sent to SEO

113. September 4, 1917 – Proof of Completion of Works was filed out by L.M. Lawson, manger of the project on behalf of the United States and notarized, and was filed with the State Engineer on September 7, 1917.
114. September 3, 1917 L.M. Lawson, PM, to James A. French, SE, in response to May 2 letter Lawson sends under separate cover detail drawings of the Elephant Butte Dam and Spillway on tracing cloth, in three parts, each sheet being 24” x 33”. Also blue print duplicates and two copies of specifications were sent as well as one copy of “Proof of Completion of Works,”
115. September 8, 1917 – Letter to L.M. Lawson from the State Engineer stating that: “Proof of completion and plans and specifications in connection with the Rio Grande Project, Elephant Butte Dam, were received and given date of September 7, 1917, under file No. 8.” (WRD21, LGWS12)
116. 1917, E.P. Osgood, Drawings for the Rio Grande Project (Con. Use), 1917 Board of Engineers, USRS
117. 1917, Percha Dam had been completed. *No plans and specification. No application.*
118. June 15, 1918 By written contract between the United States, the Elephant Butte Irrigation District of New Mexico and the said Elephant Butte Water Users’ Association of New Mexico, the said association agreed to a transfer of its rights to, and a merger with, said Elephant Butte Irrigation District, and to a substitution of the district for the association assign instrumentality for the purpose of securing payment to the US of the construction cost of said project,... “
119. 1918, E.P. Osgood, Drawings for the Rio Grande Project (Con. Use), 1917 Board of Engineers, USRS
120. April 23, 1920 – Application 1380 filed by Matias J. Nagle, Jr. and Ed. J. James to appropriate 50 acre feet and 80 acre feet respectively from the Arroyo Hondo in the County of Santa Fe, State of New Mexico.
121. December 21, 1921 – Certificate of Construction issued that certifies “That the works knOwn as the “Auxiliary Diversion Dam and Ditch to Arroyo Hondo Reservoir, Permit No. 1380” from Arroyo Hondo which are located within the Sebastian de Vargas Grant...”
122. December 16, 1921 – Letter from H.H., Brook President of EBID to Charles May, State Engineer seeking to secure copies for EBID files of all papers filed by the UNRS for the Rio Grande Project
123. December 19, 1921 – Letter from SE to H.H. Book, President, EBID transmitting letter of Jan 23, 1906 Application for Permit, Louis C. Hill April 1908 letter to Vernon Sullivan, Jan 23 letter from B.M. Hall to David L. White, TE, L.M. Lawson to James A. French dated September 4, 1914
124. 1922 Rio Grande Project Map Map No: 19199 Accession Number 19199
125. May 20, 1925 – Letter from Hubert Work to The Commissioner of the General Land Office Regarding the Rio Grande Embargo. The Rio Grande in New Mexico and Colorado is not navigable. Further “The purpose of the withdrawal having been accomplished, there being no power in the Secretary to suspend laws of Congress, and the granting of water.
126. June 18, 1926 – Letter from Edward D. Tittmann, Esq. who states: **“I note there is not in the list any approval by the State Engineer, and my recollection is that**

