

FIFTH JUDICIAL DISTRICT  
COUNTY OF CHAVES  
STATE OF NEW MEXICO

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FIFTH JUDICIAL DISTRICT  
CHAVES COUNTY NM  
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BEE J. CLEM  
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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

**DECISION AND ORDER**

**Decision and Order Denying and Granting, in Part, State's Motion to Adopt, in Part, Certain Recommendations Concerning the Adjudication of Water Rights Claims of CID Members, Partially Defining Issues re Elements of Quantification, Purpose and Priority and Scheduling Times For the Submission of Memoranda Briefs in Connection Therewith**

THIS MATTER comes on for consideration by the Court in connection with a MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND

MEMORANDUM IN SUPPORT THEREOF (State's Motion) filed by counsel for the State of New Mexico *ex rel* the Office of the State Engineer (State) on January 18, 2001.

In connection with this matter, the Court has reviewed the State's Motion and the following correspondence and submissions of counsel:

1. Counsel for the State's letter dated October 23, 2000 captioned "Re: Concerns raised by the Court during certain exchanges addressing subfile issues", addressed to counsel in the Project (Offer) Phase of these proceedings.

2. Counsel for the State's letter dated December 12, 2000, captioned "Re: Motion to Adopt, In Part, Certain Recommendation of the Court" addressed to counsel in the Project (Offer) Phase of these proceedings with which a draft of the State's Motion was submitted to counsel in accordance with Rule 1-007.1 NMRA for concurrence, opposition or statement that counsel did not oppose the motion<sup>1</sup>.

3. RESPONSE TO MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND MEMORANDUM IN SUPPORT THEREOF (CID's Response) filed by counsel for the Carlsbad Irrigation District (CID) on January 26, 2001.

4. The UNITED STATES' RESPONSE TO THE STATE'S MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND MEMORANDUM IN SUPPORT THEREOF (United States' Response) filed by counsel for the United States of

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<sup>1</sup> The State's Motion states in pertinent part at page 8 "Pursuant to Rule 1-007.1, NMRA 1978, the State has requested the concurrence of counsel for the United States, CID, Pecos Valley Artesian Conservancy District, the Brantleys, the Tracys, New Mexico State University, and Pardue Limited Company. The United States and CID oppose the State's motion. PVACD concurs in the motion. The Brantleys concur in the motion. The Tracys concur in the motion. NMSU does not oppose the motion. Pardue Limited Company takes no position on the motion."

America (United States) on January 29, 2001.

5. NEW MEXICO STATE UNIVERSITY'S RESPONSE TO THE STATE'S MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND MEMORANDUM IN SUPPORT THEREOF (NMSU's Response) filed by counsel for New Mexico State University (NMSU) on behalf of its Agricultural Science Center in Artesia on February 1, 2001.

6. The BRANTLEY'S RESPONSE TO THE CARLSBAD IRRIGATION DISTRICT'S RESPONSE TO THE STATE OF NEW MEXICO'S MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND MEMORANDUM IN SUPPORT THEREOF (Brantley's Response) filed by counsel for the Brantley Defendants (Brantleys) on February 12, 2001.

7. The STATE OF NEW MEXICO'S CONSOLIDATED REPLY TO THE UNITED STATES' AND THE CARLSBAD IRRIGATION DISTRICT'S RESPONSES TO THE STATE'S MOTION TO ADOPT, IN PART, CERTAIN RECOMMENDATIONS OF THE COURT, AND MEMORANDUM IN SUPPORT THEREOF (State's Consolidated Reply) filed on February 16, 2001.

