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FIFTH JUDICIAL DISTRICT  
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FIFTH JUDICIAL DISTRICT  
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, )

Defendants, )

and )

STATE OF NEW MEXICO, ex rel, )  
State Engineer )  
and PECOS VALLEY ARTESIAN )  
CONSERVANCY DISTRICT, )

Plaintiffs, )

vs. )

HAGERMAN CANAL CO., et al., )

Defendants. )

Nos. 20294 and 22600  
Consolidated

Carlsbad Irrigation  
District Section -  
Carlsbad Basin Section

**ORDER**

**Order Identifying Preliminary Threshold Legal Issues Re the Claims of the United States of America and the Carlsbad Irrigation District Concerning Their Respective Rights, Duties and Obligations Pertaining to the Diversion, Storage and Distribution of Water Within the Carlsbad Project Which Require the Submission of Memoranda Briefs and Scheduling Times for Their Submission.**

THIS MATTER comes on for consideration by the Court in connection with the Court's

Order concerning the respective claims of the United States of America (United States) and the Carlsbad Irrigation District (CID) in connection with their claimed rights, duties and obligations with respect to the diversion, storage and distribution of Carlsbad Project water which was served on February 10, 2001.

The United States and CID served their respective statement of claims on January 19, 2001 (January 19 Submissions). The Order requested that responses to the January 19 Submissions be submitted by the State of New Mexico, (State), Pecos Valley Conservancy District (PVACD), the Brantley Defendants (the Brantleys), the Tracy Defendants (the Tracys), New Mexico State University (NMSU), parties appearing *pro se* and other interested parties by February 12, 2001 (para 3, p.3). The Order provided that replies of the United States and CID be submitted by March 12, 2001 (para. 4, p. 3). Responses and replies were timely served. The Order also provided that simultaneous briefs would be permitted in connection with issues specified by the Court after it had been afforded an opportunity to review all of the submissions of the parties (para. 5, p. 3).

The Court has reviewed the following submissions in connection with this matter:

1. The January 19 Submissions.
2. The STATE OF NEW MEXICO'S RESPONSE TO THE JANUARY 19, 2001 SUBMISSIONS OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT (State's Response) served on February 12, 2001.
3. PVACD'S JOINT RESPONSE TO US AND CID CLAIMS (PVACD's Response) filed on February 12, 2001.
4. The TRACY/EDDYS' RESPONSE TO THE JANUARY 19, 2001 SUBMISSIONS OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT AND

STATEMENT OF ISSUES FOR BRIEFING (Tracy's Response) served on February 12, 2001.

5. The BRANTLEYS' RESPONSE TO THE JANUARY 19, 2001 SUBMISSIONS OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT (Brantleys' Response) served on February 8, 2001.

6. NEW MEXICO STATE UNIVERSITY'S RESPONSE TO THE UNITED STATES' AND CARLSBAD IRRIGATION DISTRICT'S STATEMENTS OF CLAIMS, RIGHTS, DUTIES AND OBLIGATIONS WITH RESPECT TO STORAGE, DIVERSION AND DISTRIBUTION OF PROJECT WATER SUPPLY WITHIN THE CARLSBAD PROJECT (NMSU's Response) served on February 12, 2001.

7. THE UNITED STATES' CONSOLIDATED REPLY TO THE RESPONSES TO THE UNITED STATES' STATEMENT OF CLAIMS, RIGHTS, DUTIES AND OBLIGATIONS WITH RESPECT TO THE DIVERSION, STORAGE AND DISTRIBUTION OF WATER IN CONNECTION WITH THE CARLSBAD PROJECT (United States' Reply) served on March 9, 2001.

8. Defendant Carlsbad Irrigation District's Reply to Defendants Tracys', Eddys', New Mexico State University's, Brantleys', and Plaintiffs State of New Mexico ex Rel. State Engineer's and PVACD's Responses to CID's Statement of Claims, Rights, Duties, Etc., served on March 9, 2001.

