

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,)
)
Defendants.)

Nos. 20294 & 22600
CONSOLIDATED

Carlsbad Basin Section
Carlsbad Irrigation District

OPINION RE THRESHOLD LEGAL ISSUE NO. 5

THIS MATTER comes on for consideration by the Court in connection with Threshold Legal Issue No. 5 which provides:

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.

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

I. SUBMISSIONS REVIEWED BY THE COURT.

In connection with the Court's consideration of Threshold Legal Issue 1, the Court has reviewed:

1. **PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE #5** (PVACD's Brief) served on October 28, 1996.
2. **DEFENDANTS' BRIEF ON THRESHOLD LEGAL ISSUES NO. 1, 4 AND 5** submitted by Defendants identified on Exhibit A to their brief, filed by A.

J. Olsen of Hennighausen & Olsen and served on October 28, 1996. This submission incorporated the arguments set forth in PVACD's Brief.

3. **STATE'S RESPONSE TO PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE #5** (State's Response) served on December 24, 1996.
4. **PVACD'S REPLY TO STATE'S RESPONSE ON THRESHOLD LEGAL ISSUE NO. 5** (PVACD's Reply) served on January 22, 1997.

II. CLAIMS AND CONTENTIONS OF PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT (PVACD) AND THE STATE OF NEW MEXICO (State)

PVACD claims that the State has lost its objectivity and is in a conflict position because the State negotiated and agreed to a subfile determination of water rights of the United States of America (United States) and the Carlsbad Irrigation District (CID) in connection with the Carlsbad Project. This provided an extremely large amount of water rights to the US/CID which also provided the State with a convenient method of maximizing state-line flows for delivery to the State of Texas now required by the Pecos River Compact, C.H. 184, 63 Stat. 159 (1949); NMSA 1978, §72-15-19 (1985 Repl. Pamph.). PVACD's Brief, at 2.

...The state's current position in the interstate conflict with Texas, as it affects the position taken by the state in this case, creates the main conflict to which PVACD objects in this brief. The basis for this conflict was foreshadowed by some of the engineering assumptions underlying the Pecos River Compact, then it was made worse by some of New Mexico's arguments to the United States Supreme Court, and it was further worsened in an entirely new fashion by the Court's decisions in the *Texas v. New Mexico* case. The conflict began to be given form and permanence by the state's often successful efforts to influence this litigation to serve the Court's newly imposed interstate obligations on New Mexico to deliver water

to Texas. Finally, the conflict was reflected in the state's Offer to CID in this case.

At 3.

In the State's Response served on December 24, 1996, the State responds:

PVACD seems to believe that adjudication of the rights set out in the Stipulated Offer would enable New Mexico to meet its Compact deliveries and solve the problem created by Texas v. New Mexico, U.S. Court No.65, Original. The facts do not bear this out. In 1995 the Carlsbad Project delivered 3.5 acre feet per acre to Project lands, a full supply, yet the Pecos River Master appointed by the United States Supreme Court determined that New Mexico under delivered in 1995 by 14,100 acre feet. Texas v. New Mexico, Report of the River Master, Water Year 1995, June 20, 1996 (excerpt, Exhibit A hereto). There does not appear to be any direct correlation between delivery to the Carlsbad Project of the amount of water set out in the Stipulated Offer and delivery to Texas of the water required under the Compact. In other words, surface flows in the Pecos River in an amount sufficient to satisfy a Carlsbad Project right as set out in the Stipulated Offer do not guarantee that there will be sufficient flows at the state line to satisfy New Mexico's Compact delivery obligation. Even if there were a direct correlation and adjudication of the rights in the Stipulated Offer would somehow ensure New Mexico's compliance with its Compact delivery obligations, PVACD does not explain how that would ease the task before the State. A priority call by the US/CID would have the same disastrous consequences for the economy of the region as a curtailment to make up a shortfall in New Mexico's Compact deliveries. It is not even clear whether adjudication of the rights in the Stipulated Offer would alter the identity and number of junior uses that would have to be curtailed in the event of a Compact shortfall. The State's Compact obligations and the manner in which it must meet those obligations will be unaffected by the Court's decision as to the water rights of the Carlsbad Project.

