

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

1994 FEB 26 AM 11:41
CLERK DISTRICT COURT

STATE OF NEW MEXICO ex rel.)
STATE ENGINEER and PECOS VALLEY)
ARTESIAN CONSERVANCY DISTRICT,)

Plaintiffs,)

vs.)

L.T. LEWIS, et al., and)
UNITED STATES OF AMERICA,)

Defendants.)

Nos. 20294 and 22600
Consolidated
Carlsbad Basin Section
Carlsbad Irrigation District Section

**PRETRIAL ORDER FOR
CARLSBAD PROJECT WATER RIGHT CLAIMS**

THIS MATTER having come before the Court and counsel of record having approved this Pretrial Order, the Court hereby enters it.

SUMMARY STATEMENT OF CASE AND PRETRIAL ORDER

The adjudication of the water rights for the Carlsbad Project has been initiated by a stipulated offer of judgment (Offer) entered into by plaintiff State of New Mexico ex rel. State Engineer (State), the United States of America (United States), and the Carlsbad Irrigation District (District) and filed June 22, 1994. Pursuant to the Court's May 9, 1994, pretrial order and February 3, 1995, order, the State served notice of the Offer on water right claimants of record in the Pecos River stream system and published notice in newspapers of general circulation. The notice provided opportunity for objection to the Offer and many objections were filed. On May 26, 1995, the United States and the District filed a motion with the Court seeking a ruling on certain procedural and due process issues. Pursuant to the Court's June 16, 1995 order, State Counsel coordinated a counsel of record report for the Court identifying the issues

in the objections and motion and recommending procedures for their resolution. Pursuant to the Court's Order of August 30, 1991 permitting joinder of parties by the State without notice or service of notice upon other parties, the Court on June 22, 1995 ordered members of the District to be joined as defendants in the Carlsbad Basin Section.

The provisions of this Pretrial Order were prepared and proposed to the Court by a committee of counsel ("Committee Counsel") appointed by the Court at the October 23, 1995, hearing on the State's Motion for Adoption of Report and for Order Setting Hearing on Issues, Initial Pretrial Order, and Controls for Conduct of Adjudication. The Committee Counsel consists of:

Rebecca Dempsey, Counsel for State
Lynn A. Johnson, Counsel for United States
Steven L. Hernandez, Counsel for District
Frederick H. Hennighausen, Counsel for Pecos Valley Artesian
Conservancy District (PVACD)
Stuart D. Shanor, Counsel for PVACD

The Committee Counsel was assigned the task of preparing a pretrial order for the disposition of the issues identified in this matter. Prior to submission of the Pretrial Order to the Court, it was distributed to counsel of record, which includes counsel representing objectors, for review of substance and form. The Pretrial Order was then submitted to the Court with the approval of counsel.

PURPOSE AND SCOPE

The purpose of this Pretrial Order is to govern all subsequent proceedings for the disposition of the procedural and threshold legal issues identified herein, as well as to identify the Offer issues and to provide for a supplemental pretrial order governing the disposition of those issues. This Pretrial Order supersedes all prior procedural orders and pretrial orders in this

Carlsbad Project adjudication to the extent they are inconsistent with this Pretrial Order. All issues covered by this Pretrial Order are concerned with and arise from:

1. The filed objections to the Offer.
2. The May 26, 1995, motion of the United States and the District requesting that the Court rule upon the adequacy of the notice of the Offer, sufficiency of service, and other procedural and due process issues.
3. The motion of the State filed August 31, 1995, for a court order adopting the report attached thereto and the entry of a pretrial order submitted with the motion.

JURISDICTION AND VENUE

This is an action to determine the water rights for the Carlsbad Project which has been initiated by the Offer. The jurisdiction of the Court is not disputed and is hereby determined to be present. Venue is proper under N.M. Stat. Ann. §72-4-17 (1985 Repl.).

GENERAL NATURE OF THE CLAIMS

The water rights claims for the Carlsbad Project are specifically identified in the Offer. Notices of objections to the Offer have been filed by over 900 water right claimants in the Pecos River stream system.

The issues in the objections were initially identified by counsel in the report accompanying the State's motion filed August 31, 1995. Opportunity for all parties to identify additional issues was provided at the October 23, 1995, hearing. The United States and the District have not yet filed their responses to the objections to the Offer. Issues have been identified from the Offer and objections as follows.

PROCEDURAL ISSUES

1. Whether the State's notice to the water right claimants in the Pecos River stream system was sufficient since it did not advise them how their rights could be affected by the Offer or how they could determine the effect of the Offer on their

rights.

