FIFTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel. State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	
Plaintiffs,	)	Nos. 20294 & 22600 CONSOLIDATED
vs.	)	
L.T. LEWIS, et al., UNITED STATES OF AMERICA,	)	Carlsbad Basin Section Carlsbad Irrigation District
Defendants.	)	

OPINION RE THRESHOLD LEGAL ISSUE NO. 3

THIS MATTER comes on for consideration by the Court in connection with Threshold Legal Issue No. 3 which provides:

> Whether project water rights described in the Offer are rights of the United States and/or the District or rights of the District members.

See PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHT CLAIMS (Pretrial Order) filed on February 26, 1996, page 6.[1]

I. SUBMISSIONS REVIEWED BY THE COURT.

In connection with the Court's consideration of Threshold Legal Issue 3, the Court has reviewed:

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[1]The United States of America is referred to herein as United States. The State of New Mexico is referred to herein as State. The Carlsbad Irrigation District is referred to herein as CID. The Pecos Valley Artesian Conservancy District is referred to herein as PVACD. The Carlsbad Project is referred to herein as the Project.

1. PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE # 3[2] (PVACD's Initial Brief) served on October 23, 1996 by The Law Office of Hennighausen & Olsen through Fred H. Hennighausen, Esq., Stuart D. Shanor, Esq., and Eric Biggs, Esq.

2. DEFENDANTS' BRIEF ON THRESHOLD LEGAL ISSUE NO. 3 (Olsen Clients' Initial Brief) served on October 23, 1996 by The Law Office of Hennighausen & Olsen through A. J. Olsen, Esq.

3. NEW MEXICO STATE UNIVERSITY'S BRIEF ON THRESHOLD LEGAL ISSUES THREE AND FOUR (NMSU's Initial Brief) served on October 25, 1996 by Sheehan, Sheehan & Stelzner, P.A. through John W. Utton, Esq. and Cynthia Mojtabai, Esq.

4. BRIEF OF THE TRACYS, THE BRANTLEYS, RIVERSIDE COUNTRY CLUB, JACK AND JOY VOLPATO, WAYNE CARPENTER AND MARY CARPENTER OF THRESHOLD LEGAL ISSUE # 3 (Martin Clients' Initial Brief)[3] served on October 28, 1996 by The Law Offices of W. T. Martin, Jr., P.A. through W. T. Martin, Esq. and Stephen S. Shanor, Esq. The parties represented by The Law Offices of W. T. Martin, Jr., P.A. are hereafter referred to as the Martin Clients.

5. STATE'S RESPONSE BRIEF AS TO LEGAL THRESHOLD ISSUES 3 AND 4 (State's Response) served on March 26, 1997 by Rebecca Dempsey, Esq., Special Assistant Attorney General.

6. ANSWER BRIEF OF DEFENDANT CARLSBAD IRRIGATION DISTRICT TO TRACYS, BRANTLEYS' ET AL. AND NEW MEXICO STATE UNIVERSITY'S BRIEFS ON THRESHOLD LEGAL ISSUE NO. 3 (CID's Answer Brief) served on March 31, 1997 by Hubert and Hernandez, P.A. through Beverly J. Singleman, Esq.

7. UNITED STATES OF AMERICA'S CONCURRENCE IN AND ADOPTION OF THE ANSWER BRIEF OF DEFENDANT CARLSBAD IRRIGATION DISTRICT TO TRACYS', BRANTLEYS', ET AL. AND NEW MEXICO

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[2]The Court has also reviewed PVACD's General Statement of Fact and Proceedings served on October 28, 1996, the Appendix to PVACD's Brief on Threshold Legal Issue #3 served on November 1, 1996, and various exhibits furnished in connection with the submissions of the parties.

[3]There is lack of continuity between pages 57 and 58 which should be supplemented by counsel.

STATE UNIVERSITY'S BRIEFS ON THRESHOLD LEGAL ISSUE NO. 3 served on March 31, 1997 by the U.S. Department of Justice through Lynn A. Johnson, Esq. and David W. Gehlert, Esq., attorneys for the United States of America.

8. UNITED STATES' RESPONSE TO PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE NO. 3 (US's Response Brief) served on March 31, 1997 by the U.S. Department of Justice through Lynn A. Johnson, Esq. and David W. Gehlert, Esq.

9. CID CONCURRENCE IN AND ADOPTION OF DEFENDANT UNITED STATES RESPONSE BRIEFS ON THRESHOLD LEGAL ISSUES NOS. 3 AND 4 served on March 31, 1997 by Hubert & Hernandez, P.A. through Beverly J. Singleman, Esq.

10. STATE'S REPLY BRIEF ON THRESHOLD LEGAL ISSUE NO. 3 - OWNERSHIP (State's Reply) served on April 29, 1997 by Stephen R. Farris, Esq. and Rebecca Dempsey, Esq.

11. CID'S RESPONSE IN OPPOSITION TO ARGUMENTS MADE IN STATE'S RESPONSE BRIEFS AS TO LEGAL THRESHOLD ISSUES NOS. 3 AND 4 (CID's Response to State Response) served on April 30, 1997 by Hubert and Hernandez, P.A. through Beverly J. Singleman, Esq.