## **SUMMARIES OF REQUESTS AND CLAIMS OF THE PARTIES**

### **A. STATE'S REQUESTS AND CLAIMS**

The State's Motion requests that:

1. The Court tentatively approve an order captioned "Order Regarding Adjudication Procedures", attached as Exhibit A to the Motion, and a Prehearing Order attached as Exhibit A

to the Motion (p.3). The State proposes that it would then give notice<sup>2</sup> of the tentative approval of the orders regarding adjudication procedures by the Court to all parties in the Membership Phase of these proceedings. An opportunity would be afforded counsel and parties appearing *pro se* to submit objections, and after the Court has had an opportunity to consider and dispose of the objections, the Court would proceed to enter appropriate orders which would defer consideration by the Court of the elements of quantification, purpose of use and priority dates until such time as these elements have been considered and determined in the Project (Offer) Phase of these proceedings (pp. 2-3).

2. The Court approve a proposed Prehearing Order which counsel for the State claims would permit members of CID to present their claims in a simplified and less burdensome manner (pp. 3-4).

3. The Court enter an order that the Modified Blaney-Criddle method of quantifying consumptive use will not be used in determining and adjudicating the water rights claims of the members of CID in the Membership Phase these proceedings (pp. 4-8).

## **B. CID'S CLAIMS AND REQUESTS**

In CID's Response it claims that:

CID has previously responded to the substance of the matters raised in the State's Motion by letter dated November 22, 2000 addressed to Pierre Levy, Esq., one of the attorneys for the State, and that further legal support for CID's position is found in DEFENDANT CARLSBAD

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<sup>2</sup> The State proposes that after initial approval of the orders re adjudication procedures, State would serve it upon the 628 claimants who have been joined as parties in order that they be afforded an opportunity to object. After objections, if any, are determined, the State would ask the Court to enter the orders (p 2).

IRRIGATION DISTRICT'S STATEMENT OF CLAIMS, RIGHTS, DUTIES AND OBLIGATIONS WITH RESPECT TO STORAGE, DIVERSION, AND DISTRIBUTION OF PROJECT WATER SUPPLY WITHIN THE CARLSBAD PROJECT (p. 1). CID incorporates, by reference, the points set forth in the November 22, 2000 letter and its statement of claims (p. 1).

There are due process issues "...which arise by the proposed Court's actions..." (p. 2). CID claims that when its members were granted the right to object to the Project Offer, the only CID members who filed objections were those represented by Mr. Martin and Mr. Blenden and that hundreds of remaining members filed no objections to the Project Offer or the elements contained therein. *Id.*

When the member adjudication was initiated, the State claimed that the only parties were the State and individual members of CID (p. 2). CID claims that it is not a party to the Membership Phase of this adjudication proceedings and that it is not a party to the negotiations between its members and the State. *Id.* CID alleges that this is in sharp contrast to the adjudication proceedings in the lower Rio Grande which allows CID to participate in informal mediation on behalf of its members. *Id.*

CID is troubled by its participation in responding to the State's Motion (p. 2). CID pointing out problems should in no way lessen the due process claims of CID members (p. 2). Counsel for CID states that it is not participating in this motion on behalf of its members. *Id.*

CID states that it is at a loss to explain why the State is agreeing to defer making offers that contain elements of the Project Offer. *Id.* Counsel for CID questions various aspects of the positions taken by counsel for the State and states that due process problems arise because

individual members of CID are given no say in a motion which directly affects their interests, not those of CID, and counsel for CID states that he is particularly concerned about members of CID that have not been served with offers. (p. 3)

Counsel for CID states that it does not see how the State's Motion saves the Court time and that it is inequitable to force CID members to negotiate or litigate only part of their water rights. *Id.* Counsel for CID claims that its members are being forced into an untenable position which would result in taking away any bargaining authority which may be afforded to compromise part or all elements of their water rights and require them to cave in to offers made by the State. *Id.*

Counsel for CID requests that the Court deny the State's Motion and order the State to stop issuing member offers (p. 4).

### **C. THE UNITED STATES CLAIMS**

In the United States' Response it claims that:

A tract-by-tract adjudication of the claims of members of CID is unnecessary (p. 1 and 2).

Issues concerning quantification, purpose of use and priority dates are to be determined under federal Reclamation laws and regulations and specific New Mexico laws governing the distribution of Reclamation Projects and the distribution of Project water to members of CID (p. 1).

