No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Plaintiff
v.

STATE OF NEW MEXICO and
STATE OF COLORADO,
Defendants

OFFICE OF THE SPECIAL MASTER

NEW MEXICO'S REQUEST FOR LEAVE TO FILE MOTION TO STRIKE UNITED STATES OF AMERICA'S NOTICE OF ERRATA

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March 8, 2021

NEW MEXICO'S REQUEST FOR LEAVE TO FILE A MOTION TO STRIKE UNITED STATES OF AMERICA'S NOTICE OF ERRATA

On March 3, 2021 the United States of America filed its Notice of Errata [Dkt. 485]. Therein the United States requests the Court and Parties disregard a substantive statement of law it asserted in its Reply in Support of its Motion for Partial Summary Judgment [Dkt. 472] and substitute the United States' assertion of law with an opposite position of law. New Mexico requests leave to file the attached Motion to Strike because:

1. "Errata" is not the proper vehicle for a party to reverse its expressed position on substantive law provided in a dispositive motion brief;
2. The United States' new statement of law is incorrect, and its prior statement of law was correct; and
3. This issue is important to this litigation in that the new position by the United States attacks the authority of the New Mexico State Engineer, which is a relevant issue in this litigation.

WHEREFORE New Mexico respectfully requests leave to file the attached Motion to Strike the United States of America's Notice of Errata.

Respectfully submitted,
/s/ *Jeffrey J. Wechsler*

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NEW MEXICO'S MOTION TO STRIKE
UNITED STATES OF AMERICA'S NOTICE OF ERRATA

On March 3, 2021 the United States of America filed its Notice of Errata [Dkt. 485] ("U.S. Errata"). The document is misnamed, as the United States is not notifying the Special Master of errata but is instead seeking to reverse its position on a substantive, material legal matter.[1] Offering no reason for its untimely reversal of legal position, the United States requests the Court and Parties disregard an accurate statement of law it asserted in its Reply in Support of its Motion for Partial Summary Judgment [Dkt. 472] ("U.S. Reply Brief"), and substitute for that assertion of law an inaccurate, opposite position. The Court should strike from the record and not consider the U.S. Errata for the reasons set forth below.

A. **"Errata" is not the proper vehicle for a party to reverse its expressed position on substantive law set forth in a dispositive motion brief.**

"Errata" is defined in Black's Law Dictionary, 2nd Edition (online) as "[t]ext correction attribution in a short or minor document revision. Does not add text, as in an addendum, nor does it remove text, as in a corrigendum." Under this definition, the United States has not in fact filed a "Notice of Errata." Rather than make a "short or minor document revision" to its brief, the United States attempts to reverse its legal position on a substantive matter. This is improper. The Tenth Circuit addressed precisely such an effort in *Abernathy v. Wandes*, 713 F.3d 538, 544, n. 5 (10th Cir. 2013), and stated:

> In a filing styled an "errata sheet," the government seeks to alter and withdraw certain legal positions taken in its answer brief. An errata sheet, however, is a filing by which a party corrects technical, inadvertent *errors*, rather than one by which it makes substantive alterations to legal positions previously taken in its brief. In other words, an errata sheet

[1] The United States did, in fact, include a proper errata correction at the bottom of the page regarding the phrase "AWRM." This is seemingly a façade to mask the real purpose of this submission by the United States: to reverse its position on substantive law. *See* U.S. Errata at 1.

> is not a proper vehicle for the request that the government presents here [*Citations omitted, emphasis in the original*].

There are appropriate vehicles through which a litigant may properly and straightforwardly make a substantial change in position. *See e.g. United States v. Scott*, 529 F.3d 1290, 1300 n.11 (10th Cir. 2008) (granting the government's motion to withdraw an argument), *cited in Abernathy, supra*, n. 5. Had the United States used such a proper and conventional vehicle, it would have been required to offer reasons for why such a motion should be granted. Because the United States has instead chosen to mischaracterize a substantial change in legal position as an errata, it has provided *no* reason for its request that "the Court and parties disregard the quoted statement." U.S. Errata at 1. This omission requires New Mexico to offer arguments against the United States' new position without having the benefit of the United States' own statement of why it seeks to change a correct statement of law into an incorrect statement of law. For this reason alone, the U.S. Errata should be struck.

