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

SUPPLEMENTAL DECISION AND ORDER

This Supplemental Decision and Order Addresses the Comments, Suggestions, Objections and Memorandum Briefs of Counsel for the Parties Set Forth in Their Respective Responses to the Court's October 19, 2001 Decision and Order Concerning the Water Rights Claims of Members of CID.

THIS MATTER comes on for consideration by the Court in connection with the

submissions of counsel for the parties in response to the requests of the Court set forth in numbered paragraphs 2 and 3, pp. 19 and 20 of the Court's Decision and Order served on October 19, 2001 (Court's Decision). The requests are summarized as follows:

1. Counsel for the State was requested to advise the Court as to whether all counsel and other interested parties had conferred and agreed upon the proper approach to be used in order to quantify consumptive use and the approach agreed upon, or, if an approach had not been agreed upon, to advise the Court of all remaining issues and controversies in connection therewith. Court's Decision, p. 19.

2. All counsel were requested to submit comments, suggestions and objections, if any, as to the form or content of the Court's Decision " and memorandum briefs addressing the issues set forth under the heading **PRIORITY DATES**, at pages 16-17," of the Court's Decision. Court's Decision pp. 19 and 20.

The Court has reviewed the following:

1. Counsel for the State's letter to all other counsel and parties appearing *pro se* concerning methodology dated July 24, 2001.

2. Counsel for the Pecos Valley Artesian Conservancy District's (PVACD) letter to counsel for the State dated July 30, 2001.

3. Letter report dated November 6, 2001 from Pierre Levi, one of the attorneys for the State, regarding "technical discussions".

4. Counsel for the State's memorandum dated November 9, 2001 captioned RE: *LEWIS* ADJUDICATION - CARLSBAD IRRIGATION DISTRICT SECTION METHODOLOGY FOR QUANTIFYING CONSUMPTIVE USE (State's Memorandum).

5. The UNITED STATES' COMMENTS, SUGGESTIONS, AND OBJECTIONS

TO THE COURT'S OCTOBER 19, 2001, DECISION AND BRIEF ON PRIORITY DATES (United States' Comments) served on November 16, 2001.

4. TRACY/EDDYS' MEMORANDUM ON WATER RIGHTS PRIORITY DATES (Tracy/Eddys Memorandum) served on November 16, 2001.

5. Letter dated November 19, 2001 from W.T. Martin, Jr., attorney for the Brantleys and Dick A. Blenden, attorney for the Tracy/Eddys regarding issues concerning Project Offer, upon whom it is binding and comments concerning the use of the Blaney-Criddle approach to quantification of water rights.

6. The BRANTLEYS' RESPONSE AND COMMENTS TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (Brantley's Comments) served on November 19, 2001.

7. The United States' and CID's Response to Court's Decision and Order of October 19, 2001 Regarding The Status of Discussions on Methodology of Quantifying Consumptive Use in Connection With The Membership Phase and The Project Offer Phase (United States' and CID's Response) served on November 20, 2001.

8. Defendant Carlsbad Irrigation District's Comments, Suggestions, and Objections to Court's October 19, 2000 (sic) Decision and Order and Brief on Priority Date Issue (CID's Comments) served on November 20, 2001.

9. The STATE OF NEW MEXICO'S RESPONSE TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (State's Response) served on November 20, 2001.

10. PVACD's COMMENTS ON N.M. STAT. ANN. §72-9-4 (PVACD's Comments) filed November 20, 2001.

11. PVACD'S BRIEF ON MEMBER PRIORITY DATES (PVACD'S Brief) filed on

November 20, 2001.

12. NEW MEXICO STATE UNIVERSITY'S COMMENTS, SUGGESTIONS AND OBJECTIONS TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (NMSU'S Comments) served on November 21, 2001.

INTRODUCTION

Nothing contained in the Court's Decision 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.

COURT'S DECISIONS AND ORDERS

I. ISSUES AND CONTROVERSIES PERTAINING TO PROPER APPROACH TO QUANTIFYING CONSUMPTIVE IRRIGATION REQUIREMENT, FARM DELIVERY AND PROJECT DIVERSION REQUIREMENTS

Counsel for the State Responded in Pertinent Part:

> Counsel for the CID, the United States, PVACD, the Brantleys, the State, as well as representatives of the Tracy and Eddy interest, conferred about these matters on November 15, 2001. Counsel and the interested parties did not agree on the methodology to be used in quantifying the consumptive irrigation requirement and the off-farm efficiencies in the 9 (sic)connection with the Membership Phase and the Project (Offer) Phase.
>
> Counsel for the CID, the United States, PVACD, and the State agreed that determinations with regard to the consumptive irrigation requirement and the off-farm efficiencies should be

reserved for the Project (Offer) Phase of these proceedings. After the Court has issued its final order disposing of the issues set forth in its March 20, 2001 Decision and Order, counsel for the CID, the United States, PVACD and the State propose that committee counsel develop a list of the remaining issues to be determined by the Court in the Project (Offer) Phase and a tentative scheduling order for the Court to consider in establishing a schedule to resolve the remaining issues.

Counsel for the CID and the United States will submit a separate filing regarding the figures used for the consumptive irrigation requirement and the off-farm efficiencies, and the methodology to be used in calculating such figures. Counsel for the PVACD stated that the PVACD does not want to be precluded from presenting evidence about actual historical use when considering the consumptive irrigation requirement and the off-farm efficiencies. Counsel for the Brantleys and representatives of the Tracy and Eddy interests will submit separate proposals to the Court addressing when these issues should be determined. At the time the Court may set for consider (sic) of these issues, the State will submit it (sic) own filing regarding the consumptive irrigation requirement and the off-farm efficiencies.

State's Response, pp. 4-5.

Counsel For CID Responded in Pertinent Part:

E. Issue No. 5 (Pages 12-13 of Court's Decision

It appears that the Court agrees, based upon counsels' submissions, that proper figures for CIR, FDR, Project Delivery Requirement, and Off Farm Diversion Requirement may require factual determinations and should be reserved for the Project (Offer) Phase of the proceedings. CID has submitted a separate response to this issue.

F. Issue No. 6 (Pages 13-14 of Court's Decision)

The Court in this section of its Decision agrees with CID's and the United States' responses that there is no need for making determinations of Off-Farm Conveyance Efficiency, On-Farm Efficiency percentages and adjustments for Off-Farm Diversions, or Farm Delivery in connection with individual subfile determinations of CID's members. These terms are inappropriate at the farm level and, therefore, will not be made in the members' subfile orders. For

clarification purposes, it appears from the Court's ruling that as to factual issues involving Diversion, Farm Delivery, and Consumptive Irrigation Requirements, these determinations will be made in the Offer Phase, not the membership phase. Once determined, these numbers will then be incorporated by reference into the members' subfile orders. CID's Response at p. 6.

The United States and CID Jointly Responded in Pertinent Part:

2. It is the position of the United States and CID that the Project Offer agreed to by the CID, United States of America and State of New Mexico ex rel. State Engineer sets forth a CIR for the lands within the Project. This number appears as part of paragraph I(C) "Allowable annual diversion" in the Project Offer. In addition to CIR, farm delivery requirement and maximum diversion are also set forth.

3. As part of the negotiations, justification of the numbers in the Project Offer, including the CIR, was based upon the Pecos River Compact as examined through the use of computer models involving Blaney Criddle and Blaney Criddle modified.

4. CID, the United States, and the State of New Mexico were satisfied that the numbers would be defensible when the Project Offer was subjected to objections during the *Inter Se*. After this portion of the negotiations, the State of New Mexico made the Project Offer which was accepted by the United States and CID.

5. It has always been the understanding of CID and the United States that the United States, CID, and the State of New Mexico shared the responsibility of justifying the numbers in the Project Offer (including the CIR) during the Offer Phase of these proceedings because the three parties are bound by the Project Offer.

6. Defense of the numbers used in the Project Offer would be carried out by introducing evidence to the Court in the Offer Phase. The goal of the parties bound by the Project Offer is to show the Court that the numbers are justified and reasonable. The Objectors are free to contest the evidence as they see fit.

7. The Court appears to be positioning the case in such a way that the numbers in the Project Offer agreed to by the three parties are being thrown out and are no longer binding on the parties. The Court is entertaining comments on calculating a new CIR by all the parties and Objectors instead of allowing the three parties to defend the number agreed to in the Project Offer.

