

No. 2006-3219

FILED
CLEMENT SANCHEZ
DISTRICT CLERK

IN RE: THE ADJUDICATION

IN THE DISTRICT COURT OF

OF WATER RIGHTS IN THE

2006 OCT 30 AM 10 45

UPPER RIO GRANDE SEGMENT

EL PASO COUNTY, TEXAS

EL PASO COUNTY, TEXAS

OF THE RIO GRANDE BASIN

327TH JUDICIAL DISTRICT

FINAL JUDGMENT AND DECREE

BE IT REMEMBERED that on this day came on to be heard the above numbered and entitled cause, said cause being an action to finally adjudicate water rights in the Upper Rio Grande Segment of the Rio Grande Basin above Fort Quitman. The Court, having reviewed the Final Determination of the Texas Commission on Environmental Quality ("Commission") in this adjudication and having considered evidence in this matter, including the evidence in the record of the proceedings before the Commission, finds as follows:

1. The Commission established jurisdiction over this matter in accordance with applicable law.
2. One motion for rehearing was filed with the Commission by the United States Department of Interior, Bureau of Reclamation.
3. The motion for rehearing was granted by the Commission, and a revised Order approving the Final Determination was issued by the Commission.
4. Notice of the revised order was duly given by the Commission and no motions for rehearing were filed upon the issuance of this revised Order.

5. The Commission filed its Final Determination with this Court, in accordance with TEX. WATER CODE ANN. § 11.317 (Vernon 2000); and requested that the Court set deadlines for filing of exceptions and hearing dates.

6. On August 9, 2006, the Court set deadlines for filing exceptions for 4:00 pm on September 15, 2006, and hearing dates for exceptions for 10:00 am on October 30, 2006, in accordance with TEX. WATER CODE ANN. § 11.317 (Vernon 2000). A hearing on the merits was also set for 10:00 am on October 30, 2006.

7. All claimants of water rights in the Upper Rio Grande Segment of the Rio Grande Basin above Fort Quitman who appeared before the Commission were notified by the Commission of the filing of the Commission's Final Determination with this Court in compliance with TEX. WATER CODE ANN. § 11.317 (Vernon 2000).

8. All claimants of water rights in the Upper Rio Grande Segment of the Rio Grande Basin above Fort Quitman who appeared before the Commission were duly notified by the Commission of the Court's setting a September 15, 2006 deadline for filing exceptions to the Commission's Final Determination and of the October 30, 2006 hearing dates.

9. Clerical errors in the final determination of the City of El Paso's claim have been identified, to wit: references to "paragraph 1" in paragraphs 5.a. and 5.b. under Conclusions of Law, on pages 13-14 of the Commission's Final Determination, should refer to "Conclusions of Law, paragraph 2." The City of El Paso has requested that these references be corrected. The Commission agrees that this is a clerical error which should be

corrected. The Court finds that the references in Conclusions of Law Nos. 5.a. and 5.b. are clerical errors which should be changed.

10. No Exceptions have been filed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Final Determination of water rights in the Rio Grande Segment of the Basin (SOAH Docket No. 582-96-0144, TCEQ Docket No. 1996-0209-WR), issued April 13, 2006, and filed with this Court on August 7, 2006, a copy of which is attached hereto as Exhibit A and incorporated herein for all purposes, is affirmed by this Court, except that references to "under paragraph 1 above" in paragraphs 5.a. and 5.b. under the Conclusions of Law, on pages 13-14 of the Commission's Final Determination, which relate to the Claim of the City of El Paso, should be, and they are each hereby MODIFIED to read "under Conclusions of Law, paragraph 2 above."

2. The Commission is authorized to take such further action as is required by the Texas Water Rights Adjudication Act, TEX. WATER CODE ANN. § 11.301 et seq. to implement this Final Judgment.

3. Costs of court are assessed against the Texas Commission on Environmental Quality.

SIGNED this 30th day of October, 2006.

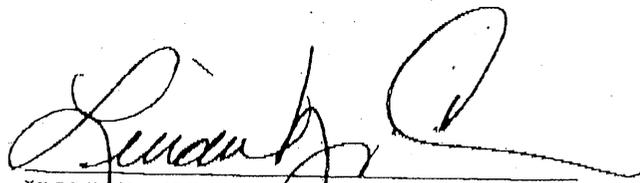

HONORABLE LINDA CHEW
Judge Presiding
327th Judicial District Court
El Paso County, Texas.

Exhibit A

Final Determination Adjudication of Water Rights in the Upper Rio Grande Above Fort Quitman

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



NOTICE OF THE FINAL DETERMINATION OF ALL CLAIMS OF WATER RIGHTS IN THE UPPER RIO GRANDE SEGMENT OF THE RIO GRANDE BASIN WITHIN THE STATE OF TEXAS

THIS NOTICE IS AN ADDITIONAL NOTICE TO THE NOTICE SENT TO YOU ON JANUARY 19, 2006, CONCERNING THE FINAL DETERMINATION OF THE UPPER RIO GRANDE. ON APRIL 12, 2006, THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY GRANTED THE DEPARTMENT OF INTERIOR'S MOTION FOR REHEARING IN PART AND REVISED THE FINAL DETERMINATION BY ADDING PARAGRAPHS 2 AND 3 ON PAGE 1 UNDER "FINAL DETERMINATION." THIS ADDITION TO THE FINAL DETERMINATION STATES THAT BENEFICIAL USE OF WATER ALONE DOES NOT GIVE RISE TO A WATER RIGHT.