The right of a CID member to receive water from the Carlsbad Project is not a water right pursuant to state law but is a right founded upon and limited by, federal law and contracts, and the state laws which govern CID's distribution of Project water to CID members. Brantley Farms v. Carlsbad Irrigation District, 124 N.M.

698, 954 P.2d 763 (1998), *see also e.g.* NMSA 1978 §73-10-24 (1919) (Board of Directors of an irrigation district has authority to distribute water in the best interest of all parties provided all water 'shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of interior and provisions' of the contracts with the United States. (pp. 1 and 2).

Counsel for the United States claims that "...United States' Project storage and water rights are appurtenant to the *entire* irrigable acreage within the Project, 25,055 acres, Carlsbad Irrigation District v. Ford, 46 N.M. 335, 123 P2d 1047, 1051 (1942)..." (p. 2). The United States claims that "...Pursuant to state law that the amount of Project water that is delivered by CID to a CID member's land each year is determined by the total amount of water available for delivery on a pro rata basis, and how many acres each CID member has on the tax assessment roles. NMSA 1978 §73-10-16 (1919). State law based water rights have no role in that process...". The United States claims that "...CID, with the approval of the Bureau of Reclamation, determines when water can be transferred for irrigation use from one CID member's land to another, up to the total Project acreage. NMSA 1978 §73-13-4 (1925). State law based water rights also have no role in that process..." (p. 2).

"Because state law, federal law, and the contracts between the United States and CID govern the distribution of water within the Project there is no need to conduct a tract-by-tract adjudication or to determine the elements of a water right for CID members. Indeed, it is contrary to New Mexico laws to do." (p. 2) Counsel states that if the Court and the State persist in the tract-by-tract adjudication, without waiving its claims and defenses, the United States "...agrees that the Court should delay making a determination in the subfile proceedings of

quantification, purpose of use, and priority until a ruling on the Project Offer has been made. However, the Court should also delay the subfile proceedings on all of the elements, *e.g.* acreage, until final ruling on the Project Offer. It is a waste of the Court's time and the CID's members' time and money to have to respond to an offer from the State more than once" (at 3).

The United States claims that it is not clear what methodology is being proposed by the state to quantify consumptive use. In the June 22, 1994 stipulated Offer of Judgment, the State stipulated to a quantity of water for all Project acreage, 25,055 acres, determined by an agreed upon methodology and the same methodology should be used to determine quantification of the CID members' claims (p. 3). The United States vehemently disagrees that the amounts set forth in the Project Offer are the "ceiling" for the quantification (p. 3). "The amounts in the Stipulated Offer were negotiated among the United States, CID, and the State, and the State cannot now unilaterally change the agreement" (p. 3).

#### **D. The BRANTLEYS' CLAIMS**

In the Brantleys' Response, they claim that:

CID owns no water rights, and CID is nothing other than a delivery system for water to CID members who own the water rights. (pp. 1 and 2).

CID has a duty to represent its members interests; it has not done so. (p. 2). CID has taken the position that water rights in connection with the Project are owned by the United States and not by individual landowners who are members of CID. (p. 2). CID has placed itself in a position contrary to and adverse to its membership as a result of which CID cannot represent its membership in any member adjudication or in the *inter se* phase of these proceedings. (p. 2).

CID and its Board of Directors, management and attorneys have a direct and



irreconcilable conflict with individual members of CID regarding the ownership of water rights, the amount of acreage the individual owns and any priority date that any individual member might have because of the position that CID has taken in this litigation. (p. 2).

Rule 16-107 NMRA prohibits an attorney from representing multiple clients who have interests adverse to each other or which conflict with each other and CID and its attorney cannot represent CID members in this adjudication. (At 2).

CID's Board of Directors has a duty to represent the best interests of its members but it has not done so and its failure is in direct violation of duties imposed upon "...the board of directors and its members..." (p. 2). (Citations omitted).

