



the Carlsbad Project water by December 8, 1997. (Opinion re Threshold Legal Issue No. 3 at page 8.) In addition, the Opinion provided:

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

Opinion re Threshold Legal Issue No. 3 at page 28.

In the Court's Opinion re Threshold Legal Issue No. 4, counsel were requested to submit their objections, comments and suggestions regarding the opinion to the Court by December 15, 1997. Opinion re Threshold Legal Issue No. 4 at page 5.

In connection with the preparation of this opinion and these orders, the Court has reviewed the following:

1. Letter dated December 4, 1997 and enclosures from Law Offices of W. T. Martin, Jr., P.A. signed on behalf of Mr. Martin by Stephen S. Shanor. (hereafter Martin Comments.)
2. Carlsbad Irrigation District's Response to Court's Request In Opinion Re Threshold Legal Issue No. 3 For Confirmation re Reference to Exhibits Defining Ownership Rights, Interests, Duties and Obligations In Connection with Project Water served on December 7, 1997 by Hubert & Hernandez, P.A. through Beverly J. Singleman, Esq. (CID's Response.)
3. TRACY'S SUBMISSION IN RESPONSE TO THE COURT'S REQUEST IN COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 3 served on December 15, 1997 by Lana E. Marcussen, Esq., one of the attorneys for the Tracy's. (Tracy's Submission.)
4. TRACY'S COMMENTS IN RESPONSE TO THE COURT'S REQUEST IN THE COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 3 served on December 15, 1997. (Tracy's Comments.)
5. COMMENTS AND SUGGESTIONS OF THE STATE OF NEW MEXICO served on December 12, 1997 by Lee Huffman, Esq., Special Assistant Attorney General. (State's Comments and Suggestions.)
6. NEW MEXICO STATE UNIVERSITY'S COMMENTS ON THE COURT'S OPINION RE THRESHOLD LEGAL ISSUES 3 AND 4 served on

December 15, 1997 by Sheehan, Sheehan & Stelzner, P.A. through John W. Utton, Esq. (NMSU's Comments.)

7. CARLSBAD IRRIGATION DISTRICT'S COMMENTS/SUGGESTIONS AND REQUEST FOR CLARIFICATION CONCERNING COURT'S OPINION ON THRESHOLD LEGAL ISSUE NO. 3 served on December 12, 1997 by Hubert & Hernandez, P.A. through Beverly J. Singleman, Esq. (CID's Comments.)
8. PVACD'S COMMENTS ON COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 3 served on December 15, 1997 by Fred H. Hennighausen, Esq., one of the attorneys for Pecos Valley Artesian Conservancy District. (PVACD's Comments.)

In addition to the foregoing submissions, the United States filed:

- A. UNITED STATES' SUBMISSION IN RESPONSE TO THE COURT'S REQUEST IN THE COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 3 served on December 5, 1997. (United States' Submission.)

Counsel for PVACD and the parties represented by W. T. Martin, Jr., Esq. and Stephen S. Shanor, Esq. have filed motions to strike this submission

- B. UNITED STATES' OBJECTIONS, COMMENTS, AND SUGGESTIONS CONCERNING THE COURT'S OPINIONS ON THRESHOLD LEGAL ISSUE NO. 3 AND THRESHOLD LEGAL ISSUE NO. 4 served on December 12, 1997. (US Objections, Comments and Suggestions.)

Counsel for PVACD and certain other parties represented by A. J. Olsen, Esq. have filed motions to strike this submission. The time for filing a response and a reply under our rules has not expired.

Consideration of the motions to strike and dispositional action in connection therewith will be consolidated and action thereon taken by the Court after all submissions in connection with both motions have been received by the Court. There is no necessity to defer action in connection with the preparation and filing of this opinion and the orders contained herein until after the issues involved in connection with the aforesaid motions have been determined and resolved.

The Court enters the following decisions and orders and has the following

comments:

1. The supplemental materials referenced and submitted by counsel in order to define the current respective rights, interests, duties and obligations of the United States, CID, PVACD and members of CID in connection with Project water are noted.
2. The briefs of the Tracys, Brantleys, Riverside Country Club, Volpato, Carpenter on Threshold Legal Issue No. 3 are supplemented and amended as set forth in the attachments to the letter of their counsel dated December 4, 1997 referred to in subparagraph 1 above.
3. The comments and suggestions of the State are adopted and the Court's Opinion re Threshold Legal Issue No. 3 is amended as follows:
  - A. Page 1, line 3 of footnote 1, insert the phrase "or the District" after "CID".
  - B. Page 27, line 6, replace the word "coarse" with "course".
  - C. Page 27, line 8, insert the phrase "certain diversion, storage and distribution" after the word "have".
  - D. Page 27, line 10, substitute the words "store and distribute" for the words "and appropriate".
  - E. Page 27, line 11, insert the word "appropriating" before the word "landowner".

