

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

**MOTION OF ELEPHANT BUTTE IRRIGATION
DISTRICT FOR LEAVE TO FILE EXHIBIT**

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Attorneys for Elephant Butte Irrigation District
August 31, 2015

Elephant Butte Irrigation District (EBID), which has moved to intervene, requests leave to file the exhibit attached to this motion as part of its motion to intervene. The exhibit consists of the Declaration of Gehrig (“Gary”) Lee Esslinger, which attaches and authenticates an agreement between EBID and El Paso County Water Improvement District No. 1 (“EPCWID”), dated September 18, 1995, which is commonly referred to as the “6A-6B” agreement.

During oral argument on EBID’s motion to intervene, the Special Master asked EBID’s counsel whether the 6A-6B contract was before the Special Master. EBID’s counsel replied that the contract was included as an appendix to EBID’s reply brief. In fact, the contract was included as an appendix to the reply brief of EPCWID in support of EPCWID’s motion to intervene, which is pending before the Supreme Court. Therefore, EBID requests leave to file the agreement before the Special Master as part of EBID’s motion to intervene.


EBID’s counsel has contacted counsel for the parties—the States of Texas, New Mexico and Colorado, and the United States—and counsel for all parties have indicated that they have no objection to this motion for leave to file exhibit.

CONCLUSION

For the foregoing reasons, it is requested that the Special Master grant leave for Elephant Butte Irrigation District to file the declaration and agreement attached to this motion, and that the declaration and agreement be considered as part of Elephant Butte Irrigation District’s motion to intervene.

Dated: August 31, 2015

Respectfully submitted,

By: 

Roderick E. Walston
Steven L. Hernandez
Attorneys for Elephant Butte Irrigation
District

EXHIBIT

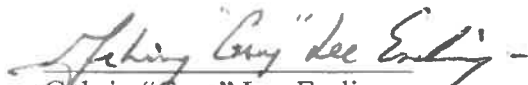
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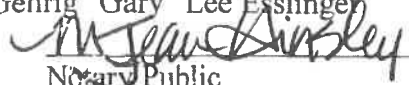
DECLARATION OF GEHRIG "GARY" LEE ESSLINGER

1. The undersigned, hereby makes the following sworn declaration, under penalty of perjury, pertinent to the above styled and numbered cause:
2. I have been employed by Elephant Butte Irrigation District (EBID), the Proposed Intervener, since 1978 in various capacities and currently serve as the General Manager of EBID. I was appointed Treasurer-Manager in 1988 by the EBID Board of Directors.
3. As General Manager, my duties include supervision of the general day to day operation of EBID. I oversee the departments of tax, maintenance, hydrology, operations, engineering, information technology, human resources and ground water resources.
4. I am also the records custodian for EBID, and I am responsible for the interaction with the United States Bureau of Reclamation, the International Boundary and Water Commission and El Paso County Water Improvement District #1 with respect to carrying out EBID's contractual obligations with these parties.
5. I hereby certify that the attached 12 page Agreement labeled Exhibit G, is a true and correct copy of an EBID record of the August 9, 1995 Agreement between EBID and EPCWID commonly referred to as the "6A/6B Contract" that the court inquired into during oral argument on EBID's Motion to Intervene on August 20, 2015.

I, Gehrig "Gary" Lee Esslinger, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. Executed this 28th day of August 2015.


Gehrig "Gary" Lee Esslinger

STATE OF NEW MEXICO)
)ss.
COUNTY OF DOÑA ANA)

The foregoing instrument was acknowledged before me this 28th day of August, 2015,
by Gehrig "Gary" Lee Esslinger

Notary Public
My Commission Expires: 12-21-2018

AGREEMENT

THIS AGREEMENT (the "Agreement") made and entered into this 9th day of August, 1995, pursuant to the Joint Powers Agreement Act, being Sections 11-1-1 to 11-1-7, et seq., N.M.S.A. 1978 Comp., (1994 Supp.), and the Interlocal Cooperation Act, Sections 791.001-791.030 of the Texas Government Code, for the purposes and benefits set forth in said statutes regarding the parties hereto. The parties (the "parties") hereto are the Elephant Butte Irrigation District (hereinafter called "EBID") and the El Paso County Water Improvement District No. 1 (hereinafter called "EPCWID").