**there was none, and I would like a certificate to that effect,..."**

127. March 23, 1927 Letter from Herbert W. Yeo to Davies indicating no action on Application No. 8.
128. March 31, 1928 - Letter and report from E.P. Osgood, Engineer for New Mexico and Texas of the RS to Herbert W. Yeo entitled Preliminary Report Upon The Use Control and Disposition of the Waters of the Rio Grande and its Tributaries Above Fort Quitman, Texas.
129. August 2, 1927 – Certificate by Herbert W. Yeo, State Engineer certifying to a copy of Application No. 8 attached to the Certificate is a true and correct copy of the original of said Application No. 8 on file in the office of the State Engineer of the State of New Mexico.
130. October 29, 1929. Certificate of Comparison prepared by Leslie Gillett who certifies to the January 23, 1908 B.M. Hall letter and the April 1908 Louis C. Hill letter.
131. October 29, 1929, Letter from State Engineer to Mr. P.W. Dent, District Counsel for the U.S.R.S. containing certified copies of the Hall and Hill letters.
132. April 13, 1929 – Letter from L.M. Lawson, Commissioner of the IBWC to Capt. Herbert W. Yeo, State Engineer replying to Yeo March 15, 1929 letter seeking information on aerial photographs of the El Paso and Mesilla valleys.
133. July 1, 1935 - F.B. Clayton writes the State Land Office seeking documents relating to acquisition of water rights by the U.S. Government prior to and contemporary with the construction of Elephant Butte Dam.
134. July 5, 1935 – Frank Vesely, Commissioner of public Lands refers Clayton’s letter to Thomas McClure, State Engineer.
135. July 5, 1935, The State Engineer writes Frank B. Clayton who states “The only record we have of the United States rights is under filing No. 8 for Elephant Butte project, which was filed about 1906, which is for the storage in Elephant Butte Reservoir. This is a reservation of all unappropriated water in the Rio Grande and tributaries, and **no release has been made since filing of plans within the statutory limit.**
136. June 19, 1935 – Letter from L.R. Fiock to Thomas M. McClure, State Engineer stating that the average contentd of EB Reservoir on June 15 for the past 16 years was 1,469,502 acre feet. Also, Mr. Fiock states: **“Mean annual draft past 9 years 946,100 acre feet, including 798,105 acre-feet released for irrigation use and 148,004 acre-feet reservoir loss.”**
137. July 12, 1935 – Letter from Frank Clayton to State Engineer requesting information contained in Filing No. 8.
138. July 18, 1935 – Letter from State Engineer to Frank B. Clayton stating that: “Filing No. 8 by the United States consists of two notices of reservation of which I am inclosing copies.”” “As you will notice from these reservations, **there is not designated any particular acreage on which this water will be used.**”
139. December 1935 – State Engineer issues Surface Permit 0620 to the Middle Rio Grande Conservancy District.
140. 1936, Construction of Caballo Dam begins. *No plans and specifications and no application*
141. 1938, Caballo Dam completed as flood control unit. *No Proof of Completion or as built plans and specification*
142. March 18, 1938 Rio Grande Compact signed.

143. October 3, 1940 – Letter from F.S. Merriau to State Engineer asking if plans and specs were filed within 3 years as required by statute and when they were filed and whether the 730,000 acre feet has been applied to beneficial use. Note in pencil on the letter states “ **Give him this dope – The Rio Grande Project gives them normal release from reservoir of 790,000 ac ft. per year.**”
144. October 4, 1940 Letter to F.S. Merriau from the SE wherein he states that File No. 8 requested the reservation of all un-appropriated water of the Rio Grande. First maps were received in early 1909 but were returned. First set of maps were received and accepted for filing November 22, 1909. Additional maps with no receipt stamp were prepared in January 1910. Original application was for 730,000 acre feet and was amended to include all un-appropriated waters of the stream. The amount reserved has thus been an undetermined amount until the drafting and signing of the Rio Grande Compact on March 18, 1939. The amount fixed by the compact was 790,000 acre feet annual that has been used beneficially for several years on Project Lands. (WRD28, LGWS30)
145. July 19, 1945 – Letter from Fred Wilson to Thomas McClure asking if the Bureau of Reclamation made notice of its intention to utilize water to be impounded in Elephant Butte Dam pursuant to Section 22, Chapter 102, Laws of 1905. and whether it made subsequent application under the laws of 1907. (WRD29)
146. July 20, 1945 – Letter from McClure to Frank E. Wilson stating the RS reserved 730,000 acre feet and 2,000,000 acre feet of water for irrigation of project land. On April --, 1908, we received a supplemental notice of intention referring to Session Laws of 1907 and reserving all un-appropriated waters of the Rio Grande and the right to store 2,000,000 acre feet of water for use of project lands.
147. June 30, 1947 – Letter to Mr. L.R. Flock from John H. Bliss with an attached Synopsis of Documents Filed and Actions Taken in the Office of the State Engineer Under Water Right Filing No. 8 of the United States of America. The Synopsis states as follows (summarized)
148. B.M. Hall filed letter reserving 730,000 ac ft per year under Sec 22 of Ch. 102 of laws of 1905. (36th Legislature) “**It is noted that the aforesaid letter did not state the amount of land which the United States planned to irrigate within the Rio Grande Project.**”
149. During the month of April 1908, Louis Hill requested all of the unappropriated water of the Rio Grande and its tributaries in a manner as stated in Mr. Hall’s letter of January 23, 1906. Under Section 40 of Chapter 49 of laws enacted in 1907 by the 37th Legislative Assembly. “**Similar to the letter of 1906, this letter did not state the amount of land which the United States planned to irrigate within the Rio Grande Project.**”
150. On April 1, 1909, plans and specs of the Leasburg Unit were filed but they were returned for revision. On November 1, 1909, the corrected tracings (a new tracings) were received and accepted by the Territorial Engineer on November 22, 1909.
151. ON Feb 2, 1910, W.M. Reed District Engineer for the RS filed two tracings consisting of a general map of the RGP and a plan of the proposed EBD. The general map contemplated irrigation of 180,000 acres of land in the Palomas, Rincon and Mesilla Valleys of New Mexico and in the El Paso valley in Texas; however, the proposed irrigated valley in Texas extended downstream only to the vicinity of Clint.

