

July 30, 2003

Counsel for the Negotiating Parties:

Re: *State v. Lewis, et al.*, Chavez County Cause Nos. 20294 & 22600 Consolidated - Comments re Proposed SCHEDULING AND PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE, Exhibits thereto and SUPPLEMENTAL JOINT MOTION REQUESTING APPROVAL OF SERVICE PROCEDURE PURSUANT TO RULE 1-004(L) NMRA 2003

Dear Counsel:

Please refer to Mr. Schatzman's letters to me dated May 22, 2003 and July 17, 2003, the proposed revised form of SCHEDULING AND PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE with revised Exhibits: "A", "B", and "C" enclosed therewith, the SUPPLEMENTAL JOINT MOTION REQUESTING APPROVAL OF SERVICE PROCEDURE PURSUANT TO RULE 1-004(L) NMRA 2003, the DECLARATION of CHRISTOPHER G. SCHATZMAN, ESQ. IN SUPPORT OF SUPPLEMENTAL JOINT MOTION REQUESTING APPROVAL OF SERVICE PROCEDURE PURSUANT TO RULE 1-004(L) NMRA 2003 and Mr. Schatzman's letter to me dated July 26, 2003.

Mr. Schatzman has advised that all of the submissions have the concurrence of counsel for all of the Negotiating Parties and Mr. Bloom and Mr. Martin, who represent some of the water rights claimants. Mr. Schatzman has also advised that the procedures for the issuance of the proposed notices as set forth in Exhibits "B" and "C" by the Clerk of the District Court, have been correlated with the Clerk, Ms. B. J. Clem, and that she has no objections to the proposed procedures.

1. COMMENTS RE PROPOSED SCHEDULING AND PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE AND PROPOSED EXHIBITS "A", "B", AND "C".¹

¹ Apparently, the content of Exhibit "B" and "C" is identical. Is this correct? Since the procedure for incorporating a duplicate of Exhibit "B" has been agreed upon, I will not object; however, it would seem easier to require that the Negotiating Parties cause to be published the notice in the form of Exhibit "B".

In reviewing the matters set forth in this letter, please refer to my letter dated June 5, 2003, concerning prior submissions.²

A. I have the following comments and recommendations concerning the revised proposed SCHEDULING AND PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE and proposed Exhibits "A", "B" and "C":

- 1) Beginning with the first full paragraph, page 2, and continuing through the first full paragraph on page 3.

I have previously recommended and reiterate my recommendation that these provisions be deleted. I do not understand why they are necessary. They raise what may be non-existent and what may be false issues. If and when issues are raised by an interested party concerning the sufficiency of notice, service thereof or similar related issues, the matters will then be addressed. At present, however, the potential issues may never arise and I do not believe it is my province to decide possible potential issues at this time.

- 2) In the second full paragraph on Page 3, second line, after the word "Decree," insert "(The Proposed Partial Final Decree)"
- 3) Under subparagraph A, SOLICITING AND FILING WITHDRAWALS OF OBJECTIONS AND CONSENTS TO ENTRY OF PROPOSED PARTIAL FINAL DECREE BY CID AND PVACD, page 3, line 8, move the figures in parenthesis "(35)" to after "five".
- 4) Subparagraph B. ADOPTION OF PROCEDURES FOR SERVICE OF NOTICE PURSUANT TO RULE 1-004(L) NMRA 2003, page 4.

Both Rule 1-004 H. and L. require showings by affidavits or sworn pleadings.

- 5) Under PART C., SERVICE OF NOTICES OF JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE; OPPORTUNITY TO OBJECT, paragraph 1, Notice to Members of the Carlsbad Irrigation District, page 4.

I would have thought that appropriate requisite notices would have been given by CID to its members when the Term Sheet was presented and public meetings held in connection with the proposed settlement

² I requested that a presentment hearing by telephone conference call be arranged as expeditiously as possible. Apparently, it was deemed best to submit a new filing.

agreement; however, I have no objection to CID giving further notice to its members.