8. CID and the United States would ask that the Court clarify this matter and allow the three parties bound by the Project

> Offer to proceed forward with the defense of the numbers agreed to in the Project Offer, including CIR, through the introduction of evidence at the Offer Phase. The Objectors will then have their opportunity to convince the Court that the numbers are not justifiable through the introduction of their evidence. United States' and CID's Response at pp. 2-3.

Counsel for the Brantley and Tracy/Eddys's Response

In a letter dated November 19, 2001 from counsel for the Brantleys and Tracy/Eddys to the Court, counsel stated:

> After counsel conferred on Thursday afternoon, the State of New Mexico began the process of drafting a letter to you regarding the results of that telephone conference and the position of various parties. Because of an issue or issues that arose, the Brantleys, together with the Tracys and Eddys, were not able to present their position at that time. The other attorneys were advised that the Tracys, Eddys and Brantleys need to discuss the issue and arrive at their own independent conclusions as to what should be their response. As a result, the State's letter will indicate that you are to receive a separate written comment or response from the Tracy-Eddy group as well as the Brantleys regarding the issue of the Project Offer and upon whom it is binding as well as Blaney Criddle. That discussion has now occurred. The Tracy-Eddy group as well as the Brantleys jointly take the following position:
>
> 1. There is no necessity to consider the Blaney Criddle approach or formula.
>
> 2. The Stipulated Offer of Judgment as written calls for and incorporates a diversion of 4.97 acre feet, a farm delivery at 3.69 acre feet, and a consumptive irrigation requirement of 2.218 acre feet. As a result of over five (5) years of negotiation, this is the amount of water that the United States, the State of New Mexico and the CID have agreed to accept in the project offer and have signed off on. With these particular amounts, it is not necessary to use the Blaney Criddle approach.

In the Brantleys' Response counsel submit that no evidentiary hearing is necessary on the quantification of consumptive use. Brantley's Response at p. 5.

COURT'S DECISIONS AND ORDERS

The proposed procedures concerning the determination of all matters pertaining to the quantification of consumptive irrigation requirement, project diversion, and off-farm efficiencies, farm delivery and related matters outlined by the State is approved. Committee counsel are requested to proceed as suggested.

All issues and controversies concerning all of these matters will be addressed and determined in the Project (Offer) Phase of these proceedings.

The Court does not intend to nor has it positioned "the case in such a way that the numbers in the Project Offer agreed to by the three parties are being thrown out and are not longer binding on the parties." as claimed by the United States and CID. Nothing contained in the prior decisions and orders of the Court should be deemed or construed to prevent CID, the United States or the State from adducing evidence in defense of the numbers agreed to in the Project Offer, including, but not limited to, those pertaining to CIR, through the introduction of evidence in the Project (Offer) Phase of these proceedings. Necessarily, Objectors will also have an opportunity to rebut the evidence adduced by CID, the United States and the State.

II. ISSUES AND CONTROVERSIES RE PRIORITY DATES

The following are pertinent summaries and excerpts from the parties responses:

The United States' Response

The United States first argues that assigning a Priority date to CID members rights is contrary to state and federal law. In support of its contention, the United States refers to NMSA 1978, §73-10-16 and argues that: " Pursuant to this statute, water must be distributed by CID *pro rata* to CID members at all times, not just in times of shortage...". United States' Comments at p. 3. "Thus, assigning a priority date to CID members' rights, and delivering water to them

based on the seniority of those rights, would be in direct contravention of the specific requirements of § 73-10-16. The water must be distributed pro rata to the CID members." United States' Comments at p. 4.

Counsel for the United States raises a new issue under paragraph B. Carlsbad Project Facilities Cannot Divert or Store Pre-Project Rights at page 5 of the United States' Comments stating:

> The federal Reclamation program was undertaken by Congress under the authority of the Property Clause, U.S. Const. art. IV. § 3, cl. 2 and the General Welfare Clause, U.S. Const. art. I, § 8, cl. 1. See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 88-95 (1907); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 293 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725,738 (1950). Thus, to the extent that the Bureau of Reclamation, an Executive Branch agency, has authority to engage in the Reclamation Program, it is due to a statutory delegation of authority from the Congress to the Executive. *See* id. One such statutory delegation of authority is the Reclamation Act of 1902 which authorized the construction of the Carlsbad Project. Under the Reclamation Act, Reclamation facilities were authorized to be constructed for the purpose of diverting, storing and delivering Reclamation project water to Reclamation project lands. 43 U.S.C. § 371 *et seq.* FN
>
> > FN Absent Congressional authorization, no person or entity may come upon or use federal property in any way. Congress' control of federal property is essentially unlimited in this regard. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).
>
> The authorization granted by Congress in the Reclamation Act of 1902 did not allow non-project water to be diverted by or stored in project facilities or to allow project water to be delivered to non-project lands.
>
> Authorization by Congress for the use of Reclamation facilities for delivery of non-project water and for the delivery of project water to non-project lands was not given until the passage of the Warren Act in 1911. Act of February 21,1911, ch. 141, 36 Stat. 925; *J. B. Bean v. United States*, 163 F. Supp. 838, 841 (Ct. Cl. 1958) (The Secretary of the Interior was authorized to contract

under the Warren Act to deliver to non-project lands only such water as in excess of the needs of the project lands.); see also *United States v. Tilley*, 124 F. 2d 850, 853 (8th Cir. 1941). Thus, even if individuals had owned water rights in 1905 when the Carlsbad Project was authorized and those water rights were not waived or relinquished as discussed below, it was illegal for Reclamation to undertake the storage or delivery of any those privately owned water rights. See October 19, 2001 Decision at 17. Consequently, only the water rights owned by the United States were stored in the Carlsbad Project reservoirs or diverted into the Carlsbad Project canals and were distributed to irrigators within the Project.

In order to have private water rights stored or diverted under the Warren Act, (1) the Secretary of the Interior must determine that the Reclamation project has excess capacity and (2) the water right holder must enter into a contract with the Secretary of the Interior for the diversion, storage or delivery of the water rights through the federally owned facilities. 43 U.S.C. §§ 523,524, 525. FN

> FN A Warren Act Contract was executed on August 15, 1921 between the United States and the owners of the Willow Lake Reservoir. This contract was terminated and a new contract between the United States, CID and the owners was executed on March 29, 1935. The 1935 contract was replaced with a new contract on July 2, 1951, but was terminated later. The July 2, 1951 Warren Act Contract which provides for the delivery of non-project water through project canals is attached as Exhibit A herein. See Ex. A. ¶¶ 10, 16, 20.

None of the objectors have such a contract. Thus, they cannot claim to have a water right that has been, or is, delivered through Project facilities. Any pre-project rights claimed by CID members could not have been diverted, stored or delivered to them since the authorization of the Project in 1905.

C. <u>There Can Be No CID Member Water Rights in the Project Senior to the Storage and Diversion Rights of the United States</u>

If the Brantleys, or any other CID member, want to assert a claim in this case to a water right to waters of the Pecos

River basin independent from, and senior to, the Carlsbad Project, they are certainly entitled to do so. The validity of the claim would be determined as any other claim; there would be subfile proceedings with the State and any water right determined in a subfile order would be subject to *inter se* challenge by all other water right claimants. As the Court acknowledged however, it is difficult to perceive that a CID member could hold a water right with a priority date prior to the priority date of the Project storage and diversion rights set forth in the Stipulated Offer of Judgment. October 19, 2001, Decision at 17.

Under the authority of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.*, the United States purchased water rights and appropriated the waters of the Pecos River for the Carlsbad Project. *See* 43 U.S.C. §§ 383,421. In a December 18, 1905 Warranty Deed, the Pecos Irrigation Company conveyed to the United States fee simple title to certain parcels of land and real estate, the irrigation system together with all water rights owned or claimed by the Company, and all its laterals, feeders, flumes, headgates, sluiceways, reservoirs, etc. U.S. Statement of Claims, FN

> FN The United States Statement of Claims, Rights, Duties, and Obligations With Respect to the Diversion, Storage and Distribution of Water in Connection with the Carlsbad Project.

