

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,)	
)	Nos. 20294 & 22600
Plaintiffs,)	CONSOLIDATED
)	
vs.)	
)	
L.T. LEWIS, et al.,)	Carlsbad Basin Section
UNITED STATES OF AMERICA,)	Carlsbad Irrigation District
)	
<u>Defendants.</u>)	

DECISION AND ORDERS RE UNITED STATES' MOTION FOR
 RECONSIDERATION AND CLARIFICATION OF COURT'S DECISIONS AND
 ORDERS RE THRESHOLD LEGAL ISSUE NO. 3 OR FOR ENTRY OF JUDGMENT
 PURSUANT TO RULE 54(C)

THIS MATTER comes on for consideration in connection with the United States' Motion for Reconsideration and Clarification of Certain Parts of the Court's 1998 Decisions and Orders Concerning Threshold Legal Issue No. 3 or , in the Alternative, Motion for Entry of Judgment Pursuant to Rule 54(C) and Motion to Stay the Court's Order for Counsel to Prepare a Supplemental Prehearing Order served on January 28, 1998 (hereafter United States' Motion).

In connection with this matter, in addition to the aforesaid motion, the Court has reviewed the Court's Opinion re Threshold Legal Issue No. 3 (November 1997 Opinion), the Court's Decisions and Orders re Request for Information, Objections, Comments and Suggestions re Opinions - Threshold Legal Issue No. 3 and Threshold Legal No. 4 and Order re Preparation of Supplemental Pre-Hearing Order (hereafter January 1998 Opinion), Order Allowing Briefing and Submission Schedule served on February 9, 1998 and the following submissions of counsel:

1. CARLSBAD IRRIGATION DISTRICT'S RESPONSE TO UNITED STATES' MOTION FOR RECONSIDERATION AND CLARIFICATION OF CERTAIN PARTS OF THE COURT'S 1998 DECISIONS AND ORDERS CONCERNING THRESHOLD LEGAL ISSUE NO. 3 OR, IN THE ALTERNATIVE, MOTION FOR ENTRY OF JUDGMENT PURSUANT TO RULE 54 (C), AND MOTION TO STAY THE COURT'S ORDER FOR COUNSEL TO PREPARE A SUPPLEMENTAL PRE-HEARING ORDER served on February 10, 1998.
2. THE BRANTLEYS', RIVERSIDE COUNTRY CLUB'S, JACK & JOY VOLPATO'S, WAYNE CARPENTER'S AND MARY CARPENTER'S RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION FOR RECONSIDERATION OF THRESHOLD LEGAL ISSUE #3 served on February 12, 1998.
3. NEW MEXICO'S RESPONSE TO THE UNITED STATES MOTION TO RECONSIDER OR CLARIFY DECISION ON THRESHOLD LEGAL ISSUE NO. 3 served on February 16, 1998.
4. PVACD'S RESPONSE TO US MOTIONS OF JANUARY 28, 1998 filed on February 16, 1998.
5. UNITED STATES' REPLY TO RESPONSES OF PVACD AND THE BRANTLEYS ET AL TO THE UNITED STATES' JANUARY 28, 1998 MOTION served on March 5, 1998.
6. UNITED STATES' REPLY TO NEW MEXICO'S AND CID'S RESPONSES TO THE UNITED STATES' JANUARY 28, 1998 MOTIONS served on March 5, 1998.
7. TRACY'S RESPONSE TO THE UNITED STATES MOTION FOR RECONSIDERATION AND CLARIFICATION OF CERTAIN PARTS OF THE COURTS 1998 DECISIONS AND ORDERS CONCERNING THRESHOLD LEGAL ISSUE NO. 3 OR, IN THE ALTERNATIVE, MOTION FOR ENTRY OF JUDGMENT PURSUANT TO RULE 54(C). There is a question as to the date this submission was served.
8. UNITED STATES' REPLY TO TRACY'S RESPONSE TO UNITED STATES' JANUARY 28, 1998 MOTIONS served on March 10, 1998.