12. NEW MEXICO STATE UNIVERSITY'S REPLY BRIEF ON THRESHOLD LEGAL ISSUES THREE AND FOUR (NMSU's Reply) served on April 30, 1997 by Sheehan, Sheehan & Stelzner through John W. Utton, Esq.

13. REPLY BRIEF OF THE TRACYS, THE BRANTLEYS, RIVERSIDE COUNTRY CLUB, JACK AND JOY VOLPATO, WAYNE CARPENTER AND MARY CARPENTER TO THE CARLSBAD IRRIGATION DISTRICT'S AND THE UNITED STATES' ANSWER BRIEF TO THRESHOLD LEGAL ISSUE NO. 3 (Martin Clients' Reply)[4] served on April 30, 1997 by The Law Offices of W. T. Martin through W. T. Martin, Jr., Esq.

14. PVACD'S CONSOLIDATED REPLY BRIEF ON THRESHOLD LEGAL ISSUE # 3 (PVACD's Reply) filed on April 30, 1997 by the Law of Office of Hennighausen & Olsen through Fred H. Hennighausen, Esq.

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[4]There is a lack of continuity between pages 58 and 59 which should be supplemented by counsel.

15. SUPPLEMENTAL REPLY BRIEF FOR THE TRACYS ON THRESHOLD LEGAL ISSUE NO. 3 served on May 1, 1997 by Lana E. Marcussen, Esq.

II. BACKGROUND

The terms and provisions of the proposed Stipulated Offer of Judgment (hereafter Offer) submitted by the State, the United States and the CID filed herein on June 22, 1994, are incorporated herein by reference. A copy of the Offer is attached as Exhibit 4 to the US/CID Memorandum re Threshold Legal Issue No. 2.

The claims and objections of the parties concerning the proposed Offer in connection with the Project are set forth in the PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHTS CLAIMS filed on February 26, 1996.

Summarization of all of the claims, contentions and arguments of the parties would serve no useful purpose. The aforesaid briefs are available to all interested parties for review.

The parties have agreed, and the Court concurs, that oral arguments are not necessary in connection with the determination of Threshold Legal Issue No. 3.

Based upon the submissions of the parties, the ownership of Project water rights to be determined in this phase of these proceedings fall into four (4) categories as follows:

1. Water rights owned by landowners at the time water rights were acquired by the United States from Pecos Irrigation Company in connection with the Project and excepted in the December 5, 1905 agreement as "...water rights and claims to water... for which contracts have been made by this

Company and which have been placed of record whether the same are now held in the name of Pecos Irrigation Company or by other parties..."[5] (*See* PVACD's Initial Brief, Exhibit 3, and the warranty deed executed and delivered by Pecos Irrigation Company to the United States dated December 18, 1905 recorded in the deed records of Eddy County, New Mexico on March 26, 1906 in Book 16, page 277; *See* Martin Clients' Initial Brief, Exhibit 10 and CID's Answer Brief, Exhibit 8).

2. Water rights acquired in connection with the Project by the United States from Pecos Irrigation Company under the agreement and warranty deed described in paragraph 1 above.

3. Water rights acquired in connection with the Project by landowners subsequent to the time that water rights were acquired by the United States from Pecos Irrigation Company under the agreement between them and the warranty deed described in paragraph 1 above.

4. Water rights acquired by the United States pursuant to Section 22 of Chapter 102 of the laws of 1905 which provided:[6]

> 'Whenever the proper officers of the United States authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described and unappropriated at the date of such notice, shall not be subject to further appropriation under the laws of New Mexico, and no adverse claims to the use of such

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[5]These contracts have not been identified by the parties.

[6]For current law see § 72-5-33, NMSA 1978 Comp. (1997 Rep. Pam.).

> waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally re-leased in writing by an officer of the United States thereunto duly authorized.'
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> The United States, acting under authority of the Reclamation Act, gave notice to the Territorial Engineer that it proposed to construct the Project, and,
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> In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to wit:-
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> A volume of water equivalent to 300,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches, said water to be diverted or stored from Pecos River and tributaries at a point described as follows:
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> At Avalon Dam, about 6 miles above Carlsbad, with storage dam at Lakewood, New Mexico, and at such other points above Avalon Dam as may be necessary.

See US/CID Exhibits 20 and 22, Threshold Legal Issue No. 2.

In addition, the United States "...gave statutory notice of its purchase of Pecos Irrigation Company's water rights and irrigation system by filing mandatory notices of the purchase with the local probate clerks in Eddy, Chaves, and Leonard Wood counties. [CID Exs. 4-5]" CID's Answer Brief, page 32.

A decision concerning the ownership of property rights in physical facilities such as dams, reservoirs, ditches, water distribution systems and other physical facilities and claims of easements vis-a-vis the United States, CID or members of CID will not be made; however, water storage and distribution rights in connection with dams and

reservoirs and related rights in connection with the Project will be determined.