152. On May 30, 1911, the TE received and accepted tracing showing the cross-section of the river at the EBD site.
153. As a result of correspondence initiated by the SE on March 27, 1917, the U.S. filed on September 7, 1917, three tracings showing the design of Elephant Butte Dam as finally constructed, two copies of the specifications of said dam, and Proof of Completion of Works, which stated that the dam was completed on May 13, 1916. **“It is noted that the dam actually constructed different considerably in design from the plan submitted on February 2, 1910.”**
154. **“It appears that no documents, maps or plans have been filed subsequent to September 7, 1917, and that at no time has the U.S. Bureau of Reclamation filed any tracings showing the exact lands which are irrigated with water stored in the Elephant Butte Reservoir, nor has the Bureau filed any statement of the exact acreage or the description of the irrigated lands within the Rio Grande Project. Also, no assignments of water rights have been filed, and any rights claimed by virtue of the the aforesaid letters of reservation are today vested in the United States of America.”**
155. March 21, 1951 – Letter from Leo L. Heisel, Attorney at Law to John H. Bliss, State Engineer, Heisel questions where “...the Tri-State Compact gets its authority over any of the waters of the Rio Grande River. The states of Colorado, New Mexico or Texas does not own one acre of land upon which any of the water of the Rio Grande River is used beneficially. Neither does any of the irrigation district association own a single acre of land. The land upon which the waters of the Rio Grande River has been used for many years, belongs to the individual owners and they alone have acquired such rights to water as they put to beneficial use and not one drop more, and they alone have the sole right to control only so much of the waters as are actually put to beneficial use.”
156. “The failure to adjudicate the rights under the Rio Grande River Basin makes it impossible to determine just how much of the water of that stream system is actually being put to beneficial use, by the individual land owners. It is a well recognized fact that much of the water of that stream system is not being put to beneficial use: much is being sold illegally; given to various organizations, and an enormous amount of these waters are being wasted. The actual facts as borne out by the records, are that much more water is being wasted than is being put to beneficial use by those who are entitled to such waters.”
157. “Your office has all of the data available and necessary to establish the respective rights of the individual land owners in the States of Colorado, New Mexico and Texas to the waters of the Rio Grande River; the enormous losses within the State of New Mexico through seepage, evaporation and transpiration; the illegal sales to others, and the granting of rights to waters to corporations and organization.”
158. March 18, 1952 – Letter from Louis A Scott to John H. Bliss. Request for exemplified copies of documents requesting same information, i.e. B.M. Hall letter, Hill letter, plans and specs for Leasburg, February 2, 1910 General Map, cross section of RG, Proof of Completion of Works
159. March 25, 1952 – John Bliss certifies that B.M. Hall wrote letter January 23, 1906 from Carlsbad reserving 730,000 acre feet per hear of Rio Grande Water. That a supplemental notice dated April \_\_1908 that the RS reserved all unappropriated water. That plans and specs of the Leasburg Unit of the RGP were returned for revision on