2. Whether the State service of the notice was sufficient since some water right claimants in the stream system did not receive the notice and since some of the published legal notices contained publication errors. The State has performed additional service as directed by the Court and has filed affidavit(s) setting forth the procedures utilized in making service of the notice of the Offer and the opportunity to object. Whether service by publication in this proceeding required SCRA 1986, 1-004.H, affidavits is a part of this issue.
3. Whether the decree adjudicating the project water rights will be binding on all water right claimants in the Pecos River stream system or only on those claimants made defendants through personal service of summons and complaint.

PVACD has withdrawn its objections to the sufficiency of the notice, sufficiency of the service and procedural due process identified in issues 1 and 2 above. PVACD does not intend to file a brief on these issues. All counsel of record have notified the State, United States and the District of any deficiencies in service or publication of which they are aware.

In a Pretrial order dated May 9, 1994, the Court found that any order entered in this case adjudicating the water rights of the Carlsbad Project "shall be final and binding on all parties and on all water right claimants within the Pecos Stream System subject only to such future modification as may be authorized by the Court." Pursuant to Order entered by the Court on February 3, 1995, the Court found the notice of the Offer "adequately informs defendants in the Pecos river system water right adjudication and all persons claiming water rights in the Pecos River stream system of their right to object to all or any part of the Carlsbad Project water right claims described in the Stipulated Offer of Judgment. . . ." The United States and CID support the legal conclusions of the court as stated above. Therefore, the United States and CID do not intend to file a brief on these issues except in response to a brief filed by another party.

The procedural issues will be resolved by the Court prior to consideration of the threshold

legal issues. Parties raising these issues will submit their initial legal briefs on the procedural issues within thirty (30) days following the service of the Pretrial Order. The parties will file response briefs within thirty (30) days following the filing of the initial briefs and reply briefs within fifteen (15) days following the final date for filing the response briefs. All participants shall be prepared to present oral arguments if requested by any party or the Court within thirty (30) days following the completion of briefing.

The Court's decision with respect to the procedural issues will dictate whether it will be necessary to revise the adjudication process or whether the parties can proceed to the threshold legal issues described below. Within thirty (30) days following a decision on the procedural issues permitting the adjudication to proceed to the threshold legal issues the United States and the District shall file their responses to all filed objections to the Offer. Rather than respond to the individual objections, it will be sufficient for the United States and the District to generally respond to the categories of Threshold Legal Issues and Offer Issues identified in this Pretrial Order. Additionally, after service and joinder of District members are completed, the State reserves the right to file a motion to consolidate the project and member adjudications as to certain common legal and factual issues. All parties reserve the right to object to the motion on any grounds including but not limited to the ground that the motion is premature with respect to the schedule set forth to brief the Threshold Legal Issues.

THRESHOLD LEGAL ISSUES

1. Whether the utilization of the stream system inter se procedure for the project adjudication prior to the adjudication of all other stream system subfiles denies due process to affected parties and is contrary to State v. Pecos Valley Artesian Conservancy District, 99 N.M. 699, 663 P.2d 358 (1983).

2. 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.
3. Whether project water rights described in the Offer are rights of the United States and/or the District or rights of the District members.
4. Whether the adjudication of the project rights described in the Offer may proceed without first adjudicating the interests of the District members.
5. Whether the decree in Texas v. New Mexico, U.S. Supreme Court No. 65, Original, creates a conflict of interest for the State in this adjudication requiring the withdrawal of its participation in the Offer.
6. Whether provisions in the Enabling Act of the State of New Mexico require representation of the United States Attorney General of the State Land Office in this proceeding, and, if there is such a duty to represent the State Land Office, whether such duty results in a conflict of interest sufficient to require the withdrawal or reconsideration of the proposed Offer. By inclusion of this issue in this Pretrial Order, the United States does not waive its right to object to this being a Threshold Legal Issue on the grounds that it was not raised by timely objection.

The identification of these issues for briefing in this Pretrial Order does not indicate concurrence of any party as to whether or not these are valid legal issues that should or can be resolved by the Court in this case, or whether or not any party has standing to raise these issues. The United States does not waive any arguments or defenses it may have that consideration of any issue by this Court is precluded by the McCarran Amendment. The threshold legal issues will be resolved by the Court, if appropriate, prior to consideration of the Offer issues.

The parties will file briefs on the issues in accordance with the following schedule. PVACD and other parties raising the issues will file their initial legal briefs on issues 1, 3, 4, and 5, the United States and the District will file their initial legal briefs on issue 2, and the State Land Office will file its initial legal brief on issue 6 within forty-five (45) days following the filing of responses to the objections by the United States and the District. The parties will file

response briefs within sixty (60) days following the final date for filing the initial legal briefs and reply briefs within thirty (30) days following the final date for filing the response briefs. All participants shall be prepared to present oral arguments if requested by any party or the Court within forty-five (45) days following completion of the briefing.