WITNESSETH:

WHEREAS, EBID is a public district in the State of New Mexico organized pursuant to Section 73-10-1, et seq., N.M.S.A. 1978 Comp., and a public agency as defined in said Joint Powers Agreement Act; and

WHEREAS, EPCWID is a water improvement district organized pursuant to Article XVI, Section 59, of the constitution of the State of Texas and a local government as defined in said Interlocal Cooperation Act; and

WHEREAS, EBID and EPCWID receive water from dams and irrigation facilities built pursuant to the Reclamation Act of 1902, and each of the parties depends upon irrigation works, including canals, drains, laterals, and diversion structures, which are constructed in both the State of New Mexico and the State of Texas; and

WHEREAS, such irrigation works do not always follow the state boundary lines, and therefore it is economically and practically unfeasible for either of the parties to properly maintain and operate its district and deliver water to its constituents without the cooperation of the other party; and

WHEREAS, EBID took over the function of operation and maintenance of the New Mexico portion of the Rio Grande Project (hereinafter called "the Project"), other than Elephant Butte Dam and Caballo Dam, by contracts with the Bureau of Reclamation dated February 15, 1979 and May 31, 1989 (copies of which are attached hereto and made a part hereof by reference as Exhibits "A" and "B"); and

WHEREAS, prior to the above named contracts, the Bureau of Reclamation was the federal agency that operated and maintained the Project as a whole without regard to the state boundary line and the fact that some of the irrigation drains, canals, laterals and other irrigation works cross and re-cross the state boundary line between New Mexico and Texas at numerous places; and

WHEREAS, since the date of the above mentioned contracts, the parties have continued the previous practice of the Bureau of Reclamation of operating that portion of the Project known as units 6A and 6B (a map showing 6A/6B is attached hereto as Exhibit "C") which transverse said state boundary line at numerous places as inseverable units without regard to such state boundary line, with EBID's personnel delivering water to all users in unit 6A and EPCWID's personnel delivering water to al users in unit 6B; and

EBID's personnel and equipment maintaining all Project works in Unit 6A and EPCWID's personnel and equipment maintaining all Project works in unit 6B without regard to the state boundary line and whether said Project works are situate in New Mexico or Texas; and

WHEREAS, the parties desire the rights and benefits of the above mentioned statutes and enter into this Agreement for the benefits to be derived from said statutes and to confirm and authorize the pre-existing informal arrangements between them; and

WHEREAS, the Congress of the United States passed and the President of the United States signed into law Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), which authorizes the Secretary of Interior to transfer title to the parties to easements, ditches, laterals, canals, drains and other rights-of-way which the United States has acquired on behalf of the Project; and

WHEREAS, under said Public Law 102-525, such transfer of title will be upon agreement of the parties and the Secretary of the Interior, who requires this Agreement between the parties to be formalized prior to said transfer of title; and

WHEREAS, it is in the best interests of the parties to enter into this Agreement in order to efficiently operate and maintain the Project facilities after their transfer to the parties and to secure the benefits of Public Law 102-575.

NOW, THEREFORE, the parties agree as follows:

1. Purpose. The parties enter into this Agreement pursuant to and for the purpose of complying with the above mentioned statutes and law and in consideration of the premises and the hereinafter set forth mutual terms and conditions.

2. Parties to Cooperate. The parties shall continue to cooperate in a fair and equitable manner to ensure that each party will be able to receive its water after said transfer of title through the same ditches, laterals, canals, drains, and other rights-of-way as it has heretofore and in compliance with the legal and equitable rights of and statutory and contractual obligations affecting each party.

3. Special Covenant. A. Each party specially covenants hereby with the other not to cause or permit any interference with or blockage of diversion dams, ditches, laterals, canals, sublaterals, drains, spillways, rights-of-way or any other facilities presently in use by either party, directly or indirectly, or of any other facility which may be necessary, for the transportation of any Project water released from Elephant Butte Dam or Caballo Dam for use by such other party or of any other water lawfully held by or for the benefit of either of the parties for storage or delivery in or through conveyance facilities. This covenant shall be enforceable by injunction, and any breach shall entitle the injured party to invoke any other remedy to which it may be entitled, either at law or in equity. For so long as the United States and its Department of the Interior Bureau of Reclamation shall have any legal authority or responsibility to act in

releasing water from Project storage or diverting Project water, then the United States is hereby granted the authority to invoke the remedies provided herein for the breach of such special covenant. Such covenant and the remedies provided herein shall be effective at such time as this Agreement becomes effective and shall continue until such time as both parties may otherwise mutually agree in writing. Furthermore, this covenant and the remedies provided in this article shall survive the execution and delivery of any deed or deeds to the parties, or either of them, pursuant to the provisions of Title XXXIII of the Act of October 30, 1992 (Public Law 102-575), the Reclamation laws of the United States, or any other applicable law and shall continue until both districts may otherwise agree in writing.