- November 1, 1909 and received back and accepted by the Territorial Engineer on November 22, 1909.
160. June 20, 1952 – Letter from John Bliss to L.R. Fiock, Project Manager of RGP. States the after a check of the SEO files, the BOR never transmitted to the SEO “as Constructed” plans of the Elephant Butte Dam. Further no filing has ever been made of the plans of the Caballo Dam. (LGWS4)
  161. August 12, 1952 - A.F. Brown completed a certification that contains 35 documents that were in the file on August 12, 1952. Contains many documents already recognized in the Timeline. There are some documents not in the file. (LGWS10)
  162. November 11, 1952 – CERTIFICATION from John Bliss by A.F. Brown – Certification of documents including Jan 23, 1906 letter from B.M. Hall to David L. White., April, \_\_ letter from L.C. Hill to Vernon L. Sullivan, TE
  163. Plans and specs for the Leasburg unit received and accepted by the Territorial Engineer Nov. 22, 1909 (Sheets 1,2,3 and 4)
  164. General Map of the RGP filed February 10, 1910
  165. Print of tracing of a cross section of the RGP filed Mar. 30, 1911. (LGWS8)
  166. November 16, 1955 – Letter from Eugene T. Edwards to the State Engineer asking for exemplified copies of
  167. January 23, 1906 B.M. Hall letter to David L. White giving notice of reservation of 730,000 acre feet of water of Rio Grande water.
  168. Supplemental notice dated at Phoenix, Arizona April \_\_, 1908 for all of the unappropriated waters of the RG and tributaries signed by Louis C. Hill, Supervising Engineer
  169. Plans for Leasburg Unit of the RGP that were rejected November 1, 1909 and were accepted for filing on November 22, 1909.
  170. General map of the RGP showing contemplated irrigation by the US of 180,000 acres of land in NM and TX filed February 2, 1910 filed by the District Engineer of the RS with the Territorial Engineer.
  171. Tracings of cross section of the RG at Elephant Butte site received and accepted from USRS by the NMTE on or about March 30, 1911
  172. Letter from L.M. Lawson, PE from El Paso September 3, 1917 to SE enclosing copy of proof of completion of works on the RGP.
  173. Proof of Completion of Works of the RGP filed on September 7, 1917 with SEO.
  174. Letter to L.M. Lawson from SE dated September 8, 1917 acknowledging receipt of proof of completion of works and plans and specifications in connection with the RGP.
  175. Letter from Fred S. Merriou, Raton, NM October 3, 1940 to SE
  176. Letter from Thomas M. McClure October 4, 1940 to Fred S. Merriau, Raton.
  177. December 9, 1952 – Letter from Eugene Edwards to John Bliss, SE, seeking a long list of documents from File No. 8. (LGWS9)
  178. December 11, 1952 – Letter from A.F. Brown, assistant SE to Eugene T. Edwards, Attorney, El Paso acknowledging letter from John Bliss dated December 8, 1952
  179. Letter of Jan 23 1906 from HB.M. Hall to David L. White.
  180. Letter from L.C. Hill to Vernon Sullivan, TE
  181. Plans and specs for Leasburg unit received and accepted by the TE on Nov. 22, 1909

182. General map of RGP filed Feb 10, 1910
183. Print of tracing of a cross section of the RG of EB site filed Mr. 30, 1911.
184. December 2, 1955 – Certification by S.E. Reynolds. Contains basically same information in the Bliss Certification. *Does not state whether the RGP was ever approved.*
185. November 27, 1956, Reynolds declares the Rio Grande Underground Water Basin.
186. February 14, 1975 – Reynolds prepares Affidavit which states that waters of the Rio Grande are fully appropriated under the terms of the Rio Grande Compact. *The affidavit contains no factual material that supports his assertion.*
187. September 15, 2003 – Lion’s Gate submits its sixth amended application for permit to appropriate
188. September 18, 2003 - State Engineer rejects the Sixth Amended Application
189. October 1996 – Rio Puerco Sedimentation and Water Quality Study – Preliminary Findings compares 1815 and 1988 surface water evaporation for Elephant Butte. Assuming 6 feet of net annual evaporation. Surface area increase attributed to sediment accrual to the reservoir. 1918 reservoir full evaporation 218,400 af. 1988 at 2 maf storage evaporation was 214,800 af. Over the next 100 years from 1996 the increase in evaporation will be 500,000 af per year. NB. This will increase evaporation to a level that we will no longer be able to comply with the compact. (LGWS82, USBOR)
190. U.S. BOR Crop Production Report indicates 66,575 acres under irrigation in the MRGCD. Includes 8576 acres classified as fallow or idle and approximately 7,500 acres of Indian owned land. Reynolds states that about 30,000 acre feet are irrigated under “vested” rights in other than Indian Ownership. Usage of such rights was initiated prior to 1907 without a permit or after 1907 with a permit issued prior to the creation of the District in 1925. 30,000 acres are irrigated in the District with waters owned by the District. See February 14, 1975 Affidavit of Steve Reynolds
191. May 8, 1980 Memo Opinion 75-742 Civil Page 8 in Jicarilla Apache Tribe V. United States “Delaying actual use of [a] scarce resource for 45 years in an arid region such as the State of New Mexico is repugnant to the concept of beneficial use”
192. April 21, 1997 – Opinion In the United States Court of Federal Claims (no. 96-476L) RIO GRANDE DAM AND IRRIGATION COMPANY obtained right to undertake project Act of March 31, 1891, ch. 561, 26 State. 1101. In October 1895 the Dam and Irrigation and Land Company Limited (English Co.) was created under English law to obtain financing for the Elephant Butte Project. In 1896 RIO GRANDE DAM AND IRRIGATION COMPANY leased all of its right in the Project to the English Co. In 1896 RIO GRANDE DAM AND IRRIGATION COMPANY completed a dam called the Leasburg Diversion Dam & Canal (Leasburg Dam) and construction began on Elephant Butte Dam. On May 22, 1900 the English Co. transferred 48,650 shares out of a total of 50,000 shares in the RIO GRANDE DAM AND IRRIGATION COMPANY to Nathan Ellington Boyd.
193. October 23, 2000 – Letter from David L. Bernadone, Water Resource Specialist in the State Engineer Office stating returning a Declaration of Ownership to Scott Boyd because water rights claimed by Boyd are permitted to the Elephant Butte Irrigation District under Surface Permit No. 8. He states “This office is not the proper jurisdiction to determine ownership of a water right and cannot accept a declaration once a permit has