Notice is given under 30 Texas Administrative Code § 86.18(c) that on April 13, 2006, the Texas Commission on Environmental Quality issued a Final Determination of all claims of water rights under adjudication in the Upper Rio Grande Segment of the Rio Grande Basin (Above Fort Quitman) located within the State of Texas and which includes all or portions of Hudspeth and El Paso Counties, Texas. The effective date of the Final Determination is May 15, 2006. The Final Determination is included in this mailing.

The Final Determination and all evidence presented or considered by the Commission will be open for public inspection at the offices of the Texas Commission on Environmental Quality in the Office of the Chief Clerk in Building F, 12100 Park 35 Circle, Austin Texas. The times and hours of public inspection will be from 8:00 a.m. until 5:00 p.m. of each working day. Copies of the Final Determination are also available for public inspection at The Rio Grande Compact Commission, 401 East Franklin, Suite 510, El Paso, Texas 79901.

One copy of the Commission's Final Determination will be furnished without charge to each person who filed a claim of a water right in the Upper Rio Grande Segment of the Rio Grande Basin. Any other interested person desiring a copy of the Final Determination may obtain one by writing to Water Supply Division, Water Rights Permitting, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas, 78711-3087. Each request must be accompanied by a check or money order in the amount of \$5.00 per copy requested.

Any water right claimant affected by this Final Determination who disputes the Final Determination may file on or before May 15, 2006, a written motion for rehearing with the Commission stating with reasonable certainty the grounds of the request for rehearing. This motion for rehearing is the same as a motion for rehearing under the Administrative Procedures Act and is a prerequisite to filing an

exception to the Final Determination in court under Texas Water Code § 11.318. If the Commission finds that a motion for rehearing does not have merit, it may deny the motion without notice. If the Commission grants a motion for rehearing, it will provide notice to each claimant of the substance of the motion and setting the time and place of the hearing on the motion. Once all motions for rehearing are disposed of, the Final Determination will be filed in a district court in El Paso County, which will consider any exceptions to the Final Determination and issue a Final Decree either affirming or modifying the Final Determination.

A handwritten signature in black ink, appearing to read "LaDonna Castanuela". The signature is written in a cursive, flowing style.

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER adopting the Final Determination in the Adjudication of all Claims of Water Rights in the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin; SOAH Docket No. 582-96-0144; TCEQ Docket No. 1996-0209-WR.

On 01/11/06, the Texas Commission on Environmental Quality (Commission) considered the Adjudication of All Claims of Water Rights in the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin.

On 08/17/05, the Commission issued an Order adopting a Preliminary Determination in the Adjudication of All Claims of Water Rights in the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin. A copy of the Order adopting the Preliminary Determination was mailed to all parties on 08/19/05. Notice of the Preliminary Determination and the Opportunity to file a Contest was mailed to all claimants on the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin on August 30, 2005. Notice of the Preliminary Determination and the opportunity to file a Contest was published in the *El Paso Times* on August 31, 2005 and September 7, 2005. No contests were filed.

After Considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Texas Commission on Environmental Quality adopts the following Final

Determination of All Claims of Water Rights in the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin, incorporating appropriate Findings of Fact and Conclusions of Law:

FINAL DETERMINATION

The Texas Commission on Environmental Quality hereby makes its Final Determination of claims of water rights in the Upper Rio Grande (above Fort Quitman, Texas) and contributing Texas tributaries. This action is taken pursuant to The Texas Water Rights Adjudication Act, § 11.301 *et seq.* of the Texas Water Code ("Code," TEX. WATER CODE ANN.) Jurisdiction was established in the initial public hearings in El Paso, Texas, on October 28 and December 11, 2003, and evidence was received then and at subsequent public hearings.

The Department of the Interior's Motion for Rehearing asserts that the McCarran Amendment does not waive sovereign immunity in this proceeding because property owners in the Rio Grande Project in Texas are not joined as parties in this adjudication proceeding. The Motion for Rehearing was considered on 04/12/06, and is granted in part to add this statement and denied in all other respects. In Texas mere beneficial use by individual property owners of waters alone gives the user no vested rights to them. *J.B. Bean v. United States*, 143 C. Ct. C. 363, 163 F.Supp. 838 (1958). Consequently, beneficial use of water alone does not give rise to a water right.

After considering all evidence and matters introduced during the proceeding, including an investigation report by Commission staff with a plat or maps required by law, and an administrative law judge's report and written statement of facts, the Commission makes the following findings of fact and conclusions of law.

