FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	Nos. 20294 and 22600 Consolidated
Plaintiffs,	)	Carlsbad Irrigation District Section
~~L.T. LEWIS, et al.,~~ UNITED STATES OF AMERICA	)	~~Hon. Harl D. Byrd~~ District Judge *Pro Tempore*
Defendants,	)	
vs.	)	
and	)	
STATE OF NEW MEXICO, ex rel, State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	
Plaintiffs,	)	
vs.	)	
HAGERMAN CANAL CO., et al.,	)	
Defendants	)	

DECISION AND ORDER

This Decision and Order Is Entered in Connection With: (1) the Motions of the Brantleys, the Tracy/Eddys, and the State of New Mexico (State) for an Order (a) Striking the Entry of Appearance of Jay Stein, Esq. as Attorney for the Carlsbad Water Defense Association, Inc. (CWDA) for the Purpose of Participating in Briefing and Addressing the Issues set forth in the Court's March and April 2001 Orders and (b) Prohibiting CWDA from Participating

Duties and Obligations of the Carlsbad Irrigation District in Connection With The Distribution of Project Water

THIS MATTER comes on for consideration by the Court in connection with the issues and matters specified in the Court's April 6, 2001 Order (Court's Order) concerning the respective rights, duties and obligations of the United States of America (United States) pertaining to the diversion and storage of water and the distribution of water by the Carlsbad Irrigation District (CID) to its members in connection with the Carlsbad Irrigation District Project (Project).

The Court has reviewed the following:

1. The Court's Order.

2. The UNITED STATES' RESPONSE TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER AND APRIL 6, 2001 (United States' Response) filed on August 1, 2001, insofar as it pertains to the Court's Order.

3. The CARLSBAD IRRIGATION DISTRICT'S RESPONSE BRIEF TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER and APRIL 6, 2001 ORDER (CID's Response) filed on August 1, 2001, insofar as it pertains to the Court's Order.

4. The STATE OF NEW MEXICO'S CONSOLIDATED RESPONSE TO THE COURT'S MARCH 20, 2001 AND APRIL 6, 2001 DECISION AND ORDERS AND THE ISSUES ORDERED TO BE BRIEF THEREIN (State's Response) filed on July 26, 2001 insofar as it pertains to the Court's Order .

5. PVACD's COMMENTS REGARDING 2001 ORDERS (PVACD's Comments)

filed on July 30, 2001 insofar as it pertains to the Court's Order.

6. The TRACYS AND EDDYS RESPONSE TO THE ORDER OF APRIL 5, 2001 (Tract/Eddy's Response) filed on August 1, 2001.

7. The BRANTLEYS' ANSWERS AND BRIEF RESPONDING TO THE COURT'S QUESTIONS IN APRIL OF 2001 (Brantley's Response) filed on August 1, 2001 insofar as it pertains to the Court's Order.

8. NEW MEXICO STATE UNIVERSITY'S BRIEF ON QUANTIFICATION AND ALLOCATION ISSUES (NMSU's Response) filed on August 1, 2001 insofar as it pertains to the Court's Order.

Other than the Brantleys and the Tracy/Eddys, members of CID did not submit responses or memoranda briefs in connection with the matters set forth in the Court's Order.[1]

INTRODUCTION

Nothing contained in this Decision and Order shall be deemed or construed as a determination of any claim, contention or assertion of any party not specifically set forth herein under the designated portions captioned "Court's Decision" or "Court's Decision and Order".

Matters not specifically decided herein have not been determined because they are inconsistent with specific determinations of the Court or they are not well founded or determinations in connection therewith are not required at this time in order to dispose of the matters presently pending before the Court.

Matters are addressed in the same order set forth in the Court's Order.

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[1] The motion of the Carlsbad Water Defense Association, Inc. and certain of its members to file a memorandum brief as *amicus curiae* has been granted in part.

Pertinent determinations of the Court set forth in the Court's Decision and Order filed on October 22, 2001(Court's Decision) and the Court's Supplemental Decision and Order served on December 19, 2001 are incorporated herein by reference as though set forth in detail.

PERTINENT ISSUES AND MATTERS SET FORTH IN THE COURT'S ORDER

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

As indicated in the Court's Order, the issues set forth under this heading and the responses of the parties will be considered in connection with the Project (Offer) Phase of these proceedings.

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.

The Court's Order stated that there was no dispute concerning the following claim concerning the respective rights, duties and obligations of the United States pertaining to the diversion and storage of Project water and the rights duties and obligations of CID pertaining to the distribution of Project water, and, therefore, the Court did not request that memorandum 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.

Underscoring for emphasis added.

COURT'S DECISION

The State, CID and the Brantleys have responded as requested. Their responses to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties' requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

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

ISSUE NO. 1

Under this issue the Court requested that memorandum briefs be submitted in connection with the matters set forth in the Court's Decision and Order concerning the water rights claims of CID members filed on March 20, 2001. The requested memorandum briefs were prepared and have been received. The briefs were considered in connection with the preparation of the Court's Supplemental Decision and Order served on December 19, 2001.

ISSUES RE CLAIMS OF CID

ISSUE NO. 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?

COURT'S DECISION

The irrigation water rights of members of CID are appurtenant to the lands upon which they have been devoted to beneficial use subject to the provisions of NMSA 1978, §72-5-28 F. Please refer to the Court's Decision re **ISSUE NO. 1** set forth at pp. 5-7. See also NMSA 1978, §72-4-19.

The diversion and storage rights of the United States and the distribution rights of CID associated with the Carlsbad Project, which the Court has determined are held for the use and benefit of the members of CID, are applicable to the entire Carlsbad Project. Court's Decision at p. 6.

ISSUE NO. 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.

COURT'S DECISION

Please refer to the Court's Decision re Issue No. 1 at p. 6 and the Court's decision set forth in the Supplemental Decision and Order served on December 19, 2001 at p. 34.

The authority of the board of directors of CID to distribute water to its members is set forth in NMSA 1978, §§73-10-16 and 73-10-24 and is subject to the terms and conditions set forth therein. Water must be distributed and apportioned among CID members equitably and in accordance with applicable acts of Congress, rules and regulations of the Secretary of Interior and the provisions of contracts concerning the distribution of water by CID. See also NMSA 1978, §73-10-24 and §72-5-28 F.

ISSUE NO. 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?

COURT'S DECISION

The United States, on behalf of the members of CID and in order to protect the United States' diversion and storage rights in connection with Project water, has the right to issue priority calls. CID, with the approval of the United States and on behalf of its members, has the right to issue priority calls in connection with the diversion and storage of Project water in order to protect its ability to distribute Project water to its members.

Since CID members (although they are the owners of water rights in connection with the

Project) do not individually divert or store water, there should be no need for them to issue a priority call. If, however, the United States or CID should fail or refuse to issue a priority call, when requested by the members of CID, members of CID may initiate appropriate action to require that the United States or CID issue a priority call, or, in the event the United States or CID fail or refuse to do so, members of CID, jointly, may be able to issue a priority call. The Court has been unable to find pertinent authority on the right of members of CID to issue priority calls and counsel have not referred the Court to citations of authority in support of or contrary to the Court's determinations in connection with this issue.

ISSUE NO. 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)?

COURT'S DECISION

Please refer to the Court's Decision re the effect of NMSA 1978, §73-13-4 at pp. 7-9.

ISSUE NO. 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..."?

COURT'S DECISION

NMSA 1978, §73-13-4 speaks for itself and is so limited.

Please refer to the Court's Decision re NMSA 1978, §73-13-4 at pp. 7-9.

ISSUE NO. 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?

COURT'S DECISION

The issue is framed in terms of the right of CID to have Project water stored. The United States has the right to store Project water.

Issues concerning the Pecos River Compact and its relationship to the storage of Project water in upstream reservoirs in quantities set and confirmed by permits issued by the State Engineer will be considered and determined in the Project (Offer) Phase of these proceedings.

ISSUE NO. 8

Does the State Engineer's permit of September 22, 1972 conclusively determine the matters set forth therein?

COURT'S DECISION

Decisions of the State Engineer in granting a permit have the effect of a judicial judgment to the extent that it addresses "'questions, points or matter of fact *in issue*...which were *essential to a decision* and which were decided in support of the judgment'" and are a bar among parties to the permit proceedings or their privies. *State ex rel Reynolds v. Rio Rancho Estates*, 95 N.M. 560, 562, 624 P.2d 502, 504 (1981); *City of Socorro v. Cook*, 24 N.M. 202, 173 P.682 (1918); *Paulos v. Janetakos*, 46 N.M. 390, 393, 129 P.2d 636, 638 (1942); .

ISSUE NO. 9

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

COURT'S DECISION

Please refer to the Court's discussion concerning **PRIORITY DATES** set forth in the Court's Decision at pp. 16-18 and the Court's Supplemental Decision and Order served on December 19, 2001 at pp. 27-29. The Court will address this issue in further detail after it has had an opportunity to review the memorandum briefs of the parties concerning issues of relinquishment or waiver of individual priority dates. See Court's Decision at pp. 28-29.

ISSUE NO. 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 current proceedings?

COURT'S DECISION

The contract between the United States and individual members of Pecos Water Users Association (PWUA) does not now control how Project water should be distributed among members of CID. Membership in CID required termination of a member's entitlement to shares in PWUA. See the United States' Statement of Claims at pp. 11-14.

The United States claims that the PWUA contract is relevant to the United States' claim that water received by Project irrigators is derived entirely from the right of the United States to divert and store Project water. No determination as to the relevancy of the PWUA contract need be made by the Court at this time. The United States' submission should be helpful in understanding it claims re relevancy and in preparing requested findings of fact and conclusions of law.

ISSUE NO 11

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

COURT'S DECISION

The United States and CID claim that the 1932 Contract, along with reclamation and State law, are the sources of the claims of CID, on behalf of the United States, that CID has the right to distribute water to 25,055 acres of Project land owned by CID members.

The State responds, in part, by claiming that if the total number of acres to which water is devoted to beneficial use by actual historical irrigation is less than 25,055 acres "over time", the lower figure is the total number of acres that may receive Project water.

The Brantleys claim that the 25,055 acres figure pertains to irrigable acres and not to how much acreage was being irrigated.