The United States' Motion requests that the Court reconsider and clarify the Court's

November 1997 Opinion and January 1998 Opinion::

...because the Court has not yet indicated whether or not it believes the United States has legal title to the storage and diversion water rights for the Carlsbad Project.

In its most recent orders, the Court has recognized the United States has 'certain diversion, storage, and distribution rights and interests in connection with the storage and delivery of Project water', but the Court has not explicitly specified whether or not these rights and interests constitute ownership rights.

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The United States requests the Court clarify that the United States has legal title to the diversion and storage water rights of the Carlsbad Project. If the Court chooses to hold that the United States does not have any ownership in the diversion and storage rights, the United States requests the Court enter judgment against the United States pursuant to New Mexico Rule of Civil Procedure 54(C), since the Court's ruling will have disposed of the United States' claim to Project water rights and there is no just reason for delay of entry of judgment.

United States' Motion, at 2 and 3.¹ (Underscoring for emphasis added.)

The United States states that in its November 1997 Opinion, the Court concluded that:

'...the beneficial ownership of water rights is vested in the land owners 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. Opinion re Threshold Legal Issue No. 3 at 26 and 27. In addition, the Court held:

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.

Id. at 27.

¹Issues concerning the Court's order requesting that counsel prepare a supplemental pre-hearing order have been rendered moot because of the Court's Order Allowing Briefing and Submissions Schedule served on February 9, 1998.

On January 9, 1998, the Court amended this language based upon the comments of certain of the parties on the Court's Opinion Re Threshold Legal Issue No. 3. Apparently, the Court declined to consider the comments on the Opinion submitted by the United States because of a motion to strike the United States comments filed by PVACD. The Court revised the language as follows:

The Court is also of the opinion that the United States and the CID have certain diversion, storage, and distribution rights and interests in connection with the storage and delivery of Project water.² Under the Reclamation Act, the United States has authority to divert, store and distribute Project water for the use and benefit of the appropriating 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.³

1998 Decisions and Orders at 4-5.

United States' Motion, at 5.

The United States then states:

Specifically, the United States requests that the Court make the following changes and additions to its Opinion re Threshold Legal Issue No. 3, as revised by the 1998 Decisions and Orders, (1) revise the first sentence of the first full paragraph on page 27 to state that '[t]he Court is also of the opinion that the United States purchased and appropriated the diversion and storage water rights for the Carlsbad Project and that the United States has legal title to the diversion and storage water rights for the Carlsbad Project.' (2) add a sentence after the preceding sentence that states that '[A]s legal title holder of these diversion and storage water rights for the Carlsbad Project, the United States should be adjudicated and decreed the diversion and storage water rights as set forth in the

²The amendment deleted the word "rights" because the Court does not consider the defined rights and interests as "water rights". *See, infra.*

³The remainder of the unquoted portion of this paragraph of the November 1997 Opinion provides: "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.*"

Stipulated Offer of Judgment (“Stipulated Offer”)’ and (3) delete the word ‘appropriating’ before landowner in the second sentence of that same paragraph.

United States’ Motion, at 6. (Underscoring for emphasis added.)

The United States then argues that if the Court determines that the United States does not own “legal title to the diversion and storage water rights of the Project”, the Court should direct the entry of a judgment against the United States pursuant to Rule 54(C). (Matter in quotations and underscoring added for emphasis.)

COURT’S OPINION RE UNITED STATES’ MOTION TO RECONSIDER AND CLARIFY

Except as specifically set forth herein, this decision shall not be deemed or construed as a determination or adjudication of any issue or controversy among the parties other than those involved in connection with the United States’ motion for reconsideration and clarification of certain portions of the Court’s opinions re Threshold Legal Issue No. 3.