The individual membership adjudication should continue with the only parties being the individual members and the State of New Mexico. (p. 3). Counsel claims that CID cannot be a party ... it has no ownership in individual water rights and hence no standing (p. 3).

Counsel claims that CID's position constitutes an effort to circumvent the Court's decision concerning Threshold Legal Issue No. 3 and to allow CID to participate and exercise some type of ownership or control over the water rights owned by the individual members should not be permitted. (p. 3). Various meetings have been held and stipulated and agreed upon procedures have been adopted which should not be altered or modified. (*Id.*, pp. 3 and 4).

Due process has not been violated because everyone who had an interest initially received the Project Offer and had an opportunity to respond in a manner that they deemed appropriate (p. 4). "The CID cannot now come forward and asked to be made a party to individual member adjudications" (p. 4).

No parallels between this proceeding and those involved in the lower Rio Grande can be

drawn.(p. 4)

Attempts to set up any type of mediation process to deal with the individual adjudications would only result in delay and obfuscate the progress of individual adjudications. *Id.* Individual member adjudications are progressing satisfactorily. *Id.*

**E. CLAIMS OF NMSU**

In NMSU's Response it states that:

NMSU is not opposed to the Court deferring consideration of water right elements in CID membership subfile proceedings pending the litigation of such elements in the Project Adjudication phase of these proceedings (p. 1).

Due process concerns "...are met as long as individual members of CID have a full and fair opportunity to have each element of their water rights addressed by the Court..." and the State's "... *Order Regarding Adjudication Procedures* accomplishes that purpose..." (p. 2).

In regard to the use of the Modified Blaney-Criddle method of quantifying consumptive use, "... NMSU does not oppose the State's position requesting that the modified method not be used in quantifying the consumptive irrigation requirement in the CID Basin Section of the Lewis Adjudication...". *Id.*

**SUMMARY OF THE STATE'S CONSOLIDATED REPLY TO THE UNITED STATES' AND THE CARLSBAD IRRIGATION DISTRICT'S RESPONSES TO THE STATE'S MOTION**

In its reply, counsel for the State states:

The United States' argument that the tract-by-tract adjudication of CID membership water rights should not proceed has already been addressed and dismissed by the Court (pp. 1 and 2).

In response to the United States' second point, (that the Court should defer on all elements of the water rights in subfile proceedings) counsel argues that this is "... but another iteration of the first argument, and likewise should be disregarded..." (p. 2).

Finally, counsel for the State argues that the United States' comments with respect to quantification are not inconsistent with the State's concerns over using the SCS Modified Blaney-Criddle method of quantification and notes that the United States does not oppose the State's argument that using the SCS Modified Blaney-Criddle method would create substantial delay in the *Lewis* adjudication as a whole. *Id.*

Counsel for the State argues that the objections of CID do not squarely address the issues raised by the State in its motion. *Id.*

CID's concerns regarding due process are not warranted. Under the procedures suggested by the State, all claimants within the district would have an opportunity to participate in the drafting of a proposed order and an opportunity to object to the proposed procedures. After an initial review of the State's Motion has been made by the Court,

A(a) preliminary order will be drafted which will then be served 'on the approximately 621 claimants within the Carlsbad Irrigation District who have so far been joined in the adjudication' Motion at 2 and 3. Later joined claimants will also have an opportunity to object to the procedures. The motion is clear that the procedures would be subject to amendment at a later date. Motion at 2. Clearly then, all claimants within the district would have the opportunity to participate in the crafting of a proposed order and propose subsequent amendments (pp. 2 and 3).

In response to CID's claims that the proposed procedures would be more burdensome than the present method of adjudicating subfile claims, counsel for the State responds that a two-step proceeding, to the extent members would want to participate, is inevitable (p. 3) "The new

approach the State proposes at least spares individual CID claimants the burden of two litigations on those three elements, by reserving the priority, purpose of use, and quantification elements for determination at a later date. It is far better for those elements to be decided once, with the full participation of those entitled to participate, than to litigate them piecemeal" (p. 3).