The Tracy/Eddys claim that the 1932 Contract is a source of the right to distribute water to 25,055 acres but that the "actual source is the contracts emanating over the course of this Project and New Mexico law providing for the application of water rights." .

The submissions of the parties should be helpful in understanding their respective claims and in connection with the preparation of the requested findings of fact and conclusions of law. No further determinations of the Court are required at this time. Determinations will be made by the Court at the time it enters its decision in connection with the Project (Offer) Phase of these proceedings.

ISSUE NO 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.

COURT'S DECISION

Federal law, state law, the 1932 contract and rules and regulations of CID all require that the delivery of water be conditioned on the payment of certain charges. See the Reclamation Act, 43 U.S.C. §§419, 423 (d) and (e) (contract with District condition precedent to delivery of water) 431, 461, 479, 492-497; see U.S. Statement of Claims, Exhibit 14, 1932 Contract at paragraphs 17, 24- 25, 30-32 and 39; NMSA 1978, §§ 73-10-16, 73-10-17, 73-11-29 and 73-11-30.

ISSUE NO 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?

The United States responds:

> The 1932 contract called for the United States to transfer to CID responsibility for the care, operation and maintenance of all irrigation and drainage works in the Project, including McMillan and Avalon Reservoirs and all canals, drains and laterals effective on January 1, 1938. U.S. Statement of Claims, Exhibit 14, 1932 Contract at ¶10. Transfer did not actually occur until 1949. More recently, title to the canals, drains and laterals was transferred to CID; title to the Project reservoirs remains in the United States. See 43 U.S.C. § 498 ("[T]itle to and the management and operation of the reservoirs and the works necessary for their protection and operation [in a Reclamation Project] shall remain in the Government until otherwise provided by Congress"). CID currently operates all the project reservoirs, with oversight by the United States (see Brantley Farms, 954 P.2d at 772), except Santa Rosa Reservoir, which is operated by the United States. In accepting this responsibility, CID agreed that the care, operation and maintenance of these facilities, and the delivery of Project

> water to the irrigators, would be done in full compliance with Reclamation law, the regulations of the Secretary, and the terms of the 1932 contract and any other contracts affecting the transferred works. U.S. Statement of Claims, Ex. 14, 1932 Contract at ¶ 11. As recognized by the court in Brantley Farms, CID has the discretion pursuant to NMSA 1978, § 73-10-24 (1919) to determine what water is available for distribution to its members. 124 N.M. at 704, 705, (sic) P. 2d 763 at 769, 770. The New Mexico Court of Appeals also recognized that all of CID's discretionary decisions involving the operation of the Project facilities and delivery of Project water to its members must be made in compliance with federal law and the contracts CID has with the United States. See Id. at 771-72; see also 43 U.S.C. § 498. Thus, while CID has discretion under state law to determine how much water will be distributed to CID members on a yearly basis, that discretion is constrained by federal law and contracts. Id. at 772; see also NMSA 1978, § 73-10-24. United States Response at pp. 22-23.

CID responds in pertinent part as follows:

> Under the 1989 contract between CID and the United States, CID has Operation and Maintenance responsibilities to Sumner and Brantley Dams and Reservoirs. The United States Army Corp of Engineers have Operation and Maintenance responsibility over Santa Rosa Dam and Reservoir. The CID board has discretionary authority over allocation and distribution of Project water supply to its members. See CID's Response to Question 5. CID's Response pp. 34-35.

The state responds in pertinent part as follows:

> CID has the authority to operate irrigation works necessary for the delivery of water and distribution of water. *See* NMSA 1978, § 73-10-16 (irrigation district's board may contract with the United States for construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom). Pursuant to the 1932 Contract CID became responsible for the care, operation and maintenance of the irrigation and drainage works of the Carlsbad Project. *See* Exhibit 14, United States Statement. CID also has the authority to make decisions the(sic) allocation and distribution of Project water to its members. *See, e.g.*, NMSA 1978, §§ 73-10-16 and 73-10-24. As addressed in the

> State Response's to Question C-2 (CID's discretion to determine annually how much of the water supply and storage shall be made available for distribution) above and to Question D-25 (ISSUES RE CLAIMS OF CID - Are individual CID members permitted to demand delivery or distribution of water), CID's discretion over the allocation and distribution of Project water is limited by the very statutes that grant it the authority to act in this area, its duty to act in the best interest of all of CID's members, and applicable principles of law relating to the water rights owned by the individual members. State's Response at 67-68.

COURT'S DECISION

CID has the right and responsibility to operate all ditches, canals, drains and the Fort Sumner and Brantley dams and reservoirs, with oversight by the United States. The United States Corp of Engineers has operation and maintenance rights and duties in connection with Santa Rosa Dam and Reservoir. Title to all Project Reservoirs remain in the United States. See 43 U.S.C. §498.

CID has agreed that the care, operation and maintenance of these facilities and the delivery of water to irrigators by it will be performed in full compliance with applicable reclamation law, rules and regulations of the Secretary of Interior and applicable contracts.

Brantley Farms determined that CID had discretion in connection with the allocation and distribution of Project water, and, therefore, in the context of the issues before the Court, mandamus was not a proper remedy. *Brantley Farms* did not determine the parameters or the basis of the authority under which CID must exercise its discretionary authority. CID's discretionary authority must be exercised in accordance with applicable reclamation and State laws, regulations of the Secretary of Interior and applicable contracts.

The landowners' title to lateral ditches and subsidiary canals located on their lands

continues in force and effect; however, CID has an easement for the purpose of maintaining and operating them. Inside the headgate to which water is delivered to CID, the ditches are owned by the landowner but maintained and operated by CID.

The quoted excerpts from the parties responses should be helpful in understanding their respective claims and contentions and in preparing requested findings of fact and conclusions of law.

No further action of the Court is required at this time.

ISSUE NO 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?

COURT'S DECISION

The United States claims that NMSA 1978, §73-10-5 sets forth the procedures for establishing an irrigation district boundary, and that this, in turn, defines CID's tax base. Of the 58,000 acres within CID's boundaries, 25,055 acres are taxed for operation and maintenance of the Project. See NMSA 1978, §§73-11-21 and 29.

The United States claims that the fact that this acreage is taxed is relevant to its claims that the United States' diversion and storage rights are appurtenant to all 25, 055 acres listed on CID's assessment rolls.

CID cites its ability to tax lands within the geographical boundaries of the district, other than the 25,055 acres, by virtue of NMSA 1978, §73-11-12 (pertaining to drainage works) and NMSA 1978, §73-11-13 (pertaining to Local Improvement Districts).

The State claims that :

> The process of establishing what lands will be subject to assessments or levies imposed by the district, however, is not relevant to defining the rights, duties and obligations of CID and the United States in connection with their respective claims in this adjudication concerning the diversion, storage and distribution of Project water.
>
> ***
>
> The acreage claimed by CID as its tax or assessment base is relevant in these proceedings only for the purposes to determining what land owned or held by the individual members is eligible to receive Project water. *See* State's Response to Question 2 (basis on which the rights of members of CID should be quantified) above under ISSUES ORDERED BRIEFED IN THE MARCH 20, 2001 DECISION AND ORDER. State's Response, p. 69.

See also State's Response to Issue 31, *infra.*

The Court determines that NMSA 1978, §§73-10-5, 73-11-12, 73-11-13, 73-11-21 and 73-11-29 are the statutes defining CID's tax base.

The claims of the parties concerning the relevancy of these statutes should be helpful in understanding their respective claims and contentions and in connection with the preparation of findings of fact and conclusions of law.

ISSUE NO 15

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

The United States responds:

> NMSA 1978, § 73-10-16 (1919) addresses the powers and duties of an irrigation district's board of directors. *Inter alia*, the statute authorizes CID's Board to "contract with the United States for water supply under any act of congress providing for or permitting such contract," to collect money on behalf of the United States and "to do any and all things" required by federal statute or regulations. The statute also requires that "[a]ll waters distributed [by the

> Board] shall be apportioned to each landowner or entryman *pro rata* to the lands assessed under this act within such district."
>
> The statute's application is limited by federal law; the statue requires "all water, the right to use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto." NMSA 1978, § 73-10-16 (1919). Reclamation law is in accord with the state law provisions requiring *pro rata* distribution of water with a reclamation project. See 43 U.S.C. § 461 (requiring equitable distribution of Project waters).
>
> NMSA 1978, § 73-10-16 (1919) is supplemented by the terms of NMSA 1978, § 73-10-24 (1919) which addresses distribution of water within an irrigation district in times of shortage and grants the Board authority "to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned." However, where, as here, an irrigation district has a contract with the United States, the water must be apportioned pursuant to federal law, rules and regulations of the Secretary of the Interior, and the governing contracts. NMSA 1978, § 73-10-24 (1919). United States' Response at pp. 24-25.

CID responds that it did not misquote the statute. CID's Response at pp. 35-36.

The State responds:

> In its January 19, 2001 submissions to the Court, CID incorrectly quotes two key provisions of NMSA, Section 73-10-16 (1919). Contrary to CID's assertions, Section 73-10-16 does not grant, without limitation, the broad powers with which CID seemingly cloaks itself. The incorrect quotations of CID occur both on page 12 and 13 of its January 19th submissions. On page 12, CID alleges that its board "may prescribe their duties and establish equitable rules and regulations for the distribution and use of water among the owners of irrigable lands within the district." On page 13, CID alleges that its board "has the power to lease or rent the use of water, or contract for the delivery thereof, to occupants of other lands or municipalities within or without CID's boundaries 'at such prices as they deem best.'" In the first instance CID has

incorrectly cited the statute, leaving the impression that its power is somehow broader than specified. In the second instance, CID has incompletely cited the statute, leaving out key limitations the statute imposes if CID were to lease, rent, or contract out water.

Section 73-10-16 sets forth the organization of the board of directors, its powers and duties, and certain rules and regulations affecting those powers and duties. NMSA 1978, § 73-10-16. The statute does not state that the board of directors may prescribe their duties, meaning the board's duties, and establish equitable rules and regulations for the distribution and use of water among the owners of said land." Instead, the statutes states that

> the board shall have power [sic], and it shall be their duty to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employees as may be required and prescribe their duties and establish equitable rules and regulations for the distribution and use of water among the owners of said land.