A. Claim of El Paso County Water Improvement District No. 1 and United States:

DIVERSION POINTS NOS.: 0050, 0100, 0150, 0200, 0250, 0500, and 0600

TRACT NO.: 0050

OWNERSHIP: El Paso County Water Improvement District No. 1 and United States of America, Department of the Interior, Bureau of Reclamation

SECTION 11.307 CLAIM (El Paso County Water Improvement District No. 1): Under Permit No. 5433 and Certified Filing No. 123, to divert and use 376,000 acre-feet of water per year from the Rio Grande for irrigation, municipal, industrial, mining, and recreational use; any measurable surface water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande for which the District has entered into legal contracts with the United States of America pursuant to the Reclamation Act (38 Stat. 388, 43 U.S.C. 371, *et seq.*); and an average of 1,899 acre-feet of water averaged over any five-year period from tributary inflows of the Rio Grande between the Texas/New Mexico state line and Riverside Dam. The priority date is January 1, 1918, for water and return flows under Permit No. 5433 and July 6, 1889, under Certified Filing No. 123. The place of use is for a maximum of 69,010 acres of land within the District's boundaries and the District has the right to sell any of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

SECTION 11.307 CLAIM (United States of America, Department of the Interior, Bureau of Reclamation): Under Permit No. 5433 and Certified Filing No. 123, to impound 2,246,510 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico, and to divert and use 315,548 (67/155 of 730,000 acre-feet) acre feet of water per year from water released from Elephant Butte Reservoir and Caballo Reservoir to the Rio Grande for irrigation, municipal, industrial, mining, and recreational use (under Permit No. 5433) and 70,000 acre-feet per year for irrigation, municipal, industrial and recreation (under Certified Filing No. 123). The priority date is July 6, 1889, for Certified Filing No. 123 and January 23, 1906, for water stored in New Mexico and delivered via contracts to the El Paso County Water Improvement District No. 1 under Permit 5433.

FINDINGS OF FACT:

1. Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "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 the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

2. Claimant El Paso County Water Improvement District No. 1 ("Claimant District") is a political subdivision of the State of Texas organized and existing under Article XVI, § 59 of the Texas Constitution. Claimant District is authorized to enter into contract or other obligations with the United States under Chapter 55 of the Code.
3. Claimant United States of America ("Claimant United States") is acting by and through the Department of the Interior, Bureau of Reclamation, with respect to recognition of water rights relating to the Rio Grande Reclamation Project.
4. The Rio Grande Project in New Mexico and Texas was constructed by Claimant United States under the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat 814.
5. The State of Texas authorized the Secretary of the Interior to conduct any activities in the State of Texas necessary to perform his duties under the federal reclamation act, as amended (43 U.S.C. § 371 *et seq.*).
6. The Rio Grande Reclamation Project provides water to land classified as irrigable within the Elephant Butte Irrigation District in New Mexico and the Claimant District in Texas. Claimant District includes 69,010 acres within its boundaries that are classified by the United States and Claimant District as irrigable.
7. Claimant United States acquired lands, canals, and water rights in Texas for the construction of the Rio Grande Reclamation Project. These acquisitions included, without limitation, the Franklin Canal and the lands and water rights identified in the Loomis affidavits filed July 6, 1889, and August 10, 1889, and later embodied in Certified Filing No. 123, and beneficial use after July 6, 1889, was continuous. Said project was constructed by the United States, using Reclamation funds.
8. In 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Code § 41.009) to "remove all causes of present and future controversy among" those states with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas.
9. Claimant United States stores water in two reservoirs, Elephant Butte and Caballo, located in New Mexico and constructed by and owned by Claimant United States, for use throughout the Rio Grande Reclamation Project and in Mexico. Claimant United States claims a right under Certified Filing No. 123 to impound 2,638,860 acre-feet of water in these reservoirs. Claimant United States diverts water through a series of diversion dams on the Rio Grande in New Mexico and Texas.
10. In 1906, the United States entered into the Convention with Mexico for the Rio Grande providing for the equitable distribution of water of the Rio Grande for

irrigation purposes (34 Stat. 2953). The Convention also provides in part that the delivery of 60,000 acre-feet per year to Mexico shall be assured by the United States, but in the event of extraordinary drought or serious accident to the irrigation system in the United States, available water shall be distributed through the year in the same proportions as the irrigation water supply furnished to lands in the United States.

11. Water for Claimant District is presently diverted by Claimant United States at the Mesilla Diversion Dam in New Mexico and the American Diversion Dam in Texas. Water has historically been diverted at the Riverside Diversion Dam, but this diversion dam is not currently functional.
12. Approximately 2.3 miles downstream from the American Diversion Dam is the International Diversion Dam, which is used to deliver 60,000 acre-feet of water per year to Mexico under the 1906 Convention between the United States and the Republic of Mexico. The International Diversion dam was constructed by and is owned by Claimant United States.
13. Claimant United States entered into a contract dated December 29, 1917, with Claimant District and the El Paso Valley Water Users' Association for construction of drainage works for the distribution and delivery of water for irrigation purposes. Claimant United States entered into a contract dated January 17, 1920, with Claimant District and the El Paso Valley Water Users' Association for the repayment of construction and operation and maintenance charges. Thereafter, the El Paso Valley Water Users' Association was dissolved. Pursuant to a Memorandum of Agreement dated August 27, 1920, El Paso County Water Improvement District No. 1 and El Paso County Conservation and Reclamation District No. 2 agreed to consolidate, and subsequently consolidated as El Paso County Water Improvement District No. 1.
14. Pursuant to said contracts and amendments thereto and later contracts between Claimant United States and Claimant District, Claimant United States delivers to Claimant District water from the Rio Grande Reclamation Project. Claimant District has reimbursed Claimant United States for construction costs, as required by contract. Claimant United States in 1996 conveyed to Claimant District certain facilities and rights-of-way within the District's boundaries but reserved ownership of the American Canal, the American Canal Extension, and the American, International, and Riverside diversion dams. The American Diversion Dam and Riverside Diversion Dam and the American Canal and American Canal Extension are used by the United States to divert and convey all water diverted and acquired from the Rio Grande by Claimant United States and Claimant District in accordance with Findings of Fact Nos. 17, 18, and 19.