The scenario imagined by PVACD--that the State sees the Stipulated Offer as a 'convenient method' of meeting its Compact deliveries--does not stand up to logic or the hydrologic facts. New Mexico's obligations under the Compact do not create a conflict which prevents it from entering the Stipulated Offer because the Carlsbad Project water rights, whatever they are, do not provide the State a way out of its Compact delivery dilemma.

At 2 and 3.

The State then states:

...The fact that CID, the United States and the State have stipulated to the Project rights does not increase PVACD's burden in any way. In this, as in every other subfile adjudication, the burden of proof remains on the water right claimant, i.e. US/CID. State ex rel. Martinez v. McDermott, 120 N.M. 327, 330 (Ct.App.1995). Although the State stands ready to submit to the Court the relevant and admissible evidence in its possession pertaining to the Project water rights, it will not be actively defending those rights. That is the job of the claimants. Id. The State has entered into thousands of similar stipulations with thousands of other water right claimants in the Pecos River stream system. When those rights are subjected to *inter se* challenges, the State will also be present, but not as an advocate for the water rights being challenged. Any other approach would put the State in the untenable position of being an advocate for thousands of potentially adverse claimants.

At 5.

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By negotiating the Stipulated Offer, the State has done nothing more than set the stage for this proceeding to determine the Project rights. The claimants will present their evidence in support of the rights claimed and the objectors will present their evidence in opposition to those rights. The Court will adjudicate the Project rights based on the evidence presented. The Stipulated Offer is just the starting place for the litigation. It is not even *prima facie* evidence of the Project rights. The Stipulated Offer explicitly states on page 8, that, 'This Stipulated Offer of Judgment is made solely for the purpose of settling the disputed diversion, impoundment, and storage claims of the defendants to the public surface waters of the Pecos River Stream System....'.

At 6.

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PVACD appears to believe that the State is applying different standards to the claims of groundwater right users in the Roswell Artesian Basin than to the Project rights. The State fully agrees that it must apply the same standards to all water rights in the Pecos River stream system. State ex. rel. v. Allman, 78 N.M. 1, 427 P.2d 886 (1967). That is precisely why the State moved the Court to issue orders to show cause to all supplemental groundwater right claimants in the Hondo Basin and asked the Court to amend the Hondo Basin subfile orders. It was the State's position that if the Hondo Basin subfile orders adjudicated relation back to

the supplemental groundwater rights, that was not done in accordance with the Templeton doctrine and should be corrected so that the same criteria are used to determine all groundwater priorities. State v. Lewis, Rio Hondo Basin Section, Letter decision regarding 'State's Motion to Dismiss Affirmative Defenses, or in the alternative, to Amend Subfile Orders or the Order Adopting Final Report 37' (September 20, 1995). The State fully intends to apply the Templeton criteria to any relation back claims made by CID members who have supplemental groundwater rights.

In PVACD's Reply, PVACD amplifies its position stating:

The State's participation in and support of the offer to the US/CID (incorporating what the PVACD believes are inflated quantities), presents a conflict in that the greater the quantity adjudicated and available to the CID the greater the quantities which should and will be available for meeting Compact commitments. It is good that the State should meet its Compact commitments. It is not good that the CID adjudication should be used as a vehicle in that effort.

This would be contrary and adverse to the interests of upstream users junior to the CID whose rights were, or are now being, adjudicated on the basis of historical data including the availability of water, forfeiture, abandonment, beneficial use and surveys of specific lands irrigated. The State's support of high quantities of diversion for the US/CID, resulting in increased flows to Texas and reduced State obligations under the Compact, is in conflict with its advocacy of difference and more restrictive standards utilized to determine the rights of upstream water users.

At 4.