The phrase, "prescribing their duties" applies to the individuals employed by the District. It authorizes the board to set out those duties which will apply to those employees. The phrase does not allow, however, the board to set *its own* duties. Although the board's duties are broad by the very terms of the statute, provided the board promulgates equitable rules and regulations for the distribution and use of water, the suggestion that the board could set its own duties, without limit, takes the board's powers beyond the realm of even the broad terms of the statute. The board, being a creature of statute, can only have the powers that authorizing statutes grant. NMSA 1978, Section 73-9-1 (1919).

Section 73-10-16 also imposes important limitations on the board when it chooses to lease or rent the use of water or electrical energy, and to contract for the delivery of water to other lands or to municipalities. The board may do so at prices the board deems best,

> but the rental shall not be less or on terms more favorable than those fixed for district lands. Provided no vested or prescriptive rights to the use

> of such water shall attach to said land by virtue of such lease or such rental. And, provided further, no rules shall be prescribed or regulations enforced which shall interfere with the vested rights of any water user or with the exercise of such rights of any such water user.
>
> *Id.*

> Thus, the statute prescribes a whole host of limitations on the board in conducting those activities, including price limitations, limitations on the vesting of rights, and most importantly, a provision that the activities of the board cannot interfere with the rights of any water user, or with the exercise of such rights.
>
> The State has here addressed only the contentions of CID set out in its January 19th submissions with respect to Section 73-10-16. Elsewhere in this brief, the State discusses other limitations the statute imposes, as appropriate. State's Response at 69-72.

PVACD concurs in the response of the State and further responds as follows:

> NMSA 1978, 73-10-16, provides for pro rata distribution to members of waters obtained through contract with the US. The law is expressly conditioned to prevent activities of CID from creating vested or prescriptive water rights. The law likewise mandates that "no [CID] rules shall be prescribed or regulations enforced which shall interfere with the vested water rights of any water user or with the exercise of such rightsof any such water user." The vested water rights of water users are protected and regulated by the state. The state's response explains this.
>
> Section 73-10-16 safeguards the right of the state to regulate the beneficial use water rights of each CID member, including transfers, as is done for any other water user. The law does not give CID the right to regulate any water transfer. Otherwise, PVACD has nothing to add to the State's Response in this matter. PVACD's Response at pp. 19-20.

The Brantleys respond:

> The CID has misquoted **§73-10-16 N.M.S.A. 1978 Comp.** The CID argues that the statute requires an apportioned or-pro rata delivery of water to assessed lands within the district. The

pertinent portion of the statute actually says the following:

> **All waters distributed shall be apportioned to each landowner or entryman pro rata to the lands assessed under this act within such district. ...provided further, no rules shall be prescribed or regulations enforced which shall interfere with the vested rights of any water user or with the exercise of such rights of any such water user.**

The statute clearly provides that the CID cannot take any action that would interfere with prior vested rights of any water user or with that water user's exercise of those rights.

***

Those individuals who acquired water rights from the Pecos Irrigation and Improvement Company had the contractual right to demand water delivery when needed for production of crops. The only time there was to be a pro-rata distribution of water was when the water supply was insufficient. Even then, the owner of a water right that needed additional water would be given a credit for water not delivered by means of taking the credit off the water right owner's next year's bill.

For those individuals in Court's Category One, such as the Brantleys, whose rights stem from the Pecos Irrigation and Improvement Company contracts, **§73-10-16 N.M.S.A. 1978 Comp.** leaves those vested rights intact and enforceable. Brantleys' Response at pp. 46-47.

The Tracy/Eddys respond:

> Yes, §73-10-16 NMSA (1978 Comp.) has been misquoted. That section of the law does not give any rights to the CID that are not in the contract or their Charter creating the CID. It does not change their fiduciary duty to deliver all of the water to the members on a pro rata basis. It does not change the fact that they must deliver 176,500 acre feet, if available, to the 25,055 acres pro rata. Nothing in that statute provides that they may make a decision to lease that portion of the water to another party or withhold its delivery on the basis that an arbitrary decision may be made to conserve the water. They have a fiduciary duty to deliver all of that water. Tracy/Eddys' Response at p. 13.

COURT'S DECISION

All Project water must be apportioned and distributed by CID to its members in accordance with applicable federal and state laws, rules and regulations and in accordance with applicable contracts.

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses should be helpful in connection with the preparation of requested findings of fact and conclusions of law and will be considered in connection with the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO 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 for 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?

The United States responds:

> In NMSA 1978, § 73-10-16 (1919), that statement is qualified by the provision "all water, the right to use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto." The proviso requires CID to exercise its authority consistent with federal law and its contracts with the United States. United States' Response at p. 25.

CID responds that its statement is not incomplete. CID's Response at p. 36.

The State incorporates by reference its response to Issue 15. State's Response at p. 72.

PVACD states that it has nothing to add to the State's response. PVACD's Response at p. 20.

The Brantleys Respond as follows:

> The CID's statement is incomplete for two reasons: (1) It fails to recognize the limitation of the purpose for which it may lease or rent water; and (2) It fails to consider the statutory limitation on not interfering with vested rights.
>
> The paragraph in the statute deals with paying of district debt arising from the construction of the project or portion of the project works. The rental or leasing of water can occur solely for the purpose of helping to pay off that debt. **New Mexico Attorney General Opinion No. 72-26 (1972)** recognizes such a limitation. The statute does not contemplate giving the CID Board of Directors the unlimited and uncontrolled authority to rent or lease water allotted to the project except for the very limited purpose of paying off debt. As of the date of this Memorandum Brief, the indebtedness of the CID to the U.S. has been fully paid. Today, the CID has no right or authority to lease or rent project water to a third party.
>
> Further, any renting or leasing of project water, even under the limited circumstances allowed by the statute, cannot interfere with or impair existing vested rights. The statute expressly limits the Board's authority. That portion of the statute is in recognition of the constitutional restriction on impairing vesting rights. The **Rubalcava** court has held, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past must be deemed retrospective and as such, cannot impair prior vested rights. Also, when a property right has vested, that property right is protected from invasion by the legislature by subsequently enacted statutes. **Pierce v. State, supra.** Brantleys' Response at p. 47- 48.

The Tracy/Eddys respond:

> It is incomplete in that it does not state the only way they could lease or rent the use of water would be if they had excess water over the 176,500 acre feet per year or if any individual owner of

rights would agree to allow them to rent the water. Also see Answer to No. 15. Tracy/Eddys' Response at p. 14.

COURT'S DECISION

The parties responses to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law. Please refer to the Court's Decision re Issue No. 15.

No further decision of the Court is required at this time.

The responses will be considered in connection with the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 17

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

COURT'S DECISION

Please refer to the Court's opinion re Issue No. 3 set forth in the Court's Decision at pp. 9-11.

The Court will defer making further determinations concerning the State Engineer's administrative authority over CID in the absence of specific factual matters which raise the question of the extent to which CID is subject to the State Engineer's administrative authority and which may be hereafter presented to the Court for determination.

ISSUE NO. 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?

COURT'S DECISION

Please refer to the Court's Decision re issue No. 17, *supra*.

ISSUE NO. 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 exemptions.

COURT'S DECISION

Please refer to the Court's Decision re issue No. 17, *supra*.

ISSUE NO. 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?

COURT'S DECISION

NMSA 1978, §72-5-28 F. provides:

> The owner or holder of a valid water right or permit to appropriate waters for agricultural purposes appurtenant to designated or specified lands may apply the full amount of water covered by or included in the water right or permit to any part of the designated or specified tract without penalty or forfeiture.

ISSUE NO. 21

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

COURT'S DECISION

Please refer to the Court's Decision re Issue No. 20, *supra*.

ISSUE NO. 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?

COURT'S DECISION

NMSA 1978, §73-13-3 provides:

> The directors of any irrigation district, now organized or which may be hereafter organized under the laws of the state of New Mexico, shall have power to purchase, hold, use, control, operate, sell, convey, lease and otherwise acquire and deal in lands and water rights, and any and all interests therein, in the name and for the use of the district, whenever, in their judgment such action shall be for the benefit or the district.

NMSA 1978, §73-9-14 provides in pertinent part that:

> The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other lands within or without said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if included in the districts lands assessed under this act;....

The rights and authority of the board of directors of CID to deal with lands and water rights are set forth in the quoted statutes, subject to the terms and provisions contained therein. The rights and authority of the board of directors of CID are also subject to compliance with applicable federal statutes, rules and regulations of the Secretary of Interior, state laws and the terms and provisions of existing contracts among the United States, CID and its members. See also NMSA 1978, §73-10-16.

ISSUE NO. 23

In what manner has CID incompletely cited NMSA 1973, §73-13-3? How are the matters raised by the statute relevant to the issues now before the Court, particularly in light of prior determinations re Threshold Legal Issue No. 3?

United States' Response

The United States responds, in pertinent part, as follows:

> NMSA 1978, § 73-13-3 (1925) is not relevant to issues presently before the Court except to the extent that it gives CID's Board authority to "use" the water rights held by the United States for the benefit of the Project. United States' Response at p. 27

CID's Response

CID responds, in pertinent part, as follows:

> CID has not incompletely cited NMSA 1978, §73-13-4. As to the second part of the Court's question, see CID's response to Questions 1, 2 and 3 of the March 20, order above and response to Question 14 above. CID' Response at p. 38.

State's Response

The State responds, in pertinent part, as follows:

> The State respectfully requests that the Court refer to the State's Response to Question 22 immediately above, in which it addresses Section 73-13-3. In light of the Court's determinations regarding Threshold Legal Issue No. 3, if CID exercises the authority granted to it under Section 73-13-3 to " purchase, hold, use, control, operate, sell, convey, lease and otherwise acquire and deal in lands and water rights," it will be subject to the same law governing water rights in New Mexico to which the members of CID are subject. *See* Section 73-13-3. In addition, any water rights CID holds pursuant to Section 73-13-3 will be subject to the same determinations that the Court makes regarding the water rights held by the individual members of CID, including those regarding vesting of water rights, appurtenancy, forfeiture, abandonment, and quantification. State's Response at p. 77.

PVACD's Response

PVACD responds, in pertinent part, as follows:

> PVACD has nothing to add to the State's Response. PVACD's Response at p. 22.