In addition to declarations and filings by the United States in connection with Project water, the following documents setting forth the respective rights, duties and obligations of the United States, the CID, PVACD and the members of CID have been submitted in connection with the determination of Threshold Legal Issue No. 3:

(a) The December 5, 1905 agreement between the United States and the Pecos Irrigation Company pursuant to which the United States acquired the irrigation system of the Pecos Irrigation Company together with all water rights owned or claimed by Pecos Irrigation Company except "...all water rights for which contracts have been made by this Company and which have been placed of record whether the same are now held in the name of the Pecos Irrigation Company or by other parties...".[7] (See PVACD's Exhibit 13).

(b) The warranty deed executed and delivered by Pecos Irrigation Company to the United States dated December 18, 1905, recorded in the deed records of Eddy County, New Mexico on March 26, 1906 in Book 16, page 277 (Martin Clients' Exhibit 10; see also US/CID Exhibit 8).

(c) The March 19, 1906 agreement between the United States and the Pecos Water Users Association (See Martin Clients' Initial Brief, Exhibit 10. The Court does not have a complete copy).

(d) The November 14, 1932 agreement among the United States, the CID and

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[7] The contracts which were excepted from the conveyance have not been identified by any of the parties.

the Pecos Water Users Association (PVACD's Exhibit 16)[8] and contracts pertaining to the delivery of Project water executed by landowners in connection with the Project.

The Court is uncertain whether the aforesaid summary of documents includes all current documentation which correctly defines the rights, interests, duties and obligations of the parties in connection with the Project, or whether there are other contracts or underlying documents which should be reviewed in order to determine these matters in connection with the Project. Counsel are requested to confirm by reference to submitted exhibits or submit additional exhibits which cumulatively define the current respective ownership rights, interests, duties and obligations of the United States, CID, PVACD and members of CID in connection with Project water. These submissions should be made to the Court by December 8, 1997.

Based upon the documents furnished to the Court at this time, it does not appear that CID claims to own Project water rights. (See CID's Answer Brief at page 2, footnote 2.) CID does claim that under the aforesaid November 14, 1932 agreement with the United States, and, under state laws[9] pursuant to which it was created in 1932, it has interests in Project water. (*See* CID's Answer Brief, page 2.) CID believes that the Offer properly sets forth the United States and the CID's interests.[10] In *Carlsbad Irr. Dist. v. Ford*, 46 N.M. 335, 128 P.2d 1047 (1942), CID alleged that water users on the

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[8] The organization of CID and its authority to enter into the agreement was approved, ratified, and confirmed by Court decree. *See* PVACD's Initial Brief, Exhibit 17.

[9] CID was formed under what is now § 73-10-1 *et seq.* NMSA 1978 Comp.

[10] The CID is requested to specifically define its claimed interests in connection with the Project during the course of further proceedings in this phase of these proceedings.

Project are the beneficial owners of the water rights in the water of the Pecos River, and, the Supreme Court in discussing the relationship among CID, the United States and landowners in connection with the Project stated:

> The pleadings, findings and decision of the trial court disclose such a relationship between the plaintiff and the Government of the United States, which had an interest in the right to use the waters involved, and the land owners who are the beneficial users of the water, and for whose benefit plaintiff was organized and maintained its existence and service, and to whom it owed a duty of impounding, preserving and distributing the water involved, that we conclude as did the district court that the plaintiff was a proper party to maintain this action.

46 N.M. at 339.

By way of background, and in order to focus upon the precise issue to be determined in connection with Threshold Legal Issue No. 3, the Court quotes from the State's Reply Brief as follows:

> ...The State files this Reply Brief because it believes the question before the Court with respect to Threshold Legal Issue No. 3 is much narrower than indicated by the wide ranging arguments in the briefs. The parties, including the State, have filed briefs which are peppered with several collateral issues that are not ripe for decision. The State urges the Court to restrict its ruling to the issue identified by the Pretrial Order and reserve resolution of the collateral issues until they have been fully briefed and properly raised.

At 1.

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> ...The briefs filed by the parties on the ownership issue, however, address several collateral issues which are not before the Court on Threshold Legal Issue No. 3, have not been fully argued and are not ripe for decision. For example, in several places in its brief the United States argues that the Project rights are not subject to state laws on forfeiture. US Brief on Legal Issue No. 3, pp. 19, 57 and 59. The Court will be deciding this issue when it reaches Offer Issue No. 2.b. Pretrial Order,

p.7. The United States also included argument about its right to return flows and seepage. US Brief on Legal Issue 3, pp. 11-12, 15, 20-22 and 38. The State very much disagrees with the position taken by the United States, which the State has not had the opportunity to dispute. The Stipulated Offer, which the United States accepted, places a limit on the quantity of water that can be depleted under the diversions offered to the US/CID, which would prevent any capture and reuse of seepage or return flows that might result in greater depletions. Stipulated Offer, ¶1.C.1,p. 4. Furthermore, issues as to the consumptive use, irrigation efficiency and conveyance loss will be heard by the Court in connection with Offer Issue Nos. 3.a, 3.b and 3c. If the United States' claims to return flow and seepage are appropriate issues in this adjudication at all, and they may not be given the Stipulated Offer which is before the Court, it would be in connection with Offer Issue Nos. 3.a-c.