In addition to the comments and suggestions of the State, in the first sentence of the first full paragraph on page 27, the word "rights" at the end of the sentence should be deleted and the first sentence, incorporating the recommendations of the State, is revised to read:

the CID have certain diversion, storage and distribution rights and interests in connection with the storage and delivery of Project water.

4. NMSU's Comments are noted.

While the Court's opinion states at page 27:

...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*. (Underscoring for emphasis added.)

the Court is now of the opinion that it should defer ruling on the aforesaid rights, interests, duties and obligations of the parties until after completion of remaining pre-hearing matters and after requisite evidentiary hearings have been held concerning preclusion matters and whether the proposed Stipulated Offer of Judgment submitted by the State, the United States and the CID should be adopted, the Court has reviewed requested findings of fact and conclusions of law of counsel and entered its decision in connection therewith. Appropriate findings of fact, conclusions of law and determinations concerning these matters will be included in the Court's decision.

5. In connection with CID's requests for clarification as set forth in CID's Comments:

- A. In holding that CID members have “beneficial ownership” of Project water rights, this determination should not be deemed or construed as a determination at this time that water rights can be sold, transferred, or assigned for use outside of the Project. See page 4, CID’s Comments and Court’s discussion of the scope of Opinion re Threshold Legal Issue No. 3, at page 11.
- B. Further, the Opinion re Threshold Legal Issue No. 3 should not be deemed or construed as a determination that CID members may individually dictate how Project water is to be impounded, stored, diverted or delivered. See CID’s Comments, pages 4-6. Further clarification of the rights and interests of CID members in Project water will be made during the course of further proceedings.

6. In connection with PVACD’s Comments, concerning *State v. Acquavella*, 131 Wash. 2d 746, 935 P.2d 595 (1997), based upon the Court’s review of the decision, the Court is of the opinion that the Washington Supreme Court decision does not undercut the persuasive value of the Washington trial court’s opinion relied upon, in part, by this Court in defining the rights and interests of the US/CID in Project waters. The Court’s Opinion, however, should not be deemed or construed as a determination of any issue dealt with by the Washington courts concerning any matters other than the ownership of Project water rights and rights and interests in Project water as more particularly set forth in the opinion. See scope of Opinion re Threshold Legal Issue No. 3, at page 11.

Committee Counsel<sup>1</sup> and other counsel and interested parties appearing *pro se* are requested to jointly proceed to confer, prepare and submit to the Court a proposed supplemental pre-hearing order to the PRETRIAL ORDER FOR THE CARLSBAD PROJECT WATER RIGHT CLAIMS served on February 23, 1995 in connection with the resolution of all remaining issues and controversies among the parties concerning the proposed Stipulated Offer of Judgment patterned after the form used in the United States District Court. Requisite submissions required or permitted in connection with the Court's Opinion and Order re Proposed Procedures for Identifying and Resolving Genuine Issues of Material Fact to Legal Issue No. 2 executed on November 19, 1997, should be coordinated with the preparation of a proposed pre-hearing order and all remaining issues and matters integrated into one pre-hearing order.

There is no reason why action in connection with both aspects of these proceedings should not proceed simultaneously.

Special attention should be directed to incorporating appropriate provisions in the pre-hearing order pertaining to the consideration of (a) objections, if any, to the matters pertaining to the testimony of lay and expert witnesses; (b) exhibits (a provision should be incorporated requiring the highlighting by shading, underlining specific matters or other appropriate methods to identify portions of documents that should be reviewed and considered by the Court) and the procedures for consideration of objections and rulings on the admissibility of exhibits prior to trial; (c) the submission and disposition of any other matters which should be properly considered and determined prior to an

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<sup>1</sup>Stephen R. Farris, Esq. is substituted for Rebecca Dempsey, Esq., as the Committee Counsel representative for the State.

evidentiary hearing; and (d) the submission of tentative requested findings of fact and conclusions of law prior to the commencement of an evidentiary hearing.

The proposed pre-hearing order should be submitted to the Court by February 25, 1998. At the time of the submission of the supplemental pre-hearing order to the Court, counsel should also submit alternate dates, times and places for a pre-hearing conference. In a JOINT PROPOSED PROCEDURE FOR IDENTIFYING AND RESOLVING ISSUES OF MATERIAL FACT RELATING TO THRESHOLD LEGAL ISSUE NO. 2 - PRECLUSION DEFENSES served on November 14, 1997, counsel advised that they were "...available for a pretrial conference anytime during the weeks of April 6 and 13, with the exception of April 8, 13 and 14...". At page 4. The Court is hopeful that a pre-hearing conference can be held prior to these suggested dates.

Counsel for the State is requested to serve a copy of this decision and the orders contained herein upon all interested parties who have elected to participate in this phase of these proceedings with the exception of counsel to whom the Court has mailed a copy as set forth in its Certificate of Service submitted in connection herewith.

Dated: 1-9-98

  
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