15. The Secretary of the Interior of the United States is authorized to conduct any activities in Texas necessary to perform duties under the federal reclamation act, as amended (43 U.S.C. § 371 *et seq.*), and to conduct any activities in the State of Texas, as authorized by the State of Texas, necessary to perform duties under the federal reclamation act. In accordance with its contractual obligations, Claimant District reimburses Claimant United States annually for certain costs incurred by Claimant United States for operations and maintenance of said Project.
16. In 1991, Claimant District applied for a permit from the Texas Natural Resource Conservation Commission (predecessor to the Texas Commission on Environmental Quality) and the Commission recognized that Claimant District had water rights under the law of the State of Texas to that portion of the facilities and water of the Rio Grande Reclamation Project and the Rio Grande and its tributaries that have been reserved for or appropriated by or for the benefit of Claimant District and its predecessors and beneficial users.
17. Claimant District is the owner of Permit No. 5433, which in part authorizes the diversion and use of 376,000 acre-feet of water per annum from the following:
 - a. All rights that Claimant District acquired or perfected pursuant to Certified Filing No. 123;
 - b. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release to Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, plus any additional share of Project Water obtained through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Project; any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande; and any measurable return flows from the District entering the Rio Grande in Texas above Riverside Dam.
18. Claimant District is also authorized by Permit No. 5433 to divert and use from the Rio Grande any measurable surface-water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande by Claimant District or any other entity with whom Claimant District has entered into a legal contract for such water.
19. Claimant District is also authorized by Permit No. 5433 to divert and use from the Rio Grande an average of 1,899 acre feet of water per annum, when averaged over any

five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Dam.

20. Claimant District is authorized by Permit No. 5433 to divert water under Findings of Fact Nos. 17 and 18 from the Mesilla Diversion Dam, the American Diversion Dam, and the Riverside Diversion Dam at a combined maximum diversion rate of 1,355 cubic feet per second.
21. Claimant District is authorized by Permit No. 5433 to divert water under Finding of Fact No. 19 from American Diversion Dam and Riverside Diversion Dam at a combined maximum rate of 10 cubic feet per second.
22. Claimant District is authorized by Permit No. 5433 a time priority of 1914 for use of the water described in Finding of Fact No. 17. Claimant District is authorized by Permit No. 5433 a time priority of 1918 for use of the water described in Finding of Fact 19.
23. Claimants use the bed and banks of the Rio Grande to transport the water acquired by Claimant United States and Claimant District in accordance with Findings of Fact Nos. 17, 18, and 19 above, and to operate and maintain the diversion dams and works.
24. Permit No. 5433 was granted by the Texas Natural Resource Conservation Commission on September 8, 1993, and issued by said Commission on October 7, 1993:
25. Claimant United States has diverted from the Rio Grande and Claimant District has beneficially used 376,000 acre-feet during 2002, out of the water described in Finding of Fact No. 17.
26. Claimant United States has diverted from the Rio Grande and Claimant District has beneficially used 234,022 acre-feet during 1995, out of the water described in Finding of Fact No. 18.
27. Claimant United States has diverted from the Rio Grande and Claimant District has beneficially used 1,899 acre-feet during 2002, out of the water described in Finding of Fact No. 19 above.
28. Claimant District is authorized to use all of the water authorized in Permit No. 5433 for municipal, industrial, mining, or recreational purposes, and/or for irrigation of a maximum of 69,010 acres of land within the District's boundaries, and/or to sell any

of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

29. Permit No. 5433 contained the following three special conditions:

- a. This permit does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact or other applicable law to which permittee is subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or waive any right of the permittee.
- b. This permit is granted without prejudice to the claims and rights, if any, of the United States in or to the waters and facilities of the Rio Grande Project.
- c. This permit is not intended to in any way compromise or diminish the volume of water which the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the permit grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above-referenced 1906 Convention.