The United States and CID both include discussions about the transferability of Project rights. CID Brief on Legal Issue 3, p. 12; US Brief on Legal Issue 3, p. 17. The State admits that it too failed to resist addressing this subject. State's Response Brief on Legal Issue 3, p.6. Nevertheless, the transferability of Project rights, whoever owns them, is not properly before the Court. Any decision the Court might render on the matter at this stage would simply be advisory, since there is no actual case which requires such a decision. No application to transfer Project rights has been filed by any party, which has been ruled on in the first instance by the State Engineer and then appealed to district court. NMSA §§ 72-5-23, 72-5-24 and 72-7-1 (1985 Repl. Pam.) The Court should defer deciding this issue until it has a genuine factual controversy to illuminate and give substance to the parties' legal arguments.[11]

At 3 and 4.

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The State concludes:

The sole issue before the Court is 'Whether the project water rights described in the Offer are rights of the United States and/or the District or rights of the District members.' Pretrial Order, February 26, 1996, p.6. ... The collateral issues of forfeiture, return flows, transferability of Project

[11]The State then discusses § 72-9-4, NMSA 1978 and argues that the position of the United States in connection therewith is untenable; however, it is not necessary for the Court to decide the matter at this time.

> rights and the applicability of §72-9-4 to adjudication, transfer and forfeiture of federal reclamation rights, which have been argued by the parties in their briefs, are not properly before the Court and not necessary to a determination of Threshold Legal Issue No. 3.

At 8.

While the Court is not necessarily in agreement with all of the matters contained in the State's Reply Brief, the Court concurs in and adopts the aforesaid comments of the State concerning the issues for determination at this time. Issues pertaining to the determination and adjudication of the incidents of ownership of rights to divert, impound, store and use water of the Pecos River stream system, the purpose(s) for which such water may be used, the place of use, allowable annual diversion, duty, priority dates, transfers and other related matters are not before the Court at this time. This opinion should not be deemed or construed as a determination or adjudication of any matter other than whether Carlsbad Project water rights are rights of the United States and/or CID or rights of members of CID.

To the extent that arguments or contentions of parties are not addressed in this opinion, the Court considers that determinations in connection therewith are not essential in order to determine Threshold Legal Issue No. 3 and the Court expresses no opinion in connection therewith.

In connection with the determination of the rights and interests of the United States, CID, PVACD and members of CID concerning the Project, the Supreme Court of New Mexico in *Olson v. H&B Properties, Inc.*, 118 N.M. 495, 882 P.2d 536 (N.M. 1994),

held in pertinent part:[12]

> New Mexico cases have long recognized that ditch rights and water rights are distinct, are derived from different sources, and are governed by different rules of law. *See, e.g., Snow v. Abalos*, 18 N.M. 681, 694-97, 140 P. 1044, 1048-49 (1914). Water rights are derived from appropriation for beneficial use while ditch rights are derived from ownership of the ditch and an easement therein. *See Murphy v. Kerr*, 296 F. 536, 542-44 (D.N.M.1923), *aff'd*, 5 F.2d 908 (8th Cir.1925); *Snow*, 18 N.M. at 695, 140 P. at 1048-49.
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> The right of way for water flow through the irrigation ditch, as distinguished from ownership of the ditch structure itself, is an easement. *Murphy*, 296 F. at 543; *cf. Holmberg*, 56 N.M. at 407, 244 P.2d at 789 (stating community ditch is 'in effect an easement for the purpose of transporting water' without distinguishing the right of way of water flow through the ditch as an easement from the right to ownership of the ditch itself as real property); *Posey v. Dove*, 57 N.M. 200, 212-13, 257 P.2d 541, 548-49 (1953) (noting that the right of way to build a ditch is an easement, but not addressing whether water flow through a ditch is an easement). ...
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> 'The extent of an easement is to be determined by a true construction of the grant or reservation by which it is created, aided by any concomitant circumstances which have a legitimate tendency to disclose the intention of the parties.' *Kennedy v. Bond*, 80 N.M. 734, 736, 460 P.2d 809, 811 (1969) (*quoting Dyer v. Compere*, 41 N.M. 716, 720, 73 P.2d 1356, 1358 (1937)). An easement should be construed according to the intent of the parties. *Sanders v. Lutz*, 109 N.M. 193, 196, 784 P.2d 12, 15 (1989). ...

882 P.2d, at 539.

As stated in *United States v. Ballard*, 184 F.Supp. 1 (D.N.M. 1960):

> The basic case law on New Mexico Water Law appear in the

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[12]In *KRM, Inc. v. Caviness, et al.*, 122 N.M. 389, 925 P.2d 9, (1996), the Court discusses the prior appropriation doctrine, its characteristics and the nature of the ownership of water rights, which may be separate and distinct from the ownership of land. The water rights involved here are appurtenant to the land being irrigated.

following leading authorities and cases: Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 237, 61 P. 357; Snow v. Abalos, 18 N.M. 681, 140 P. 1044; Wiel on Water Rights, Vol. 1, Sec. 118, page 141; Trambley v. Luterman, 6 N.M. 15, 27 P. 312; United States v. Rio Grande, etc., Company, 9 N.M. 292, 51 P. 674; Id., 174 U.S. 690, 706, 19 S.Ct. 338, 47 L.Ed. 588; Hagerman Irrigation Co. v. McMurry, 16 N.M. 172, 113 P. 823; Farmers' Development Co., v. Rayado, etc., Co., 28 N.M. 357, 367, 213 P. 202.