Ex. 1. Excepted from the conveyance were the "certain canal system, water rights and works in connection therewith heretofore owned by the Haggerman Irrigation and Land Company and...all water rights for which contracts have been made by this Company and which have been placed of record ...."*Id.* However, as noted in the Court's November 3, 1997, Opinion re Threshold Legal Issue No. 3, p. 5 n. 5, contracts for water rights which were excepted from the conveyance to the United States have not been identified by any party. Thus all the water rights owned or claimed by the Pecos Irrigation Co. were conveyed to the United States.

Because the water rights purchased by the United States for the Carlsbad Project were insufficient, on January 23, 1906, the United States filed notice with the Territory of New Mexico of its reservation of waters of the Pecos River for the Project pursuant to the 1905 territorial laws of New Mexico. Section 22 of chapter 102 of the laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico, which provided that the waters described by the notice were not subject to further appropriation until

released by a proper officer of the United States in writing. U.S. Statement of Claims, Ex. 7. These water rights appropriated by the United States for the Carlsbad Project have not been released. Therefore, these water rights are still owned by the United States and are delivered to Project lands under the terms set by the United States and state law. *See Bean*, 163 F. Supp. at 841.

In 1906, the Pecos Water Users Association ("PWUA") and the United States entered into a contract which required that any right to the use of water from the Project be "defined, determined, and enjoyed in accordance with the provisions of [the Reclamation Act]..." U.S. Statement of Claims, Ex. 9, Art. 10. Project irrigators had to join the PWUA where they received shares of stock, the certificates for which incorporated the Amended Articles of Incorporation of the PWUA. U.S. Statement of Claims, Ex. 3. Before the shareholders in PWUA were entitled to receive Project water, they had to apply to the Secretary of the Interior for a 'water right' at the rate of one acre for each share. *Id.* at ¶ 12. The 'water right' applications formed a contract between the United States and the irrigator where the irrigator received Project water under certain conditions specified in the contract and Reclamation law.

Those individual contracts no longer govern distribution of water on the Project because, in 1932, a contract between the PWUA, the United States, and CID dissolved the PWUA and replaced it with CID. Membership in CID required the termination of any entitlements to shares in the PWUA. *See* U.S. Statement of Claims at 3-14. Through the 1932 Contract, CID took over the payment obligations of the individual irrigators and the Secretary released the liens on the individual farms. FN

> FN In order to have the application to the Secretary for a *pro rata* share of water granted, each farmer had to agree to repay their *pro rata* share of the 39 Carlsbad Project construction costs. See 43 U.S.C. § 461. In order to secure this repayment, Reclamation filed liens on the farms until such time as their share of the costs were repaid. However, during the Great Depression of the 1930's, it became very difficult for many of the farmers to make their payments. Consequently, in a 1932 Reclamation entered into a contract with the newly created Carlsbad Irrigation District in which the district agreed to take over the repayment of the Project construction costs.

> See *id.* at 11. However, before CID would agree to take over any irrigator's indebtedness to the Secretary, the irrigator had to surrender his contract with the Secretary. *Id.* at 12 n. 18. All the contracts were surrendered. If the contracts had not been surrendered, the district would have had to repay the construction costs but the farmers would get the water for free. Thus the Project's farmers moved from receiving water directly from the United States to receiving water from CID, which distributed the water on behalf of the United States in accordance with state and federal law. United States' Comments at pp. 7-10.

Court's Decision

Other parties have not specifically responded to the arguments of the United States that in order to have private water rights independently of those afforded through the diversion and storage of Project water members of CID would have to have an independent contract under the Warren Act. Counsel and interested parties are granted leave to respond. Responses shall be filed within thirty (30) days after the date of service of this decision and order.

CID's Response

In CID's Response counsel states:

II. Memorandum Brief on priority Dates Issue (Pages 16-18 of Court's Decision)

> It was and remains CID's position that there is no need to determine individual priority dates or put priority dates in members' individual subfile orders because the members never appropriated or diverted the Project water and are not entitled to make priority calls. In situations other than within Reclamation Projects, priority dates are used in times of shortage to give senior water right holders a right to receive their water supply even if the result is to cut off junior users. The language in Section 72-10-16 requires CID to deliver to each of its members a pro rata portion of the Project water each year, regardless how much water is available. When there is a shortage situation, each member shares in the shortage. Priority dates make no difference. It would be a practicable impossibility to have different priority dates for members within the Project. It would also be a violation of the District's duties and responsibilities under the statute to provide each member with a pro rata share of whatever supply of water is available in a given year. If the Court feels it necessary to

include a priority date in the members' subfile orders, then the individual subfiles should incorporate the priority dates found in the Project Offer.

The federal district court in Hope addressed this issue and applied the relation back doctrine to give the same priority dates to all 25,055 acres. Conclusion of Law II states:

> That as each of the Plaintiff's present respective purchased water right was initiated, the construction which that right was intended to be exercised by Plaintiff's predecessor in right, title and interest therein and thereto, was carried forward and completed with due diligence; and waters of the Pecos River, intended to be diverted and actually diverted under such right and through such irrigation system, were applied to a beneficial use in the irrigation of lands within a reasonable time after each right was initiated.

The Hope court then went on to find the priority dates that were applicable to the Project as a whole. See Final Decree, Paragraphs II, III, IV, and VI. These priority dates as set forth in the final Hope Decree are the dates that appear in the Project Offer and are the dates that apply to all of CID's members equally, regardless where their lands may lie within the District.

At the time the Pecos Irrigation Company bought out the Pecos Irrigation and Improvement Company in 1900, the predecessor company had entered into water contracts hoping to some day provide water to 62,000 acres. See Littlefield, at 79, 81-83. It is these paper "water rights" upon which the Tracys and Brantleys claim to own pre-existing, pre-Project water rights and presumably to which the Brantleys now claim separate or "individual" priority dates.

The members of the newly organized Pecos Water Users Association were the farmers who in the early 1900's had signed up or were actually receiving water from the predecessor private ditch company. They met in November, 1904 and passed a resolution asking the Reclamation Service for its immediate assistance in reconstructing the Pecos Irrigation Company's system. See, e.g., Littlefield, at 122; Hufstetler, at 69-70. [Tracys Ex. 8] The water users emphasized their situation was an emergency demanding immediate attention. See Hufstetler, at 70, 84. In forming the Pecos Water Users Association and subsequently entering into a contract with the federal government in 1906, the farmer members agreed in their reclamation contract and stock subscriptions that once the

system was repaired, they would receive water from the Carlsbad Project's water supply. [CID Ex. 9] These landowners in subscribing to the water users association agreed that when the time was appropriate they would execute new contracts (water right applications) with the government to receive water from the Carlsbad Project's water supply. See Littlefield, at 117.

Beginning in 1911, the government began demanding that Project farmers comply with reclamation law and their Pecos Water Users Association stock subscriptions by filing applications to receive Project water. Id. at 201. [CID Ex. 9] With the expansion of the Project during the next ten years which added Units II and III, the Carlsbad Project's irrigable acreage was increased to 25,055 acres, at which it remains today. See Littlefield, at 249. By the time Carlsbad Irrigation District was formed in 1932, all of the Project's 25,055 irrigable acres were covered by individual applications for water by the landowners, who in turn were required to subscribe to stock and become a member of the Pecos Water Users Association. [PVACD Ex. 14, at ¶12; Ex. 16, at ¶2; Tracys Ex. 8 at ¶11; Ex. 9 at ¶8]

In subscribing to the Pecos Water Users Association, the Brantleys' and Tracys' predecessors in interest agreed to make application to the United States to receive Project water for the lands identified in their water users stock subscriptions "as soon as official announcement shall be made that water for such lands is available from the works constructed, owned or controlled by the United States". [Id. at 26, Art. V, § 3] By becoming a member of the Pecos Water Users Association, each share of stock subscribed entitled the shareholder to "a right to have water delivered to the owner thereof by the Association, for the irrigation of lands to which such share is appurtenant". [Id., Art. V, § 6] The stock subscription agreement provided that the water received was appurtenant to the land described and would pass to a new owner if the land were sold. [Id., Art. V, §§ 9-11] It also provided, and the landowner agreed, that should it at any time "become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands ...." Id., Art. V, § 9]

According to the Brantleys' Exhibit 19, five separate water right applications were subsequently filed with Defendant United States in 1911-12 by various individuals owning certain lands now owned by the Brantleys. In the water right applications filed by the Brantleys' predecessors in interest, the landowners in so signing up for

Carlsbad Project water in 1911-12 agreed that the water to be delivery would be three-acre feet per acre of irrigable land, or a proportionate share per acre from the water supply actually available for the lands under the Project. [Tracys Ex. 19, at 57] The landowners within the Project's boundaries, in signing these applications with Defendant United States, also agreed the contract was subject to cancellation and forfeiture if the lands were ever transferred to parties not qualified to obtain Project water under the Reclamation Act, if the lands as to individual holdings exceeded 160 acres, and for non-payment of assessments. [Id., at 57-58]

From the government's point of view, it had no interest in purchasing the predecessor company's old contracts with private landowners. To do so would have obligated the United States, as a successor in interest to the contracts, to provide water to all these lands, which the government had no intention of doing.