B. The parties have a commonality of interest throughout the Rio Grande Project and, as a consequence, must have access to all Project facilities whether located in New Mexico or Texas in order to protect the interests of their constituents and will, from time to time, be required to travel to and be present at Project facilities in both states.

C. Unless and until a party provides the other party with 120 days prior written notice of that party's cancellation of the provisions of this paragraph, the parties agree that unit 6A will continue to be operated and maintained by EBID and unit 6B operated and maintained by EPCWID. Each party shall have unimpeded access to both units and any requests for maintenance by either party for work in their unit shall be in writing. Ditches, canals, laterals

and drains shall be maintained so as to allow for the free flow of water without obstruction. Reports of encroachments by third parties shall be delivered to the District that holds title and said encroachments shall be resolved by the title holder in an expeditious and reasonable fashion. Unless otherwise provided by written agreement signed by both parties, neither party shall impose on the other party any carriage charge in respect of water transported through facilities located within an area being operated, owned or maintained by such party.

4. Indemnity Against Tort Claims. Each district agrees to indemnify and hold harmless the other and its officers, directors, agents, servants and employees from and against all loss and expenses, including without limitation all attorney fees awarded by a court and court costs, resulting from any claim for damages from personal injury or property damage arising from or in connection with any act or omission of the indemnifying district, or its officers, directors, agents, servants and employees regardless of where such act or omission is alleged to have occurred. The parties do not intend for this agreement to create joint and several liability or a partnership.

5. Liability Insurance. Each party agrees to carry at all times, at its expense, public liability insurance showing the other party as an additional insured, with minimum combined single limits of \$1,000,000.00 for property damage and/or personal injury. Such public liability insurance may, at the election of the party providing such insurance, provide for a deductible amount

of not more than \$1,000.00 for each claim, and shall include such other provisions as reasonably may be acceptable to both parties.

6. Reciprocal Sovereign Immunity. As to any claim based on an alleged occurrence within the boundaries of the State of Texas, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of Texas applicable to claims against a subdivision of the State of Texas organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas. As to any claim based on an alleged occurrence within the boundaries of the State of New Mexico, each district, its officers, directors, employees, servants and lawful permittees or licensees shall be entitled to sovereign immunity and subject and entitled to the same treatment under the laws of the State of New Mexico applicable to claims against a public district organized pursuant to Section 73-10-1 et seq., N.M.S.A. 1978 Comp. It is the intention of the parties to provide the fullest possible reciprocity to each other as to sovereign immunity from claims as is allowed by the present and any subsequent laws of the respective states under whose laws the parties exist.

7. Payments For the Performance of Governmental Functions. As provided by Section 791.011(d)(3) of the Texas Government Code, and See §6-6-11, et seq., N.M.S.A., 1978 Comp., 1991 Repl. Pamp., each party paying for the performance of governmental functions or

services pursuant to this Agreement shall make those payments from current revenues available to such paying party.

8. Funding. The parties agree further that contributions from the funds of the parties (being public agencies) may be made for the purposes set forth in this Agreement, and that said expenditures shall not be in excess of the value of work performed. That payment of such public funds may be used to defray the cost of implementing the Agreement reached herein. Subject to Paragraph 7 above, the advancement of funds and payment of public funds hereunder shall be done in the ordinary course of the parties' business. The parties further agree that there shall be strict accountability for all funds, receipts and disbursements used to implement this Agreement. The parties agree that the benefits hereunder to each party and the burdens assumed by each party are of equal value.

9. Accountability. The parties hereto shall permit the authorized representative of the other party and the State Auditor of New Mexico and State Auditor of Texas to inspect and audit all data and records of the parties hereto relating to the performance of this contract. Both parties agree to keep strict accounting of all receipts and disbursements made in furtherance of this Agreement. Such records shall be available for inspection by the other party and by the public during business hours at the respective offices of the parties hereto.

10. Waiver. No waiver of any breach of this Agreement or any of the terms or conditions hereof shall be held to be a waiver

of any other subsequent breach; nor shall any waiver be valid or binding unless same shall be in writing and signed by the party alleged to have granted the waiver.

11. Merger of Contract. This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and all such covenants, agreements, and understandings have been merged into this written Agreement. No prior statements, representations, promises or agreement of understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement and signed in a writing executed by all of the parties hereto as a modification of this Agreement.