In connection with CID's suggestion that it should be made a party to the subfile proceedings, the State claims that CID is a distributor of water, it is not the one who has put water to beneficial use and CID has no standing in these proceedings (p. 4).

Counsel for the State claims that "... CID does not meet the constitutional minimums of injury in fact, causal connection, and redressability with respect to the claims that have been joined between the State and the individual members of CID. *See e.g., Lujan v. Defender of Wildlife, 504 U.S. 555 (1992).*" (p. 4).

"...CID's claim that the tract-by-tract litigation in Carlsbad is being carried on differently in the Lower Rio Grande is neither germane to the issues raised by the State's Motion nor an accurate representation of the State's approach to the determination of member claims..." (p. 4).

Counsel for the State argues that its motion is silent with respect to the issue of CID's participation in subfile proceedings and therefore CID's argument is "...wide of the mark..." (p. 4).

In further response to the arguments of CID concerning its participation in the Lower Rio Grande proceedings, counsel states "Nothing in the approach the State has taken so far with claimants within CID would prevent the same sort of participation by CID." as "...persons with technical expertise or witnesses that can assist mediation." as permitted under the Third Amended Order Regarding Adjudication Procedures at 4, *State ex rel. Office of the State Engineer v. Elephant Butte Irrigation District*, No. CV-96-888 (Third Judicial District) (p. 4).

## COURT'S DECISION

The Court, having considered the aforesaid submissions of counsel and being otherwise sufficiently advised, determines that oral arguments are not necessary and **FINDS AND CONCLUDES** that:

**I. State's Requests That Determinations Re Issues of Quantification, Purpose of Use and Priority Dates Be Deferred**

A. Counsel for the State's assertion that the State's Motion has been filed in accordance with determinations and recommendations of the Court should be placed in proper perspective.

Prior to the entry of this decision and order, the Court has not made and has not intended to make any final, binding recommendations or determinations concerning the proper procedures to be followed or the manner in which elements of quantification, purpose of use or the priority dates of claimed water rights of members of CID should be determined. There are overlapping issues concerning these elements which are involved in the Membership Phase and the Adjudication (Offer) Phase of these proceedings. The Court has suggested that counsel for the State obtain the input of all counsel and parties appearing *pro se* in the Membership Phase and the Project (Offer) Phase of these proceedings in order to clarify factual and legal issues in connection with the aforesaid elements and to adopt procedures in order that determinations are properly coordinated and overlapping issues are resolved and determined.

B. The following overlapping issues concerning the elements of quantification, purpose of use and priority dates must be addressed and resolved:

### QUANTIFICATION ISSUES

1. What is the effect and what are the ramifications of the rules of law that the right to the use of water in connection with reclamation projects is appurtenant to the land irrigated and that beneficial use is the basis, the measure and the limit of water rights? See Section 8 of the Reclamation Act, the NM Const. Art. XVI, § 3, ; §72-1-2 NMSA (1978), part III of the *Hope Decree*, and pertinent provisions of water rights applications and agreements relied upon by the United States in connection with its claims of diversion, storage and distribution rights?

2. Should the water rights of members of CID be quantified on the basis of (1) the amount of acreage upon which water is devoted to beneficial use, (2) the amount of acreage of individual members as set forth on the assessment rolls of CID, or (3) the entire irrigable acreage within the Carlsbad Project, i.e. 25,055 acres?

3. Memorandum briefs are requested from all counsel concerning the effect of NMSA 1978, §73-13-4 and NMSA 1978 §72-9-4.

4. Are the water rights of members of CID subject to forfeiture or abandonment, and, if so, under what facts and circumstances?

The foregoing issues appear to be legal issues which should be resolved upon the submission of memoranda briefs.