B. The United States' new statement of law is incorrect, and its original statement of law was correct.

On page 5 of the U.S. Reply Brief, the United States acknowledges New Mexico's permitting authority within the Lower Rio Grande when it accurately observes that New Mexico may require Reclamation to obtain authorization for a new point of diversion for the New Mexico portion of the Rio Grande Project pursuant to state law. The United States first correctly characterizes the interplay between federal and state law when it states that New Mexico has *"continuing authority to ensure the Project's distribution of water within New Mexico is consistent with state law*." *Id.* at § I(A) (citation omitted, emphasis added). This is a correct statement of law.

The United States then offers an example of New Mexico's continuing state law authority over the waters of the State: "For example, New Mexico may properly require Reclamation and EBID to obtain authorization for a new point of diversion for Project deliveries according to state-law procedures." *Id.* This is also a correct statement of law.

In its Errata, the United States seeks to erase these correct statements of law and substitute new and incorrect law.

1. The United States misrepresents the scope of NMSA 1978 § 72-9-4.

The United States misrepresents the scope of NMSA 1978 § 72-9-4 as extending to the entire New Mexico Water Code. The United States does this by inserting language into the statute that does not appear there, which groundlessly creates a radical, unfounded meaning for the statute. The United States gratuitously adds a misleading bracketed phrase: "nothing [in the New Mexico Water Code] shall be construed as applying to or in any way affecting any federal reclamation project…." U.S. Errata at 1. The statute actually reads in pertinent part:

> Except as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978] of this act nothing *herein* shall be construed as applying to or in any way affecting any federal reclamation project….

NMSA 1978 § 72-9-4 (emphasis added). The difference is obvious: the word "herein" plainly refers not to the entire Water Code but to the particular Act in which § 72-9-4 appeared. That Act was Chapter 126 of the Laws of 1941 ("L. 1941, Chap. 126"). The Act made certain legislative changes on specific matters, some involving notice and permitting procedures for the appropriation of water rights by non-federal entities. The subject matter of the Act was narrow

and the provision relating to Reclamation projects was included only to make clear that the new procedures did not apply (with two exceptions) to federal Reclamation projects.[2]

The United States ignores the actual narrow application of the statutory language and instead asserts that Section 72-9-4 was intended to exempt all Reclamation projects in New Mexico from the New Mexico Water Code. Such a radical, improbable, and broad reading is incongruous with New Mexico state law and directly conflicts with federal law. Moreover, the United States' reading of Section 72-9-4 requires believing that the New Mexico legislature, by a backhanded, indirect means, entirely cancelled the effect in New Mexico of Section 8 of the Reclamation Act of 1902, a provision that ensures that states subject to the Reclamation Act retain administrative control of their waters. Reclamation Act of 1902, 43 U.S.C. 309 ("Nothing in [the Reclamation 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 …").

The United States' own conduct in the New Mexico lawsuit adjudicating water rights in the Lower Rio Grande demonstrates that it does not believe this farcical reading of Section 72-9-4. If "the New Mexico Water Code" does not apply to Reclamation projects, there would be no statutory basis for the United States' involvement in the LRG Adjudication, to which it concedes it is subject. *See* NM-EX 535, Aug. 8, 2016 Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Moton for Summary Judgment*, State of New Mexico ex. Rel. Office of the State Engineer v. EBID,* CV-96-888 In the Third Judicial District, Dona Ana County, State of New Mexico ("SS104 LRG Adjudication

[2] The 1941 Session Law used the phrase "this Act" where the United States inserted its bracketed phrase. The Compiler's notes make clear that "this Act" only encompasses the sections of that 1941 bill.