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The State has entered a contract with the US and CID, and another contract with CID members, to lease up to 20,000 acre feet of water rights for the delivery of water to Texas. *See id.* PVACD does not challenge the validity of the water right leasing program, and agrees that it is an innovative way of meeting the challenges described by the State in its Response on this issue. However, if this Court adjudicates more water rights to the US/CID in this proceeding than justified by historic beneficial use and the other factors identified by PVACD, it will mean that more water will be available to the state near the Texas state line for leasing. It is not this program that causes the conflict complained of by PVACD, but the State's agreement regarding the adjudication of CID's rights. The existence of this program is the main reason why the adjudication of rights to CID will

affect the State's dilemma in complying with its Compact duties to Texas, and why the State is interested in the amount adjudicated to CID or the US.

At 7 and 8.

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We do not ask that the State agree with the PVACD position or align itself with PVACD. For one thing, we have sought an explicit recognition that the burdens of proof in this proceedings will not change. Despite the State's assurances in this regard in the past, that has not been clear heretofore. For another, we requested the Court to require the State to disown the claims it had apparently agreed to and to require US/CID to adopt the claims made in the Offer as their own, not the State's. The offer made to the US/CID is not similar to stipulations made with thousands of other water right claimants.

At 8.

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The main question here is not factual, but legal. It relates to the burden of proof. It is true that most of the disagreements between PVACD and the state are reflected in the type of factual disputes addressed above, and can be resolved in evidentiary proceedings. Our concern, though, is that the State's role as a signator to the Offer would make it an extra adversary in the process, along with the US and CID, requiring us to contend with three of the largest water entities in New Mexico, not just two. We not seek the total reformation of the process of this case, and the destruction of the Offer. We sought in part an explicit recognition by the State that it is neutral on the issues of the litigation. The State has now apparently agreed to this position.

At 9.

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...We do not want the State's Offer to alter the burdens the US/CID would otherwise face in establishing their claims.

At 11.

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...With that in mind, PVACD simply asks (1) that the State's participation as to the Offer be limited and (2) that burdens of proof in this matter clarified, so that litigating positions are not made more difficult than they otherwise need to be. Relief can be provided without disruption, delay, or complexity.

We do not seek to undermine this litigation, but only to make it fairer in the long run.

For all the above reasons, PVACD requests that the Court order that the State remain neutral in all aspects of the current litigation, notwithstanding its signature on the Offer herein, and that the claims stated in the Offer be considered those of the US/CID in this matter, with the appropriate burden of proof imposed on the claimants.

At 12.

III. COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 5

The Court determines that oral argument is unnecessary and it will render its opinion based upon the parties written submissions.

Having considered the submissions of the parties and being otherwise sufficiently advised in the premises, the Court submits the following opinion and order in connection with Threshold Legal Issue No. 5.

The State has indicated that the fact that CID, the United States and the State have stipulated to the Carlsbad Project rights does not increase PVACD's burden in connection with these proceedings in any way. "...in this, as in every other subfile adjudication, the burden of proof on the water right claimant, i.e. US/CID. State ex rel. Martinez v. McDermott, 120 N.M. 327, 330 (Ct.App.1995)...". State's Response at 5. By negotiating the Stipulated Offer, the State claims that it "...has done nothing more than set the stage for this proceeding to determine the Project rights. ... The Court will adjudicate the Project rights based on the evidence presented...". At 6. The State indicates that it will not actively be defending the rights set forth in the Offer and that this is the job of the claimants, i.e., the United States and the CID. *Id.* at 5.

The Court accepts the State's position. The United States and the CID have had, and shall continue to have, the burden of proving their water rights claims in connection with the Offer and the Carlsbad Project. PVACD has accomplished its objectives.

IT IS SO ORDERED.

Counsel for the State is requested to serve a copy of this opinion upon all counsel of record (other than those set forth on attached Exhibit A) and all parties appearing *pro se* who have elected to participate in this phase of these proceedings.

Dated this 4th day of March 1997.



HARL D. BYRD
District Judge *Pro Tempore*