Brantleys' Response

The Brantleys respond, in pertinent part, as follows:

> Though this has been fully discussed in the preceding question number 22, one additional comment is necessary. The statute does not and cannot give the CID authority to hold, control, operate and deal in land or water rights it does not own. This is reflected by the decision **Middle Rio Grande Water Users' Association v. Middle Rio Grande Conservancy District, supra.** Also, it cannot breach constitutionally protected vested property rights. Brantleys' Response at p. 52.

Tracy/Eddys' Response

The Tracy/Eddys respond, in pertinent part, as follows:

> CID has claimed ownership of the water as has the United States Government. This statute provides that they may purchase and otherwise use, control, operate, sell and lease the lands and water rights and their interests therein. However, they have no right to attempt to own the water rights of the vested interest owners already vested in the 25,055 acres in the CID Project. CID has attempted to claim an ownership right in water that has already vested in the water right owners pursuant to contract and state law. This statute does not grant them any rights in anyone else's water. Tracy/Eddys' Response at p. 16

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 24

Does the 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?

UNITED STATES' RESPONSE

> CID's Board does have the right to transfer water upon the petition of a CID member who has the right to make such a petition; however, such a transfer is subject to compliance with federal statutes and regulations and the contracts between the United States and CID. NMSA 1978, § 73-10-16 (1919). See also NMSA 1978, § 73-13-4 (1925) (allowing the transfer of the right to receive project water from lands that are not suitable or capable of being irrigated). United States's Response at p. 28.

CID's Response

CID responds, in pertinent part, as follows:

> CID has authority to suspend and transfer water rights pursuant to NMSA 1978, §73-13-4. The discretion of the Board is limited by the conditions set forth in the statute. CID's Response at p. 38.

State's Response

The State responds, in pertinent part, as follows:

> The State respectfully requests that the Court refer to that portion of the State's Response to Question 3 (concerning the effect of NMSA 1978, § 73-13-4 and NMSA 1978 § 72-9-4) addressing Section 72-13-4, and to the State's Response to Question 5 under the section Issues re Claims of CID. State's Response at pp. 77-78.

PVACD's Response

PVACD responds as follows:

> PVACD has nothing to add to the State's Response. PVACD's

Response at p. 22.

Brantleys' Response

The Brantleys respond, in pertinent part, as follows:

> Assuming the CID even has authority to engage in such an exercise absent State Engineer approval, the CID has no authority to deny a member's application. In the context of water right owners falling within the Court's Category One, as do the Brantleys, the CID is contractually obligated to make any such transfer on its records as requested by the water right owner. It is the water right owner's own individual determination and judgment as to whether land may be successfully irrigated to grow a crop that is controlling, not the CID's. This vested right contractually accrued under the Pecos Irrigation and Improvement Company. To understand how this worked, the following example is illustrative:
>
> 1. Brantleys' predecessors-in-title, Robert and Mary Tansill, owned Pecos Irrigation and Improvement Company Deed and Contract No.s 16 and 25 in "Irrigation" Class.
>
> 2. Tansill decided to move water rights onto other lands.
>
> 3. Tansill accomplished the move by having the Pecos Irrigation and Improvement Company cancel No. 16 and re-issue No. 25 with the new lands to which the water rights would be appurtenant.
>
> There was no restriction upon the ability of the land owner to transfer water rights to other lands owned by the land owner/water right owner. FN
>
> > FN As another example, the Herbert S. Potter water right transfer is illustrative of the system that was in place. Pecos Irrigation and Improvement Company issued a Deed and Contract No. 96 for the Water Right. Herbert S. Potter wanted to transfer water to a different location. To accomplish this, the Pecos Irrigation and Improvement Company canceled Water Right No. 96 and issued a new

Deed and Contract No. 99 for the water right appurtenant to the land described on that Deed and Contract.

For further illustration, suppose Brantleys own 3,000 acres of land without water rights that are not being farmed together with 1,500 acres of land with water rights that is being farmed. Also suppose all 4,500 acres of land are within the CID. Brantleys decide to subdivide the 1,500 acres. The Brantleys have the absolute right to transfer 1,500 acres of water right to that portion of the 3,000 acres the Brantleys decide can be successfully irrigated so long as it is adjacent to a CID lateral ditch.

Any water right owner within the CID has the right to transfer water rights from one tract of land that individual owns to another tract of land within the district without CID approval so long as a lateral ditch is adjacent for the delivery of water. It is the water right owner's judgment and decision as to whether land is or is not irrigable, not the CID's. The CID Board's authority and discretion is limited by the prior vested rights of the individual water right owners and the contractual obligations to which the CID is obligated. Brantleys' Response at pp. 52-53.

Tracy/Eddys' Response

The Tracy/Eddys respond, in pertinent part, as follows:

CID does have authority upon any application to transfer water rights appurtenant to land within the District to other lands within the District. (This must still be approved by the State Engineer insofar as the proof of beneficial use and point of diversion.) The limitation in the discretion of the Board of Directors is severely limited. It cannot arbitrarily determine that land may not be profitably irrigated, and in the absence of that, they must grant the transfer. This, of course, presumes that the point of diversion, that is sought to be used, has the necessary laterals or ditches and CID certainly has the right to refuse to make that transfer if it is going to cause additional expense or hardship in delivering water to a given piece of property. Other than that, they have no right to prohibit the transfer. Tracy/Eddys's Response at pp. 16-17.

COURT'S DECISION

Please refer to the Court's Decision re Issue No. 3 and its interpretation of NMSA 1978, §73-13-4, pp.7-9 set forth in the Court's Decision.

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No further determinations of the Court are required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 25

Are individual members of CID 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?

COURT'S DECISION

Brantley Farms does not define the parameters under which deliveries or distributions of water must be made by CID to its members. *Brantley Farms*' determinations concerning the discretion of the board of directors of CID is limited to the context of the issue of under what circumstances an application for a writ of mandamus may be granted.

Deliveries and distribution of water by CID must be made in accordance with NMSA 1978, §§73-10-16 and 73-10-24, subject to the provisions of NMSA 1978, §72-5-28 F, contracts between CID and its members concerning the distribution and apportionment of water among its members and in accordance with federal laws and rules and regulations of the Secretary of

Interior.

ISSUE NO. 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.

The United States states that the Court seeks no response from the United States. United States' Response at p. 28.

CID responds as follows:

> NMSA 1978, § 73-11-29 gives CID's Board broad discretionary authority to estimate funds necessary. This statute further limits the assessment of lands within the District to those that are fit for cultivation as the Board deems appropriate. See CID's response to Questions 1 and 2 of the March 20, 2001 order above and response to Questions 2, 6, 13 and 14 above. CID's Response at p. 39.

The State responds as follows:

> This question implicates NMSA 1978, § 73-11-29 (1919), which is discussed in the following two questions. CID has discretion in preparing its budget, but that discretion is circumscribed by the fiscal requirements of Section 73-11-29. FN
>
> > FN The State does not dispute that, pursuant to *Sperry v. Elephant Butte Irrigation District*, 33 N.M. 482 (1928), an irrigation district board has large discretionary powers. *Id.* at 485-86. The powers referenced in *Sperry*, however, focused on the ability of a district to estimate the funds it would need for certain future expenses. A district is still constrained by the limitations imposed in Section 73-11-29, and *Sperry* does not hold to the contrary.
>
> Those requirements are set forth in detail below. The budgetary discretion of CID's board of directors, however, is not germane to the adjudications of water rights now before this Court. A record of taxes that have been levied against water users is not in

any reliable sense reflective of whether water has been put to beneficial use. State's Response at pp. 79-80.

The Brantleys respond as follows:

The CID has very limited discretionary power. The CID is, by the March 9, 1933 Contract between itself and the Pecos Water Users' Association, obligated to follow and honor existing contracts including obligations, restrictions and liabilities of the Pecos Water Users' Association. The 1933 Contract stated:

> **AND WHEREAS said Contract contemplates that the district shall succeed to all of the privileges, immunities, rights and assets, as well as the obligations, duties and liabilities of the Association, as provided by Section 73-177 Codification of 1929, New Mexico Statutes.**
>
> **NOW, THEREFORE, in consideration of the premises and in consideration of the mutual covenants and agreements herein contained it is agreed by and between the parties as follows:**
>
> **VI**
>
> **The Association shall, and it hereby does convey, assign, transfer and set over unto the District all of the said Association's rights, assets, privileges and immunities of any kind or nature whatsoever, together with all of the said Association's obligations, duties and liabilities.**

The Eddy County District Court Decree in 1933 declared the CID bound and subject to the provision of the 1932 contract between the Pecos Water Users' Association, the CID and the U.S. Prior contractual obligations, such as the Amended Articles of Incorporation of the Pecos Water Users' Association, which formed the terms of the Subscription Agreements between the Association and its shareholders is an example of the type of contractual limitations. The Amended Articles of Incorporation of the Pecos Water Users' Association FN

FN An argument may be advanced that the CID did not

assume and become obligated to abide by the Amended Articles of Incorporation of the Pecos Water Users' Association. The argument, if advanced, is not correct. The CID is clearly bound to the Subscription Agreements that every member of the Pecos Water Users' Association had to sign. Contained in those Subscription Agreements and made a part of the contract is the entire Amended Articles of Incorporation of the Pecos Water Users' Association (*See **Appendix # 9***)

at Article VI, §7 provides:

> **Except for the operation, maintenance and repair, no work shall be undertaken, purchase made or indebtedness incurred or be authorized during any one year, whereof the cost shall exceed ten thousand dollars ($10,000), until it shall have first been ratified by at least two-thirds of the shares represented by the votes cast as an election to be called and held for that purpose. Special elections may be called and held for such purpose under such by-laws as the board of directors may prescribe, not inconsistent with these Articles.**

The CID's authority is limited by this section. Any activity of the CID since 1933 in violation of this section has been illegal and in violation of Court Order. Further, any election held by the CID is limited by the mandate of Article VIII, § 2 of the Amended Articles of the Pecos Water Users' Association which provides:

> **At all election**(sic)**each shareholder shall be entitled to one vote for each share of stock owned by him, not however to exceed in the aggregate one hundred and sixty votes.**

Therefore, if the CID is to obligate itself to expend more than $10,000.00 for some work other than operation, maintenance and repair, a vote must be held among CID members and the vote shall be based upon water right acreage owned up to a maximum of 160 acres. FN

FN It must be noted the CID board elections are conducted

> on each individual member having one vote rather than based on the amount of water right acreage owned. For decades, the CID elections for Board of Directors have been illegal because they were conducted in direct violation of Court Decree and contractual obligations the CID is bound to follow. Brantleys' Response at pp. 54-55.