The best analysis of this branch of law that the Court has read, is the lucid and articulate opinion of Circuit Judge Orie L. Phillips, then Judge of this Court, in Murphy v. Kerr, 296 F. 536. ...

III. COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 3.

Unappropriated water in New Mexico is declared to belong to the public and is subject to appropriation for beneficial use in accordance with the laws of the State. New Mexico Constitution, Article XVI, Secs. 2 and 3, Section 72-1-1 NMSA 1978 Comp. *et seq.* *See Hagerman Irrigation Co. V. McMurry*, 16 N.M. 172, 113 P. 823 (1911). As held in El Paso County Water Imp. Dist. No. 1 v. City of El Paso, 133 F.Supp. 894 (1955) "..a water right under the Reclamation Act is in the nature of property and, broadly, is a vested right, although it just as well fits other terms, since, after all, the statute declares that 'beneficial use shall be the basis, the measure, and the limit of the right'...". At 904 and 905.

In *Ickes v. Fox*, 300 U.S. 82, 81 L.Ed 525, 575 S.Ct. 412 (1937), the United States Supreme Court stated:

> Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. Under the Reclamation Act, *supra*, as well as under the law of Washington, 'beneficial use' was 'the basis, the measure and the limit of

the right.' And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, the determination of the secretary as to the number of acres capable of irrigation was 'to be based upon and measured and limited by the beneficial use of water.' Predecessors of petitioner, accordingly, had decided that 4.84 acre-feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands; and upon that decision, for a period of more than twenty years prior to the wrongs complained of, there was delivered to and used upon the lands that quantity of water. [Footnote omitted] Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto--a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.

The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. *California Power Co. v. Beaver Cement Co.*, 295 U.S. 142, 162. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

300 U.S., at 94-96. (Underscoring for emphasis added.)

The Supreme Court of the United States, in *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 655 S.Ct. 1332, 89 L.Ed. 1815 (1945) stated:

> *Claim of United States to Unappropriated Water.* The United States claims that it owns all the unappropriated water in the river. It argues that it owned the then unappropriated water at the time it acquired water rights by appropriation for the North Platte Project and the Kendrick Project. Its basic rights are therefore said to derive not from appropriation but from its underlying ownership which entitles it to an apportionment in this suit free from state control. The argument is that the United States acquired the original ownership of all rights in the water as well as the lands in the North Platte basin by cessions from France, Spain and Mexico in 1803, 1819, and 1848, and by agreement with Texas in 1850. It says it still owns those rights in water to whatever extent it has not disposed of them. An extensive review of federal water legislation applicable to the Platte River basin is made beginning with the Act of July 26, 1866, 14 Stat. 251, the Act of July 9, 1870, 16 Stat. 217 and including the Desert Land Law (Act of March 3, 1877, 19 Stat. 377) and the Reclamation Act of June 17, 1902, 32 Stat. 388. But we do not stop to determine what rights to unappropriated water of the river the United States may have. For the water rights on which the North Platte Project and the Kendrick Project rest have been obtained in compliance with state law. Whether they might have been obtained by federal reservation is not important. Nor, as we shall see, is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law or otherwise.
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> The Desert Land Act 'effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.' *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 158. It extended the right of appropriation to any declarant who reclaimed desert land and provided: 'all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, *mining and manufacturing purposes subject to* existing rights.' See *Ickes v. Fox*, 300 U. S. 82, 95; *Brush v. Commissioner*, 300 U. S. 352, 367.

Sec. 8 of the Reclamation Act provided: 'That 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; *Provided*, That *the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*' (Italics added.)

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All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox*, *supra*, pp. 94-95: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'

The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i. e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *See Murphy v. Kerr*, 296 F. 536, 542, 544, 545; *Commonwealth Power Co. v. State Board*, 94 Neb. 613, 143 N. W. 937; *Kersenbrock v. Boyes*, 95 Neb. 407, 145 N. W. 837. Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the

limit of the right.'

> We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier. We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. Though we assume *arguendo* that the United States did own all of the unappropriated water, the appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act. The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal government. Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress.

325 U. S. at 611-615. (Underscoring for emphasis added.)

California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978) contains a summary of the history of the Reclamation Act and a discussion of water rights in connection therewith. The following are selected excerpts from the opinion:

> If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States. Reflective of the 'cooperative federalism' which the Act embodied is § 8, whose exact meaning and scope are the critical inquiries in this case:[13]
>
> Perhaps because of the cooperative nature of the legislation, and the fact that Congress in the Act merely authorized the expenditure of funds in the States whose citizens were generally anxious to have them expended, there has not been a great deal of litigation involving the meaning of its language. Indeed, so far as we can tell, the first case to come to this Court involving the Act at all was *Ickes v. Fox*, 300 U. S. 82

[13]Wording of § 8 omitted. *See* wording page 16, *supra*, of this opinion.