been issued.

194. December 5, 2000 – Letter from Scott Boyd to Thomas Turney, State Engineer, in reference to David Bernadone letter of October 23, 2000. He re-submitted his Declaration upon the grounds that the 1894, 1895, 1896, and 1897 filings by the Rio Grande Dam and Irrigation Company (RGD&IC) are senior to the subsequent permit no. 8. He points out that the RIO GRANDE DAM AND IRRIGATION COMPANY rights vested prior to the filing for [Application No. 8 filed by the R.S. in December 25, 1906. He states there has never been any legal hearing or determination by the SEO addressing the forfeiture of the rights acquired by the RIO GRANDE DAM AND IRRIGATION COMPANY and notice by the SEO of the forfeiture of rights vested to the RIO GRANDE DAM AND IRRIGATION COMPANY. Boyd states that its rights were storage rights not subject to forfeiture for nonuse. Boyd points out the SEO has been ordered by the court to make a survey of all known or unknown pre-1907 prior appropriations of the Lower Rio Grande River. Under 72-4-17 NMSA. Boyd points out the RIO GRANDE DAM AND IRRIGATION COMPANY filed in Sierra and Dona Ana Counties and the U.S. Land Office under the 1891 and 1897 Acts and had completed extensive construction, applied to beneficial use the waters of the LRG had perfected its right of ways, easements and water rights senior to those latter rights acquired by the BOR under Permit No. 8 filed December 25, 1906 72-5-33 NMSA. Boyd points out the Territorial Irrigation commission, predecessor of the Territorial Engineer's office, knew that the RIO GRANDE DAM AND IRRIGATION COMPANY had completed its diversion dam. Members of the Territorial Irrigation Commission conspired with the U.S. Government to defraud the RIO GRANDE DAM AND IRRIGATION COMPANY of their rights according to a letter from commission of Irrigation of NM (LGWS77, Scott Boyd Papers, Exhibit P)
195. January 12, 2001 – Letter to Scott Boyd from Susanne Hoffman-Dooley, Special Assistant Attorney General, SEO stating that SEO cannot accept a declaration for a water right for which the U.S. has submitted a filing to appropriate and that the State will make an offer of judgment to the US. For any right the State determines the US may have under Filing No. 8.
196. July 23, 2001 Letter from Susanne Hoffman-Dooley to Scott Boyd stating she will notify Boyd when the State makes an offer to the U.S. on the LRG and that state does not have jurisdiction to make determinations on ownership disputes
197. December 21, 2004 – Letter from Rio Rancho John Kolessar expressing interest in water under SP-04904
198. April 29, 2005 – Confidential Memo from Richard Simms
199. November 6, 2005 – Aquifer storage and retrieval (ASR) Water storage under way. “Millions of gallons of California Aqueduct water are being pumped down wells in an effort to store water for drought years and to replenish the Antelope Valley's declining underground aquifer. Los Angeles County Waterworks officials began October 28, 2005 pulling water from its distribution pipeline system and sending it down three Lancaster wells, with a fourth well to be added this month, officials said.”
200. November 11, 2005 – Utah Code says “municipalities cannot monopolize any part of trade or commerce.” “Further the high court said that Summit County indulged in circuitous reasoning to define itself as a municipality. ‘We decline to engage in such a tortured analysis,’ wrote Chief Justice Christine Durham.” This is essentially a ruling

against bad faith attempt to bring an entity that is clearly outside the meaning of a statute to within its meaning. One could cite estoppel by statute. (LGWS87, The Salt Lake Tribune by Christopher Smart)