#### **A. INTRODUCTION**

The analogy drawn by counsel for the United States to "the proverbial bundle of sticks" in connection with the water rights claims of the United States warrants some discussion. The "bundle of sticks" analogy is ordinarily encountered in connection with the concept of "fee simple title" to

real property. "Fee simple title" is discussed in terms of absolute, indefeasible and complete title, and, therefore, ownership of the entire "bundle of sticks". Ownership of any right, title or interest in real property such as, but not limited to, patent or other reservations or exceptions, easements, encroachments, rights of way, profits a prendre and other mineral rights and interests, liens and encumbrances, rights of parties in possession, zoning and other restrictions, and any other rights or interests that detract from "fee simple title" ownership are considered sticks in the entire "bundle of sticks" or "fee simple". The "bundle of sticks" concept contemplates a single, undivided ownership in "fee simple". The concept should be distinguished from the ownership of separate cognizable ownership rights and interests.

It would seem that further discussion of the proper definition of water rights is, to a great extent, an exercise in semantics and form, rather than one of true meaning and significance. The United States has the right, duty and obligation to divert water from the Pecos River in connection with the Project and store the water at certain specified locations for the benefit of the landowners. CID has the right, duty and obligation to distribute Project water for the use and benefit of the landowners. Members of CID, as landowners, have the right to devote deliveries of Project water to beneficial use. All of these ownership rights, duties and obligations are subject to certain conditions and have certain limitations; however, the parties apparently agree that beneficial interests in the diversion, storage and distribution rights in connection with Project water lie in the landowners. (For example, see United States' Reply, first full paragraph, p. 11).

The Court's OPINION RE THRESHOLD LEGAL ISSUE NO. 3, concluded, in part, that:

Regardless of the category into which water rights involved in this phase of these proceedings fall. (As set forth at pages 4, 5 and 6, *supra*), the Court is of the opinion that the beneficial ownership of

Project water rights is vested in landowners in the Project measured by the amount of water devoted to beneficial use (p.26).

Perhaps it would be helpful to reiterate a portion of the opinion in *California v. United States*, 438 U.S. 645, 675, 98 S.Ct. 2985, 57 L.Ed. 2d 1018 (1978) (quoted in the Court' s OPINION RE THRESHOLD LEGAL ISSUE NO. 3, (pp. 20 and 21) as follows:

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

Underscoring added for emphasis.

It is extremely doubtful that, except as provided in this order, further inquiries or determinations are required or should be made in connection with the water rights claims of the United States.

**B. OFFER ISSUES THAT DO NOT REQUIRE THE SUBMISSION OF MEMORANDA BRIEFS AT THIS TIME**

The following are considered Offer issues. The Court will not require the submission of memoranda briefs in connection with these issues at this time:

1. Quantification of the amount of water and the priority date of the right of the United States to divert water from the Pecos River in connection with the Project for the use and benefit of members of CID.

2. The total number of acres which may be irrigated in connection with the Project.

3. Is the Project water supply set as the amount of water required to irrigate 25,055 acres?

4. Should irrigable acreage be the basis for quantifying the respective diversion, storage and distribution rights of the United States and CID?

5. Quantification of the amount of water which may be stored by the United States in connection with the Project (and the priority date(s) of such storage rights) for the use and benefit of members of CID.

a. Whether the United States has a Project storage right of 176, 500 acre feet per annum for use in connection with Project acreage of 25, 055 acres and whether the 25,055 irrigable acres was confirmed as a part of the "1947 Condition" of the Pecos River Compact and by subsequent State Engineer permits.

b. The United States' claim that it has authority to divert and store from the Pecos River up to 176, 500 acre-feet per year.

c. The issue of whether at the time of the 1932 contract the Carlsbad Project had 25,055 acres under irrigation.

d. Is the 25, 055 acreage amount referred to by CID guaranteed and protected by the Pecos River Compact and an amount which cannot be forfeited or

decreased in acreage?

e. Is the State barred or estopped from contesting that the 25, 055 acres figure is the number of acres that may be irrigated in connection with the Project?