(1937), and the first case to require construction of § 8 of the Act was *United States v. Gerlach Live Stock Co., supra*, decided nearly half a century after the enactment of the 1902 statute.

438 U.S. at 650-51.

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The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. The rivers, streams, and lakes of California were acquired by the United States under the 1848 Treaty of Guadalupe Hidalgo with the Republic of Mexico. 9 Stat. 922. Within a year of that treaty, the California gold rush began and the settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West. Other settlers coming into the intermountain area, the vast basin and range country which lies between the Rocky Mountains on the east and the Sierra Nevada and Cascade Ranges on the west, were forced to the same conclusion. In its place, the doctrine of prior appropriation, linked to beneficial use of the water, arose through local customs, laws, and judicial decisions. Even in this early stage of the development of Western water law, before many of the Western States had been admitted to the Union. Congress deferred to the growing local law. ...

438 U.S. at 653-54.

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Similarly, in *Kansas v. Colorado*, 206 U. S. 46 (1907), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado, stemming from its power 'to control the whole system of the reclamation of arid lands.' The Court disagreed and held that state reclamation law must prevail. The United States, of course, could appropriate water and build projects to reclaim its own public lands. 'As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property.' *Id.*, at 92. But federal legislation could not 'override state laws in respect to the general subject of reclamation.' *Ibid.* '[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.' Id., at 93. With respect to the question that

had been presented in *Rio Grande Dam & Irrig. Co.*, the Court reaffirmed that each State 'may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.' 206 U.S., at 94.

438 U.S. at 663.

It is against this background that Congress passed the Reclamation Act of 1902. With the help of the 1891 and 1897 Acts, private and state reclamation projects had gone far toward reclaiming the arid lands, [footnote omitted] but massive projects were now needed to complete the goal and these were beyond the means of private companies and the States. In 1900, therefore, all of the major political parties endorsed federal funding of reclamation projects. While the Democratic Party's platform specified none of the attributes of a federal program other than to recommend that it be 'intelligent,' K. Porter & D. Johnson, National Party Platforms 115 (2d ed. 1961), the Republicans specifically recommended that the reclamation program 'reserv[e] control of the distribution of water for irrigation to the respective States and territories.' *Id.*, at 123. In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation and again recommended that state law control the distribution of water. [Footnote omitted]

As a result of the public demand for federal reclamation funding, a bill was introduced into the 57th Congress to use the money from the sale of public lands in the Western States to build reclamation projects in those same States. The projects would be built on federal land and actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water. As originally introduced, § 8 of the Reclamation Act provided:[14]

From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. According to Representative Mondell, the principal sponsor of the reclamation bill in the House, once the Secretary

[14]The wording of § 8 omitted. *See* wording at page 16, *supra*, of this opinion.

determined that a reclamation project was feasible and there was an adequate supply of water for the project, 'the Secretary of the Interior would proceed to make the appropriation of the necessary water *by giving the notice and complying with the forms of law of the State or Territory in which the works were located.*' 35 Cong. Rec. 6678 (1902) (emphasis added). The Secretary of the Interior could not take any action in appropriating the waters of the state streams 'which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands.' H. R. Rep. No. 794, 57th Cong., 1st Sess., 708 (1902). ...

438 U.S. at 665. (Underscoring for emphasis added.)

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Indeed, until the unnecessarily broad language of the Court's opinion in *Ivanhoe*, both the uniform practice of the Bureau of Reclamation and the opinions of the Court clearly supported petitioners' argument that they may impose any condition not inconsistent with congressional directive. In holding that the United States was not an indispensable party in *Nebraska v. Wyoming*, 295 U. S. 40 (1935), this Court observed:

> '[T]he Secretary of the Interior, pursuant to the [1902] Act, applied to the state engineer of Wyoming and obtained from him permission . . . to appropriate waters, and was awarded a priority date. . . . All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming.
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> . . . . .
>
> 'The bill alleges, and we know as matter of law [citing § 8 of the 1902 Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law.' *Id.*, at 42-43.

Ten years later, in its final decision in *Nebraska v. Wyoming*, 325 U. S. 589 (1945), the Court elaborated on its original observation:

> 'All of these steps make plain that [the Reclamation] projects were designed, constructed and completed

> according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox*, [300 U. S. 82 (1937)]: "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water rights became property of the land owners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water..., with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. ...

438 U.S. at 676-77. (Underscoring for emphasis added.)

On May 14, 1992, the Superior Court of the State of Washington in and for Yakima County filed a MEMORANDUM OPINION RE: THRESHOLD ISSUES in a proceeding captioned *In The Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, in Accordance With The Provision of Chapter 90.03 Revised Code of Washington, State of Washington, Department of Ecology v. James J. Acquavella, et al.*, Cause No. 77-2-01484-5. The memorandum opinion provided in pertinent part that:

> One of a trilogy of issues that point toward the control and management of the Yakima Project, as envisioned by the D.O.E., is the question of the ownership of the water rights involved herein. This issue has been exhaustively briefed and argued notwithstanding that this Court has previously addressed this issue, albeit in a different context. Some of that will be reiterated herein from the Memorandum Opinion, February 16, 1982, Court Document 2515, (herein Memo. '82).
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> Initially, in Memo. '82, p. 12, the Court recognized that both federal and state law hold the water right is to be appurtenant to the land

irrigated, as follows: 'The Reclamation Act of 1902, 43 U.S.C. 372 provides that: "The right to the use of water acquired under provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure and the limit of the right." Similarly, the Washington Legislature, by Laws of Wash., 1917, c. 117 §39 (RCW 90.03.080) provided that "the right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used..." This, however, is not the total story.'