## APPENDIX B

### PROCEDURAL HISTORY

1. Applicant/Appellant/Complainant in these proceedings is a common-law, discretionary, express business trust better known as a contract for the benefit of a third person created in Vancouver, British Columbia, Canada by that certain Contract and Declaration of a Trust dated April 22, 2002 and doing business in New Mexico as a foreign trust pursuant to State Corporation Commission Certificate Number 2506673 issued on October 14, 2004 (the "Application"), pursuant to NMSA 1978 Section 72-7-1 (2006)
2. Pursuant to NMSA 1978 Section 72-1-1 et seq. LGW filed its Application SP-4904 for a Permit to salvage, divert, capture, store, sell and lease for beneficial use the un-appropriated water in the Rio Grande Stream System lost to evaporation from Cochiti, Elephant Butte, and Caballo Reservoirs (the Application").
3. LGW's Application was rejected by the New Mexico State Engineer ("SE") and Applicant/Complainant/Appellant was aggrieved and appealed the SE's rejection of the Application to an administrative Hearing under Hearing Unit Number 4-093.
4. The Water Rights Division, representing the SE, filed a Motion for Summary Judgment to dismiss the administrative appeal on the grounds that it was the SE's opinion that there was no un-appropriated water in the Rio Grande.
5. An opinion is not a fact.
6. After the Hearing on the Motion for Summary Judgment on November 17, 2005, the Hearing Examiner entered an adverse Order Granting the SE's Motion for Summary Judgment on June 26, 2006, seven (7) months later, which was signed by the SE on June 27, 2006, from which this appeal is taken.
7. The Order was mailed by certified mail on June 27, 2006 and received by the Applicant on June 28, 2006.
8. Complainant/Appellant filed its appeal for a trial *de novo*.
9. The State Engineer filed its Motion to Dismiss for Improper Venue.
10. Complainant/Appellant had filed its Motion for a Status Conference which was set for hearing by the Court on November 9, 2006.
11. On November 9, 2006, at hearing on Complainant/Appellant's Motion for a Status Conference, Judge William A. Sanchez announced for the first time from the bench the he was going to take up the Motion for Dismissal for Improper Venue.
12. Complainant/Appellant had not been notified of this and was unprepared to argue it.
13. State Engineer Attorneys proceeded to testify through their argument regarding facts they thought they gleaned from the Application which facts were incomplete, mischaracterized, and incorrect.
14. Complainant/Applicant offered Dr. William M. Turner, a highly qualified expert as a witness to the Application that was critical to determination of appropriate venue.
15. Judge Sanchez, dismissed Complainant/Appellant's offer of expert testimony from Dr. William M. Turner on the application claiming that venue was a legal issue effectively stating that facts were of no consequence.
16. The State Engineer's attorneys are not expert witnesses and mischaracterized and incorrectly stated the application.

17. The Code of Judicial Conduct states: “21-100 A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.”
18. The Code of Judicial Conduct states: “21-200 A. **Respect for the law.** A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary ....”
19. Whether or not a party before the Court will make a profit or a windfall or any other type of gain is of absolutely no business of the court. Their business is the law.
20. The present case is not a bench trial but a jury trial and only a jury can make a determination of the facts.
21. Judge Sanchez did not empanel a jury that has been requested and paid for by Complainant/Applicant. It is juries that make determinations of facts.
22. *Ad questiones facti non respondent iudices; ad questiones legis non respondent juratores.* 8 Coke, 308; Co. Litt. 295 (Judges do not answer questions of fact; juries do not answer questions of law.)
23. The Code of Judicial Conduct further states: “21-B(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism (or whether or not a profit will be made by a litigant) Parenthetical material added.”
24. It further states: “B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status.”
25. Because of the character of the Motion, Movant has not sought concurrence from other counsel of record.
26. JUDGE SANCHEZ LOST JURISDICTION OF THE CASE ON NOVEMBER 27, 2006
27. There is no process for the appointment of a Judge to replace a sitting Judge.
28. In November 2006, Appellant filed Motion to Recuse Judge Sanchez for Cause.
29. In November 2006, the State Engineer filed its Motion for Presentment
30. On November 2, 2006 The Supreme Court Appointed Judge Eichwald as the Water Court Division Judge for the Thirteenth Judicial District.
31. On November 30, 2006, with total disregard for the Motions precedent before him, Judge Sanchez, after his removal from the case, signed the State Engineer’s Order for dismissal for improper venue without prejudice.
32. On November 27, 2006 the Clerk of the Thirteenth Judicial Court entered the above Designation and entered a Notice of Judge Assignment indicating the excusal of Judge William A. Sanchez and reassignment of the case to Judge George P. Eichwald
33. The District Court’s docket sheet indicates that on November 27, 2006, “Honorable George E. Eichwald has been assigned to the above captioned cause pursuant to an order from the Supreme Court of the State of New Mexico appointing the Honorable George E. Eichwald to the water court Division of the 13<sup>th</sup> Judicial District Court.” See Docket Sheet dated December 15, 2006.