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimant United States is recognized a right under Certified Filing No. 123 to impound 2,638,860 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico.
3. Claimant United States and Claimant District are authorized to divert and Claimant District is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year from the following sources:
 - a. All rights which Certificate Holders acquired or perfected pursuant to Certified Filing No. 123;
 - b. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release to the Elephant Butte Irrigation

District and Claimant District, plus any additional share of Project Water obtained by Certificate Holders, or either of them, through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Reclamation Project; and

- c. Any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande.
4. In addition to the water diverted pursuant to Conclusion of Law No. 3, Claimants are authorized to divert from the Rio Grande up to 234,022 acre-feet per year of measurable surface-water based effluent, groundwater based effluent or groundwater discharged into the Rio Grande by Claimant District or any other entity with whom Claimant District has entered into legal contract for such water. "Effluent" as used in this Certificate of Adjudication means any and all water that reaches the bed of the Rio Grande from agricultural drains, sewage treatment plants, or storm water runoff.
5. In addition to the water diverted pursuant to Conclusions of Law Nos. 3 and 4, Claimants are authorized to divert from the Rio Grande an average of 1,899 acre-feet of water per annum, when averaged over any five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Diversion Dam.
6. Claimant United States and Claimant District are recognized a right to use the bed and banks of the Rio Grande to transport the water which is the subject of this Preliminary Determination, and to operate and maintain diversion dams and works.
7. Claimants are authorized to divert all or any part of the water authorized for diversion in Conclusions of Law Nos. 3 and 4, at a combined maximum diversion rate of 1,355 cubic feet per second, at the following diversion points:
 - a. Mesilla Diversion Dam located on the Rio Grande in New Mexico;
 - b. American Diversion Dam located on the Rio Grande at the point where Texas, Mexico, and New Mexico meet; and
 - c. Riverside Diversion Dam located on the Rio Grande approximately 13.5 miles downstream of the American Diversion Dam;
8. Claimants are authorized to divert the water authorized for diversion in Conclusion

of Law No. 5 from the American Diversion Dam and the Riverside Diversion Dam at a combined maximum rate of 10 cubic feet per second.

9. Claimant District is recognized a right to use all of the water authorized in Permit No. 5433 for municipal, industrial, mining, or recreational purposes and/or irrigation of a maximum of 69,010 acres of land within the District's boundaries and/or to sell any of such water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.
10. The following Special Conditions should be included in the Certificate of Adjudication:
 - a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.
 - b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water that the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.
 - c. Nothing in this certificate is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.
11. The time priority for use of the water included in Conclusions of Law Nos. 3 and 4, is July 6, 1889. The time priority for use of the water included in Conclusion No. 5 is January 1, 1918.

B. Claim of Jobe Concrete, Inc.:

DIVERSION POINTS NOS.: 0400 and 0450

TRACT NO.: None

OWNERSHIP: Jobe Concrete, Inc.

SECTION 11.303 CLAIM: By predecessor in interest, as a riparian owner appropriator, and/or a claimant of rights under the Irrigation Acts of 1889 and 1895 for which no filings were made by claimant. The claim encompassed one reservoir with a capacity of 137 acre-feet and diversion of 178 acre-feet of water per annum from the Rio Grande for industrial use (in the manufacture of Portland cement), with a priority date of 1910.

SECTION 11.307 CLAIM: By predecessor in interest, affirming the basis of the prior § 11.303 claim, for 178 acre-feet of water per annum from the Rio Grande for industrial use.

FINDINGS OF FACT:

1. Claimant owns land on which flows from a small watershed adjacent to the Rio Grande are impounded by a small reservoir called Cement Lake. The flows originate in seeps and springs upstream of the impoundment and create a discernible watercourse there.
2. Claimant's land, noted in Finding of Fact No. 1, was patented out of the State of Texas between 1840 and 1895.
3. The Cement Lake reservoir was built by 1910 and used from that year onward for industrial processes.
4. During the years from 1963 through 1967, water from the unnamed watercourse impounded in Cement Lake was used at the site, in the amount of 178-acre feet per annum, for the manufacturing of cement (*i.e.*, for cooling large machinery at the facility).

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimant is recognized a right to divert 178 acre-feet of water per annum for industrial purposes from the flows of an unnamed tributary of the Rio Grande that are impounded in Cement Lake, with a priority date of 1910.

C. Claim of City of El Paso:

DIVERSION POINTS NOS.: 0500, 0550, 0600, and 0650

TRACT NO.: None

OWNERSHIP: City of El Paso, by and through its Public Service Board

SECTION 11.307 CLAIM: Under Permit No. 1535, as amended, to divert and use 11,000 acre-feet of water per year for municipal and domestic purposes from the Rio Grande, with a priority date of November 1, 1948. The diversion point is at the American Diversion Dam or the Riverside Diversion Dam and the water is conveyed through the American Canal, the Franklin Canal, and/or the American Canal Extension.

FINDINGS OF FACT:

1. Claimant was authorized by Permit No. 1535, issued on May 10, 1950, to divert, appropriate, and use 27,000 acre-feet per annum of the unappropriated or unused storm, flood, and return waters of the Rio Grande for municipal and domestic purposes, and to impound 16,000 acre-feet of that water per annum in an off-channel storage reservoir having a capacity of 3,000 acre-feet.
2. Permit No. 1535 was amended on September 10, 1963, by changing the location of the storage reservoir and by adding a new point of diversion.
3. Permit No. 1535A was amended on August 25, 1969, by deleting the requirement to construct a 3,000 acre-foot capacity off-channel reservoir, and by reducing the right to divert and use water to 11,000 acre-feet per year by direct diversion of return and flood waters, without the use of storage, for municipal purposes.
4. Permit No. 1535B was amended on September 8, 1993, by adding the authorization for diversion at the Riverside Diversion Dam, identifying the City's existing water treatment plants, and allowing for the use of the American Canal Extension.
5. The priority date of Claimant's rights under Permit No. 1535, as amended, is November 1, 1948.
6. After Claimant applied for Permit No. 1535, it entered into a Stipulation and Agreement dated December 1, 1949, with the El Paso County Water Improvement District No. 1 and the Hudspeth County Conservation and Reclamation District No. 1 ("the Districts"), the United States and others, which Stipulation and Agreement incorporates a Contract between the City of El Paso and the El Paso County Water Improvement District No. 1 dated August 10, 1949, and set forth the terms and conditions of withdrawal of the United States' and the Districts' protests of the City of El Paso's permit application, and established that the United States shall determine when federal Rio Grande Reclamation Project water is in excess of the requirements of the Districts and is available to the City under its permit.

