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

FINAL DECISION RE THRESHOLD LEGAL ISSUE NO. 2

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INTRODUCTION

THIS MATTER comes on for consideration by the Court in connection with the entry of a final opinion re Threshold Legal Issue No. 2 which has been phrased as:

"Whether the decree in United States of America v. Hope Community District, U.S. District Court Cause No. 712 Equity (1933) provides the United States and the District with res judicata and estoppel defenses to filed objections."

See **PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHT CLAIMS** filed on February 26, 1996 (1996 PHO) at page 6.

I. BACKGROUND[1]

The United States is represented by Lynn A. Johnson, Esq., David William Gehlert, Esq. and Christopher B. Rich, Esq.; CID is represented by Steven L. Hernandez, Esq. and Beverly J. Singleman, Esq.; the State is represented by Ted Apodaca, Esq.; PVACD is represented by Fred H. Hennighausen, Esq., David M. Stevens, Esq., Stuart D. Shanor, Esq. and Eric Biggs, Esq.; the Brantley defendants are represented by W.T. Martin, Esq. and Stephen S. Shanor, Esq.; the Tracys and Eddy Trust defendants are represented by Lana E. Marcussen, Esq.

The matters presently before the Court involve and are limited to a determination of the

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[1]The United States of America is referred to herein as the United States, the State of New Mexico is referred to as the State, the Carlsbad Irrigation District is referred to as CID, Pecos Valley Artesian Conservancy District is referred to as PVACD and the Carlsbad Project is referred to as the Project. The proceedings in United States v. Hope Community Ditch, et al., No. 712, Equity, of the United States District Court for the District of New Mexico are hereafter called *Hope*, and the final decree entered therein, the *Hope Decree*.

preclusive effect of *Hope* pertaining to the claimed rights of the United States' to divert, store and distribute water in connection with the Carlsbad Project (hereafter the Project). The United States/CID (US/CID) alternatively claim that by virtue of or under the doctrines of *res judicata,* collateral estoppel, or the rule of property doctrine all of those who have objected (Objectors) to the proposed STIPULATED OFFER OF JUDGEMENT (Offer) (see numbered paragraph 8, page 10, *infra*) are precluded from litigating the matters set forth on pages 17-27 of this opinion in these proceedings. [2]

The *Hope Decree* adjudicated to "the Plaintiff, the United States of America, " five rights:

I

> "...the absolute and indefeasible vested right, formerly exercised through what was known as the Halagueno Ditch, with a priority date as of July, 1887, to divert, perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is known as the Carlsbad Project, to an amount of 300 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose of domestic use and the watering of livestock....

II

> ...the absolute and indefeasible vested right, with a priority date as of July, 1888, to divert perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is now known as the Carlsbad Project to an amount of 700 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose

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[2]On October 6, 1998, the parties agreed that similar claims in connection with the alleged preclusive effect of the proceedings in United States v. Judkins, No. 112, D.N.M. (January 3, 1912) affirmed in United States v. D.R. Harkey, No. 1610, Equity D.N.M. (September 30, 1930), which are collectively referred to as the Black River Proceedings, need not be addressed in this opinion. See paragraph 26, at 12 , *infra*.

of domestic use and the watering of livestock....

III

...the absolute and indefeasible vested right, with a priority date as of the year 1889, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert. impound and store in its Avalon Reservoir, constructed across the stream bed of said River with a capacity of 7,000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefore, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock...

IV

... the absolute and indefeasible vested right, with a priority date as of the year 1893, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert, impound and store in its McMillan Reservoir, constructed across the stream bed of said River with a capacity of 90,000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefor, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock....

VI

...under and by reason of its certain written Notice to the Territorial Engineer of the then Territory, now State of New Mexico, that it intended to utilize certain specified waters of the Pecos River, which said Notice was filed with the said Territorial Irrigation Engineer on or about the 2nd day of February, 1906, in conformity with the provision of Section 22 of Chapter 102, Session Laws of 1905, of the then Territory of New Mexico, the Plaintiff, the United States of America has the absolute and indefeasible vested right, with a priority dates as of the 2nd day of February 1906, to divert, impound, store, and utilize through, in, by means of or in connection with its Carlsbad Project, as now constructed, or as it may be enlarged, added to or otherwise changed hereafter, 300,000 acre feet per annum of the perennial and flood waters of the Pecos

> River and its tributaries, at its Avalon and McMillan Dams and Reservoirs and at such other points above the Avalon Dam as may be available for such diversion or storage; that such right remains and shall remain reserved and vested until formally released in writing by an Officer of the United States thereunto duly authorized, irrespective of lapse of time or failure to utilize the waters so reserved..."

See *Hope Decree*, Vol. II, THE CARLSBAD PROJECT, Water Rights of the United States of America Exercised and to be Exercised Through Its Carlsbad Project, pages 449-452, Exhibit A-1 to the Court's September 22, 1997, **OPINION RE THRESHOLD LEGAL ISSUE NO. 2**, (hereafter 1997 Opinion) at 1 and 3.

The *Hope* Decree also provides:

V

> "... That beneficial use of the waters at any time diverted, impounded or stored by the Plaintiff under its rights last above set forth in paragraphs I, II, III and IV, is and shall be the basis, the measure and the limit of said rights to the Plaintiff's use of waters of the said Pecos River and its tributaries...". Id.

Matters reviewed and considered by the Court in connection with the preparation of this opinion include those set forth on attached Appendix A.

Oral arguments re Threshold Legal Issue No. 2 were presented by counsel on March 6, 2000 at the United States Courthouse in Albuquerque, New Mexico. A transcript of the oral arguments was prepared and has been reviewed by the Court.

The Court has again reviewed the Court's letter opinion dated July 17, 1996 and Order Relating to Procedural Issues filed on August 16, 1996. The letter opinion includes a discussion and opinion re procedural due process, notice, service, the binding effect of determinations upon

unknown claimants in interest, the requirement that all who may be barred or affected by a decree must be afforded notice and an opportunity to be heard "so that they may have their day in court" and other related matters re due process. Letter opinion at pages 16, *et seq.* and cases cited therein. Matters in the letter opinion and order are incorporated herein by reference, but will not be reiterated in this opinion.

A summary in this opinion of all of the numerous and voluminous matters contained in the parties submissions of their claims, contentions, arguments, requested findings of fact and conclusions of law evidentiary matters in support of said claims would serve no useful purpose.

II. CLAIMS RE PRECLUSION

The US/CID claim that by virtue of the aforesaid determinations of the water diversion, storage and distribution rights of the United States in *Hope,* Objectors are precluded under the doctrines of *res judicata,* collateral estoppel or the rule of property doctrine from litigating the following matters[3]:

> "...1. **With respect to diversion right, beneficial use and historic supply, whether:**
>
> a. **The offer of direct diversions in addition to storage rights allows an improper aggregation...**" (Bolding added for emphasis.)

US/CID claim that the testimony before the *Hope* court addressing the

[3]Category numbers and sub-category letters from the 1996 PHO are used. See **US/CID Initial Memorandum**, at page 57, footnote 45, paragraph 31. The respective claims of the parties are summarized after the statement of each category of claimed preclusion.

need for both diversion and storage rights is summarized in the US/CID Identification at 19-21. US/CID claim that after hearing testimony, the *Hope* court awarded the United States both direct diversion and storage water rights, thus, necessarily finding that this would not constitute an improper aggregation and that either *res judicata* or collateral estoppel may be applied. **US/CID's Comments at 2 and 3**.

US/CID agree that whether there has been an improper aggregation of direct and storage rights is purely a legal question. **US/CID Position at 3**. The State agrees that a determination of the issue involves a legal matter and should be decided on the submission of briefs. **State's Position at 1**. PVACD claims that the determination of this matter is not purely a legal question and that there may be factual determinations as to whether direct diversions can be made while storage is maintained, and if so, whether that practice harms the public interest and the interest of water users throughout the basin. "The Stipulated Offer allows US/CID to make a priority call on upstream users when the direct flow in the Pecos at Avalon falls below 100 cfs, even when reservoirs in the system are full or nearly so. A direct diversion right with no time component cannot be quantified, but if it were used year-round in combination with full storage, the US would be able to command one million acre feet of water per year, or forty acre feet per acre per annum for a fully utilized 25,000 million acre feet of water per year, or forty acre feet per acre per annum for a fully utilized 25,000 acre project. However, operation of CID historically has been exclusively based on storage, not diversion.

A provision allowing the US/CID independent and dual diversion and storage rights would give CID something it has never used. This is contrary to beneficial use principles." **PVACD's Response at 2 and 3.**

"**...c. Reasonable beneficial use of the claimed right has been made by the District...**" (Bolding added for emphasis.)

US/CID claim that the question of beneficial use has both legal and factual components. US/CID Position at 3.

US/CID claim that testimony concerning whether reasonable beneficial use of the United States' claimed right has been made is summarized in the **US/CID Identification at 13-17** and that relevant findings of fact (numbered IX and X) are set out in the **US/CID Identification at 12-13.** US/CID claim that the Special Master in *Hope* concluded as a matter of law that for each of the water rights purchased by the United States from the Pecos Irrigation Company, construction of the storage, diversion and distribution system to which the rights were intended to be exercised was done with due diligence and that waters of the Pecos were actually diverted and applied to a beneficial use within a reasonable time after each right was initiated. **US/CID Identification at 3** (quoting *Hope's* Special Master's conclusion of law II).

US/CID claim that because the United States' beneficial use of its claimed water was at issue and decided by the Court, either *res judicata* or collateral estoppel may be applied. **US/CID's Comments at 3**.

US/CID claim that legal questions include whether storage for later beneficial use is itself a beneficial use and the effect of paragraph VI of the *Hope Decree*. US/CID claim that the court must also consider the effect of the provisions of § 72-9-4 NMSA (1978) (which they claim exempts federal reclamation projects from many aspects of New Mexico water law) and § 72-5-28 NMSA (1978) (which they claim provides that water rights for storage reservoirs cannot be forfeited by non-use).

US/CID claim that after legal questions are decided factual questions regarding how much water has been put to beneficial use should be examined. "...This is another issue to which preclusion should be applied because the *Hope* court expressly determined that the rights awarded had been and were being put to beneficial use citing the *Hope Decree* general findings and conclusion IV (parties to decree 'diverted and appropriated' the waters of the Pecos and have applied and continue to apply the water to beneficial use)." **US/CID's Position at 3 and 4**.

PVACD agrees with the Court's preliminary determination that *Hope* speaks as of the date of the decree with regard to its interpretation of the provision that beneficial use shall be the basis, measure and limit of the interests accorded to the United States. PVACD claims that as to questions of waste, abandonment, forfeiture and non-perfection, these issues will involve evidence from the original claims to water rights by predecessors in interest in the Project to a current date. **PVACD's Response at 3**.

"...2. **With respect to priorities and acreage, whether:**

a. **Claimed priorities are justified.**

b. **Project acreage must be established by acreage actually and continually irrigated...**" (Bolding for emphasis.)

Subparagraphs 2 a and b will be considered together.

US/CID claim that "The *Hope* court dealt directly with the priorities of the Project's water rights and the Project's irrigated acreage. Testimony was taken on when the Project was initiated and the *Hope* court specifically determined the priority for each of the water rights awarded to the Carlsbad Project. See US/CID Identification at 13-19 (summarizing testimony); see also Special Master's Findings of Fact I, III, IV, set out at 6-10 of the US/CID Identification. Each of the priorities awarded was established by witness testimony. ...After reviewing the evidence before him, the Special Master concluded the Project's irrigation system had been developed with due diligence. Id at 3 (quoting Special Master's Conclusion of Law II). Consequently, either *res judicata* or collateral estoppel may be applied to preclude this category of objections as the issue was actually and necessarily determined by the *Hope* court.