The Tracy/Eddys respond as follows:

> Not applicable to the Tracy/Eddy interest, but see Answers to 18 thru 25. Tracy/Eddys' Response at p. 17.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 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 this is an incomplete statement of the provisions of the statute.

The United States's responds:

> The first paragraph of NMSA 1978, § 73-11-29 (1919) states: "Every person desiring to receive water during the course of the year, at the time he applies for water shall furnish the secretary of the board of directors of said irrigation district, a statement in

writing of the number of acres intended by him to be irrigated, and a statement, as near as may be, of the crops planted or intended to be planted." The statute also allows the board to exempt "lands which, in the opinion of the board of directors, are unfit for cultivation by irrigation" from assessment. Lands which are not assessed do not receive water. See NMSA 1978, § 73-10-16 (1919)(water is to be distributed *pro rata* to those lands assessed).

Apart from the provisions of NMSA 1978, § 73-11-29 (1919), section 3 of the Reclamation Act of 1902 charged the Secretary with pursuing Reclamation projects only on those lands which were found to be irrigable. See 43 U.S.C. §§ 416, 434. By 1926, it was illegal under federal law to include non-irrigable lands in a Reclamation project or to provide them with water. 43 U.S.C. § 423. FN

FN 43 U.S.C. § 423 demonstrates that all water use on a reclamation project ultimately stems from the United States. The statute forbids delivery of water to lands classified as permanently unproductive and provides that "the water right formerly appurtenant to such permanently unproductive lands shall be disposed of *by the United States* under the reclamation law..." (emphasis added). United States's Response at pp. 28-29.

CID responds:

CID sets forth the proper interpretation of NMSA 1978, §73-11-29. The statute speaks for itself. CID's Response p. 49.

The State responds:

In its January 19, 2001 submissions to the Court, CID incorrectly cited a key provision of NMSA 1978, Section 73-11-29 (1999). CID asserted that it had the discretion to not provide water to lands within the district it deemed unfit for cultivation, or to which existing distribution works could not furnish water to such points of delivery. Section 73-11-29, however, does not stand for this proposition. Rather, Section 73-11-29 is a statute concerned with categories of various funds the district will require to meet its obligations, the taxes the district can impose, and mechanisms through which an aggrieved landowner can appeal a taxing

decision.

The State disagrees with CID's assertion that it has the discretion to not deliver water to lands it deems unfit for cultivation. Nothing in Section 73-11-29 supports this assertion. Section 73-11-29 sets forth four categories of funds that an irrigation district must consider when estimating its financial needs. The first is for the payment of bonds and any instalment on the principal of the bonds. *Id.* § B(1). The second is for any payment to become due under contract with the United States or to secure bonds which have not been deposited with the United States, or both. *Id.* § B(2). The third is for the payment of expenses of operation and maintenance of the irrigation and drainage systems to be collected by tax assessment and levy, to be collected from all lands within the district whether irrigated or not, except as such lands may be exempted. *Id.* § B(3). The fourth category is for current and miscellaneous expenses not included in other categories. *Id.* § B(4).

Of particular relevance here is a provision of § 73-11-29 that exempts certain lands from being taxed for purposes of the third category, funds necessary for the payment of expenses of operation and maintenance. The statutory provision reads, in relevant part:

> Lands that, in the opinion of the board of directors, are unfit for cultivation by irrigation on account of seepage, alkali or physical condition and location of the land, or other conditions, or lands to which the existing distributing system or its extensions cannot furnish water at such points of delivery as the board may consider reasonable, shall not be taxed for Paragraph (3) of Subsection B of this section, ...; and lands shall not be taxed for Paragraphs (1) and (2) of Subsection B of this section for the periods and to the extent that, on account of seepage or other conditions, in the opinion of the directors or the secretary of the interior, as may be provided by contract with the United States, or with district bondholders, such lands are not fit for cultivation by irrigation on account of those conditions; but nothing contained in this section shall be construed to relieve the district from making provision to

> raise the amount required to make full payment to private creditors or to the United States for the full cost of construction or of operation and maintenance, irrespective of the exemption of any lands from taxation, unless expressly provided by the assent of the bondholders or other private creditors or by agreement with the United States, as the case may be.

Id. § (C).

The plain language of this section shows that nothing therein gives CID the power to refuse delivery of water to a member with water rights. Rather, the provision of the statute on which CID relied is concerned exclusively with the amount of taxation that may apply to lands which are no longer fit for cultivation. The intent of this provision is to assure an element of fairness and equity in the tax structure of the district, not to allow the board of directors to refuse to deliver water. Similarly, with certain exceptions, "[t]he portion of the operation and maintenance expenses collected by tax assessment and levy shall be collected from all lands of the district, whether irrigated or not." NMSA 1978, § 73-11-29(B)(3) (1999). These statutes reinforce the fact that there is no necessary connection between CID's assessments and the water rights being adjudicated. As the State points out in previous sections of this brief, consistent with constitutional prohibitions against the taking of property without just compensation, the district does not have the authority to substitute its judgment for that of the member regarding proper management of his or her land and water rights. *See, e.g.*, U.S. Const., amend. V; N.M. Const. art. II, § 20. FN

> FN The State is not hereby implying that a member with water rights has an absolute constitutional right to continue to irrigate land where such irrigation would be contrary to the law of beneficial use. Rather, the State maintains that CID itself may not unilaterally make the determination that beneficial use is no longer followed, and refuse to deliver water to a member with water rights who is paying an assessment.

No such constitutional constraints exist where a water right has not vested, and therefore no property interest has been established. Provided that no water has been delivered to land such that a water right would vest by virtue of beneficial use, the

State agrees with CID that the District is not compelled to deliver water to "lands to which the existing distributing system or its extensions cannot furnish water at such points of delivery as the board may consider reasonable." Section 73-11-29 (C). State's Response at pp. 80-82.

PVACD responds:

PVACD has nothing to add to State's Response. PVACD's

Response at p. 22.

The Brantleys respond:

The Pecos Irrigation and Improvement Company Deed and Contract called for delivery of water on demand by the water right owner as necessary for the crops to be grown. (*See **Appendix #5***) This is a vested right for water right owners in Court Category One. **Section 73-11-29 N.M.S.A. 1978 Comp.** provides in part:

> **Every person desiring to receive water during the course of the year, at the time he applies for water shall furnish the secretary of the board of directors of the said irrigation district, a statement in writing of the number of acres intended by him to be irrigated, and a statement, as near as may be, of the crops planted or intended to be planted.**

This statutory language is very close to the language contained in the contract with the Pecos Irrigation and Improvement Company, which the U.S. and CID is bound to follow.

The CID has no authority to determine what land is or is not capable of cultivation. That determination belongs to the land owner. It is a part of his property right to make his own unfettered determination as to whether his land is or is not capable of cultivation. As long as the CID assessment has been paid, the water right owner has the absolute right to have all water delivered to where he wants it delivered irrespective of whether that water right owner's judgment call regarding the ability to successfully cultivate a piece of land is or is not ultimately proven to be correct.

> The CID's refusal to deliver water to a water right owner who has paid his assessments is a taking in violation of the vested property right.
>
> Again, it must be noted that as to Court's Category One water right, within which the Brantleys' right fall, those water rights are prior rights that vested well before enactment of the statute and the statute cannot impair those vested property rights. **Rubalcava v. Garst, supra.** Brantleys' Response 56 et seq.

The Tracy/Eddys respond:

> This is an incomplete statement of the provisions. This is primarily a statement to be used for assessment or tax purposes for the expenses of operation and maintenance of the irrigation and drainage systems. It is not a blanket statement that provides that they can make an arbitrary discretionary determination that certain lands are unfit for cultivation. They have a duty to supply water to the water right owners within the District up to 25,055 acres total or 176,500 acre feet. Therefore, any given member of the District may accept his full allotment but the Board may decide not to tax him for item 3 under the statute because there may not be a way to get water on the property or the water may not be beneficial to the property in question but would be beneficial to other areas owned by the vested rights owner of the water rights. This is a tax statute to prohibit unfair levies on property not being used, not a blanket determination of the Board's authority. Tracy/Eddys at p. 17.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 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.

The State responds:

> CID's recitation regarding Section 73-11-29 is incomplete in that it does not explain to the Court the exemptions from assessments that are included in the statute. Furthermore, CID does not explain to the Court that the statute provides that up to one-half of the operating and maintenance charges for the district's irrigation system may be collected by means of tolls and charges imposed upon those who actually use an irrigation system and water.
>
> In material part, Section 73-11-29 states that:
>
> > "[t]he amount required to meet the obligations of the district, except that portion collected from tolls and charges, shall be raised by tax assessments, levy and collection, as provided in Chapter 73, Articles 10 and 11 NMSA 1978, to be extended pro rata per acre over all lands in the district or, in appropriate cases, under Paragraph (2) of Subsection B of this section, against all land in each respective unit of the district."
>
> NMSA 1978, § 73-11-29(C) (1999).
>
> Section 73-11-29 requires an irrigation district to collect not less than one-half of the ensuing year's operating and maintenance expenses for its irrigation and drainage systems by tax assessment and levy from all lands of the district, whether irrigated or not, except those lands exempted from taxation by the terms of Chapter 73, Articles 10 and 11 NMSA 1978. *Id.*, at (B)(3). The remainder of the estimated operating and maintenance expenses must be paid by the parties actually using the irrigation and drainage systems "and water for irrigation or other purposes in accordance with the terms of their contract for water[.]" *Id.*

> As explained in the State's Response to Question 2 (quantification of water rights of individual members), CID's assessments are irrelevant to the core issues involved in adjudication. The assessments are not an accurate measure of the number of acres that are actually irrigated by the individual members or that have water rights. The only relevance of CID's assessment rolls is in determining whether water users have paid the fees necessary to receiving water from the District. State's Response at pp. 82-84.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 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.