7. Claimant established that it has beneficially used a maximum of 6,403 acre-feet (in 1981) of the water authorized in Permit No. 1535, as amended, for the authorized purposes.
8. The reasons Claimant failed to use the total amount of water authorized in Permit No. 1535, as amended, for the authorized purposes were that that total amount of water was not determined by the United States to be available to Claimant or was not available to Claimant at a time when Claimant could beneficially use it.
9. Claimant demonstrated an intention to divert and use 11,000 acre-feet per year of the unappropriated storm, flood, and return waters of the Rio Grande, without the use of storage, for domestic and municipal purposes by showing anticipated future need and the possibility of modified water treatment operations that would allow use of low quality water.

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimant is recognized a right under Permit No. 1535, as amended, to divert, appropriate, and use not to exceed 11,000 acre-feet of water per year of the unappropriated storm, flood, and return waters of the Rio Grande, without the use of storage, for domestic and municipal purposes, with a priority date of November 1, 1948.
3. Claimant is authorized to divert the water authorized by Conclusion of Law No. 2 from the Rio Grande at the American Diversion Dam or the Riverside Diversion Dam and conveyed therefrom, depending on the point of diversion, through the American Canal, the Franklin Canal, and/or the American Canal Extension, to any of the City's water treatment plants, including the W. E. Robertson/Elwood J. Umbenhauer and Jonathan W. Rogers Water Treatment Plants, where it will be diverted from the canals to the plants. In addition, Claimant is authorized to divert this water directly from the Rio Grande to the water treatment plants through facilities provided, or to be provided, by or for the City of El Paso.
4. Claimant's Certificate of Adjudication should include the following Special Conditions:
 - a. Measurement of the water herein authorized to be appropriated by the City of El Paso, by and through its Public Service Board, is to be made at the point of diversion.
 - b. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.
5. Claimant, the El Paso County Water Improvement District No. 1, the Hudspeth County Conservation and Reclamation District No. 1, the United States, and the Executive Director

of the Texas Commission on Environmental Quality have agreed to include the following additional Special Conditions in the certificate:

- a. Certificate Holder is authorized to divert water under paragraph 1 above, in accordance with the provisions in paragraphs 2 and 3 of the August 10, 1949 Contract between the City of El Paso and the El Paso County Water Improvement District No. 1.
- b. Determination of the quantity of water available under paragraph 1 above shall be made by the United States, Secretary of the Interior, or his or her designee in accordance with federal reclamation laws and the laws of the State of Texas.

D. Claim of Indian Cliffs Ranch, Inc.:

DIVERSION POINT NO.: 0700

TRACT NO.: None

OWNERSHIP: Indian Cliffs Ranch, Inc.

SECTION 11.307 CLAIM: Under Permit No. 3544, to impound without diversion 52 acre-feet of water for recreational purposes, in a single impoundment on San Felipe Arroyo, with a priority date of October 11 1977.

FINDINGS OF FACT:

1. Claimant was authorized by Permit No. 3544, issued on February 13, 1978, to impound without diversion 52 acre-feet of water for recreational purposes, in a single impoundment on San Felipe Arroyo.
2. Site investigation by Commission staff revealed that the reservoir is actually not located on San Felipe Arroyo, but on an unnamed tributary of San Felipe Arroyo, and staff recommended that the Certificate of Adjudication issued to Indian Cliffs should reflect that fact.
3. Claimant has impounded water for recreational use, as authorized, during each of the 10 years prior to 2004. The annual amount of water impounded during the period has varied, however, with a maximum impoundment of 28 acre-feet.

4. Claimant could and intends to make beneficial use of the impoundment's entire authorized volume for recreational purposes, in the event that local rainfall produces enough runoff to fill the impoundment.

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimant is recognized a right under Permit No. 3544 to impound without diversion 52 acre-feet of water for recreational purposes, in a single impoundment on an unnamed tributary of San Felipe Arroyo, with a priority date of October 11, 1977.

E. Claim of Hudspeth County Conservation and Reclamation District No. 1 and United States:

DIVERSION POINTS NOS.: 0850 and 0900

TRACT NO.: 0300

OWNERSHIP: Hudspeth County Conservation and Reclamation District No. 1 and United States of America, Department of Interior, Bureau of Reclamation

SECTION 11.307 CLAIM (Hudspeth County Conservation and Reclamation District No. 1): Under Permit No. 236A to divert and use 27,000 acre-feet of water per year from the Rio Grande for irrigation use, at a priority date of November 22, 1917. The place of use is 9,000 acres of land within the District's boundaries for any of the authorized purpose of use.