US/CID claim that the *Hope* court also expressly addressed the Project acreage. Evidence was introduced documenting the development of the Project from its beginnings in the 1870s until the close of evidence in 1931. See US/CID Identification at 13-19. ...The Special Master found that since 1925 'approximately 25,000 acres of land [had been] regularly cultivated and irrigated

under the project and by means of its irrigation system.' Special Master's Finding of Fact VIII (Set out in US/CID Identification at 12). Thus, the issue of the acreage irrigated by the project was at issue and determined by the *Hope* court. Accordingly, either *res judicata* or collateral estoppel may be applied." **US/CID Comments at 4 and 5**.

US/CID intended that references to priorities in paragraph 2a referred to the priorities set forth in the offer; however, the priority dates in the offer are the same as those in the *Hope Decree*. US/CID Position at 4.

"...The United States and CID agree that paragraph V of the *Hope Decree* limits the water rights established by paragraphs I, II, III and IV of the *Hope Decree* to the quantity of water beneficially used. However, the United States and CID do not agree that Paragraph V 'requires a limitation on Project acreage to that actually and continuously irrigated.' Moreover, by its terms, paragraph V has no effect on the water right established by paragraph VI of the *Hope Decree*." **US/CID's Position at 4**. PVACD states that it cannot state a position "until the position of US/CID has been reviewed." **PVACD' Response at 3**. The State does not respond as to whether a question of law or fact is involved. The Brantleys' position is that the amount of water that can be diverted and stored is different from and in excess of the actual amount of acreage to which that water may be put to beneficial use. **Brantleys Response at 2.**

3. **"..With respect to consumptive use, irrigation efficiency, and conveyance loss, whether:**

   b. **The claimed project water right has been established or expanded through waste..."** (Bolding added for emphasis.)

The US/CID claim that "...The *Hope* court heard testimony regarding allegations that the Project suffered from excessive waste. The testimony in response to those allegations is summarized in US/CID Identification at 21-23. ...In short, there is no doubt the *Hope* court considered the allegations of waste on the Project and the Project's efforts to combat waste when it decreed the United States' water rights. Further, as discussed above, the Court made explicit findings that the water claimed was beneficially used. Waste is not a beneficial use. Thus the Court's awarding of the Project rights necessarily included a finding that they were not established through excessive waste and as a result these objections may be barred through either *res judicata* or collateral estoppel." **US/CID Comments at 5**.

US/CID state "...The question of whether there has been waste is generally a question of fact. The issue of whether the Project water rights were established through waste should be subject to preclusion as the *Hope* court heard such allegations prior to decreeing the project rights. See US/CID Comments at 5-6. Moreover, as the Offer of Judgement claims a smaller quantity of water rights than that awarded by the *Hope Decree*, the Project water rights cannot have been 'expanded' through waste since the entry of the *Hope Decree*." **US/CID Position**

at 4 and 5. The State agrees with the Court's tentative opinion that the determination of matters in connection with paragraphs 3 and 5 involve questions of fact which should be determined as of a current date. **State's Position at 1.** PVACD claims "that beneficial use standards, and particularly beneficial consumptive use, are intrinsically related to waste. It is also true that the *Hope Decree* provision in Paragraph V prohibits waste. PVACD's comments under #2 above (reasonable beneficial use) are generally applicable here. These are Offer issues to be tried." **PVACD's Response at 4**.

"...5. With respect to impoundment, diversion, and storage, whether:

a. Storage claims are excessive..." (Bolding added for emphasis.)

US/CID claim that:

"...The storage rights decreed in *Hope* were based on the capacity of the storage reservoirs then in existence and the 1906 Notice by which the United States appropriated 300,000 acre feet of water as a storage and diversion water right for the Project. The *Hope* court heard testimony establishing the capacity of the then existing reservoirs, that the then-current storage capacity was inadequate for the project, that the Project's organizers had long contemplated building additional storage and that the Project could store as much as 300,000 acre feet of water if the Project's storage capacity permitted it. **See US/CID Identification at 19-21** (summarizing testimony).

The *Hope* court also reviewed documentary evidence and heard testimony on the operation and effect of the United States' 1906 notice, including testimony by a former New Mexico State Engineer. See US/CID Identification at 23-25. After hearing that testimony and reviewing the statute and evidence, the Special Master concluded that the United States had not released any of the water reserved and concluded as a matter of law that 'by reason of its written notice to the Territorial Engineer. the United States has the vested right to divert and store 300,000 acre feet of water in the Project's reservoirs...'. **See Id. at 23** (quoting Special Master's Conclusion of Law VII).

In short, the *Hope* court determined that the United States' storage water rights claims met all applicable legal requirements. Accordingly, either *res judicata* or collateral estoppel may be applied.

5. Determinations Regarding the 1906 Notice

The Court's opinion states that 'the ramifications of the 1906 notice given in conformity with the provisions of Sec. 22 of Chapter 102, Session Laws of 1905 of the then Territory of New Mexico, including the necessity of devoting water to beneficial use thereunder, or whether the rights and interests of the United States are subject to forfeiture or abandonment' was not submitted for determination or adjudicated in *Hope*. Opinion at 5.

With all due respect to the Court, the United States and CID submit that the ramifications of the 1906 notice were explicitly determined by the *Hope* court. The Special Master concluded that the effect of the 1906 notice was to give the

United States 'the absolute and vested right, with a priority date as of the 2nd day of February, 1906 to divert, impound, store and utilize through, in and by means of or in connection with its Carlsbad Project, 300,000 acre feet per annum of the perennial and flood waters of the Pecos River and its tributaries...' US/CID Identification at 23 (quoting Special Master's Conclusion of Law VII); see also *Hope Decree*, Documentary Evidence, Vol. 1. Tab U.S. Fact 2, at pages 451-52 (same). The Special Master expressly addressed the abandonment and application to beneficial use questions raised by this Court by holding that the right created by the 1906 notice 'remains reserved and vested until formally released in writing by an officer of the United States thereunto duly authorized, irrespective of lapse of time *or failure to utilize the water's so reserved* ' Id. (emphasis added).

The Court's questions evidence a desire to read into the statute requirements which simply are not there. Like many other western states, the New Mexico legislature adopted a statute which set up a unique and simplified method of appropriation for federal reclamation projects and thereby spurred the development of those projects in their states. Under the procedure adopted by New Mexico's statute, the *Hope* court had no need to consider to what extent the 300,000 acre feet of water had then been applied to beneficial use because the statute required no such finding. The only factual findings required by the statute were that the United States had submitted its notice to the Territorial Engineer and that the United States had not released the water. See Section 22 of Chapter 102 of the New Mexico Territorial laws of 1905. The *Hope* Special Master made

those findings. See US/CID Identification at 24-25 (quoting Special Master's Finding of Fact VIII); see also Consolidated Response Memorandum of the United States and the Carlsbad Irrigation District Addressing Threshold Legal Issue No. 2 at 17 n. 13 (discussing evidence considered by the *Hope* court)." **US/CID Comments at 6-8**.

US/CID is correct in their analysis of the Court's preliminary determinations concerning the 1906 notice in *Hope*. Therefore, the quoted phrase from this Court's preliminary opinion at page 5 is incorrect and the ramifications of the 1906 notice as discussed by US/CID were considered and determined in *Hope*.

The Tracy and Eddy trust defendants request that the Court reflect that the *Hope* court erred in conferring a separate water right based upon Part VI of the *Hope Decree* and should expand upon its explanation of *Hope* to reflect the proper interpretation of New Mexico law regarding these rights that "there was no separate 'permit' to acquire a water right." **Tracys' Objections at 6-8.**

PVACD claims that "The Court has held correctly that PVACD is not bound by the *Hope Decree*. As to any PVACD constituents who may be parties or privies to *Hope* and may be deemed bound, PVACD contends that whether US/CID storage claims are excessive is a question related to beneficial use and consumptive beneficial use standards. PVACD's comments under #2 above (reasonable beneficial use) are generally applicable here. This is an Offer issue to be tried." **PVACD's Response at 4.** The State claims that the matter involves questions of fact which should be determined as of a current date. **State's Position at 1**.

Except as discussed by US/CID in the US/CID Comments at 6-8, the devotion of water

to beneficial use by the United States in connection with the Project and whether the storage of water by the United States constitutes beneficial use were not specifically submitted for determination or adjudicated in *Hope*.

The parties have filed voluminous requested conclusions of law, ultimate material facts and evidentiary facts. The United States /CID's Statement of Conclusions of Law, Ultimate Material Facts, Evidentiary Facts, filed on October 2, 1998 contains 117 pages and 313 evidentiary entries. (Compare with the Memorandum of the United States and the CID Identifying Material Facts in Relation to Threshold Legal Issue No. 2 filed on February 9, 1998 which contains 32 pages and 99 claimed material fact entries. PVACD's Ultimate Material Facts re Threshold Legal Issue No. 2 served on October 5, 1998 and filed on November 23, 1998 contains 126 pages, over 400 entries and other references and outlines of issues.)

The vast majority of the matters contained in these submissions are not limited to the matters which the 1997 Opinion requested be addressed. The 1997 Opinion was not an open invitation to again brief and reargue all of the matters involving Threshold Legal Issue No. 2.

The parties have agreed that (1) no evidentiary hearing is required in connection with the resolution of issues of fact or other issues involving Threshold Legal Issue No. 2, and dispensing with and waiving said hearing; (2) the issues and controversies in connection with Threshold Legal Issue No. 2 are to be resolved by the Court based upon the parties' joint statement of conclusions of law; their respective statements of ultimate material facts and evidentiary facts as submitted to the Court and supplements thereto agreed upon among counsel for the parties; and the memoranda briefs submitted and to be submitted to the Court. See Order Approving Stipulations cited at paragraph 44, at 10 of Appendix A. PVACD claims that this procedure

should be followed in connection with determining those who are in privity with the parties in *Hope* and that the determination should be made at this time. **PVACD's Response at 4 and 5**. US/CID claim that action to determine persons in privity with precluded parties in *Hope* and factual determinations concerning those who are in privity should not be resolved on the existing record and should be deferred until after an order has been entered by this Court and appeals, if any, resolved. **US/CID Comments at 21-22** and **US/CID's Position at 9 and 10.** The Court is of the opinion that the stipulations among the parties concerning the resolution of issues involving Threshold Legal Issue No. 2 as set forth in the Order Approving Stipulations (paragraph 44, page 10 of Appendix A) apply only to the resolution of remaining issues concerning whether the decree in *Hope* provides the United States and CID with *res judicata*, collateral estoppel or rule of property defenses but do not clearly apply to the subsidiary issue involving the specific identification of those in privity with parties in *Hope*.

US/CID claim that the court has not given due consideration to or discussed the desirability of affording consistency and identical treatment of determination as to all Objectors and finality to the determination in *Hope*, and that when these matters are properly considered, the preclusive effect of the determinations in *Hope* should be applied to all Objectors. The Court has considered the salutary and commendable objectives argued by US/CID; however, the Court is of the opinion that they must yield if they do not fully comport with constitutional requirements of due process requiring notice and an opportunity to be heard.

To the extent that requested ultimate material facts or evidentiary facts are not incorporated into this opinion, they have been omitted because they are inconsistent with those set forth herein or they are not necessary in order to resolve genuine issues of material fact and

other remaining issues pertaining to Threshold Legal Issue No. 2.

Counsel for the parties have agreed and the court concurs that this opinion should be in a form responsive to the matters set forth in the **US/CID/PVACD Joint Statement** paragraph 22, page 11, *infra*) but that determinations of the Court may be made in the affirmative or negative of the stated proposition. Subsidiary conclusions of law have been set forth explaining the rationale for the Court's opinions.

Issues concerning those in privity to parties in *Hope*, possible aggregation of direct diversion in addition to storage rights, beneficial use, priorities, Project acreage, consumptive use, irrigation efficiency, conveyance losses, waste, forfeiture, abandonment and with respect to impounding, diversion and storage, whether storage claims are excessive and legal or factual issues, other than those pertaining to the preclusive effect of the *Hope Decree* are not determined in this opinion. They will be considered in connection with the offer phase of these proceedings.