> [T]hese alleged water rights were for the most part nothing more than an inchoate right, or what could be called even that, used merely for proving up under the desert land laws... Most of the desert land entries thus were in reality made for the benefit of the Company, so that the hardship, if any, fails where it properly belongs, upon the Company. In those cases where entries were made in good faith, all inceptive rights were lost by abandonment long prior to the purchase of the system by the United States

Littlefield, at 232 (Reclamation Director Newell - 2/8/1912).

The holders of these unfulfilled contracts, if they ever wished to receive Project water, were required to join the Pecos Water Users Association and to agree by signing such stock subscriptions to pledge their lands and subordinate whatever claims to water they believed they owned in exchange for receiving a water supply from the government's reclamation project -- the only game in town. In order for the government to begin work on the Carlsbad Project, the farmers and landowners had to satisfy the above contractual procedures required by the Reclamation Service. See Littlefield, at 148-49.

Although the federal government tried to bring as many cultivated lands as possible into the Carlsbad Project which may at one time have received water, the United States never formally recognized any such pre-existing water rights, requiring all Carlsbad farmers to file new water right applications before they could receive any Project water from the government. See Littlefield, at 268. In their March 19,

1906 agreement, the United States and the Pecos Water Users Association acknowledged that the Association's shareholders were required "to initiate rights to the use of water from the proposed irrigation works to be constructed by the Secretary of Interior..." [CID Ex. 3, at 983] The government, in turn, agreed that only those who were shareholders in the Pecos Water Users Association would be accepted as applicants for rights to use Project water. [Id. at 985, No. 2]

The Tracys and Brantleys in their abstract exhibits submitted with their briefs on Threshold Legal Issues Nos. 3 and 4 provided numerous documents showing that their predecessors agreed to and complied with the government's conditions to receive water from the Carlsbad Project. They subscribed to stock in the Pecos Water Users Association. [Tracys Ex. 19, at 26-31; Ex. 21, Abstract #96,198, at 225; Abstract #96,285, at 45; Abstract #96,283, at 16, 23; Abstract #23,994, at 9; Abstract #96,180, at 39, 85, 96, 145; Abstract #96,205, at 24, 28, 3 l, 34, 177; Abstract #4821, at 48, 49, 65] They submitted applications to the United States after 1911 to receive water from the government's Project supply. [Tracys Ex. 19, at 3639, 41, 46, 52, 79; Ex. 21, Abstract #96,198, at 37; Abstract #96,285, at 49, 56; Abstract #96,283, at 29, 31; Abstract #23,994, at 16, 18; Abstract #96,180, at 46, 88, 92; Abstract #96,205, at 48, 190, 194, 197, 200; Abstract #4821, at 55] They sold excess lands as required by reclamation law. [Tracys Ex. 21, Abstract #96,283, at 77; Abstract #96,285, at 89] All of these actions belay any argument by the Brantleys that they are entitled to individual "priority dates" different than those set forth in the Project Offer.

When CID's members' predecessors farmers signed up with the Pecos Water Users Association in 1905 committing to participate in the Project, they relinquished in signing their stock subscription agreements any claims to priority dates, agreeing instead to receive a pro rata share of whatever Project water supply was developed. When these association members later signed individual contracts and applications for water supply from the Project with the federal government once it assumed the responsibility for building the Carlsbad Project, they waived any rights to claim individual priority dates or receive more than a pro rata share of the Project water supply.

The senior status of the Carlsbad Project water supply in terms of priority dates is at the Project level, and the priority dates of the Project as a whole is the District's, as well as its members' priority dates. There is no need, therefore, to put priority dates in the

individual offers. Priority dates are for purposes of priority calls in years of shortage. If any of CID's members believe they have non-Project water rights with earlier priority than in the Project Offer, then they are certainly free in the membership phase to prove them up. But they are not Project water rights, as these rights are strictly construed by the applications CID's members' predecessors signed many years ago agreeing to be part of the Project. And the Court in this proceeding is only determining Project water rights.

The priority dates set forth in the Project Offer were taken from the Hope Decree. If any of CID's members believe these dates are factually in error and that all or some part of the Project water rights purchased by the federal government from the old private ditch companies, as well as those appropriated and put to beneficial use within the Project, have an earlier priority date than those in the Project Offer, then they are of course free to raise and prove this in the Offer Phase of these proceedings. In this case, if the priority dates accepted in the Project Offer by the United States, the District, and the State are proven later to be factually in error by a member not bound by the Hope Decree, then the dates will change as to the entire Project. There can be no differing Project priority dates between CID's members. The Project's priority dates, instead, as a matter of state law must be applied as a whole to the entire Project water supply under the relation back and Mendenhall doctrines. These principals of state law, as well as federal reclamation law, are more thoroughly addressed in the United States' response to the Court's October 19, 2001 Decision and Order which CID, rather than repeating, adopts and incorporates by reference.

CID's Response at pp. 7-13.

State's Response:

In the State's Response counsel states:

Although the State was not a party in either of those cases, (the Hope Decree (Pecos River) or the Judkins Decree (Black River)) and is not bound by those decrees, it agreed to the priority dates contained in those decrees for the purpose of making a stipulated offer of judgment and offers of judgment to individual CID members in these proceedings. As a party to the Stipulated Offer of Judgment and as a party to those offers that individual CID members have accepted, the State considers itself bound by the priority dates set forth in those documents. Counsel also noted that NMSA 1978 §§73-10-16 AND 73-10-24, pro rata apportionment of water to lands assessed by the

> irrigation district is required and that water is to be "distributed and apportioned by the district in accordance with acts of Congress and the Rules and Regulations of the Secretary of the Interior and the provisions" of the district's contract with the United States. NMSA 1978, §73-10-16.

State's Response at pp. 6-7.

PVACD's Response

In PVACD's Response counsel states:

> In previous briefs, CID has claimed that separate individual priority dates will result in highly complicated intra-district administration, with each tract of farmland having to be provided water based on the priority accorded to each respective tract. On the other hand, upstream claimants are concerned that use of a single relation-back priority for the project will ignore the historical development of the district and inflate the water rights claims of many CID users to the detriment of upstream water users.
>
> Application of relation back would be pernicious in these circumstances. Project priorities are incorrect and have nothing to do, logically, with member use rights. The appropriate test for member priorities is the date that water is devoted to a beneficial use by the claimant on a tract by tract basis.

II. Legal Discussion

The thesis of this brief is that the priority of the water right appurtenant to each individual tract of land in the project needs to be determined based on perfection by beneficial use. As priority is initially defined by diversion, and diversion leads to and is completed by beneficial use, and there is no legal priority without beneficial use, the priority and use doctrines are intrinsically related. And both concepts require tract-specific determination in New Mexico. CID can provide for intradistrict administration issues through contracts with its members, and can make appropriate intradistrict adjustments for those rights which may be dried up by priority administration of the stream system.

The leading case is from the Nambé-Tesuque-Pojoaque watershed. In *State ex rel. Reynolds v. Aamodt*, D.N.M. No. CIV 6639-M, Memorandum Opinion and Order (Feb. 26, 1987), Judge Mechem extensively treated this matter. *Id.* at 22-28. He ruled that a common priority cannot be adjudicated for rights under a ditch. "New Mexico law requires tract-by-tract priorities." *Id.* at 23. The reason: "Appropriators hold water

rights individually based on satisfaction of the prerequisites for prior appropriation for their tract." *Id.* Thus Judge Mechem related beneficial use and priority as the two main determinations necessary to set prior appropriation rights for each specific tract.