The Court's decision with respect to the threshold legal issues will dictate whether it will be necessary to revise the adjudication process or whether the parties can proceed to the Offer issues described below.

OFFER ISSUES

1. With respect to diversion rights, beneficial use, and historic supply, whether:
 - a. The Offer recognition of direct diversions in addition to storage rights allows an improper aggregation of claims to the detriment of upstream users.
 - b. The annual project diversion or depletion rights are excessive since farm-by-farm determinations of use have not been made.
 - c. Reasonable beneficial use of the claimed right has been made by the District.
 - d. The claimed diversion right must be limited by the historic beneficial use in the project and reflect the historical supply in the river.
2. With respect to priorities and acreage, whether:
 - a. Claimed priorities are justified, either historically or through the relation back doctrine.
 - b. Project acreage must be established by acreage actually and continually irrigated and whether any project acreage has been forfeited or abandoned.
3. With respect to consumptive use, irrigation efficiency, and conveyance loss, whether:
 - a. Irrigation efficiencies stated in the Offer are excessively low and contrary to the conservation of water.

- b. The claimed project water right has been established or expanded through waste.
 - c. The Offer duty, consumptive use, and depletion are correct and justified.
4. With respect to wells and other sources of supply, whether:
- a. Supplemental wells in the project must be adjudicated first so that claimed surface diversions will not be overstated.
 - b. Black River water is adequately stated as an offset to the use of Pecos River water.
5. With respect to impoundment, diversion, and storage, whether:
- a. Storage claims are excessive since evaporation, bank storage, loss from bank storage and conveyance losses are not shown and may be limited by the extent of beneficial use.
 - b. The total storage right of 176,500 acre-feet has been put to beneficial use within a reasonable time.
 - c. The 1906 priority for Lake Sumner and Santa Rosa Lake is correct and should apply to the additional lake surface areas and evaporation.
 - d. The 1893 priority for Brantley Lake is correct and should apply to the additional lake surface area and evaporation.
 - e. The total quantities of water for the project are reasonable, and consistent with conservation.
6. With respect to project water right claims of the United States and the District in the Offer, whether they should be required to make the bases for the following claims more definite:
- a. Domestic and livestock use.
 - b. Project use of reservoir storage.
 - c. Water right acreages expressed in acres and acre feet and the priorities attached to said acreages.

Within sixty (60) days following a Court decision permitting the parties to proceed to the Offer issues, the parties shall submit to the Court a proposed supplemental pretrial order for disposition of the Offer issues utilizing the form of the pretrial order adopted by the United States District Court for the District of New Mexico. All parties electing to participate in connection with issues involving the Offer as hereinafter provided shall be given notice by the State of a procedure which will afford them an opportunity to participate in the preparation of the supplemental pretrial order. The notice shall be given within fifteen (15) days following the aforesaid decision by the Court.

DISPUTED ISSUES OF FACT AND LAW

The foregoing procedural, threshold legal, and Offer issues shall constitute the disputed issues of fact and law in this proceeding. Objections described in categories 1 and 2 of Exhibit 3 to the Report submitted with the State's August 31, 1995, motion are dismissed for lack of specificity regarding issues of fact or law.

EXTENSIONS OF TIME

For good cause and with concurrence of Committee Counsel, the time provided in this Pretrial Order for the submission of briefs and for submission of the proposed supplemental pretrial order may be extended up to thirty (30) days without further action by the Court. A motion and order of the Court shall be required for any extension of time exceeding thirty (30) days.

PUBLIC REPOSITORIES OF INFORMATION

For the convenience of all water right claimants in the Pecos Stream System, the following repositories have been established at locations within the stream system where

pleadings, briefs, notices of hearings, and orders that are filed pursuant to this Pretrial Order will be available for inspection: Guadalupe County Courthouse, 420 Parker, 2nd Floor, Santa Rosa, NM 88435; DeBaca County Courthouse, 514 Avenue C, P.O. Box 910, Ft. Sumner, NM 88119; Pecos Valley Artesian Conservancy District, 2303 East 2nd Street, Roswell, NM 88201; Carlsbad Irrigation District, 201 S. Canal, Carlsbad, NM 88220; and Chaves County District Court, 401 N. Main, P.O. Box 1776, Roswell, NM 88201. These public repositories shall be included on all service lists compiled in accordance with the provisions of the Limitations of Service, ¶ b, page 10.