III. APPLICATION OF FEDERAL LAW FOR PURPOSES OF DETERMINING PRECLUSION.

The parties raise an issue as to whether State or Federal law should be applied in determining preclusion questions. The Court remains unaware of significant differences in state or federal law when applied to the facts and circumstances of this case which would result in modifications or revisions to the 1997 Opinion or the determinations set forth herein. In addition to the authorities set forth in Exhibit C, page 1, to the 1997 Opinion, the parties are directed to the Restatement, Second, Judgments §87, Effect of Federal Court Judgment in a Subsequent Action, "Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court," at 314 and the commentary which provides in pertinent part:

> ...The rules of res judicata are not easily classifiable for purposes of determining whether a federal rule or a state rule should be used to determine a particular effect of a federal judgment. Some aspects of the rules of res judicata reflect primarily procedural policies. Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. See §§17-28. These should be determined by a federal rule.
> Other aspects of the rules of res judicata reflect policies that seem more distinctively substantive. In particular, the ramifications of the concept of 'privity' generally reflect considerations going to stability of legal relationships--not unlike definitions of property. See §§ 43-61. Where the principal relationship is regulated by federal law, the corollary relationships appropriately may also be governed by a uniform federal rule, whether the subsequent action is in federal or state court. On the other hand, if the substantive relationship adjudicated in a federal judgment is governed by state law, the federal courts should adopt state law to determine the effects on others under the rules stated in §§ 43-61. The underlying distinction parallels, and indeed may correspond to, the distinction drawn between 'procedure' and 'substance' under the Rules of Decision Act and the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)... At 317 and 318.

This opinion has been prepared with due regard to the aforesaid principles.

IV. OPINIONS OF THE COURT

A. Burden Of Proof

The burden is upon the entity invoking the doctrine of preclusion to introduce sufficient evidence for the Court to rule whether the doctrine is applicable, and, if the record does not provide sufficient reliable evidence to support preclusion, the Court cannot invoke the doctrine. International Paper Co. v. Farrar, 102 N.M. 739, 700 P.2d 642 (1985), citing Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974), overruled on other grounds, 98 N.M. 690, 652 P.2d 240 (1982).

The United States/CID has the burden of proof concerning all Conclusions of Law

identified in the US/CID/PVACD Joint Statement except Conclusion of Law #4 for which PVACD bears the burden. **US/CID/PVACD Joint Statement, at 1.**

B. Format and Decisions

The United States, CID and PVACD have agreed that the Court should address the resolution of genuine issues of material fact and related matters concerning Threshold Legal Issue No. 2 using the format hereafter set forth in this opinion.[4]

CONCLUSION OF LAW NO. 1: THE *HOPE DECREE* BINDS OBJECTORS THROUGH *RES JUDICATA* AS TO THE INTERESTS OF THE UNITED STATES IN CARLSBAD PROJECT WATER AND WATER RIGHTS.

1. The Court in Farmers High Line Canal and Reservoir Co., et. al. v. City of Golden, 975 P.2nd 189 (1999) held:

> "Claim preclusion bars a subsequent action only if, as between prior and present suits, there exists an identity of subject matter, claim or cause of action, parties to the action, and capacity in the persons for which or against whom the claim is made. See Weibert v. Rothe Bros., 200 Colo. 310, 318, 618 P.2d 1367, 1372 (1980); City of Westminister v. Church, 167 Colo. 1, 8, 445 P.2d 52, 55 (1968). At 975 P.2d 199
>
> xxx
>
> Furthermore, '[t]he best and most accurate test as to whether a former judgment is a bar in subsequent proceedings . . . is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form.' Pomponio v. Larsen, 80 Colo. 318, 321, 251 P.

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[4]See US/CID/PVACD Joint Statement, at 13. The Court's determinations are set forth separately in connection with each corresponding paragraph. In the joint statement, the parties do not set forth the reasons for disagreement which are addressed in their respective briefings. Footnote 1, at 1. Again, supplemental conclusions of law have been used to explain the Court's reasoning and decisions.

534, 536 (1926). At 975 P.2d 203

The Court also held, citing, Williams v. Midway Ranches, 938 P.2d 525, that "claim preclusion does not bar the water court from addressing circumstances which have changed subsequent to the previous decree proceedings and which have not been litigated."

2. The Court has previously held that certain matters were not determined or adjudicated in *Hope* and may be considered during the course of these proceedings. See II. MATTERS WHICH WERE NOT DETERMINED IN THE *HOPE* OR BLACK RIVER PROCEEDINGS AND WHICH MAY BE CONSIDERED IN THESE PROCEEDINGS, 1997 Opinion, pages 11 and 12. These matters are reiterated, affirmed and incorporated herein by reference.

3. The determinations of the United States' water diversion, storage and distribution rights and interests in the Project were "...fixed as of the date of the testimony and evidence herein, to wit , the 15th day of June 1931...". *Hope Decree*, paragraph IX, at 5 of Exhibit A to 1997 Opinion.

4. The determinations of the Court in *Hope* concerning the United States' aforesaid rights and interest are not universally binding on all Objectors in these proceedings under the doctrine of *res judicata*. The determinations of the Court in the *Hope Decree,* subject to the terms and provisions thereof, are binding upon persons joined as parties to *Hope*, those who entered an appearance or participated in *Hope*, and all unknown claimants in interest, provided that they were afforded procedural due process (given proper notice, were properly served and given an opportunity to assert their objections, claims and contentions concerning the diversion,

storage and distribution water right claims of the United States in connection with the Project - see Court's July 17, 1996 Opinion and Order Relating to Procedural Issues filed on August 16, 1996), those who were not joined as parties but were notified of the aforesaid claims and contentions of the United States and afforded an opportunity to assert objections and defenses thereto, those in privity with the aforesaid persons and their successors in interest.

5. The *Hope Decree* is a validly entered decree of a Federal Court.

6. The *Hope Decree* itself limits its applicability as follows: "...this Decree shall not be construed as having adjudicated determined or affected the title to any lands or rights in any property other than the rights to the diversion and use of water as herein determined and established." *Hope Decree*, General Findings and Conclusions Section III, at 3, Exhibit A to 1997 Opinion, at 4.

7. The New Mexico Supreme Court has held that the *Hope* Court's pronouncements did not affect any rights except those specifically adjudicated therein. Persons who were not named and joined as parties to the *Hope* adjudication are not bound by *res judicata* or collateral estoppel under the Decree. Cartwright v. Public Service Company of New Mexico, 66 N.M. 64, 343 P.2d 654 (1958).

8. In Bounds v. Carner, 53 N.M. 234, 205 P.2d 216, 221 (1949), the New Mexico Supreme Court recognized that if proper notice was given and served, the *Hope Decree* binds all of the approximately 3,500 persons involved in the *Hope* proceedings, their privies and their successors in interest.

9. The New Mexico Supreme Court held in Bounds v. Carner, 53 N.M. 234, 243,

205 P.2d 216 (1949) that "...The fact that all of the persons entitled to the use of water from the Pecos River Stream System were not made parties to the Federal suit [*Hope* suit] does not invalidate the decree. It is binding on all who were parties...".

10. This Court has held that "The provisions of the *Hope Decree* are not binding upon persons who were not parties to said proceeding except as hereinabove provided." State v. Lewis, Gallinas River Section, City of Las Vegas Subfiles, Decision and Orders, paragraph 6 at 6 (filed August 3, 1994)." In addition, this Court has held that "the State has no standing to assert the applicability of the doctrine of *res judicata* in connection with the *Hope Decree* because it was not a party to said proceeding." Id paragraph 3c at 5. The City of Las Vegas, however, which was the successor in interest to certain rights that were adjudicated in the *Hope Decree*, was " bound under the Doctrine of collateral estoppel from relitigating matters which were decided in the *Hope Decree* . Id paragraph 5 at 6.

11. The New Mexico Court of Appeals has held "In 1933, the United States was decreed to be the owner of water rights in the Project in United States of America v. Hope Community Ditch, U.S. District Court Cause No. 712 (1933)" and relied on that fact in determining that the United States was an indispensable party to the dispute involving the operation of the Carlsbad Project. Brantley Farms v. Carlsbad Irrigation District, 124 N.M. 698, at 706, 954 P.2d 763 (N.M. Ct. App. 1998).

12. "A prior judgment bars a subsequent action on the same claim only between the same parties or their privies (see 3, *below* (discussion of when a person may be considered to be in privity with a party for purposes of claim preclusion)). As the Supreme Court stated in *Hansberry v. Lee*, '[i]t is a principle of general application in Anglo-American jurisprudence that

one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' The *Hansberry* principle has been repeated by the Supreme Court on several occasions and followed by many courts in innumerable cases holding that preclusion cannot be applied to an action by or against a person who was not a party to the prior adjudication." 18 *Moore's Federal Practice*, §131.40[1] (Matthew Bender 3d ed.) at 131-128.

13. "The basis for limiting operation of the claim preclusion doctrine to the parties involved in the previous litigation is the concept that everyone is entitled to his or her 'day in court' before they are bound by an in personam judgment. This right is protected by the Due Process Clause. This requirement for identity of the parties is one major difference between claim preclusion and issue preclusion. Issue preclusion may sometimes be applied in favor of someone who was a stranger to the prior litigation." 18 *Moore's Federal Practice*, §131.40[1] (Matthew Bender 3d ed.) at 131-130.

14. "There is no such thing as 'preclusion by association.' If, within a group of plaintiffs or defendants in litigation, some of the parties are precluded from proceeding with the action because of a judgment in a prior action, those persons within the group who were not parties in the previous case are not precluded from participating in the pending case." 18 *Moore's Federal Practice*, §131.40[1](Matthew Bender 3d ed.) at 131-130.

15. "The existence of privity for purposes of claim preclusion is usually considered to be a question of fact." 18 *Moore's Federal Practice*, §131.40[3][a] (Matthew Bender 3d ed.) at 131-136 and 137.

16. "...Because there is no definite formula for the determination of privity, the Restatement (Second) of Judgments has abandoned the term in favor of identifying specific relationships between parties and nonparties that may preclude nonparties. However, the term is still widely used as a convenient shorthand way of describing the various circumstances under which a nonparty may be bound by judgment." 18 *Moore's Federal Practice,* §131.40[3][b] (Matthew Bender 3d ed.) at 131-137.

17. A person may be bound by a judgment, even though not a party if the parties to the prior suit are so closely aligned with that person's interest as to be his virtual representative. See Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), pages 22-26 of Exhibit C to 1997 Opinion. The Court's are " sharply divided on how to implement this strand of issue preclusion." Exhibit C at 23.

18. "Some courts have held that a nonparty may be bound by a prior judgment if the interests of a party to the prior action were so closely aligned with the nonparty's interest of a party his or her *virtual representative* in the prior action. The doctrine of virtual representation binds parties to a subsequent action who were not parties to the prior action when a party to the prior action with interests that are closely aligned to those of the subsequent party vigorously litigated the prior action." 18 *Moore's Federal Practice,* §131.40[3][e] (Matthew Bender 3d ed.) at 131-142 and 143.

19. "Because of the controversy surrounding the virtual representation doctrine, some understanding of its history is important to assessment of its current viability. Although the doctrine of virtual representation is sometimes represented as a recent creation of the federal

courts, in fact the doctrine is rooted in English property law that is centuries old. Courts of equity bound persons with certain interests in real property, such as remainders, to prior judgments to which they were not a party, in which the owner of the first vested estate was a party to the prior litigation. The owner of the first vested estate was said to 'represent' the remainder interests. Similarly, a person whose representative suffered a defeat in a prior action could not pursue another such action on his or her own behalf. The doctrine of virtual representation was applied in a variety of contexts in nineteenth century American law. One example is taxpayer suits, in which a prior action by one group of city taxpayers challenging the sale of municipal bonds, was held to bind taxpayers who were not parties to the prior action. Another example is the application of claim preclusion when the prior adjudication determined a trustee of a life estate interest had a right to sell land. The prior adjudication was binding on persons holding a contingent remainder estate subsequent to the life estate if one remainderman was made a party to the suit and thus served as a representative of all those holding such interests." 18 *Moore's Federal Practice*, §131.40[3] (Matthew Bender 3d ed.) at 131-143 and 144.