Order") *discussed at* U.S. Reply § I(B)(2) at 13. Thus, the United States' new construction of NMSA 1978 § 72-9-4 is misleading as to the actual language and effect of the statute and also incorrect in the light of the United States' own actions.

Moreover, the United States' false and misleading assertions regarding the meaning of Section 72-9-4 should be viewed in the context of the United States' long tortured history of attempting, and failing, to evade New Mexico jurisdiction over the adjudication of Project water rights. *See United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002) (discussing federal attempts to evade the jurisdiction of the New Mexico adjudication court and affirming the district court's decision to abstain from hearing a federal suit to adjudicate the Project's water right in favor of the state proceeding). The errata sheet is simply more of the same from the United States and should be summarily disregarded.

2. The United States mischaracterizes the *Vermejo* case.

The United States claims *City of Raton v. Vermejo Conservancy Dist*, 678 P.2d 1170 (N.M. 1984) stands for the proposition that Reclamation projects are exempt from state permitting requirements applying to changes in points of diversion. U.S. Errata at 1. It does not. The *Vermejo* court held that changes in ***project storage*** for the Vermejo Project did not require a permit from the New Mexico State Engineer. It did not hold that changes to project points of diversion do not require a permit from the State Engineer. The United States' reliance on this case to refute the principal that Reclamation is subject to New Mexico permitting requirements is not supported by law or practice.

The United States is entirely aware that its new position has been rejected by New Mexico courts. The United States previously urged its erroneous position as to the effect of NMSA 1978 72-9-4 and the *Vermejo* case in its summary judgment briefing in the SS104 LRG

Adjudication case. The court rejected the United States' strained reading of the statute and case, specifically noting that the United States may "apply to the State Engineer for an alternative point or points of diversion" and "may pursue any administrative action available under New Mexico law …" NM-EX 535, SS104 LRG Adjudication Order at 4.

Plainly, the New Mexico Water Code applies to the Rio Grande Project and the United States' attempt to revise its failed argument in another forum should not be accepted.

C. The United States' requested change to its statement of law matters because its new position attacks the authority of the New Mexico State Engineer to effect the water administration that the United States claims is necessary.

The United States has put the ability of the New Mexico State Engineer to effectively administer the water resources of the Lower Rio Grande squarely at issue in this litigation. *See* U.S. Reply Brief at 26-32; U.S. Memorandum in Support of Motion for Partial Summary Judgment [Dkt. 414] at 15-20, 30-39. In the United States Reply Brief on page 5, the United States correctly gave an example of the means at hand for the State Engineer to administer and regulate water system issues in the Lower Rio Grande. This type of administration is relevant to the claims the United States, and Texas, are making against New Mexico.

The United States' alleged "errata" is a thinly-veiled attempt to alter the relationship between federal and state law in New Mexico, and would be a radical break with the United States' own prior positions and decades of prior practice. By means of an errata sheet, the United States seeks to eliminate the statutory authority the New Mexico Office of the State Engineer relies upon to administer water not only for the Rio Grande Project, but also as to the numerous (at least nine) other Reclamation projects in New Mexico. The United States is simply wrong on its new position. If the United States is allowed to "slip in" this new legal position through a one-page errata sheet, New Mexico would be deprived of its ability to challenge and correct an important

element of this case. The United States should not be allowed to circumvent its obligation to accurately state and apply governing legal principles in this manner.

CONCLUSION

For the reasons set forth above, New Mexico respectfully requests the Court strike from the record and refuse to consider the United States of America's Notice of Errata.

Respectfully submitted,
/s/ *Jeffrey J. Wechsler*

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

This is to certify that on March 8, 2021, I caused a true and correct copy of the State of New Mexico's Request for Leave to File Motion to Strike United States of America's Notice of Errata and Motion to Strike United States of America's Notice of Errata to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 8th day of March, 2021.

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