6. Issues concerning the transfer of "stacked" water rights. The parties will be requested to explain the relevance of these issues in connection with the Offer Phase.

7. Issues concerning seepage and return flows. Is the United States entitled to all seepage, waste and return flows and what is the effect, if any, of the Project Offer in connection with these matters?

**C. MATTERS CONCERNING THE RESPECTIVE RIGHTS, DUTIES AND OBLIGATIONS OF THE UNITED STATES AND CID IN CONNECTION WITH THE DIVERSION, STORAGE AND DISTRIBUTION OF PROJECT WATER ABOUT WHICH THERE IS NO DISPUTE, AND, THEREFORE, DO NOT REQUIRE THE SUBMISSION OF MEMORANDA BRIEFS**

There is no dispute concerning the following claims concerning the respective rights, duties and obligations of the United States and CID pertaining to the diversion, storage and distribution of Project water. Therefore, the Court will not require that memoranda briefs be submitted in connection therewith:

1. CID is required under State law as well as its 1932 contract with the federal government to distribute and apportion water in accordance with applicable reclamation law.

2. CID has the discretion to determine annually how much of the water supply and storage shall be made "available for distribution to its members and how much must be conserved for future years". The State and the Brantleys are, however, requested to specify claimed limitations upon the exercise of discretion by CID. Others may also respond. The State's claim that a factual controversy is required to properly respond to this issue is not well founded.

3. Available water to be distributed must be apportioned to each of the landowners or entrymen pro rata on the basis of lands assessed as provided in NMSA 1978, §73-10-16.

4. The State does not dispute that the language of the 1906 contract imposed certain limitations on deliveries of Project water to members of CID. The State, however, is requested to specify the claimed limitations. Others may also respond.

5. Project water must be distributed by CID on a proportionate basis and all units within the district treated equally. The State and CID are requested, however, to specify the manner of determining the proportion. Others may also respond.

6. CID has a continuing right to deliver Project water for distribution to all of its members.

7. Members of CID are required to pay certain sums in order to receive water.

**D. ISSUES REQUIRING THE SUBMISSION OF MEMORANDA BRIEFS CONCERNING THE RESPECTIVE RIGHTS, DUTIES AND OBLIGATIONS OF THE UNITED STATES AND CID PERTAINING TO THE DIVERSION, STORAGE AND DISTRIBUTION OF PROJECT WATER**

The Court requests that memoranda briefs be submitted concerning the following issues to the Court by all counsel in the Project (Offer) Phase and the Membership Phase of these proceedings. Parties appearing *pro se* in either phase and other interested parties are granted leave to submit memoranda briefs concerning the issues.

1. Issues set forth in the Decision and Order of the Court denying and granting, in part, the State's Motion for an order adopting certain recommendations concerning the adjudication of water rights claims of CID members filed on March 20, 2001 (Court's Decision and Orders). Responsive matter in memoranda briefs submitted in response to the Court's Decision and Order



may be incorporated by reference into responses submitted pursuant to this Order.

### **ISSUES RE CLAIMS OF CID<sup>1</sup>**

2. Whether Project water rights are appurtenant to all of the claimed Project acreage appearing on the assessment rolls of CID, or acreage upon which water is devoted to beneficial use by individual members of CID?

3. The proper manner of determining the amount of water to be apportioned and distributed by CID to landowners by the board of directors of CID under NMSA 1978, §73-10-16.

4. Is the right of CID to issue priority calls against junior users on the Pecos River Stream System exclusive or may the United States or members of CID also issue priority calls?

5. Does CID have authority to transfer water rights of CID members from lands within the District to which water has been devoted to beneficial use to other lands within the District without obtaining a permit from the State Engineer or obtaining permission from its member(s)?