As stated in *Snow v. Abalos,* "each [water user under a ditch] has a several right to take water from the stream system for the irrigation of his lands." *Id., citing Snow,* 18 N.M. 681,695, 140 P.2d 1044 (1914). In *Millheiser v. Long,* 10 N.M. 99, 61 P.2d 111 (1900), the Supreme Court "held that priority of application to beneficial use, not priority of diversion, determined water rights." Mechem Opinion at 24, quoting *Millheiser,* 10 N.M. at 104.

In order to comply with New Mexico adjudication law, it is necessary to determine "the relative rights of the parties, one toward the other." *State v. Shaw,* 66 N.M. 192, 196, 344 P.2d 943 (1959). In order to do that, specific priority determinations need to be made. *See also State v. Pecos Valley Artesian Conservancy District,* 99 N.M. 699, 700, 663 P.2d 358 (1983).

Other cases and authorities are supportive as well.

In *US v. Alpine Irrig. Dist.*, No. CIV. D- 184-HDM (8/2/98), 1998 WL 808191 (Alpine IV), the federal district court in Nevada issued an opinion on forfeiture and abandonment. *Alpine* involved a federal reclamation project. The court held that project water users *could* have had the requisite intent to abandon a right they did not know existed until 1983. The court followed the Ninth Circuit's distinction in *Alpine III* between rights acquired by the US for the initiation of a project and the actual irrigation rights of the project, which were owned by the landowners and subject to state law forfeiture and abandonment standards.. That holding necessarily implies that irrigation rights must be determined tract by tract so that priorities can be set individually. *See also Department of Ecology v. Acquavella,* 1997 Wash. LEXIS 183, 135 Wash. 2d 746, 935 P.2d 595, 599 (1997) *(Acquavella III)* (similar reasoning); *Theodoratus,* 135 Wash. 2d at 590, 957 P.2d at 1245. *See* Kelley, *Staging a Comeback-- Section 8 of the Reclamation Act,* 18 U.C. Davis 97, 17174(1984).

Throughout the last century, courts in New Mexico and other jurisdictions as well as the leading Reclamation Law commentator have all upheld the individualized determination of beneficial use, the significant interposition of beneficial use and priority, and the determination of priority tract by tract. Determination of priority must be made tract by tract so the beneficial use carrying the priority can be set, Under New Mexico law, the most authoritative approach, and the better one, is that water right priorities,

in a New Mexico irrigation district as outside it, should be determined tract by tract.

Assume that priorities in an irrigation district like CID were determined tract by tract, that is, individually. If some relatively junior rights in the district were curtailed through a priority call, the remaining rights in the district could be served by pro rata distribution to those remaining rights, after the curtailed rights were shut off.

When priority administration is not imminent, the situation is somewhat similar. Different tract by tract priorities can be adjudicated throughout a particular project. At the same time, pursuant to state statutes, intra-district distribution of water can be made on a *pro rata* basis, as is the custom at CID. The pro rata distribution does not conflict with the individualized priorities. The members of the district have no occasion to contest priorities among themselves in the normal course of things. Instead, state law on intradistrict regulation controls.

Returning to the priority call, CID relations with upstream users require a different approach. Here the adjudication of water rights on each tract of the project become important, because (first) rights determined to be junior to upstream rights cannot call on them, and (second) the priority, magnitude, beneficial use and other characteristics of the remaining senior rights is necessary for enforcement, and can only be properly determined tract by tract.

Priorities of storage at some CID reservoirs should be carefully evaluated, in light of factors such as reasonable time and due diligence. Ft. Sumner, for example, should have a date-of-construction priority, about 1937. Santa Rosa's priority would be about 1987. Evaporation at any of the reservoirs, including Brantley, caused by additional lake surface due to enlargement or transfers from smaller facilities should have a late priority. This is a significant issue, deserving of development at trial.

Another matter dealing with beneficial use but also relating to priority could be of importance to the Court. Supplemental wells should not be allowed to increase CID's demand from the Pecos. These wells are not in priority, do not meet the tests for Templeton Doctrine rights, and do not have relation back status. In increasing the early priority rights, the wells create an inflated demand based on a spurious seniority that depletes flows to Texas and harms other users. This also should be a trial issue.

III. Conclusion

For the foregoing reasons, CID member priority dates should be

determined tract by tract. Other subsidiary matters should be dealt with as suggested above.

PVACD's Response at pp. 2-5.

The Brantleys Response

Counsel for the Brantleys states:

> A. Cases Establishing Right of Individual CID Members to Claim an Individual Priority Date Prior to Priority date for the CID
> At page 16, the Court has indicated the following:
>
> > **A subsidiary issue arises as to whether members of CID waived or relinquished the right to claim an individual priority date prior to the priority date determined for the Project.**
> >
> > **It would seem that all of these issues would have been addressed by courts on numerous prior occasions and that there would be an abundance of pertinent legal authority that would be useful in determining these issues.**
>
> Brantleys have thoroughly searched for and reviewed documents regarding the priority issue. There is no document that has any CID member waiving or relinquishing that member's individual right to a priority date prior to the priority date of the Project. In fact, there exists an Eddy County District Court decision that establishes the right of an individual CID member to obtain a priority date prior to any proposed priority date prior to the Project. **In State of New Mexico, on the relation of S. E. Reynolds, State Engineer, vs. Carlsbad Irrigation District and Catherine Guitar Woods, Eddy County District Cause cause No. 23,395**, Judge Caswell S. Neal held that Catherine Guitar Woods was entitled to divert 100-acre fee (sic) of water per annum from Black River on certain lands specified in the Judgment. The 100-acre feet was over and above the 2,800 acre-feet of water per annum that the Carlsbad Irrigation District was entitled divert from Black River. Catherine Guitar Woods, an individual CID member, was determined to have a priority date of June 22, 1885, for the 100-acre feet water right. *(A certified copy of the Eddy County District Court Judgment is attached to this Response as Exhibit "A.")* Thus, there does exist a court decision that recognizes an individual CID member is not bound to a Project priority date and is entitled to not only a priority date prior to any of the proposed dates for the Project but also, if the individual member can establish the right, a

right to divert water in excess of the CID's allotted right of diversion.

It is also important to note that in Eddy County Cause No. 23,395 both the State of New Mexico and the CID were parties to the suit. Because of the issues tried and determined in that case, neither the State of New Mexico nor the CID can now challenge the right of an individual member of the CID to have a water right adjudicated with a priority date that is prior to any of the proposed priority dates for the Project. Whether one characterizes the bar as defensive or offensive collateral estoppel, the doctrine is applicable on this issue. The doctrine of defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; and that the doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action. Reeves v. Wirnberly, 107 N.M. 231, 234, 755 P.2d 75, 78 (Ct. App. 19885}; State v. Silva, 106 N.M. 472, 476, 745 P.2d 380-384 (1987)

Livingston v. Neeson, et. al., Eddy Co., Dist. Ct. Cause No. 5,144 also establishes the right to have a priority date prior to any proposed priority date for the Project. In that case, Valley Land Company, whose land, some of which was within the CID, was adjudicated to have right of March 26, 1883. The point of diversion for Valley Land Company was the original Island Crossing Ditch Company ditch which was located in Section 11, Twp. 23, Rge 28 E. Lincoln County (now Eddy Co.) which is now in the CID. *(See discussion of Livingston v. Neeson in Brantleys' prior Brief)*

Therefore, there are two Eddy County District Court cases which establish the right of an individual to obtain a priority date prior to any priority date proposed for the CID. This is exactly what the Brantleys have consistently asserted throughout this litigation.

B. Issue of Approaches to Determination of Priority Dates

1. Project priority Dates:

This Court has also asked for commentary or response regarding the issue of determination of priority dates in different contexts. The Court has suggested that a priority date(s) in connection with the diversion and storage of Project water by the United States be

determined. That date has already been determined. In the Hope Decree, the United States District Court found the Project to have an 1889 priority date at Avalon Dam for 7,000 acre feet for fill and re-fill. The Hope Decree also establishes a priority date of 1893 at McMillan dam for 90,000 acre feet for fill and re-fill. The Project Offer only gives 45,000 acre feet at Brantley. The Project offer is contrary to the Hope Decree's specific adjudication regarding priority dates for the United States at the Project's point of diversion as well as the volume of water.