20. "The prerequisites for application of the virtual representation doctrine are not well-defined. The doctrine requires something more than a showing of similar interests between the virtual representative and the plaintiff. Some courts have emphasized that the nonparty must have received actual or constructive notice of the prior litigation. Other courts have held that there must be an express or implied legal relationship between the party and the nonparty. Relevant criteria include participation in the first litigation by the nonparty, apparent consent to

be bound, apparent tactical maneuvering to avoid preclusion, and a close relationship between the party and the nonparty. Due to the problems inherent in seeking to bind nonparties to a judgment, the theory should be kept within strict confines." 18 *Moore's Federal Practice,* §131.40[3](Matthew Bender 3d ed.) at 131-144,145. Thus, virtual representation should only be applied when the Court finds the existence of some special relationship between the parties justifying preclusion.

21. As stated in Romero v. Star Markets, Ltd., 82 Haw. 405, 922 P.2d 1018 (Haw. App. 1996. (Exhibit C to 1997 Opinion, page 26):

> "[T] he requirement of reasonable notice must be regarded as a part of the due process limitation on the jurisdiction of a court. (Citation omitted) The basis for this fundamental precept is that
>
> > in Anglo-American jurisprudence ... one is not bound by a judgment in personam in a litigation in which he [or she] is not designated as a party or to which he [or she] has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115 [117], 85 L. Ed. 22 (1940)... This rule is part of our 'deep-rooted historic tradition that everyone should have his [or her] day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, at 417 (1981).
>
> *Richards v. Jefferson County*, Ala., 517 U.S. 793, 797, n, 4, 116 S.Ct. 1761, 1765-66, 135 L.Ed.2d 76, 83 (1996)." . Exhibit C to 1997 Opinion at 27. (Citation to U.S. Reporter added although not included in quote).

See also New Mexico cases cited at Exhibit C, 1997 Opinion, pages 27 and 28.

22. The Court finds and concludes that the doctrine of virtual representation should not be applied to all Objectors or as claimed by US/CID because, among other reasons, the following pre-requisites to application of the doctrine have been met:

A. Generally, there is no close or other special relationship between the defendants in *Hope* and the Objectors in these proceedings.

B. Generally, there is no express or implied legal relationship between the defendants in Hope and the Objectors in these proceedings.

C. There is no evidence that omitted parties from *Hope* consented to be bound by the determinations in *Hope*.

D. There is no evidence that omitted parties from *Hope* received actual or constructive notice of the proceedings in *Hope*.

E. There is no evidence of tactical maneuvering on the part of Objectors to avoid preclusion.

23. "The prior proceedings in *Hope* need only have provided a party a full and fair *opportunity* to litigate. A party's failure to take advantage of such opportunity will not defeat preclusion." 18 *Moore's Federal Practice*, §131.41[1] (Matthew Bender 3d ed.) at 131-166.

24. "Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the prior proceeding. When a state court judgment is being asserted as the basis for preclusion in federal court, this requirement is met by a determination that the state proceedings satisfy the minimal procedural requirements for due process. In *Kremer v. Chemical Constr. Corp.*,[456 U.S. 461, 485 (1982)] the Supreme Court stated 'We must bear in mind that no single model of procedural fairness, let alone a particular form of

procedure, is dictated by the Due Process Clause'. Thus, a court may look behind a judgment to the extent of determining whether the procedures utilized in the prior proceeding comported with current notions of procedural due process.

Given the variety of judicial and administrative procedures resulting in a final judgment and the variations on such procedures employed by various tribunals, it is difficult to make any generalizations about what will or will not constitute a full and fair opportunity to litigate." 18 *Moore's Federal Practice* §131.41[1] (Matthew Bender 3d ed.) at 131-164 and 165.

25. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement, Second, Judgments §27, at 250.

26. "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section..." Restatement, Second, Judgments §27, at 255.

27. "Under the doctrine of issue preclusion, a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.

The doctrine of issue preclusion applies only when the issues presented in each matter are identical. Issue preclusion does not apply when the issues in the prior and current litigation are not identical, even though similar." 18 *Moore's Federal Practice,* §132.02[2][a] (Matthew Bender 3d ed.) at 132-18 and 22.

28. The defendants in *Hope* were afforded an opportunity to adduce evidence, cross

examine witnesses and otherwise present their claims and contentions regarding the rights and interests claimed by the United States in connection with the diversion, storage and distribution of water in connection with the Project.

29. None of the defendants in *Hope* vigorously contested the claims of the United States regarding its water diversion, storage and distribution rights in connection with the Project.

30. The structure of the litigation in *Hope* and the treatment of stipulations by the federal attorneys, other counsel, the Special Master and the Court did not deny the defendants in *Hope* an adequate opportunity to challenge the claims of the United States regarding its water diversion, storage and distribution rights in connection with the Project.

31. The Court finds and concludes that those joined as parties in *Hope* and those properly notified of the United States' claims regarding its water diversion, storage and distribution rights and served with notice had a full and fair opportunity to litigate their claims and defenses to the United States' claimed water diversion, storage and distribution rights.

32. Those in privity are to be determined in accordance with the definition of privity set forth in the 1997 Opinion, pages 15-18 and B. Persons Bound By Determinations And Decrees In The *Hope* Proceedings And The *Black River* Proceedings, at page 21. The question of who is in "privity" involves a factual issue requiring a case by case examination. See 1997 Opinion, page 15.

33. The extensive submissions and briefings of the parties do not resolve the issue of the determination of those persons in "privity", nor can the matter be resolved based upon these submissions. See Court's letter to counsel mailed on November 21, 1998, the response of

counsel for the United States/CID dated November 18, 1998, the response of counsel for PVACD dated November 18, 1998, the response of counsel for the Brantley's dated November 18, 1998 and the Court's letter dated January 11, 1999 to counsel for United States/CID. Counsel have advised the Court that they are unable to identify those who are in privity under the definitions set forth in the 1997 Opinion. Action to identify those in privity is deferred until appeals, if any, to the Court's determinations in this opinion have been concluded.

34. The United States argues that the State, although not named as a party in *Hope*, should be considered a party and precluded from litigating matters in subject proceedings previously determined in *Hope* because in 1927 the State obtained water rights for the New Mexico Hospital for the Insane (Hospital). See United States/CID's November 13, 1998 memorandum at pages 27-28. The State responds that the United States ignores this Court's 1994 Opinion that the State was not a party to *Hope*, that the Supreme Court in State v. Valdez, 88 N.M. 338, 341, 540 P.2d 818, demonstrated that the State and the Hospital are not one and the same and, therefore, the United States/CID's position is untenable. See State's Reply at 4.

35. In determining the applicability of *res judicata* the "...capacity or character of persons for or against whom the claim is made..." must be considered. Silva v. State, 106 N.M. 472, 745 P.2d 380, 382, Three Rivers Land Company v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982); Adams v. United Steel Workers of America, 97 N.M. 369, 640 P. 2d 475 (1982).

36. The Court determines that the Hospital is precluded by *Hope* from relitigating matters concerning the water diversion, storage and distribution rights of the United States but that the State, since it was not acting in any capacity other than on behalf of the Hospital, is not bound by the determinations in *Hope* concerning these matters.

37. The United States argues that PVACD should be considered a party to *Hope* and should be precluded from litigating matters previously determined in *Hope* because it acquired certain water rights from third parties in connection with Sub-File No. RP 4 (see Exhibit K to PVACD's Response).

PVACD argues that the water rights in connection with Sub-File No. RP 4 were acquired in connection with PVACD's statutory powers of acquisition and retirement. PVACD's Response at 33. PVACD further argues that it acted in its governmental capacity in acquiring rights to protect ground water resources of the Roswell Artesian Basin citing Pecos Valley Artesian Conservancy District v. Peters, 50 N.M. 165, 173 P.2d 490 (1945) and §73-1-1 NMSA (1978) et seq. PVACD then argues that the predecessor water right owners under the Sub-File did not appear in the *Hope* proceedings nor did they have a real opportunity to participate therein.

The United States responds that PVACD's predecessor in interest, through counsel, filed an answer raising several issues now raised by PVACD, including disputing that the United States should be allowed to store water in its reservoirs and at the same time irrigating from the stream, actively objecting to evidence adduced by the United States and was otherwise afforded a full fair opportunity to litigate any and all claims and defenses concerning the United States' water diversion, storage and distribution rights. See United States' Reply at pages 20 et seq., United States' Facts 318 and 319 attached as Exhibit 3 and 4 to the United States' Reply and United States' Facts, Vol. 1, Nos. 31-32 attached as Exhibit 3 to the United States' Reply.

38. In the Court's opinion, the evidence adduced by the United States is not sufficient to establish that PVACD should be considered a party and precluded from raising issues concerning the United States' water diversion, storage and distribution rights in connection with

the Project and to so hold would constitute a stretch of reasoning and result in unfair treatment of PVACD.

39. The Court determines that since PVACD did not act in a representative capacity generally, in its statutory capacity, or on behalf of others in connection with any aspect of the *Hope* proceedings, PVACD is not bound by the determinations in *Hope* concerning the water diversion, storage and distribution rights of the United States.

40. It was not the Court's intention in its prior preliminary opinion to shift the burden of proof from the US/CID in connection with determinations involving Threshold Legal Issue No. 2.

41. In connection with the issues involving the creation of a presumption arising from the determination in *Hope*, the Court has reviewed, among other authorities, the provisions of §72-4-16 NMSA (1978) concerning the admissibility of hydrographic surveys as evidence, Evidentiary Rule 301, now codified as Rule 11-301 NMRA (formerly NMSA 1978, Evid. Rule 301 (Repl. Pamp. 1983)) patterned after comparable FED. R. EVID. 301, the Judiciary Committee notes in connection therewith, and Mortgage Inv. Co. of El Paso v. Griego, 108 NM 240, 771 P2d 173 (1989) which determined that under current rules a presumption shifts the burden of going forward with evidence to meet or rebut a presumption, but it "...does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast...." 771 P2d at 176, citing EVID. RULE 301, as amended.

42. The Court defers making any decisions concerning the creation of a presumption or giving *prima facie* effect to the determinations in *Hope* or any other evidentiary matters in

connection therewith until Offer issues are considered by the Court.[5]

43. Objectors who are not determined to be parties or properly notified of the United States' claims or afforded due process or in privity and their successors in interest are granted leave to submit specific objections to the diversion, storage and distribution rights of the United States as set forth in the *Hope Decree*. Remaining factual and legal issues concerning the United States' rights and interests will be considered in connection with the Offer phase of these proceedings. The setting of times for filing objections, responses, replies and other related submissions are deferred until appeals, if any, in connection with this opinion of the Court have been concluded. The matter will then be set down for further appropriate action by the Court.

ULTIMATE MATERIAL FACT 1-1: United States v. Hope Community Ditch, et al., No. 712, Equity (May 8 1933)(The *Hope Decree*) Is a Final Judgment On the Merits.

44. The parties agree that the *Hope Decree* is a final judgment on the merits.

ULTIMATE MATERIAL FACT 1-2: The *Hope Decree* Involved The Same Cause Of Action As The Present Proceeding.

45. The proceedings in the case at bar involves a comprehensive stream adjudication of the Pecos River stream system filed in accordance with state statutes to adjudicate both surface and underground water rights in the Pecos River stream system.