6. What is the proper interpretation of NMSA 1978, §73-13-4? Is the statute limited in its application to lands, "...which for any cause are not suitable for irrigation or capable of being properly irrigated..." and "...to other lands held by or within such District and which, in their judgment may be profitably and advantageously irrigated...."?

7. Does CID have the right under the Pecos River Compact to have Project water supply stored in upstream reservoirs in the quantities set and confirmed by permits issued by the State Engineer?

8. Does the State Engineer's permit of September 22, 1972 conclusively determine the

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<sup>1</sup> The Brantleys, generally, concur in the responses of the State.

matters set forth therein?

9. Are Project priority dates applicable to the water rights of members of CID or do members have separate individual priority dates?

10. Is there a relationship between shareholders of the Pecos Water Users Association that could somehow dictate the manner in which Project Water is required to be distributed and how is the determination of this issue relevant to the current proceedings?

11. Is the 1932 contract claimed as a source of the right to distribute water to 25,055 acres in the Project?

12. Is the claimed requirement that the delivery of water be conditional on the payment of certain charges predicated upon the 1932 contract or New Mexico law? If the former, citations to contract provisions should be submitted. If the latter, applicable New Mexico law should be cited.

13. Does the CID have the right and responsibility to operate all ditches, canals, drains and reservoirs within the geographical boundaries of the Project and to make any and all discretionary decisions involving allocation and distribution of the Project water supply to its members?

14. Under NMSA 1978 §73-10-5, does the acreage claimed by CID define its tax base and how is this issue relevant to defining the rights, duties and obligations of CID and the United States in connection with their respective claims concerning the diversion, storage and distribution of Project water?

15. How has CID misquoted NMSA 1978 §73-10-16 and what is the proper interpretation of this statute?

16. In what manner is CID's statement that its "... Board of Directors has the power to lease or rent the use of water, or contract the delivery thereof, to occupants of other lands or municipalities within or without CID's boundaries 'at such prices and terms as they deem best'" incomplete?

17. Under what circumstances is CID subject to the State Engineer's administrative authority?

18. Whether CID has power to approve transfers of water rights, changes of use, and distribution points of diversion within the boundaries of the Carlsbad Project without the State Engineer's approval?

19. Does NMSA 1978, §72-9-4 provide exemptions for federal Reclamation projects from the State Engineer's regulatory and administrative powers and the extent, if any, which the statute provides such exceptions.

20. Do CID members, as owners of water rights administered and allocated by CID have the right to apply their annual allotment, whatever that *pro rata* share may be, to all or any part of the designated tract of land assessed and assigned said water rights by CID without penalty or forfeiture?

21. Identify alleged statutory rights afforded members of CID pursuant to NMSA 1978, §72-5-28 (F).

22. Does CID's elected board of directors, under State law, have the authority to hold, control and operate and deal in both lands and water rights in the name of and for the use and benefit of the District and members of CID?

23. In what manner has CID incompletely cited NMSA 1978, §73-13-3? How are the

matters raised by this statute relevant to the issues now before the Court, particularly in light of prior determinations re Threshold Legal Issue No. 3?

24. Does CID have authority, upon application of any of its members, to transfer water rights appurtenant to lands within the district to other lands within the district which it believes may be profitably irrigated? In what manner is the discretion of the board of directors of CID limited in connection with the matters specified in this paragraph?

25. Are individual CID members permitted to demand delivery or distribution of water in storage above and beyond the amount CID has allocated *pro rata* to all of its members in any given year and under what circumstances, if any, may CID members assert such rights?

26. CID is requested to identify the "large discretionary powers conferred by statute upon the board necessary for the District to operate practically and successfully when estimating funds required to meet next years obligations and determining tax levies" and state the relevancy of these claims to the matters now before the Court.