SECTION 11.307 CLAIM (United States of America): Under Permit No. 236A (subsequent to contract No. 116r-3471 between the United States and Hudspeth County Conservation and Reclamation District No. 1), Certified Filing No. 123, and Reclamation Law.

FINDINGS OF FACT:

1. In 1905, the United States enacted the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat. 814, authorizing the construction of storage facilities on the Rio Grande in the Territory of New Mexico for storage of water of the Rio Grande for irrigation of lands in New Mexico and Texas for the Rio Grande Project.

2. In 1905, the State of Texas enacted House Bill 588, 29th Legislature, Chapter 101 (now § 11.052 of the Texas Water Code), which authorized the Secretary of the Interior to make all necessary examinations and surveys for, and to locate and construct reclamation works for irrigation purposes within the State of Texas, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act of 1902 (38 Stat. 388, now 43 U.S.C. § 371, *et seq.*) as to such lands, subject to all the provisions, limitations, charges, terms, and conditions of the Reclamation Act.
3. Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "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 the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."
4. Claimant Hudspeth County Conservation and Reclamation District No. 1 ("Claimant District") is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution, and is subject to Chapter 55 of the Code and other provisions thereof. Claimant District is authorized by statute to enter into contracts or other obligations with the United States (Code § 55.185). By statute, Claimant District is required to "... distribute and apportion all water acquired by the district under a contract with the United States in accordance with Acts of Congress, rules and regulations of the Secretary of the Interior, and provisions of the contract" (Code § 55.364). Claimant District includes 18,618 acres within its boundaries that are classified by the United States and Claimant District as irrigable.
5. Claimant United States of America ("Claimant United States") is acting by and through the Department of the Interior, Bureau of Reclamation, with respect to recognition of water rights relating to the Rio Grande Reclamation Project.
6. In 1911, the United States enacted a statute dated February 21, 1911 (36 Stat. 925, 43 U.S.C. §§ 523-525, the "Warren Act") to authorize the United States to contract for impounding, storing, and carriage of water and to cooperate in the construction and uses of reservoirs and canals under reclamation projects, and for other purposes. Claimant District entered into a contract with the United States dated December 1, 1924, as amended in 1951, (the "Warren Act Contract"), which provides for the use of Rio Grande Reclamation Project water by Claimant District.
7. In 1911, the State of Texas adopted what is now Code § 11.005, which provides as

follows: "This chapter applies to the construction, maintenance, and operation of irrigation works constructed in this state under the federal reclamation act, as amended (43 U.S.C. Sec. 371 et seq.), to the extent that this chapter is not inconsistent with the federal act or the regulations made under that act by the secretary of the interior."

8. In 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Code § 41.009) to "remove all causes of present and future controversy among" those states with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas.
9. Claimant United States releases stored water from Elephant Butte and Caballo reservoirs to supply water to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to land in New Mexico. Mesilla Diversion Dam is located in New Mexico but is used to divert water to both the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1. American Diversion Dam is the next diversion dam downstream on the Rio Grande. The United States diverts from the Rio Grande into the American Canal at the American Diversion Dam water for the El Paso County Water Improvement District No. 1 (some of which is subsequently used by Claimant District No. 1 pursuant to its Warren Act Contract).
10. The Rio Grande Reclamation Project provides water to land classified as irrigable within the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas, upstream of Claimant District.
11. On December 1, 1949, the United States, the City of El Paso, the El Paso County Water Improvement District No. 1, Claimant District, and others entered into a "Stipulation and Agreement" regarding Application No. 1584 made by the City of El Paso to the Board of Water Engineers, State of Texas, for permit to appropriate water from the Rio Grande, and attached to and made a part of such Stipulation and Agreement was a contract between the City of El Paso and the El Paso County Water Improvement District No. 1 dated August 10, 1949. Such Stipulation and Agreement set forth the terms and conditions regarding the withdrawal of protests of Application No. 1584 by Claimant United States, Claimant District, and others, and established that the United States shall determine when federal Rio Grande Reclamation Project water is in excess of the requirements of the El Paso County Water Improvement District No. 1 and Claimant District and is available to the City of El Paso.

12. Claimant District holds Permit No. 236 from the State of Texas as amended by Texas Permit No. 236A. Such permit authorizes Claimant District to divert water from the Rio Grande at a grade control structure located at latitude 31.413 degrees north, 106.096 degrees west in El Paso County, Texas, and at a grade control structure located at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas. The priority date of Claimant District's rights under Permit No. 236A is November 22, 1917.
13. Claimant District has beneficially used on 9,000 acres of irrigable land within such district 27,000 acre-feet of water during one or more years from 1918 through 2004 and has diverted such water at a maximum rate of 400 cubic feet per second at a grade control structure located at latitude 31.413 degrees north, 106.096 degrees west in El Paso County, Texas and at a grade control structure located at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas.
14. In 2001, Claimant United States has delivered and Claimant District has beneficially used 151,892 acre-feet of water available to Claimant District at the terminus of the Tornillo Drain, Hudspeth Feeder Canal, and Tornillo Canal under the Warren Act Contract and in accordance with the Stipulation and Agreement.
15. Claimants have used the bed and banks of the Rio Grande to transport the water that is the subject of their Claims and have operated and maintained diversion structures and works in the Rio Grande as necessary to divert such water described under Findings of Fact Nos. 13 and 14.
16. Claimant District has beneficially used water, described under Findings of Fact Nos. 13 and 14, diverted from the Rio Grande for agricultural, industrial, mining, and recreational purposes, and/or for irrigation of a maximum of 18,618 acres of irrigable land within the Claimant District's boundaries.