46. The *Hope Decree* was a suit in equity.

47. The issue in connection with this ultimate material fact is whether there is a common nucleus of operative facts in these proceedings with those involved in *Hope* leading to

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[5]The Court of Appeals in Trujillo v. Chavez, 93 N.M . 626, 603 P2d. 736 (Ct. App. 1979) cautioned against the use of the word "presumption" because it is such a technical term and indicated that the better practice is to describe a presumption "in terms of assumed facts and burden of proof." 603 P2d at 740.

the same judicial choice pertaining to determination of the United States' water diversion, storage and distribution rights. The characterization of the *Hope* Proceeding for purposes of Material Fact 1-2 as a quiet title proceeding, a proceeding in equity, a general statutory water rights adjudication proceeding or some other type of proceeding is immaterial. The issue is whether the essential common nucleus of operative facts is present. See Silva v. State of New Mexico, 106 NM 472, 745 P. 2d 380; Kepler v. Slade, 119 NM 802, 896 P. 2d 482 (1995). See also Farmers High Line Canal and Reservoir Co. et. al. v. City of Golden, *supra* at 20.

48. Actually, as held in pertinent part in Farmers High Line Canal and Reservoir Co., et. al. v. City of Golden, 975 P.2d 189 (1999):

> Furthermore, '[t]he best and most accurate test as to whether a former judgment is a bar in subsequent proceedings . . . is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form.' Pomponio v. Larsen, 80 Colo. 318, 321, 251 P. 534, 536 (1926). At 975 P.2d 203

49. With due regard to the foregoing authorities cited in connection with determining the applicability of *res judicata* to the determinations of the Court in *Hope* regarding the water diversion, storage and distribution rights claimed by the United States in connection with the Project, the Court is of the opinion that *Hope*, as to such matters, involved the same cause of action as that involved in these proceedings. See 1997 Opinion, A. Issues In Connection With The Requirement That In Order For Res Judicata To Apply, The Proceedings Now Before The Court And Those Involved In The *Hope* Proceedings And The Black River Proceedings Must Involve The Same "Cause of Action", pages 20 and 21.

ULTIMATE MATERIAL FACT 1-3: All Objectors In The Current Proceeding Were Parties

In *Hope* Or Are In Privity With Parties In *Hope*.

50. The submissions of the parties do not support the adoption of this ultimate material fact. See Court's determinations and discussion re **CONCLUSIONS OF LAW NO. 1**, *supra*.

ULTIMATE MATERIAL FACT 1-4: The Objectors Here, Or Their Privies, Had A Full and Fair Opportunity To Litigate Their Claims and Defenses, And To Challenge The Claims Of The United States In The *Hope* Proceedings.

ULTIMATE MATERIAL FACT 1-5: *Hope* Defendants Were Accorded Due Process.

Ultimate material facts 1-4 and 1-5 are closely related and will be considered together for purposes of determination by the Court.

51. The ultimate issue is whether parties claimed to be bound by the determinations in *Hope* were given adequate notice of the claims of the United States and afforded a full and fair opportunity to contest the water diversion, storage and distribution rights claims of the United States in connection with the Project.

52. Procedural due process issue requirements are discussed in the Court's letter opinion dated July 17, 1976 re Procedural Issue No.3, and the Court's August 16, 1996 Order, the content of which is incorporated herein by reference.

53. The 1997 Opinion discusses the requirements of affording a full and fair opportunity to litigate and other due process requirements at C. Due Process Requirements, at 21-22 and D. An Evidentiary Hearing Will Be Required to Determine Whether Procedures Were Adopted In The *Hope* Proceedings...For The Protection Of Omitted Parties Of The Same Class As Those Joined As Parties And To Ensure A Full And Fair Consideration Of The Common Issue at 23. These discussions are incorporated herein by reference.

54. In the 1997 Opinion, the Court identified the following material fact issues pertaining to the adequacy and service of notice and due process:

Whether "(1) claimants of water rights in the *Hope* Proceeding ...were properly categorized into those who were living, those who were deceased, heirs at law of deceased persons, unknown heirs of law of deceased persons and unknown claimants in interest; (2) required notices were served and omitted parties put on notice that the water and water storage rights claims of the United States would be conclusively determined against them by virtue of the *Hope* Proceedings; (3) persons claimed to be precluded under either [preclusion] doctrine were afforded a full and fair opportunity to participate in the proceedings and present their claims and contentions as to the water and storage rights claims of the United States in connection with the Project; and (4) application of collateral estoppel would be fundamentally fair." at 22 (citations omitted). In addition, a material fact issue exists as to whether procedures in the prior proceedings were "so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue..."at 23 (citations omitted).

55. The categorization of claimants as set forth in the 1997 Opinion is not required in order to meet the requirements of due process; however, it is required in order to determine those who the United States seeks to preclude and whether they were properly notified and served. See Memorandum of the United States and the Carlsbad Irrigation District Identifying Material Facts Relating To Threshold Legal Issue No. 2, paragraph 11, at 12, *supra* at 15 and 16.

56. The Court agrees with the United States that a requirement that a party have an expectation of being precluded as a result of pending litigation goes beyond the mandate of due

process.

57. A list of those persons served with notice concerning the determination of the United States' water diversion, storage and distribution rights in connection with the Project is set forth in Exhibit F to the US/CID Comments, the content of which is incorporated herein by reference.

58. No issues have been raised by any of the Objectors concerning the due diligence efforts of the United States in connection with the joinder of all claimants of water rights in the Pecos River Stream System as parties in the *Hope* proceedings.

59. Numerous claimants of water rights in the Pecos River Stream System who were not originally named as parties in *Hope* or served with summons, subpoenas, orders to show cause, or other notices entered their appearances therein by filing answers. They are identified and included in Exhibit F to the US/CID Comments.

60. At the request of the United States, the Court in *Hope* ordered the State Engineer to conduct a Hydrographic Survey. Order filed January 24, 1920- Ex. 8 to U.S./CID Opening Brief. Except as set forth in Exhibit F, persons not included as parties in *Hope*, but identified in the hydrographic survey and joined as parties, are not identified in the submissions of counsel for any of the parties. Further, notices or other documents served upon such persons, the manner of service and when service was made have not been identified.

61. Notices that the determination of water diversion, storage and distribution rights of the United States would be adjudicated in *Hope* which were published and the dates of such publications have not been identified.

62. At the time of *Hope* the procedure concerning service by publication was

governed by the Federal Equity Rules of 1912. Dobie, Handbook of Federal Jurisdiction and Procedure, § 171(1928). The Equity Rules did not have a provision expressly addressing notice by publication. However, §57 of the then-current Judicial Code, 28 U.S.C. §118. authorized service by publication where the suit addressed title to real or personal property, and one or more of the defendants resided outside the district where the suit was brought or did not voluntarily appear. The statute allowed the court to order such defendants to appear and to provide notice by publication where "personal service upon such absent defendant or defendants [was] not practicable" and required that the notice be published "not less than once a week for six consecutive weeks."

63. The form and content of all notices published, or the frequency of publication are not identified except that a notice requiring that certain specified persons "...appear, answer, demur or otherwise plead to the bill of complaint of plaintiff in this action, on or before September 16, 1925..." was published in the Albuquerque Herald once a week for six consecutive weeks, the first of which was on September 14, 1925 and the last on October 19, 1925. Exhibit 14, to U.S./CID Opening Brief.

64. No authority has been cited by counsel for Objectors that either the solicitation or use of form answers constitutes a denial of due process.

65. PVACD's criticism of the *Hope* court's treatment of the Spanish speaking community is not supported by transcript references or citations of authority. Some notices may not have been published in Spanish, but PVACD cites no authority that this failure should result in vitiating the determinations of the Court concerning the United States rights or interests.

66. A system was recommended by the Special Master, approved by the Court and

implemented by the parties pursuant to which the vast majority of the *Hope* defendants entered into stipulations with the United States concerning the quantification of the defendants' water rights in connection with the Project.

67. Counsel for certain parties in *Hope* were served with copies of the stipulations but there is no evidence that parties appearing *pro se* were served with copies of the stipulations.

68. Counsel for PVACD have raised objections and devoted substantial time to a discussion of alleged *ex parte* communications among the Special Master and counsel for the United States and other counsel regarding procedures adopted in connection with the disposition of issues and controversies involving individual water rights of defendants. These communications primarily involve the determination of water rights asserted by individual defendants and not the claimed rights and interests of the United States concerning the diversion, storage and distribution of water which were litigated and were not based upon stipulation.

69. Counsel for PVACD contends that the *ex parte* contacts created a "high degree of unfairness", and apparently contend that this would vitiate the preclusive effect of the determination made by the court in *Hope* concerning the water diversion, storage and distribution rights of the United States, but cite no authority in support of its arguments. PVACD's Brief at 81-85. The United States responds stating that "in addition to corresponding with attorneys for the defendants, the Special Master also met with them [and] ...attorneys for the defendants also contacted the Special Master *ex parte* regarding substantive legal issues." United States/CID Response at 53 and 54.

70. The US/CID argue that these "...contacts were an accepted part of the practice of the day...". Citing Cyclopedia of Federal Procedure, Vol. 3, Ch.16, §1002 (1928). United

States/CID Response at page 54. The US/CID claim that "...the practice of the Special Master circulating material to counsel and gaining their insight was not considered improper. Instead it was considered 'altogether admirable; [and] conducive to minimizing of errors in, and to the clearness and accuracy to the master's report'. Dobie, Handbook of Federal Jurisdiction and Procedure, § 192 (1928)...". United States/ CID Response at page 54. The quoted citations pertain to the procedure to be followed in connection with the review of a Special Master' report and do not support the claims of US/CID.

71. No matters pertaining to *ex parte* contacts regarding the substance of the rights and interests claimed by the United States in connection with its water diversion, storage and distribution rights are cited by any party.

72. Counsel for PVACD have failed to establish whether and how *ex parte* communications which may have occurred and which are relied upon by PVACD may have affected the determinations of the Court concerning the water diversion, storage and distribution rights of the United States in connection with the Project. Its arguments are rejected.

73. PVACD and other Objectors have failed to show how they may have been damaged as a result of the alleged *ex parte* communications concerning the issues now before the Court.

74. Documentary evidence adduced by the United States during the course of the *Hope* proceedings concerning the determination of the United States' water diversion, storage and distribution rights included:

(a) Exhibit 5: Warranty Deed transferring project from Pecos Irrigation Company to the United States. Transcript Vol. 1 at 8.
(b) Exhibit 16: Certificate of Incorporation of the Pecos Irrigation Company dated

August 17,. 1900. Id. at 16.

(c) Exhibit 17: Deed conveying real-estate and water rights of the Pecos Irrigation and Improvement Company to the Pecos Irrigation Company. Id.

(d) Exhibit 18: Articles of Incorporation of the Pecos Irrigation and Improvement Company dated May 15, 1890. Id. at 19.

(e) Exhibit 19: Articles of Incorporation of the Pecos Irrigation and Investment Company dated July 18, 1888. Id. at 20.

(f) Exhibit 20: Articles of Incorporation of the Pecos Valley Land and Ditch Company, dated October 31, 1887, Id. at 21.

75. The testimony and evidence adduced by the United States in connection with its claims in connection with Section 22, Chapter 102, Laws of 1905 are summarized as follows:

A. The United States' notice of appropriation to the Territorial Engineer was received as Plaintiff s Exhibit 8 in *Hope*. 1. Transcript, Vol. 1, at 11.

B. The State Engineer's Certificate attesting that the United States had not released any part of the 300,000 acre feet reserved by the February 2, 1906 notice to the Territorial Engineer was Plaintiff s Rebuttal Exhibit D in *Hope*. Transcript, Vol. 16,. at 3158.