The Court went further, Memo. '82, p. 15, to state, 'It should be further noted, however, that even though these landowners have vested property rights, the Bureau of Reclamation, the irrigation districts and other diverters/appropriators of surface water still retain some rights to the water they divert and deliver to the users.' The Court then made reference to United States v. Tilley, 124 F.2d 850, cert. denied 316 U. S. 691, 8th Cir. (1942). Therein, at p. 861, the 8th Circuit stated:

> "In the sense that the right to the beneficial use of such waters attaches to and follows the lands under the project or canal to which the application is made, the appropriative rights may be said to belong to the landowners. This right to the beneficial use on the part of the landowner is, therefore, in the nature of a vested right. But the owner of the irrigation project or canal also has an interest in such appropriative rights, by virtue of the fact that the statute permits him to make the appropriation and diversion, that the maintenance of such appropriative rights is necessary in accomplishing the purpose of the project or canal, and that the law imposes certain duties and obligations upon him in the carriage, distribution, and conservation of the diverted water."

This reasoning is based upon their previous holdings at page 857:

> "Such a canal company is of the nature of a public service corporation.... Its rights and duties are modified by the nature of its functions. It cannot serve the public generally, but only the occupiers of land lying under the ditch... The law grants to corporations of this character valuable rights, but with these rights are accompanying duties to the landholders for the irrigation of whose land the rights are granted... ".

Also, at page 861, the Court noted: 'The State has itself recognized the unity and integration of the project by making possible and allowing a single appropriation to be made for the benefit of all of the lands thereunder.' Thus it is in the matter sub judice.

Here, in RCW 90.40.010, we have the state granting the right, in 1905, for the U.S. to withdraw all of the then unappropriated waters of the Yakima river and its tributaries. Pursuant thereto, the U.S. did so, and built six storage reservoirs and numerous diversion works. It contracted with the irrigation districts for the delivery of natural flow and storage waters. RCW 90.40.040 provides that this appropriation by the U.S. "shall inure to the United States, and its successors in interest... In accordance with the contracts with the U.S., the irrigation districts constructed vast conveyance facilities and diversion works for delivery of the water to the landholders. As such, they are "successors in interest" to the portion of the water that they have contracted with the U.S. to receive on behalf of the patrons of their districts. In C. R. Lentz Review (hereinafter Lentz), Exhibit I to this case, p. 78, it is indicated that pursuant to RCW 90.14.041, the U. S. through the B. 0. R. , has registered 2 3 surface water claims with the D. O. E. The Water Right Claims made by the U.S. were "on its own behalf and on behalf of all persons claiming water rights furnished... to them. (See Exhibit 0, Nov. 8, 1991). The Certificate of Surface Water Right (Exhibit H, Nov. 7, 1991) was issued by the D.O.E. to the U.S.B.O.R. for 'lands within the Kittitas Reclamation District'. Clearly, as in U. S. v. Tilley, supra, the state has 'recognized the unity and integration of the project by making possible and allowing a single appropriation to be made for the benefit of all of the lands thereunder.'

Accordingly, what we have here is the U.S., acting under the Reclamation Act of 1902 and state law, diverting waters into its reservoirs for later distribution to the ultimate beneficial users of the water. The U.S. has diversion and distribution rights in those waters. It has entered into contracts with the Major Claimants herein for the M.C. diversions and conveyance by the M.C. of the water to the landowners. Thus, in accordance with the contracts, the Major Claimants also have diversion and conveyance rights in the water. It should be noted that, under the contracts, with a few minor exceptions, the obligation of the U.S. to deliver the water is conditional on the availability of water to be supplied and the decision for the proration of water among the Major Claimants rests with the Project Superintendent. Thus, we see that even though the water rights are unquestionably appurtenant to the lands upon which they are beneficially used, that in the "unity and integration" of the Project, the U.S.

> and the Major Claimants do retain some rights in the water for the diversion, distribution and conveyance of that water within the Project, albeit in a representative capacity for the landowners. *Ecology v. Acquavella*, 100 Wn.2d 651, and as previously held in Memo. '82, P. 28, 'the water suppliers are trustees of the water rights for the users.'
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> xxx
>
> In summary, the Court finds that the water right is appurtenant to the land, but that the United States and the Major Claimants also have and retain some rights in the water for the storage, diversion, distribution and conveyance of those water rights. Under the acts of Congress, the water rights will be apportioned to the irrigable acreages with the Project diversions. ...

At pages 37 and 38. (Underscoring for emphasis added.)

The reasoning and determinations of the Superior Court of Washington are analogous, in substance, to the matters involved in the case at bar and spell out the respective water rights of the United States and the landowners.