As you know, under our rules of civil procedure, notice by mail is effective only as to those who have been joined as parties; otherwise, personal service is required. This raises issues that may or may not have been considered. See also, the requirements of personal service in order to meet due process requirements as set forth in *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306. These matters may also involve part C. 2. Notice to Known Persons Claiming Water Rights in the Pecos River Stream System Who Are Not Members of CID. page 4, *infra*.

- 6) Under part C. SERVICE OF NOTICES OF JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE; OPPORTUNITY TO OBJECT, 2. Notice to Known Persons Claiming Water Rights in the Pecos River Stream System Who Are Not Members of CID.

Please refer to my comments re service by mail and personal service and the due process requirements of *Mullane*, under part 5, *supra*.

I understand that others (not the State) will be physically mailing the notices. I have no objection to this procedure.

- 7) Under paragraph D, NOTICE BY PUBLICATION TO ALL DEFENDANTS AND ALL PERSON CLAIMING WATER RIGHTS IN THE PECOS RIVER STREAM SYSTEM WITHIN THE STATE OF NEW MEXICO AND ALL UNKNOWN PERSONS WHO MAY CLAIM AN INTEREST IN OR THE RIGHT TO USE WATER IN THE PECOS RIVER STREAM SYSTEM., page 6:

Delete the phrase " The Negotiating parties shall cause to be published as legal notices, a notice in the form attached hereto as Exhibit C" and substitute the following:

Upon the preparation and filing with the Clerk of the court of a sworn pleading or affidavit as required by Rule 1-004 H (1) NMRA 2003 and the issuance by the Court clerk of notice of the pendency of action or proceeding, the Negotiating parties shall cause to be published as a legal notice, the notice in the form attached hereto as Exhibit C...

- 8) In subparagraph E. REPOSITORIES, subparagraph 3, second full paragraph, line 4,

Delete "adequate" and substitute "accurate" and in line 5, delete the word "complied" and substitute "compiled."

- 9) Paragraph G. ORDERS TO SHOW CAUSE, SCHEDULING CONFERENCES, AND HEARINGS ON OBJECTIONS NOT WITHDRAWN, 2. Filing Statement Setting Forth Objections with Specificity., page 10.
- a) In the subheading change "Specificity" to "Particularity".
 - b) Delete the last sentence which reads, "Said statement shall also include, to the extent available to the Objector, a summary of the evidence the Objector will present in support of the objection."

Paragraph 5. Hearings on Orders to Show Cause., page 11.

I am concerned about possible issues concerning shifting burdens of proof and going forward with evidence. Please submit the benefit of your research and authorities concerning this matter to the Court. Perhaps it would be best to defer consideration of these matters until they are raised by interested parties in an adversarial context.

2. RECOMMENDATIONS AND COMMENTS RE SUPPLEMENTAL JOINT MOTION REQUESTING APPROVAL OF SERVICE PROCEDURE PURSUANT TO RULE 1-004L.NMRA 2003

The necessity of personal service as required by *Mullane, supra*, should be reviewed and issues concerning the necessity of personal service considered and resolved. Joinder of parties may be required which would permit service by mail and reduce service costs.

3. SUPPLEMENTAL SUBMISSIONS

To the extent that supplemental submissions are required or deemed desirable, they can be considered in connection with either written submissions or a telephone conference call.

Chris Schatzman

From: Harldb

Sent: Wednesday, July 30, 2003 11:56 AM

To: Chris Schatzman; SLH; bjsin; david.gehlert; sshanor; fhennighausen; rsimms; sck; pabl; phillips; ajolsen; martinlaw; beej; vlgabin; jlochhead

Subject: Comments re Proposed SCHEDULING & PROCEDURAL ORDER ETC.

If you have any problems with the attached letter, please notify us. Also, a reply stating that you have received it would be much appreciated. Jo