C. State Engineer from Jan. 1927 until April 1931. Transcript, Vol. 16, at 3183. Mr. Yeo testified that: "On January 23, 1906, B.M. Hall, Supervising Engineer of the United States Geological Survey, Reclamation Service, wrote to David L. White, Territorial Engineer. stating that the United States proposed to undertake certain construction under the terms of the Reclamation Act approved June 17, 1902 (32 Stat., 388) and cited Section 22, Chapter 102, Laws of 1905 of the 36th Legislative Assembly of the Territory of New Mexico for authority. The quantity of water to be appropriated was the equivalent of 300,000 acre feet per year..." Id. at 3199.

D. Mr. Yeo also testified that under the 1905 New Mexico statute, "the State Engineer grants no license to a federal appropriator. They [the federal government] are not required to make proof of beneficial use of water, so this project has complied, so far as I know, with the Law of the State of New Mexico ... individuals have to make proof of beneficial use in order to get a license or a water right, but under the Law, the federal government does not have to make any showing of even having built their works or applied their waters." Id. at 3200-01.

E. Finally, Mr. Yeo testified that there had been no release of the government's appropriation during his terms as State Engineer and no record of any prior releases. Id. at 3201.

69. On June 6, 1932, Judge Neblett entered an Order in *Hope* giving the parties until August 15, 1932 to file objections or exceptions "to the Report of the Special Master and to the Findings of Fact and Conclusions of Law therein contained."

70. On June 23. 1932, Special Master Remley filed a Certificate in *Hope* attesting that "on the 8th day of June, 1932, he did mail to all attorneys of record representing all defendants claiming water rights on the entire stream system of the Pecos River down to and including the plaintiff's Carlsbad Project, the Order of this Court bearing date June 6th. 1932, requiring that all objections and exceptions, if any, to the Report of the Special Master and to his Findings of Fact and Conclusions of Law therein contained concerning water rights in the middle basin of said Pecos River Stream System, to be filed with the Clerk of this Court on or before the 5th [sic. 15th] day of August, A.D. 1932."

71. By letter of January 9. 1933, Wm. D. Bryars, Clerk of the U.S. District Court notified 45 attorneys and law firms in *Hope* "that the Special Master has submitted a proposed Final Decree in the above-entitled and numbered cause; that all objections or exceptions thereto, by order of the Court must be filed on or before the 15th day of March, A.D. 1933, and that all objections or exception, if any are filed on or before the last mentioned date, will thereafter be heard by the Court on a date or dates to be later fixed." (emphasis in original). Mr. Bryars' letter also informed the attorneys that the proposed final Decree would be made available for inspection in Las Vegas (Vol. 1, lands in San Miguel and Guadalupe Counties), Roswell (Vol. 11, lands in De Baca, Chaves, Lincoln, Eddy and Otero Counties) and Santa Fe (both volumes).

72. On July 14, 1932. Special Master Remley held a hearing in *Hope* "upon and discussion of the General Provisions of the Decree to be submitted to the Court for approval and signature." Notice at paragraph 1. The notice for that hearing provided that the Special Master "earnestly requests every attorney of Record to be present at such hearing and will welcome suggestions upon these matters." Notice at paragraph 2.

73. No evidence of any objections to the Court's determinations in *Hope* of the United States' water diversion, storage or distribution rights are referred to by any party.

74. Ultimately there were approximately 3,500 defendants joined as parties in *Hope*. Except as set forth in Exhibit F to the US/CID Comments, the parties have not been identified in the submissions of counsel for any of the parties in these proceedings.

75. The *Hope Decree* provides in pertinent part:

> "...This cause having come on regularly to be determined and adjudged upon the Bill of Complaint of the Plaintiff with amendments thereof and substitution of parties therein, and upon

> the pleas, answers, entries of appearance and stipulations of the defendants herein and upon the reports, findings of fact, conclusions of law and recommended decree of Geo. E. Remley, Special Master in Chancery appointed herein, to whom this matter was referred by Order of this Court entered on the 19th day of November, A.D. 1925, and upon the evidence adduced before said Special Master at hearings before him held and by him reported into court, and
> THE COURT Being satisfied from the reports of said Special Master in Chancery that the said testimony by him taken and returned into Court and upon which his findings of fact and conclusions of law herein returned were made, was taken upon due and lawful notice in all respects according to the Laws of the United States of America and the Rules and Orders of this Court, and that notice of the filing of said Reports of said Special Master, including the filing of his said Findings of Fact and Conclusions of Law, and of the Orders of this court fixing the time for the filing of objections and exceptions to such Reports, Findings and Conclusions, has been duly given and served upon all Attorneys of Record in this cause as by Law, Rules and Orders of this Court provided in relation thereto, and
>
> THE COURT, Having duly heard and considered all objections and exceptions to all Reports and Findings of Fact and Conclusions of Law by the Special Master filed herein, doth hereby overrule each and all of said objections and exceptions and doth hereby adopt the same as and for the findings of fact and conclusions of law of the Court itself, save and except in so far as the same...'...". Pages 1 and 2. Underscoring for emphasis added.

76. The Court is of the opinion that the defendants in *Hope* who were properly notified and served and those who appeared therein were afforded a full and fair opportunity to litigate their claims, defenses and contentions concerning the water diversion, storage and distribution rights of the United States in connection with the Project and were accorded due process.

ULTIMATE MATERIAL FACT 1-6: The *Hope* Defendants Were Provided Fundamental Fairness

[The United States /CID dispute that Ultimate Material Fact 1-6 applies].

77. The discussion and determinations of the Court re Ultimate Material Facts 1-4 and 1-5 are incorporated herein by reference as though set forth in detail.

78. Subject to the matters set forth in paragraph 76, the Court determines that the defendants in *Hope* were provided fundamental fairness.

CONCLUSIONS OF LAW NO. 2: THE *HOPE DECREE* ESTABLISHED "RULES OF PROPERTY."

79. The issues involved in connection with this conclusion of law are whether the determinations in *Hope* concerning the United States water diversion, storage and distribution rights in connection with the Project are rules of property or involve matters of strong public interest which preclude re-litigation of these rights and interests in this proceeding.

80. Initially, PVACD argues that the United States/CID have waived their rule of property arguments. PVACD's Response at 56, footnote 6. The United States/CID respond that the issues were not waived because they were clearly identified as Conclusions of Law #2 in US/CID/PVACD Joint Statement, paragraph 20, page 13 *supra*.

81. "Waiver usually requires clear evidence to that effect...". 18 Moore's Federal Practice, §132.05[8][a] (Matthew Bender 3d ed.) at 132-188.

82. The Court determines that the claims and contentions of the United States/CID concerning the applicability of the rule of property doctrine were not waived.

83. In the 1997 Opinion, the Court deferred determining whether the rule of property doctrine or the doctrine concerning matters of strong public interest should be applied in

connection with the determination of the Court in *Hope* regarding the United States' water diversion, storage and distribution rights. See discussion of the rule of property at 28-30 of the 1997 Opinion.

84. The principles involved in determining the existence of rules of property or matters involving strong public interest are discussed in some detail in the references in the 1997 Opinion and Bogle Farms v. Baca, 122 N.M. 421, 925 P.2d 1184 (1996) which are incorporated herein by reference.

85. The crucial inquiries are twofold and involve "First, to what extent has the proposition cited as a rule of property become settled or fixed? ...Second, we must assess the extent to which a proposition cited as a rule of property has induced persons to enter into transactions in actual or demonstrable reliance thereon..." Id at 1193.

86. "'The *rule of property*' then is not necessarily created or shown by the mere decision, or two or three decisions of a Court. It is the settled, fixed, stable principle regulating titles and the estimate of their validity and value in the minds of practical men, who draw their conclusions from judgments which have been commonly acquiesced in as settled law, or the general titles affirmed, by which they have passed beyond contention and dispute." Id at 1193 citing Hart v. Burnett, 15 Cal. at 609.

87. Both current and past Standard Operating Procedures issued by the Bureau of Reclamation for Avalon Dam and Reservoir, Sumner Dam and Lake Sumner; and Brantley Dam and Reservoir reflect the storage of water in reservoirs pursuant to rights adjudicated in the *Hope Decree*. See Documentary Evidence, Vol. 3, Tabs U.S. Facts 141-142, 153-155.

88. Various reports and manuals issued by the Bureau of Reclamation reflect the

Bureau's reliance on the diversion and storage water rights in the United States adjudicated in the *Hope Decree*. U.S. Facts 140, 143, 144.

89. The Bureau of Reclamation has entered into memoranda of understandings with other Federal agencies, the State, and private water users predicated on its ownership of the storage rights decreed in *Hope*. U.S. Fact 146, 176.

90. Brantley Dam and Reservoir and Alamogordo Dam were constructed at least in part to enable the United States to better use the storage rights adjudicated in the *Hope Decree*. U.S. Fact 147.

91. The United States and CID applied for and received a permit from the State Engineer to store "rights adjudicated in the *Hope Decree*" in Los Esteros Lake (now Santa Rosa Lake). U.S. Facts 149-151.

92. CID has filed numerous protests alleging interference with water rights adjudicated for the benefit of the Carlsbad Project in the *Hope Decree*. U.S. Facts 156-163.

93. Water is currently stored for the Carlsbad Project in four reservoirs pursuant to the storage rights decreed in *Hope*. See Declaration of Tom Davis, Documentary Evidence. Vol. 3, Tab U.S. Fact 168 at ¶ 3. The stored water is then distributed by CID to its members. Id. at ¶ 2.

94. CID operates Brantley, Sumner and Avalon Dams pursuant to operating procedures that explain that the storage rights are derived from rights adjudicated in the *Hope Decree*. Documentary Evidence. Vol. 3, at Tabs U.S. Facts 169-171.

95. As consistently reflected in the reports of the Watermaster of the Pecos Valley Surface Water District, the State Engineer has administered the waters of the Pecos in accordance with the *Hope Decree* at least since the State Engineer declared the Lower Pecos Water District

in 1952. U.S. Facts 174. 177, 189.

96. The reports of the Roswell Basin's Watermaster also rely on the water rights adjudicated by the *Hope Decree*. U.S. Fact 178.

97. Where the State Engineer has allowed water rights to be retired to offset proposed new diversions, he has accepted the retirement of rights decreed in *Hope* as sufficient to allow new appropriations. U.S. Fact 179.

98. Various hydrographic surveys issued by the State Engineer's Office have relied on the *Hope Decree* to establish elements of the water rights surveyed. U.S. Facts 180, 181, 182, 183, 193.

99. The State Engineer's Office has often treated the *Hope Decree* as a determinative statement of water rights in correspondence with the public. Documentary Evidence Vols. 3 and 4 at Tabs U.S. Fact 184, 191, 198, 202, 214, 217, 285. 293-94, 296, and 305.

100. The State Engineer's Office has also represented to Congress that water rights adjudicated in the *Hope Decree* as "fully protected by state law and the federal court decree." Documentary Evidence, Vol. 3 at Tab U.S. Fact 186.

101. Countless commercial transactions have been predicated on the determination of water rights. by the *Hope Decree*. Documentary Evidence, Vol. 4, at Tab U.S. - Facts 256-57, 287-89; Deeds contained in U.S. Facts 194-308; N.M.S.A. § 72-5-22 (water rights transfer with the land unless expressly excluded); First State Bank v. McNew, 33 N.M. 414, 269 P. 56, 60 (1928).

102. The State Engineer's Office has relied on the *Hope Decree* in making decisions regarding permits. Documentary Evidence, Vol. 4, at Tabs U.S. Fact 239, 241, 247, 252-55, 271,

and 310.

103. Judicial decisions have relied upon the validity of the water rights adjudicated in the *Hope Decree*. U.S. Facts 223, 233-34; Brantley Farms v. Carlsbad Irr. Dist., 1998-NMCA-023, 124 N.M. 698. 707. 954 P.2d 763, 772 (Ct. App. 1998); Bounds v. Carner, 53 N.M. 234, 243. 205 P.2d 216, 221 (1949).