The United States responds that "The Court seeks no response from the United States.". United States' Response at p. 29.

CID responds:

> The Court did not seek CID's response to a portion of this question. The powers and duties of the Board of Directors are found in NMSA 1978, § 73-10-16. The Board of Directors of CID is authorized to institute and maintain any and all actions and proceedings necessary or proper to fully carry out the provisions of

Chapter 73. See NMSA 1978, § 73-10-20. CID's Response at p. 29.

The State responds:

> Articles 10 and 11 of Chapter 73 contain provisions regarding the powers of irrigation districts. In their most general terms, these laws authorize the boards of irrigation districts to "perform all such acts as shall be necessary to fully carry out the purposes of this act." NMSA 1978, § 73-10-1 (1919), NMSA 1978, § 73-10-16 (1921). The basic purposes of the pertinent acts are to establish irrigation districts and distribute water among the owners of lands within the districts. *Id.*
>
> CID, despite its claim to the contrary, does not have an unqualified right to legally represent its members' interests, including their water rights, and the duty to protect their Project water rights. For example, CID has no standing to participate in subfile proceedings. 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., John Does I through III v. Roman Catholic Church of the Archdiocese, Inc.*, 1996 - NMCA-094 at ¶ 25, 122 N.M. 307 (1996). The District's powers lie chiefly in the area of budgeting and in the construction and maintenance of diversion works. *See* NMSA 1978, § 73-11-29 (1999) (financial and budgetary powers); NMSA 1978, § 73-10-16 (1921) (pro-rata distribution of water; creation of physical water delivery works, cooperation with the United States for the delivery and distribution of water).
>
> Moreover, although statutes grant the District significant authority in some areas, such as budgeting, as discussed elsewhere in this brief the District's authority is more limited with respect to water administration. For example, the District is bound by the rulings of this Court and by statute to deliver water to its members. The distribution of water must be equitable and pro-rata. To the extent the District has authority to supervise and administer certain waters within the District, concurrent with the State Engineer's authority, that authority is limited and circumscribed. The District can only approve the transfer of surface water irrigation rights within the District, provided it immediately reports the transfer to the State Engineer. See State's answer to question D.5, above,

addressing the transfer of surface water rights; *see also* NMSA 1978, Sections 73-13-4, -5. The District has the authority to issue priority calls on behalf of its members, but may not deprive its members of their water rights without due process and just compensation. In the administration of its water supply, the District is bound by constitutional principles of beneficial use, including the doctrine of waste. Finally, the District has no authority over groundwater, even if wells are located within the District. Thus, while in some respects the District has generous powers of administration and has a duty to act for the benefit of its members, its powers are not limitless, and are bounded by definite restraints. State's Response at pp. 84-85.

The Brantleys respond:

> The CID's authority is limited by its contractual obligations. Those contractual obligations provide protection to water right owners within the project. The CID is not allowed to exercise powers in derogation of the rights of the water rights owners. However, that has routinely occurred. The CID has routinely not protected or represented its Members. It routinely breaches its fiduciary duty to its members. This is evidenced by the fact it has urged this Court to hold that the water rights are owned by the U.S. and that the CID has more authority than its members. Further, the CID has openly violated contractual obligations to which it is bound by Court Decree for years, e.g. (a) illegal voting for Board Members; (b) illegal incurring of debt in excess of $10,000 without membership vote; (c) taking of water without compensation to members; (d) refusal to supply available water for crops in doubt conditions; (e) no general membership meetings in ten years; and (f) continuing violation of New Mexico's Open Meetings Act. Brantleys' Response at p. 29.

The Tracy/Eddys respond:

> The Tracy/Eddy interest submit to this Court that CID's powers are limited to its fiduciary duties to its members. Not a duty to itself as an entity to make decisions in derogation of the water right owners interests. They are violating their water right owners interests when they claim to own the water rights, or the United States owns the water rights, as they have through this suit and they have violated the rights of the owners water rights by taking their water or agreeing to allow water to be taken without

compensation. CID Board is limited in its authority to its Charter and to the contract it signed with the United States Government in 1932. It has no ancillary powers over and above its duties to its members to maintain the facilities and deliver water. Tracy/Eddys' Response at p. 18.

Court's Decision

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUES RE CLAIMS OF THE UNITED STATES

ISSUE NO. 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?

COURT'S DECISION

Yes, on behalf of members of CID in connection with the United States' right to divert and store Project water and the right of CID to distribute Project water. See Court's opinion, Issue No. 4, *supra*, p. 7-8.

ISSUE NO. 31

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

COURT'S DECISION

The diversion and storage rights of the United States in connection with Project water cannot be forfeited or abandoned through laches or the neglect of its officers or its employees. *United States v. Ballard,* 184 F. Supp. 1, 12 (D.N.M. 1960). See Court's Decision re Issue No. 4, p. 12 and Supplemental Decision and Order served on December 19, 2001, pp. 29-30.

ISSUE NO. 32

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

The issue as framed, is not clear.

The State responds:

> The State has addressed issues concerning the relationship of the 1906 Contract and subsequent contracts with New Mexico statutes controlling the operation of CID in its responses to a number of the questions posed by the Court. For the Court's convenience, the State summarizes here its response (sic) to those questions.
>
> In addition to the 1906 Contract between the United States and the PWUA, and the 1932 Contract between the United States, the PWUA, and CID, the 1905 PWUA Articles of Incorporation raise issues with regard to New Mexico statutes controlling the operation of CID. *See* Articles of Incorporation, art. V, § 2; 1906 Contract, at 3-4; 1932 Contract, at 20, ¶ 32. The issues raised focus on the apportionment of water, the significance of the 25,055 acreage, and the relationship of tax rolls to apportionment.
>
> The Articles of Incorporation established a system of distributing a "proportionate part of all the water available for distribution" to each acre of land owned or public land occupied by a PWUA shareholder. Article of Incorporation, art. V, § 7. The 1906 Contract deferred to this "proportionate" distribution. 1906 Contract, at 3-4; *id.* at 5, ¶ 1. The 1932 Contract in turn apportioned to each acre the amount of water "to which it would be entitled under the various contracts applicable thereto." 1932

Contract, at 20, ¶ 32. The "proportionate" allocation in these historical agreements is not materially different from the "pro rata" distribution that is mandated by NMSA 1978, § 73-10-16 (1921).

The 1932 Contract states that CID "contains a total irrigable area of 25,055 acres." 1932 Contract, at 1-2, ¶ 2; *see also In re Organization of the Carlsbad Irrigation District*, at 33-34 (1933 judicial authorization of 1932 Contract). This figure does not necessarily reflect the acreage *actually* irrigated. Instead, it sets the upper limit of possible irrigable acreage. For the reasons set forth in the State's responses above, the water rights of CID members should be quantified on the basis of actual irrigated acreage, not a theoretical upper limit of irrigable acreage. To do otherwise would violate principles of beneficial use. Moreover, basing distribution of water on the 25,055 figure would violate principles set forth in the 1905 Articles and the 1906 Contract upon which the 1932 Contract was based. *See* Articles of Incorporation, Art. V, § 8 (stating "that the whole amount of water actually delivered [sic] to such lands from all sources shall not exceed the amount necessary for the proper cultivation thereof"); 1906 Contract, at 6, ¶ 3 (same).

The 1932 Contract establishes a system of assessing water users for the costs of operation and maintenance and requires a proper record of these assessments. 1932 Contract, at 19-21, ¶¶ 29-33. As set forth above, CID's assessment rolls are not a measure of the number of acres that beneficially receive water. For the purposes of adjudication, the assessment roll serves two functions: First, water users may not irrigate more acres than the total number of acres for which they have paid an assessment. Second, the assessment establishes whether an individual member is legally eligible to receive water. State's Response at pp. 88-90.

The Brantleys respond:

The 1906 contract and subsequent contracts control over subsequent New Mexico statutes. Contracts from the inception of the work to divert of water from the Pecos for the purpose of applying the water to beneficial use in the 1880's through the 1932 contract between the U.S., the CID and the Pecos Water Users' Association are controlling. Those contracts establish and preserve the vested property rights of the individual water right owners. The operation of the CID is directly affected and controlled by those vested rights. An example of the rights that vested in the water

> right owners that directly affect the operation of the CID are such things as: (a) the right to have water delivered upon demand as necessary to cultivate a crop; (b) the right to transfer water rights from one location to another; (c) the right to limit the amount of capital expenditure the CID can do without vote of the individual landowners and (4) the right to one vote per one acre of water right up to a maximum of 160 votes per individual water right owner. Those vested property rights cannot be taken away or altered by subsequent legislation. **Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949); Pierce v. State, 121 N.M. 212, 1996 -NMSC-1, 910 P.2d 288 (1995)** Therefore, so far as vested property rights affect and control the operation of the CID, subsequent legislative action cannot take away or alter those vested property rights. Brantleys' Response at p. 50.

The Tracy/Eddys respond:

> The 1906 contract and all subsequent contracts are the primary documents setting forth the rights of the water right owners and the duties and obligations of the various irrigation companies including the Carlsbad Irrigation District. Those contracts all set forth the rights, duties and obligations of each of the parties for the applying of the water to beneficial use to the land. They set forth the vested property rights of the water right owners and the duties of the various companies to make delivery to them upon paying certain fees. An example of this is the fact that the water rights were attributed to a "unit" and beneficial use can be any place in that "unit". Of course, statutes passed subsequent thereto that are not in conflict with the contractual rights granted in those contracts are certainly controlling on all parties. The state law of New Mexico clearly affects the operation of the Carlsbad Irrigation District in view of the fact that it was not created until the enabling case of March 9, 1933 in Eddy County. The Carlsbad Irrigation District does have to follow those state laws in its operation in so far as they are not in conflict with its contract with the United States Government. Tracy/Eddys' Response at p. 19.

Court's Decision

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 33

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

COURT'S DECISION

Please refer to the matters discussed under the heading **NMSA 1978,§72-9-4** of **ISSUE NO. 3** of the Court' Decision pp. 9-11 and the Court's Supplemental Decision and Order served on December 19, 2001, at pp. 30-31.