34. The excusal by or of Judge Sanchez on November 27, 2006, ended his jurisdiction of the case.
35. When a Court ceases to have jurisdiction of the case, it can no longer take any action in the case, including entering an Order in the case. Village of Springer v. Springer Ditch Co., 47 N.M. 456; (1943), Martinez v. Carmona 95 N.M. 545 (App. 1980).
36. The Parties and this Court took action in accordance with an excusal and assignment.
37. The parties submitted to Judge Eichwald an Unopposed Motion and Order for Extension of Time on December 6, 2006, which Order Judge Eichwald signed and entered on December 8, 2006.
38. Thus, from the record and the actions of the parties and the Court, the parties have acted in accordance with the excusal of Judge Sanchez on November 27, 2006.
39. Thus the signing and entry of the Order of Dismissal by Judge Sanchez on November 30, 2006 was nugatory and without effect and should be stricken from the record.
40. The entry of the Order of Dismissal by Judge Sanchez was not in accord with the Rules of Civil Procedure or the Local Rules governing the Thirteenth Judicial District Court as stated in Plaintiff's Motion for Reconsideration and its Objection and Motion to Set Aside filed November 20, 2006 incorporated herein by reference.
41. Defendant State Engineer never filed a Request for Setting for his opposed Motion to Dismiss for Lack of Venue ("Motion to Dismiss") as required by LR13-404.3.(1) and Rule 1-007.1.F. of the Rules of Civil Procedure, Defendant State Engineer never sent a copy of his Motion to Dismiss to the Judge along with a Notice of Hearing as required by LR13-404.3.(2), Defendant State Engineer never sent a copy of his Motion to Dismiss to Plaintiff's counsel with a copy of her Request for Setting as required by LR13-404.3.(3), and the State Engineer's counsel never provided copies of self-addressed envelopes to the Secretary of Judge Sanchez as required by LR13-404.E.(5), so the Court never sent notice of a hearing for the State Engineer's Motion to Dismiss to Counsel for the Plaintiff. Counsel for Plaintiff did file a Motion for a Status Conference on October 3, 2006 with a Request for Setting and self-addressed envelopes.
42. When Plaintiff received Notice of Hearing for his Motion for Status Conference set for November 1, 2006, there was no indication that the Court intended to hear the State Engineer's Motion to Dismiss on November 1, 2006 or any other time.
43. The State Engineer's attorney called Plaintiff's attorney on or about October 1, 2006 to request a continuance of the November 1, 2006 hearing and Plaintiff's counsel agreed. The State Engineer's attorney agreed to call the court to reschedule the status conference hearing. Plaintiff's attorney did receive the notice from the Court of the re-scheduled status conference hearing set for November 9<sup>th</sup>, 2006 without any indication of what matter would be heard. Since only one Notice of Setting had been issued by the Court, Plaintiff's attorney assumed that only the status conference was set. What was not told to Plaintiff's attorney by any one was that some one set the State Engineer's Motion to Dismiss at the same time on November 9, 2006. Without notice of the setting of the State Engineer's Motion to Dismiss, Plaintiff's attorney was completely surprised and unprepared when Judge Sanchez took up the State Engineer's Motion to Dismiss on November 9, 2006 and did not hear his Motion for Status Conference. Apparently the State Engineer's counsel was prepared and