5. Should Consumptive Irrigation Requirement (CIR) Farm Delivery Requirement and Project Delivery Requirement and Off Farm Diversion Requirement be defined and incorporated into an order which would apply to all Member Adjudication proceedings or should they be incorporated into individual Prehearing Orders? See my letter to Mr. Levy dated September 15, 2000 and Mr. Levy's letter to me dated September 26, 2000 re the Vasquez Subfiles. See suggested provisions under II. State's Requests Re Approval of Prehearing Order,

A. 2, (pp. 18-20).

6. In quantifying the water rights claims of members of CID, Should Off-Farm Conveyance Efficiency and On-farm Irrigation Efficiency percentages and adjustments for Off-farm Diversion or Farm Delivery amounts as set forth in the Stipulated Offer of Judgment of the State, the United States, and the Carlsbad Irrigation District (at paragraph I. C. Allowable annual diversion, 2, page 4) be used or should other efficiency percentages or amounts be used?

7. The proposed Stipulated Offer of Judgment, paragraph 1 C. Allowable annual diversion. 1. b., at page 4, provides, in part:

For any transfer, conversion, or change of a water right, allotment, or entitlement that is within, part of, or diverted through the project water right described herein for (1) a purpose inside the Carlsbad Irrigation District other than that described in paragraphs I.A.2 and I. B.2 of this STIPULATED OFFER OF JUDGMENT or for (2) any place or purpose of use outside the boundaries of the Carlsbad Irrigation District described in paragraph I.A.5. of this STIPULATED OFFER OF JUDGMENT, said water right, allotment, or entitlement shall, for each irrigable acre per year, incorporate and be based on a diversion of 4.997 acre-feet, a farm delivery of 3.697 acre-feet, and a consumptive irrigation requirement of 2.218 acre-feet. For each irrigable acre affected by such transfer, conversion, or change, the combined annual diversion of water described in paragraph I.C.1 of this Stipulated Offer of Judgment shall be reduced by 4.997 acre-feet of water and the total annual depletion of water described in paragraph I.C.1 of this Stipulated Offer of Judgment shall be reduced by 2.218 acre-feet of water.

Are the Diversion, Farm Delivery and Consumptive Irrigation Requirement figures being used by the State in connection with the Membership Phase appropriate and correct with due regard to the underlined portion of the above-quoted provisions? Counsel for the State is requested to respond to this inquiry.

Counsel for the State is requested to clarify the methodology to be used to quantify consumptive use in connection with the Membership Phase and the Project (Offer) Phase of these proceedings and advise all other counsel and parties appearing *pro se* in the Membership Phase of the methodology it proposes to use. After counsel have conferred, if there are unresolved issues concerning methodology, they should be submitted to the Court for determination.

### **PURPOSE OF USE**

Do all counsel and parties appearing *pro se* in the Membership Phase and Project (Offer) Phase of these proceedings agree that the purpose of use in connection with determining the water rights claims of members of CID and the diversion, storage and distribution rights of the United States and CID be for irrigation and domestic and livestock water uses incidental to irrigation use?

### **PRIORITY DATES**

Should priority dates for the water rights of members of CID be those determined to be appropriate in the Project (Offer) Phase or should priority dates be the date that water is devoted to beneficial use by a claimant or the date that a claimant is determined to be entitled to an earlier priority date on a relation back basis?

There may be other issues concerning the quantification of water rights, the purpose of use and priority dates in the Membership Phase that overlap with issues in the Project (Offer) Phase. Counsel and parties appearing *pro se* and other interested parties in the Membership Phase and the Project (Offer) Phase of these proceedings are granted leave to submit a description of any other overlapping issues, together with memoranda briefs to the Court.

## **II. Additional Findings of Fact and Conclusions of Law**



A. CID, and apparently the United States, claim that they are not parties to the Membership Phase of these proceedings. While only the water rights claims of members of CID will be determined in the Membership Phase of these proceedings, the issues of quantification, purpose of use and priority dates involved in the Membership Phase overlap with similar issues involved in the Project (Offer) Phase of these proceedings.

B. The argument of counsel for the United States that a tract-by-tract determination and adjudication of the water rights claims of members of CID is unnecessary, is not well founded.