LIMITATIONS ON SERVICE

Pursuant to SCRA 1-005, service of briefs, other pleadings and notices of hearings filed pursuant to this Pretrial Order is limited as follows:

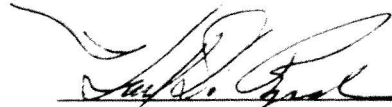
- a. Every party intending to file a brief or other pleading and to present argument at the hearing on the Procedural, Threshold Legal, or Offer issues established in this Pretrial Order, which issues were included in that party's objections to the Offer, shall so indicate on the form attached hereto as Exhibit A. (Parties participating in litigation of the Offer issues may be subject to discovery and may be required to share in the cost of depositions in which they participate.) The completed forms must be returned to the State within 15 days after service of this Pretrial Order. Parties who do not intend to file briefs and present argument may review pleadings filed by others at the public repositories.
- b. The State shall compile service lists for each category of issues comprised of the names and addresses of the parties who have indicated that they intend to participate in the briefings and hearings on the issues. The State shall serve the service list on every party included on the lists for the Procedural and Threshold Legal Issues no later than 10 days prior to the filing of initial legal briefs for those category of issues, and, as to the list for the Offer Issues, within sixty (60) days following service of this Pretrial Order. The service lists shall include the public repositories listed on this page.

- c. The United States, CID and the State may file briefs or other pleadings on any of the issues included in the Procedural, Threshold Legal, or Offer categories. The Mescalero Tribe may file briefs or other pleadings on any of the Procedural issues and on issues 1 and 2 of the threshold legal issues. Any party filing an initial legal brief or other pleading must serve the brief or other pleading on the United States, CID and the State, and every person on the service list for that category. Any party filing an initial legal brief or other pleading on the Procedural issues or issues 1 and 2 of the threshold legal issues must also serve the brief or other pleading on the Mescalero Tribe.
- d. Any responses to the briefs or other pleadings filed in accordance with subparagraph c. above shall be served only on the parties who filed such pleadings, on the United States, CID and the State, the public repositories, and, for the procedural issues and issues 1 and 2 of the threshold legal issues, on the Mescalero Tribe.
- e. Any replies shall be served only on parties who filed a brief or other pleading in accordance with either subparagraph c. or subparagraph d. and on the United States, CID, the State and the public repositories.
- f. Notice of hearing on issues included in the Procedural, Threshold Legal, or Offer categories shall be served only on parties who have filed a brief or other pleading in accordance with subparagraph c. or subparagraph d. above, on the United States, CID and the State and on the public repositories listed on page 9 above.
- g. Failure of any objector to file a brief or other pleading related to issues included in the Procedural, Threshold Legal, or Offer categories will be deemed a waiver of further notice of proceedings as to the issues included in those categories.

MODIFICATIONS

Objections to the Pretrial Order shall be filed with the Court no later than ten (10) days after service of the Pretrial Order. This Pretrial Order will control the course of the proceedings and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent injustice.

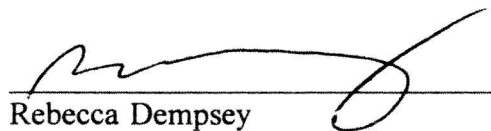
Date Served: Feb 23, 1996



HARL D. BYRD
District Judge Pro Tempore

Submitted:

Attorney for State:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Pretrial Order was mailed to parties objecting to the stipulated offer of judgment entered into by the State, United States, and District and to counsel of record on Feb 23, 1996, 1996.

A handwritten signature in cursive script, appearing to read "Robert DeLong", is written over a horizontal line.

FIFTH JUDICIAL DISTRICT
 COUNTY OF CHAVES
 STATE OF NEW MEXICO

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 UNITED STATES OF AMERICA,)
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 Consolidated
 Carlsbad Irrigation District
 Carlsbad Basin Section

Statement of Intent to Participate in Briefing and Hearing on Objections

TO: Rebecca Dempsey
 Special Assistant Attorney General
 State Engineer Office
 P. O. Box 25102
 Santa Fe, NM 87504-5102

FROM: _____
 Name of Objector (Attorney, if any)

 Address Attorney Address

Identification of Water Right (include Basin and SEO file number, subfile order number, and ditch or location of point of diversion)

I intend to file a brief or other pleading and to attend any hearing on one or more of the issues included in the following categories which were issues I raised in my objections to the Stipulated Offer of Judgment for the Carlsbad Project (see accompanying Pretrial Order for descriptions of the issues in each of the categories):

- _____ I. Procedural Issues
- _____ II. Threshold Issues
- _____ III. Offer Issues (parties participating in litigation of the Offer Issues may be subject to discovery and may be required to share in the cost of depositions in which they participate.)

 Signature Signature

RETURN THIS FORM TO REBECCA DEMPSEY BY March 9, 1996