- appears to have been told or knew that her Motion to Dismiss was to be heard, but chose not to tell Plaintiff's attorney.
44. Plaintiff's attorney offered expert testimony regarding the Plaintiff's Application by Plaintiff, but the Court refused to hear it and instead relied upon inaccurate and mischaracterized testimony by the State Engineer's counsel as to contents of the Application as to how and where water would be appropriated and diverted for use. Attorneys should not give testimony as to facts.
  45. Assuming that Judge Sanchez was excused on November 27, 2006, the Order of Dismissal entered by Judge Sanchez on November 30, 2006 should be stricken from the record and Judge Eichwald should rehear the State Engineer's Motion to Dismiss for Lack of Venue after proper notice to all parties, and make his own independent decision. Judge Eichwald lacks authority to enter an order when a former judge heard the evidence but did not enter an order or decision in the case before he was excused from the case. Pritchard v. Halliburton Services, 104 N.M. 102 (App. 1986).
  46. Alternatively, Plaintiff suggests that in order to correct all of the above irregularities and meet the intent of the Supreme Court, that the parties agree or the Court decide to either keep venue in Valencia County with Judge Eichwald as the Judge of the case or to change venue from Valencia County to Sandoval County, either by stipulation of the parties per NMSA 1978 Section 38-1-3 or by the Court on its own motion with Judge Eichwald as the Judge, for the reasons state by Judge Walters and concurred in by Chief Judge Scarborough in their specially concurring opinion in Bracken v. Yates Petroleum, 107 N.M. 463.
  47. The reason why dismissal for lack of venue is an extreme remedy and is discouraged can be seen in this case. Because Plaintiff utilized most of its thirty days to file and notice all interested persons (including three weeks for Notice by Publication), a dismissal for lack of venue will deny Plaintiff the right of an appeal because he will not be able to complete notice by publication to all interested parties within the remaining time provided by NMSA 1978 Section 72-7-1 and thus be denied an appeal, after having met the requirements of Section 72-7-1. That is exactly the type of situation that Walters and Scarborough were trying to address. The majority opinion in Bracken v. Yates Petroleum did not need to face this issue because there was sufficient time to simply re-file the case in the proper venue (27 days) in Bracken's case. But that does not exist in this case. Thus the State Engineer's objection to venue is an indirect method to deny Plaintiff an appeal after Plaintiff has successfully met the jurisdictional requirements of Section 72-7-1. Matter of Application No 0436-A into 3841, 101 N.M. 579 (App. 1984); Application of Metropolitan Investments, Inc., 110 N.M. 436 (App. 1990); case that shows must meet the notice requirements.

48. The Appeal was to be considered timely filed within the thirty-day period specified for filing a Notice of Appeal in NMSA 1978 Section 72-7-1 (B) (2006) pursuant to the Order of Judge George P. Eichwald titled Order Establishing Procedures for Further Proceedings delivered in open Court on February 9, 2007 ordering that the filing of this appeal shall be deemed filed *nunc pro tunc* on July 27, 2006.
49. Applicant has served notice of the Appeal on the State Engineer and all interested parties and has previously published Notice of the previously filed Appeal in newspapers printed in Dona Ana, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties all of which was considered completed *nunc pro tunc* on or before July 27, 2006.
50. LGW's Notice of Appeal contained all the necessary parts of a complaint in an originally docketed case in the district court as is required by the Constitution and NMSA 1978, § 72-7-1 as well as the Rules of Civil Procedure for the District Court promulgated by the New Mexico Supreme Court.
51. In addressing the proper procedure for this case the District Court stated at a hearing on August 14, 2007:
- THE COURT: — to this. However, let me say that this is a **civil** case in a civil - **the rules of civil procedure apply equally in all cases** either one of both parties may file motions that are deemed dispositive. (*Hearing of August 14, 2007, emphasis added*)
- thereby establishing the law of the case. Unfortunately the District Court later contradicted itself at the hearing of April 25, 2008 when it stated:
- THE COURT - Your remedy is to get a trial (sic) *de novo*. But it's still an appeal. And because it's an appeal, the law of the rules of **civil** procedure do emulate (inaudible) but **we're not to accept the Lionsgate wishes that they govern the appeal.** (*Hearing of April 25, 2008, emphasis added*)
52. The SE never answered the original pleading of LGW in the case and this Court allowed the SE to ignore Rules of Civil Procedure.
53. LGW filed a Motion for Judgment on the Pleadings relying on the failure of the SE to answer the original pleadings. The Court denied the Motion for Judgment on the pleadings stating that the SE was not required follow the Rule of Civil Procedure that required an answer.
54. In accordance with the Rules of Civil Procedure LGW filed an Amended Complaint in November 2008 and the SE again refused to answer and instead filed a motion to strike the amended complaint.
55. At the hearing of January 6, 2008, LGW attempted to notify the Court that it had filed an Entry of Default in the case over the failure of the SE to answer the Amended Complaint which would be dispositive and should have resulted in a stay on the hearing on Summary Judgment, but instead the Judge *sua*

*sponte* incorrectly took up the issue of the default and prematurely heard arguments on the matter even though LGW did not have the opportunity to give proper notice of the issue to the SE. The Court then denied the Entry of Default.