The US/CID rely upon the case of *Ide v. United States*, 263 U.S. 497, 500 (1924) to support their claims that the United States has legal title to water rights. (See US's Response Brief, at 21.) It should be noted, however, that the Court in *Ide* recognized that the owners of lands acquired the right to use water so far as may be necessary in properly cultivating his land. The title to Project water, to the extent that it is determined to be vested in the United States, would be for the benefit of the landowners and the landowners would be the beneficial owners of the Project water right. While in external relations with non-Project appropriators, the United States may be regarded as the appropriator of Project water, as between the United States and the landowners, the appropriation is made for the benefit of the landowners within the

Project, the individual landowners who own the water rights appurtenant to their land. *See* Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mountain Law Review 464, 477-481 (1960). In connection with the internal relationship of the parties concerning the Project and the respective rights and interests among the landowners, the United States and CID, see discussion in *Murphy v. Kerr*, 296 F. 536 (D.N.M. 1923) which is adopted by the Court.

In discussing the ownership of water rights within a reclamation project, the New Mexico Supreme Court held in *Middle Rio Grande Water Users Association v. Middle Rio Grande Conservancy District*, 57 N.M. 287, 258 P.2d 391 (1953) that:

> Unquestionably, the District does not have the authority to barter away the vested water rights of the landowners who have applied them to beneficial use. The waters are appurtenant to the land and the District stores and delivers them to the users. Murphy v. Kerr, D.C., 296 F. 536, affirmed, 8 Cir., 1925, 5 F.2d 908, 41 A.L.R. 1359; Ickes v. Fox, 1937, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525; Gutierrez v. Middle Rio Grande Conservancy District., 1929, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261. ...

57 N.M. at 299.

In *Holguin v. Elephant Butte Irrigation District*, 91 N.M. 398, 575 P.2d 88 (1977), our Supreme Court held in connection with irrigation water under the Reclamation Act that the water right is owned by the landowner, and as to the United States:

> Defendant was granted summary judgment by the trial court, one of the stated reasons being that the United States is an indispensable party. Defendant argued to the court below that the United States is the owner of the water and must be a party to the suit, but has not consented to be sued. This reasoning is not well-founded. The Reclamation Act declared that irrigation water is appurtenant to the land which is being irrigated and states that 'beneficial use shall be the basis, the measure, and the limit of the right.' 43 U.S.C. § 372 (1970). The same language is employed in N.M.Const. art. XVI, § 3, and in § 75-1-2, N.M.S.A.1953. The water was

not appropriated for the use of the government but for the use of the landowners. The government was only a carrier or a trustee for the owners. *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937). This principle was affirmed by the U. S. Supreme Court in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945) in which the court stated:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.
>
> *Id.*, 325 U.S. at 614, 65 S.Ct. at 1349.

Our court has stated that the waters are appurtenant to the land and that the district only stores and delivers them to the users. *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*, 57 N.M. 287, 258 P.2d 391 (1953). In *State v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957) this court held that water belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water.

Summary judgment against Landowners for not joining the United States as a party, based solely on the theory that the government owned the water, would be error.

91 N.M., at 401 and 402. (Underscoring for emphasis added.)

IV. CONCLUSION.

Regardless of the category into which water rights involved in this phase of these proceedings fall, (as set forth at pages 4, 5 and 6, *supra*), the Court is of the opinion that the beneficial ownership of Project water rights is vested in landowners in the Project measured by the amount of water devoted to beneficial use. Ownership of water rights in the Project are appurtenant to land in the Project upon which they are

devoted to beneficial use. Project water rights are not owned by the United States or the CID. The determination of ownership of Project water rights by members of CID does not preclude adjudication of storage and diversion rights of the US/CID and members of CID and these rights will be determined in these proceedings. The issue of whether it is necessary to adjudicate elements of Project water rights to landowners individually will be deferred at this time and will be determined during the coarse of subsequent proceedings in this phase of these proceedings.

The Court is also of the opinion that the United States and the CID have ownership rights and interests in Project water rights. Under the Reclamation Act, the United States has authority to divert and appropriate Project water for the use and benefit of the landowner. In addition, the United States and the CID have certain rights and interests in storage and distribution of Project water in order to accomplish the purpose of the Reclamation Act and the Project. The rights, interests, duties and obligations of the parties in connection with dams, reservoirs, storage and distribution facilities, and of landowners to receive water therefrom are set forth in the agreements among the respective parties and New Mexico statutes pertaining thereto. The Court will defer further defining the aforesaid rights, interests, duties and obligation of the parties until it has received and reviewed copies of the underlying agreements among the parties which are required to be furnished by counsel as provided at page 8, *supra*.

The request of the Martin Clients that they be granted summary judgment is denied. Procedurally and substantively, the matter is not properly before the Court at this time. *See* Martin Clients' Reply, at Part Seven, page 58 *et seq.*

On or before December 15, 1997, counsel shall submit their objections, comments and suggestions concerning this decision to the Court

Counsel for the State is requested to serve a copy of this opinion upon all interested parties who have elected to participate in this phase of these proceedings with the exception of counsel to whom the Court is mailing a copy.

11-3-97

Harl D. Byrd
District Judge *Pro Tempore*