ISSUE NO. 34

Do the State Engineer's permits conclusively determine the matters contained therein?

COURT'S DECISION

Please refer to the discussion in connection with Issue No. 8, *supra*, p. 9.

ISSUE NO. 35

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

COURT'S DECISION

The United States responds:

> Yes. The New Mexico Court of Appeals, recognizing that the United States is owner of the project's water rights and its facilities, held that distribution of water within the project depends on the will of the United States. Brantley Farms, 954 P.2d at 771-72. Ultimate authority over the operation and management of the

> Project's reservoirs remains in the United States as it has not been released by Congress. 43 U.S.C. § 498. Moreover, the Secretary of he Interior has the authority to take any action necessary to give the Reclamation Act full force and effect. 43 U.S.C. § 373. Thus the United States can refuse to release water to CID, and in that sense, distribution of water within the Project depends on the will of the United States. However, once water is released to CID, CID has the authority and discretion to distribute water within the Project, so long as it does so consistent with Reclamation law, rules and regulations of the Secretary of the Interior and the provisions of the contracts between CID and the United States. NMSA 1978, § 73-10-24 (1919). United States' Response at p. 31.

CID responds, in pertinent part, as follows:

> Distribution of water within the Project is performed by CID limited by its obligation under the state statute to distribute the water pro rata. CID's Response at p. 41.

The State responds, in pertinent part, as follows:

> Distribution of water within the Project does not depend on the will of the United States. Rather, the United States is bound by constitutional principles forbidding takings without just compensation or due process. U.S. Const., amends. V, XIV. In addition, the United States must comply with decisions of the Supreme Court clearly holding that the United States is bound by state water law in the appropriation and distribution of water, *see, e.g., Nevada v. United States*, 463 U.S. 110, 122-23 (1983), and that irrigators within an irrigation district own the waters rights. *See, e.g., Nebraska v. Wyoming*, 295 U.S. 40, (1935). The United States is also bound by the directives of Reclamation law, and by its contractual obligations. The distribution of water within the Project, therefore, does not depend on the will of the United States.
>
> Section 8 of the Reclamation act shows that the United States must defer to state water law in the control, appropriation, use, or distribution of water, and must deliver Project water to irrigators within CID. In *California v. United States*, 438 U.S. 645 (1978), the Court noted that Section 8 not only "provide[s] for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" *Id.* at 675. Rejecting the United States'

contention that Section 8 merely requires the Secretary to file a notice with the State of his intent to appropriate water while ignoring the substantive provisions of state law, the Court found that the legislative history of the 1902 Reclamation Act made it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law. *Id.* The United States, therefore, must deliver water to the irrigators of the Carlsbad Irrigation District, since the water the United States diverts belongs to those irrigators under New Mexico law.

Moreover, under federal law the United States has no property interest in the waters it diverts, for "[a]ppropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract [between the United States and water users], the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Ickes v. Fox*, 300 U.S. 82, 95 (1937)." Under either New Mexico or federal law, therefore, irrigators within the Carlsbad Irrigation District own their water rights, and the United States cannot, pursuant to constitutional principles controlling takings and due process, deprive them of water that can lawfully be put to beneficial use.

Finally, the United States has bound itself through contract to delivery of Project water. In the 1906 Contract, the United States agreed to make no rule or regulation interfering with the rights of the shareholders of the PWUA. Exhibit 4, United States Statement. In the 1932 Contract, the United States assigned its delivery obligation to the District, mandating that "[t]he District shall make proper distribution and delivery of water to all parties entitled thereto in full accordance with the provision of their contracts," Exhibit 14, United States Statement, thereby reaffirming its contractual obligation to deliver water to members of the District.

The State acknowledges that the *Brantley Farms* court noted, under the facts of that case, that the distribution of water pursuant to a request from the District depended on the will of the United States. *Brantley Farms*, 124 N.M. at 707. However, the *Brantley Farms* court, in making that statement, assumed that the Hope Decree's assigning Project water rights to the United States was a correct statement of law. As this Court has already ruled,

consistent with Reclamation law, New Mexico law, and United States Supreme Court decisions, the United States owns no water rights within the Carlsbad project. The United States has admitted, and this Court has recognized, that the United States purchased no water rights from the Pecos Irrigation Company, and that it had not itself put water to beneficial use. Thus, while the United States owns reservoirs on the Pecos stream system, the United States owns no Project water rights. State's Response at p. 90-92.

PVACD responds:

No. This is delegated to the CID. The US has ultimate authority over project water supply, and can prevent the supply from reaching distribution. PVACD's Response at p. 23.

The Brantleys respond:

NO! The U.S. does not own the water rights. The right to divert "...is an inherent property right incident to the ownership of water rights..." **Durand v. Reynolds, supra.** The storage right is limited by the beneficial right.

In the 1906 contract between the U.S. and the Pecos Water Users' Association, paragraph 8 provided in part:

> **... the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association as defined or modified by said articles of incorporation and by-laws.**

The prior contract in the 1880's involving the Pecos Irrigation and Improvement Company which vested property rights in those individuals acquiring through the Pecos Irrigation and Improvement Company's Deed and Contract provided:

> **2d. Said water shall be used only to irrigate the lands above described and for domestic purposes and stock kept thereon, and under no circumstances shall the same or any part thereof, be used for mining, milling or mechanical power, or any other purpose not directly**

> **connected with, or incidental to, the purposes first herein mentioned.**

In 1932, the U.S., the CID and the Pecos Water Users' Association entered into a contract. Paragraph 39 of the contract provided:

> **The District shall make proper distribution and delivery of water to all parties entitled thereto in full accordance with the provisions of their contracts now and hereafter made and the Reclamation Law and public notices and rules and regulations issued by the Secretary thereunder.**

That contract provision honored prior existing contracts and did not limit delivery of water pro-rata.

By terms of the 1933 Eddy County District Court Final Judgment ratifying and approving the 1932 contract between the U.S., the CID and the Pecos Water Users' Association, the U.S. was bound to the provisions of the Pecos Water Users' Association Amended Articles of Incorporation. The Amended Articles of Incorporation provided at Article IV, 1. the following:

> **The purposes for which this Association is organized and the general nature of the business to be transacted are: To acquire, furnish, provide for, and distribute to the lands of the shareholders of this Association** [water right owners], **as herein provided, an adequate supply of water for the irrigation thereof, to divert, store, develop, pump, carry and distribute water for irrigation and for all other beneficial uses, deriving the same from all available sources of supply; to construct, purchase, lease, condemn or acquire in any manner whatsoever, and to own, use,sell, ...**

Those Amended Articles of Incorporation provided that distribution of water was to be delivered to the water right owner at such times during the season as the water right owner may need for proper irrigation of the crops. [*See: Article V, §7*] The Amended

Articles also required all available water be provided as required by the owner of the water right. In addition, the Amended Articles of Incorporation provided that no by-laws could be passed or enforced that interfered with or affected any existing vested right of the member of the Association to the use of water for irrigation. [*See: Article VII, §14*] Further, Article XII,§1 provided that nothing in the Articles of Incorporation could be construed as affecting, or intended to affect, or in any way interfere with the vested rights of any persons to the prior use, or delivery of any waters.

In considering the fact the U.S. does not own any water rights, the right to divert is incident to the ownership of water rights and the storage is dependent upon the amount of water rights in existence, together with the U.S.'s contractual obligations, the U.S. has absolutely no right to control distribution of water. It might be noted that in its recent comments to the language in Offers, the U.S. said "The distribution of Project 'water depends on the will of the United States, as owner of the reservoirs and water right in the Project.'" The clear intent of the United States is to take control of the water on the Pecos in such a manner as to allow it to divert water for uses other than agriculture, such as endangered species, without compensating the water right owners for their loss of property. The U.S. is looking for a method of legalized thievery with the CID's Board's approval. Brantleys' Response at pp. 61-62.

The Tracy/Eddys respond, in pertinent part, as follows:

No. In the 1906 contract between the United States and the Pecos Water Users Association the Secretary of the Interior was specifically forbidden to impose a rule or regulation interfering with any vested right of the shareholders of the Association set forth in the Articles of Incorporation. The previous contract with the Pecos Irrigation and Improvement Company also had the limitation as to the government having any right to interfere. The 1932 contract specifically provides that the District shall make the proper distribution of the water in full accordance with the contract. The entire purpose of organizing the Carlsbad Irrigation District was to provide water and distribute it to the lands of the shareholders who had vested ownership rights and their duties are set forth in their Articles of Incorporation, which provide for them to make such distribution. This distribution does not belong to the

> United States Government and they cannot interfere with it because they own no water rights. Any right to divert the water is incident to the ownership and as the United States has no ownership right, it has no right to make a decision upon the distribution. Tracy/Eddys' Response at p. 20.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 36

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

The United States responds:

> Yes. Section 10 of the Reclamation Act gives the Secretary of the Interior authority to "perform any and all acts...necessary and proper [to carry the Act] into full force and effect." 43 U.S.C. § 373. Such acts could include refusing to release water to CID, if doing so were necessary to fulfill the purposes of the Reclamation Act. In addition, the 1932 contract reiterates the United States' authority to refuse to release water should CID not meet its repayment obligations. U.S. Statement of Claims, Ex. 14, 1932 Contract, at ¶ 30. United States' Response at p. 32.

CID responds:

> The Court did not seek CID's response to this question. CID's Response at p. 41.

The State responds:

> Pursuant to paragraph 2, Section 30 of the 1932 Contract, Exhibit 14, United States Statement, the United States is not obligated to release water when the "District is more than twelve months delinquent in the payment of any amount due from the District to the United States." Aside from this contractual limitation to which the District agreed, however, the United State is bound under the principles set out in the answer to the Court's previous question to release water to the Carlsbad Irrigation District. State' Response at p. 93.

The Brantleys respond:

> NO! Under existing prior contracts, the U.S. Constitution, the New Mexico Constitution, U.S. Statutes and New Mexico statutes, the U.S. cannot refuse to deliver water. The sole reason for diversion and storage of water for the CID is for irrigation and agricultural purposes for the water right owners. To refuse to deliver water, the U.S. is in violation of its contractual obligations and the law. Further, to refuse to deliver water for reasons not related to irrigation and agricultural purposes, such endangered species, amounts to a change of place, purpose or use which requires State Engineer approval, if the State Engineer can even do so. Brantleys' Response at p. 63.