It is clear, or it should be clear, that precision is required and essential in order to determine and adjudicate the property rights and interests of all parties in connection with Project water and water rights. The Court is of the opinion that property rights and interests in connection with the diversion, storage, and delivery of Project water (and perhaps other property rights and interests) are ownership rights and interests in Project water. These rights and interests, however, neither separately, nor together, constitute “water rights”. See *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914). Thus, the Supreme Court in *Snow v. Abalos*, held in pertinent part:

The latest definition of the term ‘appropriation of water’ under the Arid Region Doctrine of Appropriation by Kinney, in his work on Irrigation and Water Rights, (2nd ed.) section 707, is as follows: ‘The appropriation of water consists

in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and, consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose.'

The water in the public stream system belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose. He acquires this right as above stated. Necessarily, he must have some suitable ditch, or other device, to enable him to take the water from the stream. In other words, the water must be captured before it can be applied to beneficial use. In order to apply the water, and thereby invest the appropriator with a right to continue to take and use the same, he must have suitable appliances for conducting the water to the place of use, otherwise he would not be able to use the same.

The intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended, but it is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives to the appropriator the continued and continuous right to take the water. All the steps precedent to actual application are but preliminary to the same, and designed to consummate the actual application. Without such precedent steps no application could be made, but it is the application to a beneficial use which gives the continuing rights to divert and utilize the water.

Snow v. Abalos, 18 N.M. at 693 and 694. (Underscoring for emphasis added.)

It is not clear what ownership rights, title or interest that the United States is requesting be determined and adjudicated when it requests that the Court determine "...whether the United States has legal title to storage and diversion water rights for the Carlsbad Project". As illustrated by the case of *Snow v. Abalos, supra* "...storage and diversion" rights and interests are not water rights. They are incidents of ownership in Project water. By using the term "legal title" is the United States seeking to distinguish between the ownership of bare legal title (as in a trust) and the ownership of equitable and beneficial rights and interests? Perhaps the United States intends something else. The United States' request is unclear. In my opinion, use of the

term “legal title” does not define the ownership rights and interests of the United States and should not be used in the absence of further clarifying language to define the ownership rights and interests in Project water.

The “appropriation” of water in connection with the Carlsbad Project “...was made not for the use of the government, but, under the Reclamation Act, for the use of landowners...”. *Ikes v. Fox*, 300 U.S. 82, 95 L.Ed. 525, 57 S.Ct. 412, 416 (1937). On the basis of the law and the rationale previously set forth in the prior decisions of this Court, as guidance to counsel, the Court is of the opinion that the United States has ownership rights and interests in the physical project works and rights and interests to divert, store, distribute and appropriate (and perhaps other rights and interests) in Project water. All of such rights and interests are owned, however, for the use and benefit of the owners of the water rights in the Project, the landowners, who have devoted the water to beneficial use. It is unclear, at this time, as to whether these rights and interests may be properly characterized as “legal title”, whether the ownership thereof should be characterized as being held in trust with the United States as trustee, or in some other manner which accurately describes the rights and interests of the United States in Project waters.

In logical progression and as previously set forth in the Court’s prior opinions, factual matters pertaining to preclusion under the doctrine of *res judicata* and collateral estoppel as a result of the Black River proceedings and the *Hope* proceedings should first be determined. Then, among other determinations and adjudications, the ownership rights and interests of the United States, CID and members of CID in Project water should be defined and determined.

The Court can and does determine at this time that the rights and interests of the United States are sufficient to permit the execution by the United States of the proposed offer made by


the State of New Mexico and to submit it for consideration by the Court.

Further definition of the ownership rights and interests of the United States in Project water should be deferred as previously determined and ordered by the Court.

Except as specifically set forth herein, the United States' motion for reconsideration and clarification of certain portions of the Court's opinions re Threshold Legal Issue No. 3 be and it is hereby denied.

The United States' request for relief in connection with N.M.R.P. 1-054(C) is denied.

Dated: 3-19-98



Harl D. Byrd
District Judge Pro Tem