27. What is the proper interpretation of NMSA 1978, §73-11-29 in connection with CID's claim that members who desire to receive water during the course of the year must furnish the district with a statement of the number of acres to be irrigated and that CID, in its discretion, is not required to provide water to lands within the district it deems unfit for cultivation or to which existing distribution works cannot furnish water? The State alleges that is an incomplete statement of the provisions of the statute.

28. The State is requested to submit to the Court a statement as to why it claims that CID's claim that the amount of money needed to meet CID's obligations is raised by tax assessment, levied and collected *pro rata* per irrigable acre over all lands in the district is an incomplete

recitation of the provisions of NMSA 1978, §73-11-29 and why the claim is irrelevant to matters now pending before the Court.

29. The State is requested to submit a statement as to why it disputes CID's statement that it is granted broad powers to legally represent its member's interests, including their water rights, and the duty to protect their Project water rights. CID is requested to submit a more definite statement of its alleged broad powers.

### **ISSUES RE CLAIMS OF THE UNITED STATES**

30. Do the United States and CID have the right to issue priority calls in connection with their respective rights of diversion, storage and distribution of Project water regardless of whether they are denominated water rights?

31. Can the diversion and storage rights of the United States in connection with Project water be forfeited?

32. Issues concerning the relationship of the 1906 contract and subsequent contracts with New Mexico statutes controlling the operation of the Carlsbad Irrigation District.

33. Exemptions afforded CID under NMSA 1978, §72-9-4.

34. Do State Engineers' permits conclusively determine the matters contained therein?

35. Does distribution of water within the Project depend on the will of the United States?

36. Does the United States have authority to refuse to release water to the Carlsbad Irrigation District and, if so, under what circumstances?

37. The State is requested to identify areas of dispute in connection with the claims of the United States as set forth in paragraph 17, pp. 12-13 of the State's Response and submit a memoranda brief in support of its claims and contentions.

**E. MISCELLANEOUS**

1. The Membership Phase and the Project (Offer) Phase of these proceedings are consolidated for the purpose of considering the matters set forth herein concerning the respective rights, duties and obligations of the United States and CID in connection with the diversion, storage and distribution of Project water.

2. Counsel are encouraged to meet and discuss the issues referred to herein and attempt to clarify, simplify and limit the number of issues requiring the submissions of memoranda briefs.

3. Counsel are requested to report to the Court concerning the status of their settlement negotiations.

4. Counsel are requested to submit a status report re the "acreage issue". The February 15, 2001 submission was not helpful to the Court.

5. Counsel for the State and the United States are requested to submit a status report concerning the "ownership issue".

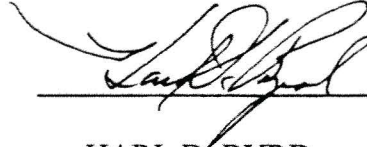
6. To the extent that claims of the parties are not addressed herein, the Court considers that determinations in connection therewith are not essential in order to determine the respective rights, duties and obligations of the United States and CID in connection with the diversion, storage and distribution of Project water and the Court expresses no opinion in connection therewith.

7. Objections, comments and suggestions concerning any aspect of this order shall be submitted to the Court on or before May 1, 2001.

8. All status reports shall be submitted to the Court by May 1, 2001. All memoranda briefs shall be submitted to the Court by June 1, 2001.

9. Except for those served by the Court as set forth in Exhibit A, counsel for the State

shall serve a copy of this order upon all counsel and parties appearing *pro se* in the Membership Phase, those participating in the Project (Offer) Phase of these proceedings and all depositories.

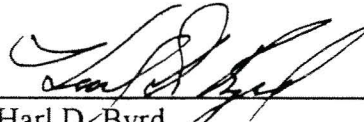


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HARL D. BYRD  
DISTRICT JUDGE *PRO TEMPORE*

CERTIFICATE OF MAILING

The undersigned does hereby certify that he caused to be mailed, postage prepaid, a copy of the forgoing order to counsel specified on attached Exhibit A on this 5th day of April, 2001.



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Harl D. Byrd  
District Judge *Pro Tempore*

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