The Tracy/Eddys respond:

> No. The United States has no authority to refuse to release the water for the same reason as set forth in the answer to question No. 35. The one exception to that is that the Supreme Court case of Texas vs. New Mexico in determining the right pursuant to the Pecos River Compact might give them the right under certain circumstances pursuant to the contract to divert water to Texas, but that does not imply that they may refuse to release water to the Carlsbad Irrigation District as long as the water is pro rated under the Compact. Tracy/Eddys' Response at p. 20.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

ISSUE NO. 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.

STATE'S RESPONSE

The State responds, in pertinent part, as follows:

> In its Response to the January 19, 2001, submissions of the United States, the State noted at paragraph 17, pages 12-13 that it disputed certain contentions of the United States, but respectfully suggested that without a factual controversy to illuminate and give substance to the issues raised by these claims, issues surrounding these claims were not ripe for a ruling. Nevertheless, to the extent it can the State responds here to the Court's question. The State's response is limited to the points and authorities raised by the United States in its January 19th submissions. Provisions of law other than those cited by the United States, including numerous reclamation statutes and court decisions, may have an ultimate bearing and effect on the issues raised by the United States on January 19th. The responses below focus solely on the claims the United States has made in relation only to the authority cited to support that claim.
>
> > Claim that consumptive use of the water of the Carlsbad Project must be made on lands within the Carlsbad Irrigation District, *citing* 43 U.S.C. § 419.

Section 419 states in relevant part:

> > Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause

> to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence.

Although nothing in this section expressly states that consumptive use of water within a reclamation project must be made within the project, the section does grant the Secretary of the Interior the discretion to initially determine which lands within a project could practically be irrigated, and mandates that he shall give public notice of the lands that are irrigable. Implicitly, then, this statute supports the claim of the United States that consumptive use of the water of the Carlsbad Project must be made on land within the Carlsbad Irrigation District. As noted above, however, other provisions of law, together with any relevant facts that may arise, may have an ultimate bearing and effect on the issue raised here.

> Claim that the United States must approve the permanent transfer of water rights within the Carlsbad Project, *citing* 423 U.S.C. § 423.

Section 423 states in relevant part:

> All lands found by the classification made under the supervision of the Board of Survey and Adjustments (House Document 201, 69th Congress, 1st Session, checked and modified as outlined in General Recommendations numbered 2 and 4, Page 60 of said document), to be permanently unproductive shall be excluded from the project and no water shall be delivered to them after the date of

> such exclusion unless and until they are restored to the project. Except as herein otherwise provided, the water right formerly appurtenant to such permanently unproductive lands shall be disposed of by the United States under the reclamation law: Provided, That the water users on the projects shall have a preference right to the use of the water: And provided further, That any surplus water temporarily available may be furnished upon a rental basis for use on lands excluded from the project under this section, on terms and conditions to be approved by the Secretary of the Interior.

The State disagrees that this provision of law supports the United States' assertion. This statute addresses the classification of lands, not the permanent transfers of water rights. Moreover, the purpose of the statute is the "rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis," not the control of the permanent transfers of water rights within a district. 43 U.S.C. § 423f. Finally, the statute is silent on the issue of approval of a transfer that would be initiated by a member within CID who simply has chosen to convey his rights. The State disputes, therefore, the United States claim that under this statute it must approve the permanent transfer of water rights within the Carlsbad Project.

> Claim that there must be equitable distribution of Project waters, *citing* 43 U.S.C. § 461

Section 461 states that

> [t]he construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably.

This statute does not directly address the distribution of water. Case law interpreting this statute, however, notes that "the basic principle of the law is that the settler shall pay the cost of what he

gets, and, reciprocally, shall get that for which he pays." *Payette-Boise Water Users Ass'n v. Cole*, 263 F. 734, 739 (D. Idaho, 1919). If charges are to be apportioned equitably, then a pro-rata distribution of water among Project users is consistent with this statute and case law

> Claim that the United States must approve any distribution of water outside the Carlsbad Project boundaries, *citing* 43 U.S.C. § 521, 390tt

Section 521 states:

> The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: Provided, That the approval of such contract by the water-users' association or associations shall have first been obtained: Provided, That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: Provided further, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: Provided further, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

This statute does not support the contention that the United States must approve any distribution of water outside Carlsbad Project boundaries. As the plain language of this statute shows, this statute allows the United States to enter into an agreement to supply water from an irrigation project for other than irrigation purposes, but imposes significant limitations on the federal action, including that water users approve such agreements, that water service for an irrigation project will not be harmed, and that the rights of any prior appropriator not be impaired. As the court in *Molokai Homesteaders Cooperative Ass'n v. Morton*, 356 F. Supp.

148 (D. Haw., 1973), stated, "the section applies only to the sale of *surplus* waters from federal reclamation projects." *Id.* at 152 (emphasis added). Nowhere in this section, moreover, is there language mandating that the distribution of water outside Project boundaries must be approved by the United States. FN

> FN The State is not hereby conceding that surplus waters which would fall under this statute are available on the Pecos stream system. Whether such surplus waters may exist from time to time, given the storage ceilings found in State Engineer permits to CID and the United States, and given the complex hydrological and legal regimes on the river, is a question of fact and law that the Court here need not decide, since no conversion issue is presently before the Court. Moreover, the Court's jurisdiction in this instance may be limited by the continuing jurisdiction of the Supreme Court of the United States in *Texas v. New Mexico*, No. 65 Original, 485 U.S. 388 (1988).

Section 390tt mandates that

> [i]rrigation water temporarily made available from reclamation facilities in excess of ordinary quantities not otherwise storable for project purposes or at times when such irrigation water would not have been available without the operations of those facilities, may be used for irrigation, municipal, or industrial purposes only to the extent covered by a contract requiring payment for the use of such irrigation water, executed in accordance with the Reclamation Project Act of 1939 [43 U.S.C.A. § 485 et seq.], or other applicable provisions of Federal reclamation law.

As with Section 521, there is no support in this section for the proposition that this section authorizes the United States to approve any distribution of water outside the Carlsbad Project boundaries. The plain language of this section discusses water temporarily made available in excess of ordinary quantities. Under the State Engineer permits granted to the United States and the Carlsbad Irrigation District, there is no such water available on the Pecos. Indeed, the 1972 permits and its amendments thereto allow the United States and CID to undertake to store a maximum of

176,500 acre-feet in their four reservoirs. Under the controlling permits, any amounts of water available, temporarily or otherwise, exceeding this storage allowance must spill to the river. There is no basis under this section, therefore, either when paired with Section 521 or when read independently, to support the United States' assertion that it must approve any distribution of water outside the Carlsbad Project boundaries

> Claim that the United States controls the ability to store non-project water in the facilities it owns, *citing* 43 U.S.C. §§ 523, 524

> Neither Section 523 nor Section 524 provide support for the United States' assertion.

Section 523 reads:

> Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under section 641 of this title, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: Provided, however, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into

> consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

This section, by its very opening words, shows that it is inapplicable to United States' and CID's interests on the Pecos. The section discusses storage or capacity that "has been or may be provided in excess of the requirements of the lands to be irrigated under any project." There is no such capacity on the Pecos. The 1972 permit and amendments thereto authorize the United States and CID to undertake to store a maximum of 176,500 acre-feet in their four reservoirs. Once this amount has been reached, water that would be stored above this amount must be released to the river. There is simply no basis, then, under the conditions on the Pecos River, to assert that this section provides authority for the United States to control the ability to store non-Project water in the facilities it owns.

Section 524 is completely inapposite to the purposes on which the United States relies.

Section 524 states:

> In carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users' associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen or water users for impounding, delivering and carrying water for

> irrigation purposes: Provided, That the title to and management of the works so constructed shall be subject to the provisions of section 498 of this title: Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: Provided, That nothing contained in sections 523 to 525 of this title shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

After even a detailed reading of this statute, the State is at a loss to understand its being cited as a basis for the argument that the United States controls the ability to store non-Project water in the facilities it owns. The plain text of the statute discusses no such proposition, even in general terms. The statute merely authorizes the Secretary to cooperate with others to provide water *for irrigation purposes*. There is no mention in the statute of non-Project water, much less the storing of non-Project water. Furthermore, the statute expressly forbids its being construed to enlarge the right of the United States to control the waters of any stream. Given the purposeful and continued deference of reclamation law to state control of waters, *see, e.g., California v. United States*, 438 U.S. 645, 653 (1978), Section 524 does not support the United States' assertion here. State's Response at pp. 93-100.

COURT'S DECISION

The responses of the parties to this issue clarify their respective positions and should be helpful in connection with the preparation of requested findings of fact and conclusions of law.

No decision of the Court is required at this time.

The responses will be considered in connection with the Court's review of the parties requested findings of fact and conclusions of law and the preparation of the Court's decision in this phase of these proceedings.

IT IS THEREFORE ordered that:

1. Oral arguments in connection with this phase of these proceedings are not required.

2. All parties are granted leave to submit objections, comments or suggestions, if any, as to the form or content of this Decision within thirty (30) days after service of this Decision and Order.

3. All parties are requested to submit ultimate requested findings of fact and conclusions of law concerning the issues involved in this phase of these proceedings within sixty (60) days after service of this Decision and Order. Requested findings of fact shall include page references to exhibits relied upon in support of each requested finding of fact. Authorities shall be cited in connection with each requested conclusions of law.

4. The parties are requested to confer and submit alternate dates for a pre-trial conference in connection with the Project (Offer) Phase of these proceedings within forty-five (45) days of service of this Decision and Order. The parties are requested to submit proposed pre-hearing orders to the Court in connection with their submissions concerning a pre-trial conference.

5. Counsel are requested to furnish computer diskettes to the Court in connection with all of the Court's requested submissions.

6. Counsel for the State is requested to serve a copy of this Decision and Order upon all counsel and parties appearing *pro se* in this phase of these proceedings other than those set forth on attached Exhibit A.

HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he caused to be mailed, postage prepaid, a copy of the foregoing decision and order to counsel and repositories specified on attached Exhibit A on this 7th day of January, 2002.

Harl D. Byrd
District Judge *Pro Tempore*

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