The Ft. Sumner and Santa Rosa storage dates were determined in the Hope Decree by reference to the United States's filing with the Territorial Engineer on February 2, 1906 for the right to divert, impound, store and utilize water within the Carlsbad Project for 300,000 acre feet per annum pursuant to the 1905 Water Code, §22 of Chapter 102, Sessions Law of 1905. *(A copy of the relevant portion of the Hope Decree is attached to this Response and Commentary as Exhibit "B").* FN

FN In its ***Response Brief to Matters Set Forth in the Court's March 20, 2001 Decision and Order and April 5, 2001 Order,*** the CID argued the Hope Decree made a finding that all of the Project's water rights related back to the 1906 priority date as set by the United States' 1906 notice under state law.

2. Individual Member Priority Dates:

Brantleys do not disagree that the Project should have its own project priority date. Brantleys do not object to the Project priority date appearing in member subfiles. However, the members are still entitled to their own individual priority date based upon the water right they own, when it was acquired and its history of being put to beneficial use. The relation back doctrine is also applicable to determination of the individual member's priority dates. The Project should have a priority date of February 2, 1906, which is the date the United States filed notice with the New Mexico Territorial Engineer. This was the first act by the United States following

> purchase from the Pecos Irrigation Company. Prior to the United States purchase from the Pecos Irrigation District, the water rights were held by individual stockholders and each had their own separate priority date. Therefore, it is also appropriate for each individual CID member to have their own individual priority date based upon the criteria Brantleys have previously set forth in their August, 2001 brief regarding priority dates.

Brantleys' Response at pp. 2-4.

The Tracy/Eddys Response

Counsel for the Tracy/Eddys State:

> The Court requested in it's Order of October 19, 2001, that the parties set forth their positions concerning priority dates and whether individual water right owners could have a priority date earlier than the project priority date of the Carlsbad Irrigation District.
>
> Insofar as the Eddys and Tracys interests are concerned it is clear that they or their predecessors in title began applying water to beneficial use many years prior to the formation of the Carlsbad Irrigation District. In fact, their water rights may date from 1883 when the first water was put to beneficial use from the Halagueno ditch, even before the Pecos Irrigation and Improvement Company. Of course, most, if not all of the project was being watered by the time of the March 19, 1932, contract with Carlsbad Irrigation District.
>
> The water rights vested with the owner once the water was applied to beneficial use upon the property and as this Court has stated once those water rights were vested by the application of the water to beneficial use then that priority would continue in force and effect unless waived or relinquished. Section 72-1-2 (NMSA 1978 Comp.) This Court has clearly held in Threshold Legal Issue No. 3 that the beneficial users within a federal irrigation project are the owners of those water rights and ownership and use of the water rights shall be subject to New Mexico Law. The storage and diversion rights of the United States are not owned as a property right by the United States and therefore cannot be property of the United States. It should be pointed out that the CID's position that preferential status was given to irrigation districts such as CID formed in cooperation with the United States under Federal

Reclamation Law is just in error and a mischaracterization of New Mexico's obligation to consent to certain federal standards.

Given the fact that this Court has made it's determination that the Law of the State of New Mexico should apply in these instances, then Statutory requirements that once beneficial use of water is commenced on a given property then the priority date of that use relates back to the initiation of the claim for rights prior to March 19, 1907, pursuant to Section 72-1-2 (NMSA 1978 Comp.). Section 8 of the Reclamation Act of 1902 represents a decision by Congress to require reclamation to obtain water rights under the requirement of State Law rather than relying on the Federal Constitutional power. In fact, in 1906 the United States filed a letter with the Eddy County Clerk's office that they had acquired the rights of the Pecos Irrigation Company and would use those rights for the Project. (See attached Exhibit "A" and "B", which is a re-typed copy for the Court's convenience.)

Since many of the individual appropriators were applying their water rights to beneficial use prior to 1906, when there was Federal acquisition of this project, those rights were vested under State Law prior to that acquisition and unless they have been relinquished or waived, those water rights were vested with the priority dates before 1906.

The contracts between the United States and members of the Pecos Water Users Association and the contract with the Carlsbad Irrigation District did not constitute a waiver or relinquishment of any vested private right of water rights to that water. The United States has never attempted to void any State acquired water rights until now and the Court has already disposed of that issue.

Therefore, the proof to be used in the Project Offer phase of this hearing, which will establish the time and amount of beneficial use of water on the land will relate back to the initiation of the claim and will establish the priority date which the individual land owners will have.

Having said the above however, it is clear that pursuant to the contract of 1932 the water to be used in the project must be applied pro-rata to the project, even if certain members have priority dates earlier than others.

Owning an earlier priority date would have some effect if an owner of a very early priority date water right were to dispose of

> the water right outside the confines of the Carlsbad Irrigation District, but that issue is not before this Court.
>
> Therefore, the Tracys and Eddys respectfully submit to this Court that the priority dates of each individual owner of the water rights in the Carlsbad Irrigation District will be determined by the date in time as established by the evidence in the Project Offer phase and their priority date will be established at that time. The proof to be presented in the Offer phase will be the original filings by the Companies, the United States and the proof of their continued use. As to the Tracys and Eddys that date will relate back to 1883, assuming the proof is established in the Project Offer phase that such water was applied to beneficial use.

Tracy/Eddy Response at pp. 1-4.

Court's Decisions and Orders

Issues and controversies concerning the appropriate priority dates for storage and diversion of Project water will be determined in the Project (Offer) Phase of these proceedings.

NMSA 1978, §72-4-19 provides in pertinent part:

> Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

Under this statute, it is mandatory that a priority date for water rights of individual members of CID be determined. Also, under the statute, "...the specific tracts of land to which it shall be appurtenant," shall be determined.

Issues and controversies remain as to whether Project priority dates should be included in subfile orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use or on a relation back basis must be determined. NMSA 1978, §72-4-19, and Judge Mechem's 1987 Opinion in *Aamodt* concerning tract by tract

determinations have not been discussed by counsel other than counsel for PVACD in connection with the 1987 Opinion. Counsel are granted leave for a period of thirty (30) days after the date of service of this opinion and order to respond to the claims of PVACD that New Mexico law requires an individual tract by tract determination of priorities in these proceedings which shall include a memorandum brief concerning the proper interpretation of NMSA 1978, §72-4-19.

The Court agrees with the arguments of the United States that NMSA 1978, §§73-10-16 and 73-10-24 concerning the pro rata distribution of water to members of CID are controlling; however, this does not answer the question of whether members of CID are entitled to have individual priority dates determined with the specific understanding that Project water *vis a vis* members of CID is to be distributed equitably and on a pro rata basis.

CID claims that when members of CID

> ...signed up with Pecos Water Users Association in 1905 committing to participate in the Project, they relinquished in signing their stock subscription agreements any claims to priority dates, agreeing instead to receive a pro rata share of whatever Project water supply was developed. When these association members later signed individual contracts and applications for water supply from the Project with the federal government once it assumed the responsibility for building the Carlsbad Project , they waived any rights to claim individual priority dates or receive more than a pro rata share of the Project water supply.

CID's Response at p. 12. Diametrically opposed to CID's position, counsel for the Tracy/Eddys state:

> The contracts between the United States and members of the Pecos Water Users Association and the contract with the Carlsbad Irrigation District did not constitute a waiver or relinquishment of any vested private right of water rights to that water. The United States has never attempted to void any State acquired water rights until now and the Court has already disposed of that issue.

Tracy/Eddys' Response at p. 3. Authorities in support of the respective contentions of the

parties as to relinquishment or waiver have not been submitted to the Court. All parties are granted leave to submit a memorandum brief concerning the issues of relinquishment or waiver within thirty (30) days after the date of service of this opinion and order.

The Court has previously stated:

> It is difficult to perceive when a member would be permitted to assert a priority date prior to a Project priority date, but the right, if established, and once vested, and, (sic) would seem to continue in force and effect unless waived or relinquished.

Court's Decision at p. 17. The Court is of the opinion that individual priority dates should be determined based upon the date that water is devoted to beneficial use or on a relation back basis, but, with the specific understanding that the distribution of water among members of CID shall be made pro rata at all times in accordance with the provisions of NMSA 1978, §§73-10-16 AND 73-10-24 with due regard to NMSA 1978, §72-5-28 F.