C. The Court will not require that the Modified Blaney-Criddle method be used in order to quantify consumptive use.

D. The State has failed to establish that deferring determinations in connection with the elements of quantification, purpose of use and priority dates in the Membership Phase or the adoption of proposed procedures in connection therewith would save time, cost or expense.

E. Counsel for the State has not submitted valid reasons or just cause for staying or deferring proceedings to determine all factual and legal issues in connection with the quantification, purpose of use or priority dates for inclusion in subfile orders determining the water rights claims of members of CID.

### **III. State's Requests Re Approval of Prehearing Order**

A. The form of Prehearing Order attached to the State's Motion as Exhibit A should be approved for use in connection with the Membership Phase of these proceedings subject to the following:

1. With due regard to the determinations of the Court herein, consideration should be given to revising the provisions of at II. NATURE OF THE PROCEEDINGS, (pp.2-3), as follows:

- a. Second paragraph (p.2), first line, after "water rights" add "and other".
- b. Third paragraph (p.2) second line, delete the period after "Project"; delete the phrase "Certain elements of the water rights claims of the Defendant in connection with the Project"; insert a period after State and delete "will be determined and adjudicated in this phase of these proceedings ". Next sentence, delete "elements of the" (p. 2).
- c. Fourth paragraph (p.2), last line, delete "certain", substitute "the", delete "the" substitute "Defendants" (p. 2).
- d. First line (p.3), delete "and" and "of the Defendant".
- e. Delete, commencing with the words "The priority date..." (p.3), line 2 through the end of the paragraph. Provisions reflecting the ultimate determinations of the Court concerning the matters referred to herein should be inserted.

2. The following should be inserted in a blanket order or in individual Prehearing orders<sup>3</sup>:

In connection with the determination, adjudication and quantification of the water rights claims of the Defendant, the following definitions have been used and applied:

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<sup>3</sup> See my letter to Mr. Levy dated September 15, 2000, Exhibit A (pp. 2-3), and Mr. Levy's letter response dated September 26, 2000 (p.1).

### CONSUMPTIVE IRRIGATION REQUIREMENT (CIR)

The quantity of irrigation water, expressed as a depth or a volume, exclusive of effective precipitation, that is consumptively used by plants or is evaporated from the soil surface during one calendar year. The consumptive irrigation requirement (CIR) may be numerically determined by subtracting effective precipitation from consumptive use. The consumptive irrigation requirement is the measure of the depletion right.

### FARM DELIVERY REQUIREMENT

The quantity of water, exclusive of effective precipitation, that is delivered to the farm headgate or is diverted from a source of water which originates on the farm itself, such as a well or spring, to satisfy the consumptive irrigation requirements of crops grown on a farm in one calendar year. The farm delivery requirement is computed by dividing the consumptive irrigation requirement, expressed as a depth or volume, by the on-farm irrigation efficiency, expressed as a decimal.

### PROJECT DELIVERY REQUIREMENT or OFF-FARM DIVERSION REQUIREMENT

When the source of irrigation water does not originate on the farm, the project delivery requirement or off-farm diversion requirement is defined as the quantity of water, exclusive of effective precipitation, which is diverted from an off-farm source to satisfy the farm delivery requirement for one calendar year. An additional quantity of water must be diverted from the ultimate source of supply to make up for conveyance losses between the farm headgate and the source of water. Estimated off-farm conveyance losses are added to the farm delivery requirement to arrive at the project diversion requirement. The off-farm diversion requirement is computed by dividing the farm delivery requirement by the off-farm conveyance efficiency, expressed as a decimal.

The water rights of Defendant will be quantified in terms of both a depletion and a diversion right. The depletion right is the maximum quantity of water which may be permanently removed from the stream system each year. It is measured in terms of consumptive irrigation requirement, which is the quantity of irrigation water expressed as a depth or a volume, exclusive of effective precipitation that is consumptively used by plants or is evaporated

from the soil surface through one calendar year. The diversion right is a maximum quantity of water which may be diverted from the stream in order to deliver the water. The diversion right is determined in accordance with the definitions of project delivery requirement and off-farm diversion requirement.