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimants are recognized a right to divert an aggregate amount of water from the Rio Grande not in excess of 27,000 acre-feet per annum within 3,500 feet upstream of a grade control structure located at latitude 31.413 degrees north, 106.096 degrees west in El Paso County, Texas, and at a grade control structure located at latitude 31.318

degrees north and longitude 105.936 degrees west in Hudspeth County, Texas, to irrigate 9,000 acres of land within Claimant District's boundaries.

3. Claimant United States is authorized to deliver and Claimant District is authorized to use a maximum of 151,892 acre-feet per year of any water available to Claimant District at the terminus of the Tornillo Drain, Hudspeth Feeder Canal, and Tornillo Canal under the Warren Act Contract and in accordance with the Stipulation and Agreement.
4. Claimants are authorized to use the bed and banks of the Rio Grande to transport the water that is the subject of their Certificate of Adjudication and to operate and maintain diversion structures and works in the Rio Grande as necessary to divert such waters.
5. The maximum combined rate for water diverted from the Rio Grande authorized under Conclusion of Law No. 2 is 400 cubic feet per second.
6. Claimant District is authorized to use all of the water authorized herein for agricultural, industrial, mining, or recreational purposes, and/or for irrigation of a maximum of 18,618 acres of irrigable land within the District's boundaries.
7. Claimants' Certificate of Adjudication should include the following Special Conditions:
 - a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.
 - b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water that the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.
 - c. All rights of the Certificate Holders under this Certificate of Adjudication shall be subject and inferior to all rights of the El Paso County Water Improvement

District No. 1 in and to all Rio Grande Reclamation Project facilities and water, and to all of the other rights of the El Paso County Water Improvement District No. 1, which are described or recognized in the El Paso County Water Improvement District No. 1's Certificate of Adjudication No. _____, subject to the provisions in paragraphs 2 and 3 of the August 10, 1949 Contract between the City of El Paso and the El Paso County Water Improvement District No. 1. However, this Certificate of Adjudication shall not be deemed to modify or affect the Stipulation and Agreement in any manner.

- d. Determination of the quantity of water available under _____ of this Certificate of Adjudication [*i.e.*, under Conclusion of Law No. 3, above] shall be made by the United States of America, Secretary of the Interior, or this or her designee in accordance with federal reclamation laws and the laws of the State of Texas.
- e. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.

- 8. The time priority for use of the water included in Conclusion of Law No. 2 is November 22, 1917. Water use under Conclusion of Law No. 3 is a non-priority use.

F. Claim of Robert and Doloris Kimpel:

DIVERSION POINT: None

TRACT NO.: None

OWNERSHIP: Robert and Doloris Kimpel

SECTION 11.303 CLAIM: None

SECTION 11.307 CLAIMS: On an unspecified basis, for agricultural and irrigation use upon three separate tracts of land, from unnamed tributaries of the Rio Grande and San Felipe Arroyo. The claims seek to authorize four small impoundments and the diversion of 656 acre feet of water per annum.

FINDINGS OF FACT:

1. Neither Claimants nor any of their predecessors in interest filed a statement of claim pertinent to Claimant's asserted rights under § 11.303 of the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*).
2. Claimants hold no permit issued by the State of Texas nor any other appropriative right pertaining to their claims asserted in this adjudication.
3. Claimants have demonstrated no use of water that pertains to their claims asserted in this adjudication during the years 1963 through 1970, inclusive

CONCLUSIONS OF LAW:

1. The Texas Commission on Environmental Quality has the authority and responsibility pursuant to the Water Rights Adjudication Act of 1967 (Code § 11.301, *et seq.*) to adjudicate all water right claims filed under that Act.
2. Claimants should not be recognized any water right in this adjudication.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Commission, pursuant to § 11.315 of the Code, makes this Final Determination of all properly pending claims of surface water rights in the Adjudication of All Claims of Water Rights in the Upper Rio Grande (Above Fort Quitman, Texas) Segment of the Rio Grande Basin.
2. The chief clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order and Final Determination to each person who filed a claim in this adjudication in accordance with § 11.307 of the Code and to other entities as prescribed in § 11.309 of the Code.
3. If any provision, sentence, clause or phrase of this Order is for any reason held to be

invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief in this proceeding, if not expressly granted herein, are hereby denied for want of merit.

ISSUED: **APR 13 2006**

A handwritten signature in cursive script that reads "Kathleen H. White". The signature is written in black ink and is positioned above a horizontal line.

Kathleen Hartnett White, Chairman