III. ADDITIONAL COMMENTS, SUGGESTIONS AND OBJECTIONS TO THE COURT'S DECISION

In the State's Response, counsel requests clarification of the Court's decision re Issue No. 4 which provides:

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

Counsel states:

> The State agrees with the Court's holding insofar as it would apply to water rights that are actually owned by the United States or to property rights in irrigation works themselves. In this case, however, the United States does not have a property right in the water rights owned by the individual members of the CID. Its right under federal reclamation law and state law to divert and store water to serve the Carlsbad Irrigation Project is neither the type of right that was at issue in *Ballard* nor the type of right that is entitled to the protection of the Property Clause. The State

> therefore respectfully requests this Court to expand its ruling to make it clear that, although water rights owned by the United States may not be lost through laches or the neglect of its officers and employees, the amount of water that the United States may divert and store, and the CID may distribute, in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of the CID's individual members.

State's Response at p. 4.

Court's Decision

Counsel for the States' request is granted. The Court determines that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of CID's individual members.

The United States' Comments Re Pro Rata Distribution of Water

Counsel states:

> The United States comments that the recognition by the Court that the diversion and storage rights of the United States and the distribution rights of CID are applicable to the entire Carlsbad Project is vital to the protection of the long term viability of the Project. *See* October 19, 2001 Decision at 6.
>
> ***
>
> However, as is discussed more fully below, state law is clear that the Project water is distributed *pro rata* to the CID members all of the time, not just in times of shortage. NMSA 1978, §73-10-16. United States' Comments, p. 2.

Court's Decision

The Court concurs that Project water is to be distributed *pro rata* to CID members all the time, not just in times of shortage. The Court did not intend to rule otherwise.

PVACD's Comments Re NMSA 1978, §§72-9-4 and 72-5-33

PVACD submits that NMSA 1978, §72-9-4 "should be given a restrictive interpretation so

that it does not apply to the situation at all and leaves the jurisdiction and authority of the State Engineer otherwise intact." PVACD's Comments at p. 1. PVACD, refers to its consolidated Reply Brief on Threshold Legal Issue No. 3, at 7 and 10, states that §§72-9-4 and 72-5-33 should be applied *in pari materia*, that the legislature did not intend to grant a permanent, broad based exemption to the Bureau of Reclamation from State law and then states:

> The most reasonable reading of these two laws, considered together, is that they exempt reclamation projects from state laws in regard to Bureau projects involving construction of works....". The only reported New Mexico cases interpreting §72-9-4 is *City of Raton v. Vermejo Conservancy Dist.*, 101 NM 95, 678 P.2d 1170 (1984). ...*City of Raton* is quite consistent with the construction of state law suggested here.
>
> In addition to the statutory construction quoted above the named brief, PVACD analyzed *City of Raton* to show that it, when interpreted correctly, led to the same conclusion already posited by the *pari materia rule*. In addition to that, PVACD relied on a memo from the Chief Counsel of the State Engineer Office, Paul Bloom, to his boss Steve Reynolds, elucidating the very same position as the State Engineer policy on such matters, and showing the firm administrative construction of the statute. *See Reply Brief, supra.*
>
> The correct legal construction of §72-9-4 is that it applies to Bureau building and rehabilitation projects, not to all reclamation projects throughout time. It doe not apply when construction is not in progress, and normal state beneficial use standards do apply. Thus we suggest that when the Court considers how to construe the law, the appropriate construction is that the law simply does not apply here at all. PVACD's Comments at p. 2.

Court's Decision and Order

The Court will consider PVACD's comments in connection with required determinations of issues which may be hereafter submitted to the Court from time to time in the context of specific factual situations. See Court's Decision at p. 9.

CID Comments Re Beneficial Use

CID suggests that the Court add to the language in its decision concerning beneficial use that it be

> ...quantified and based upon the District's historical diversion, distribution, and delivery of and its members' Project water. It is CID's understanding that the Court has not yet ruled whether the historical beneficial use was already determined and quantified in the Pecos River Compact. CID will also present evidence in the Offer Phase that shows historical irrigation of 25, 055 acres. CID's Response at p. 2.

Court's Decision and Order

CID's request is denied; however, the Court has not yet ruled whether historical beneficial use has been determined in the Pecos River Compact and whether the determination is binding in these proceedings.

Counsel for CID then states that CID :

> ...has argued that historical beneficial use is what its assessment rolls already identify. CID agrees with the Court's ruling in this section of its Decision and Order that the United States' diversion and storage rights and the District's distribution rights in the Project are applicable to the entire Carlsbad Project and can not be broken down, quantified, or decreed at the member level.
>
> The only other comment Defendant Carlsbad Irrigation District has with the remainder of this section of the Court's rulings on beneficial use is an objection to the formula set forth in the last paragraph of the Court's Decision found on Page 6. In this paragraph the Court creates a formula to be used for purposes of defining the "pro rata" basis upon which Project water is to be distributed to CID's members under NMSA 1978, §73-10-16 (1919). However, because the District's members are allowed to stack their historic beneficial use of Project water on any portion of their assessed acreage (state water law allows such actions without penalty or forfeiture), this formula would be unworkable. For example, Farmer A may have 30 acre feet of Project water supply which he originally applied to beneficial use on 10 acres of land, but which is now being applied to only 5 of those acres because he has put in a pecan orchard. Farmer B, on the other hand, may have 30 acre feet of Project water supply which he historically applied to beneficial use on 10 acres and which is still being used on the

original 10 acres.

Under the Court's formula in its Decision and Order, "pro rata" share under Section 73-10-16 is to be determined based upon a quantity of acreage, not upon the quantity of water historically put to beneficial use. The acreage upon which the Project member applies Project water may change, even from year to year. But the quantity of the member's water supply does not change. Therefore, any formula to determine an individual member's "pro rata" share cannot be based on acreage alone as the quantifying measure.

The adjudication statute under NMSA 1978, §72-4-19 (1907) authorizes the Court in its decree to declare, as to water used for irrigation, the specific tracts of land to which the use may be appurtenant. In Farmer A's case above, his stacked 30 acre feet of historical beneficial use may be decreed to be "appurtenant" to only the 5 acres, but for Farmer B it would be to 10 acres. Using the Court's formula, it appears Farmer A would receive only half of his pro rata share since it was based on quantity of acreage rather than quantity of water historically put to beneficial use, although both farmers historically applied to beneficial use the same amount of water.

The Court's formula also appears not to take into account that the amount of water supply that can be delivered "pro rata" (i.e. equally) to the "field" of each member is effected by evaporation and seepage losses along the way. It may also require push water. If the District were to determine in a given year that 10,000 acre feet of additional water is available in storage to be released and delivered"pro rata" to its members, multiplying the amount of 10,000 acre feet by the fraction in the Court's Decision would not take into account that the water needed to get Farmer A's "pro rata" share to his field at the top of the delivery system may be significantly less than the water supply necessary to get Farmer B's "pro rata" share of water to his field at the end of the distribution system. Furthermore, as commented by the United States in its Comments, Suggestions, and Objections to the Court's October 19, 2001, Decision and Order and Brief on Priority Dates, under state law the Project's water supply under Section 73-10-16 is to be distributed pro rata to CID's members all the time, not just in times of shortage.

CID's Response at pp. 2-4.

Court's Decision

Beneficial use of water shall be quantified with due regard to evaporation and seepage losses.

Water shall be distributed by CID to its members on a pro rata basis as provided in NMSA 1978, §73-10-16 with due regard to NMSA 1978, §73-10-24 and the right of members to apply the full amount of water covered by or included in their individual water rights or permits to any part of the designated or specified tract in accordance with and subject to the provisions of NMSA 1978, §72-5-28 F.

CID continues:

> **B. Issue No. 2 (Page 7 of Court's Decision)**
>
> Defendant Carlsbad Irrigation District's comments and suggests in this section that the Court's language referring to the water rights of members of CID as being quantified "on the basis of the amount of water which is devoted to beneficial use by each member" be amended to read "on the basis of the amount of water which *historically applied* to beneficial use by each member." Carlsbad Irrigation District believes that its members are legally entitled to prove up their individual Project water rights as identified on the District's assessment rolls on the basis of historical beneficial use, not the restricted "one point in time" snapshot used by the State Engineer in the State's hydrographic survey.

CID's Response at p. 4.