3. The provisions of IV. CLAIMS/ DEFENSES OF THE PARTIES, A. Claims by the State of New Mexico, ex rel Office of the State Engineer (p.4) should be revised to reflect the determinations of the Court set forth herein. (See, in particular, subparagraphs (II),(V) and (VIII). Subparagraph (XI) should be revised by striking the phrase “described in the Offer(s) of Judgment and in this Prehearing Order at and in the facilities of the Carlsbad Project and as conclusively determined by the Court.” and substitute “in connection with the Carlsbad Project which are being determined and adjudicated in the Project (Offer) Phase of these proceedings.”

**IT IS THEREFORE ORDERED that:**

1. The Membership Phase and the Project (Offer) Phase of these proceedings are consolidated for the purpose of responding to the Court’s inquiries set forth herein and submitting memoranda briefs in connection therewith.

2. The United States, CID, and all other parties appearing by counsel or *pro se* in the Project (Offer) Phase shall be considered parties to the Membership Phase for the purpose of responding to the Court’s inquiries set forth herein and submitting memoranda briefs in connection therewith.

3. Counsel in the Membership Phase and the Project (Offer) Phase shall submit memoranda briefs discussing the New Mexico Court of Appeals decision that the United States was an indispensable party in Brantley Farms et al, v. Carlsbad Irrigation District, 124 NM 698,

954 P2d 763 (NM Ct. App.) and whether the United States should be considered an indispensable party in connection with the Membership Phase of these proceedings.

4. Counsel for the State, the United States, CID, PVACD and other parties participating in the Project (Offer) Phase of these proceedings, and counsel for members of CID in the Membership Phase of these proceedings shall file responses to the inquiries and requests of the Court set forth herein together with memorandum briefs in support thereof. All parties participating *pro se* in the Membership Phase of these proceedings and the Project (Offer) Phase of these proceedings and any other interested parties are granted leave to file responses to the inquiries and requests of the Court set forth herein and memoranda briefs in support thereof.

**ALL RESPONSES TO INQUIRIES AND MEMORANDUM BRIEFS SHALL BE SUBMITTED TO THE COURT ON OR BEFORE MAY 01, 2001.**

5. In connection with the submission of memoranda briefs, responding parties shall state whether there are genuine issues of material fact which must be resolved before the issues may be determined or whether there are no genuine issues of material fact and that the issues may be determined as a matter of law.

6. After the Court has considered the submissions of the parties and the memorandum briefs submitted in connection therewith, the Court will enter an order in the Membership Phase of these proceedings setting forth the proper manner of quantifying the water rights claims of members of CID, the purpose of use and priority dates in connection therewith.

7. The Prehearing Order submitted by counsel for the State is approved, subject to the matters set forth at II. State's Requests Re Approval of Prehearing Order (pp. 17-20).

8. To the extent that arguments, claims or contentions of the parties are not

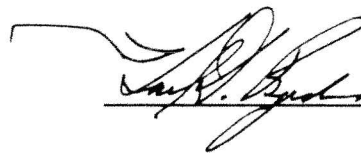
addressed herein, the Court considers that determinations in connection therewith are not essential in order to determine the State's Motion or are not properly before the Court for determination at this time and the Court expresses no opinion in connection therewith.

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

10. While proceedings in the Project (Offer) Phase of these proceedings have been stayed, the stay shall not be deemed or construed as extending to the Membership Phase of these proceedings or to any of the matters required or permitted to be submitted to the Court as herein provided.

11. All members of CID hereafter joined as parties to the Membership Phase of these proceedings will be given notice of the terms and provisions of this order and afforded an opportunity to submit objections, comments and recommendations to the Court in connection therewith.

12. Except as provided herein, the State's Motion is denied.



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HARL D. BYRD  
DISTRICT JUDGE *PRO TEMPORE*