104. The Court recognizes that if the determinations of the Court in *Hope* concerning the water diversion, storage and distribution rights of the United States concerning the Project are rules of property, they may be binding on those who were not parties to *Hope*.[6]

105. The rule of property doctrine and the doctrine pertaining to matters of strong public interest are generally considered applicable to general legal propositions and settled legal principles rather than to specific determinations of property rights and interests of a party or the results of a particular case.

106. The authorities establish that rules of property or determinations of great public interest should not be disturbed except for the most cogent reasons.

107. The rule of property doctrine is an adjunct of the rule of stare decisis. See discussion in Bogle Farms v. Baca, 925 P.2d 1192, *supra*.

108. In the Court's opinion, the determinations in *Hope* concerning the water diversion, storage and distribution rights of the United States in connection with the Project are, in a limited sense, rules of property. They are not rules of property under the rule of property doctrine, however, because they are not general legal propositions or settled legal principles

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[6]See United States v. Maine, 420 U.S. 515, 527-528 (1975); EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986).

which have been established beyond contention and dispute, particularly when considered in the context of these proceedings.

CONCLUSIONS OF LAW NO. 3: THE OBJECTORS ARE PRECLUDED FROM RELITIGATING THOSE ISSUES IDENTIFIED IN THE US/CID'S IDENTIFICATION OF MATTERS ACTUALLY AND NECESSARILY DETERMINED IN PRIOR PROCEEDINGS (ISSUES) THROUGH THE APPLICATION OF COLLATERAL ESTOPPEL.

109. If it is ultimately determined that the doctrine of *res judicata* is not applicable to matters determined in *Hope*, the Court determines that issues of fact in connection with the water diversion, storage and distribution rights of the United States in connection with the Project determined in *Hope* are binding upon persons given proper notice of the claims of the United States and properly served with such notice in *Hope* and otherwise afforded due process, those in privity with said parties and their successors in interest under the doctrine of collateral estoppel. See the Court's discussion of corresponding similar matters pertaining to the applicability of the doctrine of *res judicata, supra*.

ULTIMATE MATERIAL FACT 3-1: The Issues And Subject Matter Adjudicated In The *Hope* Proceedings Are Identical To The Issues And Subject Matter Being Adjudicated In These Proceedings.

[The United States and CID dispute that Ultimate Material Fact 3-1 applies]

110. The issues and subject matter concerning the water diversion, storage and distribution rights claims of the United States adjudicated in *Hope* are identical to the issues and subject matter being adjudicated in connection with said rights and interests in these proceedings.

111. The best and most accurate test concerning the applicability of doctrines of

preclusion is whether evidence in *Hope* would sustain similar determinations in this proceeding and if it would, the two actions are the same although they are different in form. Farmers High Line Canal and Reservoir Co., et al. v. City of Golden, *supra*, and discussion, *supra*.

ULTIMATE MATERIAL FACT 3-2: The Matters Upon Which The United States Seeks Preclusion Were Actually And Necessarily Litigated And Determined In The *Hope* Proceedings And Incorporated Into A Final Judgment On The Merits.

112. Matters pertaining to the water diversion, storage and distribution rights of the United States were actually and necessarily litigated and determined in *Hope* and incorporated into the *Hope Decree*, a final judgement on the merits.

ULTIMATE MATERIAL FACT 3-3: All Objectors In The Current Proceeding Were Parties In *Hope* Or Are In Privity With Parties In *Hope*.

113. The submissions of the parties do not support the adoption of this Ultimate Material Fact. See discussion re Ultimate Material Fact 1-3, *supra*.

ULTIMATE MATERIAL FACT 3-4: The Objectors Here, Or Their Privies, Had A Full And Fair Opportunity To Litigate Their Claims And Defenses In The *Hope* Proceedings.

114. See discussion re Ultimate Material Facts 1-4 and 1-5 *supra*.

ULTIMATE MATERIAL FACT 3-5: The *Hope* Defendants Were Accorded Due Process.

115. See discussion re Ultimate Material Facts 1-4 and 1-5, *supra*.

ULTIMATE MATERIAL FACT 3-6: The *Hope* Defendants Were Provided Fundamental Fairness.

[The United States and CID dispute that Ultimate Material Fact 3-6 applies].

116. See discussion re Ultimate Material Fact 1-6, *supra*.

CONCLUSION OF LAW NO. 4: Intervening Changes In Law Subsequent To 1933 Have Rendered Any Preclusive Effects From The *Hope Decree* Regarding Carlsbad Project Water Rights Inapplicable In The Current Proceeding.

117. "The fundamental rule, that issue preclusion applies only if the issue in the prior litigation is identical to the issue in a subsequent litigation, entails the corollary that an intervening change in the law may create a difference, even when the issues appear on their face to be identical: if the issue is different, then issue preclusion does not apply. For this reason, a change or development in the controlling legal principles governing a case may sometimes prevent the application of issue preclusion even though an issue has been litigated and decided, because application of the issue preclusion doctrine is confined to prevention of repetitive situations in which the controlling facts and applicable legal rules remain unchanged" 18 *Moore's Federal Practice* §132.02[2][f] (Matthew Bender 3d ed.) at 132-29, 30.

118. While the Court recognizes that there have been significant decisions since *Hope* affecting water and other rights in connection with reclamation projects generally, Objectors do not cite any changes in law which would have any significant impact upon the determinations to be made by the Court in connection with determining the United States' diversion, storage, and distribution water rights.

MISCELLANEOUS ORDERS

Counsel for the State is requested to serve a copy of this opinion upon counsel, other than those specified in Exhibit A, and parties appearing *pro se* who have elected to participate in this phase of these proceedings and designated depositories.

All requested findings of fact and conclusions of law which have not been incorporated

into this decision are refused. Counsel for the US/CID are requested to expeditiously prepare a final interlocutory appealable order in connection with this decision, submit it to opposing counsel for approval as to form and then submit it to the Court for review, approval and entry in these proceedings on or before June 14, 2000.

HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that he caused to be mailed, postage prepaid, a copy of the aforesaid order to counsel and the repositories specified on attached Exhibit A on this 11th day of May, 2000.

Dated: 05-11-2000

Harl D. Byrd
District Judge *Pro Tempore*

APPENDIX A

TABLE OF MATTERS, AMONG OTHERS, REVIEWED AND CONSIDERED BY THE COURT IN CONNECTION WITH THE PREPARATION OF OPINION RE THRESHOLD LEGAL ISSUE NO. 2 .

1. **PRETRIAL ORDER FOR CARLSBAD PROJECT WATER CLAIMS** filed on February 26, 1996. (1996 PHO)

2. **SUPPLEMENTAL PRE-HEARING ORDER-CARLSBAD PROJECT WATER RIGHTS** filed on August 6, 1998 (1998 SPHO) which supplemented the 1996 PHO. The order superseded all prior procedural and pre-trial orders only to the extent that the times and provisions thereof were inconsistent with those contained in the 1998 SPHO.

The order states in pertinent part:

> ...the Court has determined that there are material issues of fact that must be disposed of before final determination of Threshold Legal Issue No. 2 . Further, the Court has stated in its orders of March 19, 1998 and March 23, 1998, that, having due regard for the Court's prior opinions on Threshold Legal Issue No.3, there are remaining issues concerning 'ownership rights, interests, duties and obligations of the parties in connection with Project water' that must be determined before a final ruling on Threshold Legal Issue No. 3 can be made by the Court. This Supplemental Pre-hearing Order describes the procedures that will be followed so that any remaining issues relating to Threshold Legal Issue Nos. 2 and 3 can be resolved by the Court and those issues finally determined.

PROCEDURES FOR RESOLUTION OF THRESHOLD LEGAL ISSUE NO. 2

The Court and any interested party will use the following procedures to identify any genuine issues of material fact concerning Threshold Legal Issue No. 2, and to resolve any such genuine issues of material fact.

1. The parties will develop a statement of conclusions of law, and the ultimate issues of fact relating to the conclusions of law, that they believe may be necessary for the Court to determine in connection with a final ruling on Threshold Legal Issue No.2. Each party will provide to other interested parties a statement of material evidentiary facts with specific reference to exhibits highlighted as to relevant portions which support that party's position on each of its stated ultimate issues of fact and conclusions of law. Any interested party that intends to develop a statement of material evidentiary facts and submit exhibits which support that party's position on ultimate issues of fact and conclusions of law in connection with Threshold Legal Issue No.2, must give notice of that intention to all interested parties and the Court by July 24, 1998, for the purpose of coordinating with the other parties the development of a schedule for the exchange of statements of material evidentiary facts and supporting exhibits and stipulating to material facts about which there is no genuine issue.

If a referenced exhibit has previously been submitted to the Court and served upon all interested parties, each party shall have the option of either providing to the other interested parties a copy of the exhibit with relevant portions clearly identified by highlighting or, rather than submitting a new copy of the exhibit, the party may instead identify the exhibit and provide references to page and line numbers identifying relevant portions of the exhibit.

The procedure suggested herein does not preclude limited discovery if it is later determined to be necessary.

2. The interested parties will meet as necessary to identify (1) those material facts about which there are no genuine issues; and (2) those material facts that do involve genuine issues. At the present time, counsel believe that evidentiary issues can be resolved based upon the designated exhibits and without an evidentiary hearing. By September 22, 1998, the parties will submit to the Court a final statement of conclusions of law, ultimate issues of fact about which there are no genuine issues, and ultimate issues of fact with supporting material evidentiary facts, identifying for the Court those facts which are in dispute and will require resolution by the Court. If an evidentiary hearing is required, proposed alternate dates for such hearing will also be submitted to the Court.

Also by September 22, 1998, each party will identify and proffer to the Court by list or separate exhibit the exhibits upon which they rely, and contemporaneously, each party will submit to the Court a statement, without argument, of any objections to the admissibility of any exhibits of any other party. If a referenced exhibit has previously been submitted to the Court and served upon interested parties, each party shall have the option of either (1) providing to the Court a copy of the exhibit with relevant portions clearly identified by highlighting or otherwise, or (2) if a copy of the exhibit has previously been provided to the Court and to each interested party, rather than submit a new copy of the exhibit, the party may instead identify the exhibit and provide references to page and line numbers identifying relevant portions of the exhibit.

3. By September 22, 1998, the parties shall also submit for approval by the Court a proposed briefing schedule for matters

concerning Threshold Legal Issue No 2 for which there will be no evidentiary hearing.

Extensions of time were granted to counsel for the filing of required submissions. The parties have timely complied with the procedural requirements set forth in the 1998 SPHO.

3. The Court's **OPINION RE THRESHOLD LEGAL ISSUE NO. 2** and referenced submissions, exhibits and attachments filed on September 22, 1997 (1997 Opinion).

In the 1997 Opinion, the Court held that subject to the terms and provisions of the opinion, *res judicata* and collateral estoppel defenses predicated upon proceedings in *Hope* or *Black River*[1] may be available to the United States and CID. The Court held, however, that there were genuine issues of material fact requiring resolution. The genuine issues of material fact were identified as involving:

1. The identification of those Objectors in these proceedings who are in privity (as defined in the Opinion) with parties in *Hope*. 1997 Opinion at 21.

2. Compliance with due process requirements. 1997 Opinion at 21.

3. Whether procedures in *Hope* were so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue. 1997 Opinion at 23. (Citations omitted.)

4. The parties were granted leave to adduce evidence as to whether incentives for vigorous defenses were afforded, whether there were inconsistencies of forum and whether there

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[1] On October 6, 1998 the parties agreed that the contentions of the United States concerning preclusion, based upon the applicability of the doctrine of *res judicata* and collateral estoppel because of the *Black River* proceedings, were withdrawn. See numbered paragraph 26, page 12 *infra*.

were any other matters which might militate for or against application of preclusion doctrines by virtue of *Hope*.