12. Co-Partners. Nothing herein contained is intended or should be construed in any way to create or establish the relationship of co-partners between the parties hereto or to establish either party as the agent, representative, or employee of the other for any purpose or in any manner whatsoever. Neither party's employees shall accrue leave, retirement, insurance, or any other benefits afforded to the employees of the other party as a result of this contract.

13. Equal Opportunity Compliance. The parties hereto agree to abide by all federal and state laws, rules, regulations, and executive orders pertaining to Equal Employment Opportunity. In accordance with all such rules, laws, regulations, and executive orders, the parties agree to assure that no person in the United States shall, on the grounds of race, color, national origin, sex,

sexual preference, age, handicap, or religion be excluded from employment.

14. Sub-Contract. Neither party may sub-contract any or all of the services called for under this Agreement without the express written permission of the other party first had and obtained. Such written permission shall be liberally and freely given so as to facilitate the operation of the Project in a smooth fashion.

15. Limitation of Liability. No elected or appointed official, employee, servant, or agent shall be held personally liable under the terms of this Agreement for the actions called for in this Agreement, it being the intent of the parties that said persons are acting in the course and scope of their employment or governmental duties and responsibilities.

16. Term. This Agreement shall become effective when approved by the Department of Finance and Administration, State of New Mexico. The Agreement shall continue in perpetuity unless terminated by mutual, written agreement of the parties except to the extent that this contract may be canceled in Paragraph 3C above.

17. Amendment. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and approved by the relevant state agencies.

18. Applicable Law. The interpretation of this Agreement shall be governed by the laws of the State of New Mexico as to those sections hereof which are related to the Joint Powers Act, and by the laws of the State of Texas as to those sections hereof related to the Interlocal Cooperation Act. Each person signing

this Agreement and/or authorizing such a signing on behalf of his/her respective party is acting only in his/her official capacity on behalf of his/her respective party and is not personally liable under any circumstances either jointly or severally for any obligation or liability arising as a result of this Agreement.

19. Severability. If any part or application of this Agreement is held to be invalid, the remainder, or its application to other situations or persons, shall not be affected.

20. No Waiver of Sovereign Immunity. By entering into this Agreement, EBID and EPCWID seek to obtain the benefits provided for by the statutes cited above. Their employees are "public employees" as defined by the New Mexico Tort Claims Act, Section 41-4-1 to 41-4-29, N.M.S.A. 1978 (1994 Supp.), and the Texas Tort Claims Act, and EBID and EPCWID and their "employees" as defined in said Acts do not waive sovereign immunity, do not waive any defenses and/or do not waive any limitation of liability pursuant to law of their respective states and the above named Acts. No provision of this Agreement waives any of the provisions of the New Mexico Tort Claims Act or the Texas Tort Claims Act, or any act, constitution or law that provides sovereign immunity to the parties or their officers, directors, agents, servants or employees.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

Attest:

Ruby Provenza

ELEPHANT BUTTE IRRIGATION DISTRICT

By

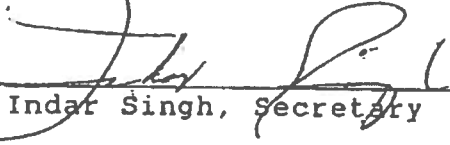
John Schopp

Rudy Provencio, Secretary

John Salopek, President

Attest:

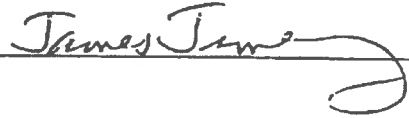
EL PASO COUNTY WATER IMPROVEMENT
DISTRICT NO. 1


Indar Singh, Secretary

By 
John P. Stubbs, President

APPROVED:

DEPARTMENT OF FINANCE AND
ADMINISTRATION, State of New Mexico

By 

Date 9/18/95

CERTIFICATE OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 2001 N. Main Street, Suite 390, Walnut Creek, California 95814. On August 31, 2015, I served the following document(s):

Motion of Elephant Butte Irrigation District for Leave to File Exhibit

- By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

- By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):
 - Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

 - Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Sacramento, California.

- By personal service.** At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.
- By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

State of New Mexico

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Hudspeth County Conservation
and Reclamation District No. 1

A. Gregory Grimsal
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Special Master

The Honorable Susana Martinez
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By First Class Mail

The Honorable Rick Perry
Governor of the State of Texas
Office of the Governor
P.O. Box 12428
Austin, TX 78722-2428
(512) 463-3000

By First Class Mail

I declare under penalty of perjury under the laws of the State
of California that the above is true and correct.

Executed on August 31, 2015, Walnut Creek, California.



Irene Islas