Court's Decision

CID's concerns may be addressed in connection with quantification of beneficial use but not necessarily by use of the phrases "historically applied". CID's request is denied.

Counsel for CID continues:

> **C. Issue No. 3 (Pages 7-11 of Court's Decision)**
>
> In this section of the October 19, 2001 Decision and Order, the Court agrees that CID's Board has the authority, either upon its own motion or that of a member, to suspend and transfer Project water under Sections 73-13-4 et seq. without being subject to the

> State Engineer's jurisdiction. It is within the Board's discretion to determine which of the District's lands are irrigable and suitable for irrigation and are to receive Project water. Carlsbad Irrigation District agrees with the Court's interpretation of Section 72-9-4 that it does not change the concept that beneficial use will be the basis and measure of CID's members' water rights, as well as the United States' diversion and storage rights and CID's distribution rights. It is CID's understanding that the Court has ruled in this section of its Decision that the District and its members are exempt under Section 73-13-4 from the State Engineer's administrative authority not only for suspensions and transfers, but also for any incidental matters involved in these transfers such as changes of use and points of diversion. The Court declined at this time to address the broader exemption language in Section 72-9-4, finding at least as to Project transfers, that the more specific language in Sections 73-13-4 et seq. granting the District such transfer powers is controlling.

CID's Response at pp. 4-5.

Court's Decision

The Court has ruled upon the matters referred to in counsel's comments. No further determinations of the Court are required.

Counsel for CID continues:

> **D. Issue No. 4 (Page 12 of Court's Decision)**
>
> In this part of its Decision, the Court ruled that the water rights of CID's members can be forfeited under the provisions found in Section 75-5-28, but that the right to use water of the United States may not be lost through laches or neglect of its officers or employees. The Court, however, does not decide what happens to a member's water right if it were forfeited. Carlsbad Irrigation District would ask the Court for clarification on this issue as it is imperative that the Court recognize that any "forfeited" water rights of a CID member would not thereby become "unappropriated water" subject to the State Engineer's permit authority. The water remains Project water and would be subject to the District's suspension and transfer process.
>
> The Court concludes this part of its Decision by stating that

> the issues and controversies surrounding the 25,055 Project acreage figure will be determined in the Project (Offer) Phase of these proceedings. It is CID's understanding that the parties will be allowed to fully address these matters at that point, including the District's position that the Pecos River Compact's determination of 25,055 acres of historical beneficial use within the Project is not only an evidentiary finding binding on the State, but is also a matter which this Court lacks jurisdiction to alter.

CID's Response at pp. 5-6.

Court's Decision

What happens to a member's water rights if they are forfeited appears to raise a new issue to which other parties have not had an opportunity to respond. The issue will be determined based upon the submission of memorandum briefs which shall be submitted to the Court within thirty (30) days after the date of service of this Supplemental Decision and Order

NMSU's Objections to Court's Determinations re Forfeiture and Abandonment Examined in Connection with Issue No. 4.

Counsel for NMSU claims that statutory forfeiture as provided in NMSA 1978, §72-5-28 should not apply to water rights appurtenant to project water acreage because NMSA 1978, §72-9-4 exempts federal reclamation projects from statutory forfeiture and

> through the practice of "suspension and transfer" in CID, as well as the payments of assessments on lands no longer being irrigated for a variety of reasons (e.g. building a barn on property which was previously irrigated) a water user is likely to be showing an intent to not abandon a right.... the issue of abandonment of a water rights should be viewed differently within an irrigation district. Although arguably these practices fail to meet the criterion set forth in *South Springs* and its progeny to show an intent to abandon, the Court's holding does not conclusively recognize that these practices work to avoid abandonment.
>
> In it *Brief on Quantification and Allocation Issues,* NMSU argued the total quantity of water rights within CID is the sum of water rights vested by beneficial use on all irrigated acreage within CID and once vested, such rights are generally protected from termination. We would respectfully request that the Court reconsider its decision on forfeiture and abandonment in order to insulate the individual landowners in CID from claims of forfeiture

and abandonment.

NMSU's Comments at p. 2.

Court's Decision

The Court has previously ruled in regard to the claims of NMSU in connection with the proper interpretation of NMSA 1978, §72-9-4.

The remainder of NMSU's requests are denied.

IT IS THEREFORE ORDERED that:

1. All parties are granted leave to submit memorandum briefs concerning the matters specified at pages 13, 28, 29, and 36 of this Supplemental Decision and Order within thirty (30) days after service of this Supplemental Decision and Order.

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

3. The parties shall prepare requested ultimate findings of fact and conclusions of law concerning the issues involved in this phases of these proceedings and suggested matters to be included in offers to members of CID and subfile orders to be entered in connection with the determination of the water rights claims of members of CID with forty (45) days after the service date of this Supplemental Decision and Order. Requested findings of fact shall include page references to exhibits relied upon in support of each tendered findings of fact. Authorities shall be cited in connection with each requested conclusions of law .

4. Within thirty (30) days after the effective date of service of the parties requested findings of fact and conclusions of law, counsel for the State shall prepare a proposed order as provided in paragraph 6, p. 21 of the Court's March 20, 2001 Decision and Order and paragraph

5, page 20 of the Court's Decision, circulate it for approval or objections as to form or content by all other counsel and interested parties appearing *pro se*, and then submit it to the Court for review, approval and entry in the Membership Phase of these proceedings.

5. Counsel are requested to advise the Court forthwith of the status of their settlement negotiations.

6. Counsel for the State is requested to serve a copy of this Supplemental 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 forgoing decision to counsel and repositories specified on attached Exhibit A on this 19th day of December, 2001.

Harl D. Byrd
District Judge *Pro Tempore*

Lynn A Johnson Esq
David W. Gehlert Esq
U.S. Dept of Justice
Environment & Natural Resources
999 Eighteenth Street Suite 945
Denver, Co 80202

Stephen L. Hernandez Esq
Beverly Singleman Esq
Hubert & Hernandez, P.A.
P O Drawer 2857
Las Cruces, NM 88004-2857

Christopher Schatzman Esq
Ann Carter, Esq.
Gary Storm, Esq.
Special Assistant Attorney Generals
P O Box 25102
Santa Fe, NM 87504-5102

Fred Hennighausen Esq
David M. Stevens Esq
Hennighausen, Olsen & Stevens, L.L.P.
PO Box 1415
Roswell, NM 88202-1415

Eric Biggs Esq
SIMMS & BIGGS, P.C.
129A West Houghton Street
Santa Fe, NM 87505

Stuart D. Shanor Esq
Hinkle Cox Eaton Coffield & Hensley
PO Box 10
Roswell, NM 88202

W.T. Martin Esq
Law Office of W.T. Martin Jr., P.A.
PO Box 2168
Carlsbad, NM 88221-2168

Susan C. Kery Esq
Sheehan Sheehan & Stelzner
PO Box 271
Albuquerque, NM 87103

Jay F. Stein, Esq.
Simms & Stein, P.A.
P O Box 5250
Santa Fe, NM 87504-5102

Chaves County Courthouse
P O Box 1776
Roswell NM 88201

DeBaca County Courthouse
P O Box 910
Ft Sumner NM 88119

Georgia Gomez, Clerk
Guadalupe County Courthouse
420 Parker, 2nd Floor
Santa Rosa NM 88435

Harl D. Byrd

December 19, 2001

Ms Trudy Hale
Deputy Clerk
Fifth Judicial District Court
P O Box 1776
Roswell, NM 88202-1776

Re: State v. Lewis et al., Chaves County Cause No. 20294 and 22600 Consolidated, Carlsbad Irrigation District, Membership Phase - Supplemental Decision and Order Addressing the Comments, Suggestions, Objections and Memorandum Briefs of Counsel for the Parties Set Forth in Their Respective Responses to the Court's October 19, 2001 Decision and Order Concerning the Water Rights Claims of Members of CID

Dear Ms. Hale:

Enclosed please find the above-captioned Supplemental Decision and Order for filing in the Membership Phase of these proceedings.

If anyone desires conformed copies, they should make arrangements directly with you.

Thank you for your cooperation and assistance.

Very truly yours,

Harl D. Byrd

HDB/jes

cc: All counsel on Exhibit A

P.O. Box 7985 Albuquerque, NM 87194-7985
Telephone: (505) 764-0098 Fax: (505) 246-9618