The rule of property doctrine and public interest doctrines were discussed but decisions thereon were deferred. 1997 Opinion, pages 28-31. The Court held ...The exact principles claimed to be rules of property are not clear and the determination thereof involves the determination of factual matters which can only be decided after evidentiary proceedings are conducted as outlined above. Therefore, at this time, the Court will defer ruling on whether the rule of property doctrine should be applied in these proceedings. Id. at 30.

Remaining legal matters involving Threshold Legal Issue No. 2 were determined in the 1997 Opinion.

5. **AMENDMENT AND REVISION TO OPINION RE THRESHOLD LEGAL ISSUE NO. 2** filed on September 24, 1997.

6. **SECOND AMENDMENT AND REVISION TO OPINION RE THRESHOLD LEGAL ISSUE NO. 2 AND ORDER REQUESTING THAT COUNSEL SUBMIT ALTERNATE DATES FOR A PRETRIAL CONFERENCE** filed on October 23,1997.

7. **ORDER** requiring that the United States specify the nature and extent of its interest in the water rights included within the Carlsbad Irrigation Project filed on October 19, 1984.

8. **RESPONSE TO COURT ORDER** described in numbered paragraph 6, *supra*, filed by the United States on October 19, 1984.

9. **STIPULATED OFFER OF JUDGEMENT** (Offer) filed by the United States, the Carlsbad Irrigation District, and the State filed on June 22, 1994.

10. **PVACD'S GENERAL STATEMENT OF FACTS AND PROCEDURES** filed on October 28, 1996.

11. **JOINT PROPOSED PROCEDURE FOR IDENTIFYING AND RESOLVING ISSUES OF MATERIAL FACT RELATING TO THRESHOLD LEGAL ISSUE NO. 2 --PRECLUSION DEFENSES** filed on November 17, 1997.

12. The Court's **OPINION & ORDER RE PROPOSED PROCEDURES FOR IDENTIFYING AND RESOLVING GENUINE ISSUES OF MATERIAL FACT -- THRESHOLD LEGAL ISSUE NO. 2** filed on November 17, 1997.

13. The United States' and CID's **IDENTIFICATION OF MATTERS ACTUALLY AND NECESSARILY DETERMINED IN PRIOR PROCEEDINGS** filed on January 9, 1998. (US/CID Identification)

14. **MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT IDENTIFYING MATERIAL FACTS RELATING TO THRESHOLD LEGAL ISSUE NO. 2** filed on February 9, 1998.

15. **PVACD'S INITIAL DESIGNATION OF MATERIAL FACTS** filed on February 23, 1998.

16. **PVACD'S RESPONSE TO US/CID DESIGNATION OF FACTS** filed on February 23, 1998.

17. **THE UNITED STATES' AND CID'S CONSOLIDATED RESPONSE TO PVACD'S INITIAL DESIGNATION OF MATERIAL FACTS AND REPLY TO PVACD'S RESPONSE TO THE UNITED STATES AND CID'S MEMORANDUM IDENTIFYING MATERIAL FACTS** filed on March 6, 1998.

18. **STATEMENT OF WITHDRAWAL OF LEGAL ISSUE** filed by PVACD on

May 14, 1998. The defense of laches in connection with Threshold Legal Issue No. 2 was withdrawn.

19. **NOTICE OF INTENTION OF PVACD TO SUBMIT ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW IN CONNECTION WITH THRESHOLD LEGAL ISSUE NO.** 2 filed on July 31, 1998.

20. The **BRANTLEY'S PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on July 30, 1998.

21. **NOTICE OF INTENTION OF THE UNITED STATES TO DEVELOP STATEMENT OF FACTS AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2.** filed on August 5, 1998.

22. **NOTICE OF INTENTION OF THE STATE OF NEW MEXICO TO DEVELOP STATEMENT OF FACTS AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2** , certificate of service filed on August 24, 1998.

23. **THE UNITED STATES', CID'S AND PVACD'S JOINT STATEMENT OF CONCLUSIONS OF LAW AND ULTIMATE MATERIAL FACTS** (US/CID/PVACD Joint Statement) filed on October 2, 1998.

24. **STATE OF NEW MEXICO'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** served on October 2, 1998.

25. **THE UNITED STATES' AND CID'S STATEMENT OF CONCLUSIONS OF LAW , ULTIMATE MATERIAL FACTS AND EVIDENTIARY FACTS** filed on October 2, 1998.

26. **PVACD'S STATEMENT OF ULTIMATE FINDINGS OF MATERIAL FACTS RE THRESHOLD LEGAL ISSUE NO. 2** served on October 5, 1998 filed on

November 23, 1998.

27. **STIPULATION BY THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT AND PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT RELATING TO EVIDENTIARY SUBMISSION ON THRESHOLD LEGAL ISSUE NO. 2** filed on October 6, 1998. Subject to the terms and conditions contained in the stipulation, PVACD withdrew its objections to the rights of the United States set forth in the stipulated offer involving the Black River and the parties agreed that evidentiary materials would not be submitted relating to the preclusive effect of the *Black River Decree* nor would the parties present arguments in their respective briefs in connection with Threshold Legal Issue No. 2.

28. **November 6, 1998 letter** stipulation among counsel for PVACD, the United States and CID re designation of additional factual material in support of arguments and the filing of objections.

29. **THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT'S NOTICE RE: EVIDENTIARY OBJECTIONS** filed on November 13, 1998.

30. **PVACD'S OPENING TRIAL BRIEF RE THRESHOLD LEGAL ISSUE NO. 2** filed November 13, 1998.

31. Hennighausen, Olsen & Stevens' Defendants' **CONCURRENCE IN AND ADOPTION OF PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE NO. 2** filed on November 13, 1998.

32. **MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on November 13, 1998. (US/CID Initial Memorandum)

33. **DEFENDANT CARLSBAD IRRIGATION DISTRICT'S OPENING BRIEF**

RE THRESHOLD LEGAL ISSUE NO. 2 AND IN SUPPORT OF MOTION TO STRIKE BRANTLEY'S SECOND AMENDED PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW filed on November 13, 1998.

34. **NEW MEXICO'S BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2** filed on November 16, 1998.

35. **ORDER STRIKING BRANTLEY'S PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on November 16, 1998.

36. Letter to Counsel re Determination of Issues Re Threshold Legal Issue No. 2 upon Written Submissions and Waiving Evidentiary Hearing in Connection Therewith dated November 21, 1998.

37. **PVACD'S STATEMENT OF ULTIMATE FINDINGS OF MATERIAL FACTS RE THRESHOLD LEGAL ISSUE NO. 2** filed on November 23, 1998.

38. Response dated December 18, 1998 of counsel for the US/CID to Court's November 21, 1998 letter.

39. Response dated December 18, 1998 of counsel for PVACD to Court's November 21, 1998 letter.

40. Response dated December 18, 1998 of counsel for the Brantleys to Court's November 21, 1998 letter.

41. **THE BRANTLEYS' REPLY TO THE BRIEF OF THE STATE OF NEW MEXICO, THE PVACD, THE CARLSBAD IRRIGATION DISTRICT ON THRESHOLD LEGAL ISSUE NO. 2 AND THE CARLSBAD IRRIGATION DISTRICT'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE BRANTLEYS' SECOND AMENDED**

PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW filed on December 22, 1998.

42. **PVACD'S BRIEF IN RESPONSE TO US/CID OPENING MEMORANDUM** filed on December 22, 1998.

43. **CONSOLIDATED RESPONSE MEMORANDUM OF THE UNITED STATES AND CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on December 23, 1998. United States' Response)

44. **ORDER APPROVING PARTIES' STIPULATION SUBMITTING REMAINING ISSUES RE THRESHOLD LEGAL ISSUE NO. 2 FOR DETERMINATION UPON WRITTEN SUBMISSIONS TO THE COURT AND DISPENSING WITH AND WAIVING EVIDENTIARY HEARING IN CONNECTION THEREWITH** filed on December 28, 1998. (Order Approving Stipulations)

45. **NEW MEXICO'S REPLY BRIEF REGARDING THRESHOLD LEGAL ISSUE NO. 2** filed on December 28, 1998. (State's Reply)

46. Court's January 11, 1999 letter to Mr. Gehlert, counsel for the United States and Mr. Hernandez, counsel for CID, re their December 18, 1998 letter.

47. **THE BRANTLEY'S AMENDED REPLY TO THE BRIEFS OF THE STATE OF NEW MEXICO, THE PVACD, THE CID ON THRESHOLD LEGAL ISSUE NO. 2** and **THE CID'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE BRANTLEYS' SECOND AMENDED PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on January 12, 1999.

48. **PVACD'S REPLY TO US/CID RESPONSE BRIEF ON THRESHOLD LEGAL ISSUE NO. 2** filed on January 25, 1999.

49. **CONSOLIDATED REPLY MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on January 25, 1999. (United States' Reply)

50. **SUPPLEMENTAL OPINION AND DECISION RE THRESHOLD LEGAL ISSUE NO. 2** filed September 30, 1999. (1999 Supplemental Opinion)

51. **BRANTLEY'S RESPONSE OBJECTING TO THE** *Hope Decree* **REGARDING DIVERSION, STORAGE AND DISTRIBUTION AND ANY *PRIMA FACIE* APPLICATION OF THE** *Hope Decree* served on November 8, 1999.

52. **THE UNITED STATES AND CID'S COMMENTS ON AND OBJECTIONS TO THE COURT'S SUPPLEMENTAL OPINION AND DECISION RE: THRESHOLD LEGAL ISSUE NO. 2** dated November 17, 1999. (US/CID Comments)

53. **PVACD'S OBJECTIONS AND COMMENTS RE SUPPLEMENTAL OPINION** filed on November 18, 1999. (PVACD Comments)

54. **DEFENDANTS'** (represented by A.J. Olsen, Esq.) **OBJECTIONS AND COMMENTS RE SUPPLEMENTAL OPINION** served on November 18, 1999. (Defendant's Comments)

55. **OBJECTIONS OF THE STATE OF NEW MEXICO TO SUPPLEMENTAL OPINION AND DECISION RE THRESHOLD LEGAL ISSUE NO. 2** served on November 19, 1999.

56. **TRACY'S OBJECTIONS TO SUPPLEMENTAL OPINION AND DECISION RE THRESHOLD LEGAL ISSUE NO. 2** served on November 22, 1999.

57. **COURT'S MEMORANDUM RE ORAL ARGUMENTS** and agenda and outline of matters to be considered dated December 13, 1999.

58. **SECOND SUPPLEMENTAL SCHEDULING ORDER RELATING TO THRESHOLD LEGAL ISSUE NO. 2 AND 3** served on January 26, 2000. (Second Supplemental Scheduling Order)

59. **THE UNITED STATES' AND CID'S STATEMENT OF POSITION** served on February 18, 2000. (US/CID Position)

60. **NEW MEXICO'S POSITIONS REGARDING ISSUES RAISED BY THE COURT IN ITS AGENDA** served on February 8, 2000. (State's Position)

61. **PVACD'S RESPONSES AND STATEMENT RE THRESHOLD LEGAL ISSUE NO. 2** filed on February 21, 2000. (PVACD's Response)

62. **BRANTLEY'S RESPONSE TO SECOND SUPPLEMENTAL SCHEDULING ORDER RELATING TO THRESHOLD LEGAL ISSUE NO. 2 AND 3 - RESPONSE AS TO THRESHOLD LEGAL ISSUE NO. 2** served on February 21, 2000. (Brantley's Response)

63. **DEFENDANT CID'S MOTION TO STRIKE EXHIBITS AND PORTIONS OF BRANTLEYS' RESPONSE OBJECTION TO THE** *Hope Decree* served on March 3, 2000.

64. **BRANTLEY'S RESPONSE IN OPPOSITION TO CID'S MOTION TO STRIKE EXHIBITS AND PORTION OF BRANTLEY'S RESPONSE OBJECTION TO** *Hope Decree* served on March 13, 2000.

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EXHIBIT A