

Harl D. Byrd

July 17, 1996

TO: ALL COUNSEL OF RECORD AND PARTIES APPEARING PRO SE WHO HAVE ELECTED TO PARTICIPATE IN THE PHASE OF THESE PROCEEDINGS CONCERNING DETERMINATION OF PROCEDURAL ISSUES

Re: *State of New Mexico v. L.T. Lewis, et al.*, Nos. 22600 & 20294 Consolidated; Carlsbad Basin Section, Carlsbad Irrigation District Section - Letter Opinion Re Procedural Issue No. 3

I. Preliminary Matters.

A. Background - Statement of the Proceedings.

Initially, on May 9, 1994, a **PRETRIAL ORDER** (May 1994 Pretrial Order) was filed which set forth the procedure for the adjudication of the water rights claims of the Carlsbad Irrigation District (CID) in connection with the Carlsbad Project. The May 9, 1994 **PRETRIAL ORDER** provides in pertinent part as follows:

II. Adjudication Procedure.

A. Within 15 days from the entry of this pretrial order, State shall serve on the United States and the District an offer of settlement describing the diversion, impoundment, storage, and beneficial consumptive use rights for the Carlsbad Project, said offer to include the following essential elements:

1. Diversion rights

- (1) Purpose**
- (2) Sources (Pecos River stream system, including the Black River)**
- (3) Points of diversion (Pecos and Black Rivers)**
- (4) Place of use, including the total acreage thereof**
- (5) Amount of water, including --**

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- (a) Annual diversion amount
- (b) Farm delivery amount
- (c) Consumptive irrigation requirement
- (d) Off-farm conveyance efficiency
- (e) On-farm irrigation efficiency
- (f) Annual depletion amount
- (6) Priorities

2. Impoundment and storage rights

- (1) Purpose
- (2) Source
- (3) Places and locations of impoundment and storage
- (4) Amounts of water storage
- (5) Priorities

B. Within 30 days from the date of receipt of the offer, the United States and the District shall accept or reject the offer.

- 1. Within 210 days of an acceptance of the offer of settlement, the State shall serve or cause to be served on all parties, including all members of the District and all water rights claimants of record within the Pecos River stream system, and shall publish in newspapers of general circulation in the Pecos River stream system, a copy of the accepted offer and notice of the date by which objections to said offer must be filed.
- 2. Within 210 days of a rejection of the offer, the United States and the District shall serve on all parties, including all members of the District, all water rights claimants of record within the Pecos River stream system, and the State, and shall publish in newspapers of general circulation in the Pecos River stream system, a copy of a statement of water right claims for the Carlsbad Project (said statement to include all elements of the offer listed in II.A.1. and II.A.2 above) and a notice of the date by which objections to said statement of claims must be filed. The State is directed to assist in the preparation of the service list by providing to the United States and the District relevant information from permits maintained and declarations filed in the State Engineer Office, existing adjudications, subfile orders, and other relevant records.

3. Objections filed under either II.B.1 or II.B.2 above may address the binding effect of the decree in United States of America v. Hope Community Ditch, et al., U.S. District Courts, Cause No. 712 Equity (1933), and matters deemed appropriate for decision by the Court as threshold legal issues.
- C. Within 30 days from the date by which objections to the offer or statement of claims are due, the United States and the District shall respond to objections or request the Court to dismiss any objections based on lack of standing to object or for other grounds.

Thereafter on February 3, 1995, the State filed its **MOTION FOR ORDER EXTENDING TIME AND ESTABLISHING NOTICE, OBJECTION, AND PUBLICATION PROCEDURES**. On the same day, an **ORDER** granting the motion was filed which provided in pertinent part as follows:

1. The time in which plaintiff State of New Mexico shall complete the Section II.B.1. requirements of the pretrial order in the above-titled action entered May 9, 1994, is extended to April 1, 1995.
2. Plaintiff State of New Mexico shall utilize and mail the form of notice attached hereto as Exhibit 1 for the notice required by paragraph 1. of this order.¹
3. Plaintiff State of New Mexico shall utilize and mail the form of notice of objections attached hereto as Exhibit 2 as part of the notice required by paragraph 1. of this order.
4. Plaintiff State of New Mexico shall cause the notice and Stipulated Offer of Judgment regarding the Carlsbad Project water rights claims entered into by the state, United States of America, and Carlsbad Irrigation District to be published... At 2 and 3. (The Stipulated Offer of Judgment is hereafter referred to as the "Offer".)

Counsel for the State filed a Certificate of Service on April 4, 1995 which provides:

¹ A copy of the notice is attached to this letter decision as Attachment A.

...copies of the Carlsbad Project stipulated offer of judgment, the notice by which objections thereto must be filed, and the optional notice of objections form were mailed to all parties, including all members of the Carlsbad Irrigation District, and all water right claimants of record within the Pecos River stream system, as shown on pages 1 through 44 of attached Exhibit A, March 31, 1995, as directed by the pretrial order and order of the court entered May 9, 1994, and February 3, 1995, respectively.

Thereafter, on December 7, 1995, the State filed **STATE'S MOTION FOR ORDER DIRECTING ADDITIONAL SERVICE**. In support of the motion, the State submitted as Exhibit A an affidavit of LeRoy R. Warren, one of the attorneys for the State, dated November 30, 1995, (Warren Affidavit). The affidavit provided in pertinent part as follows:

7. In anticipation of the service requirement subsequently reflected in the May 9, 1994, pretrial order and February 3, 1995, order, I met with the state engineer and the chief of the state engineer office hydrographic survey branch in late 1993 to discuss the need for a service list including the names and addresses of all water right claimants in the Pecos River stream system in New Mexico, the use of the hydrographic survey branch for the development of the service list, and the priority that had to be assigned to that work.

8. By memorandum to the state engineer, the chief of the hydrographic survey branch, and others dated February 3, 1995, I formalized the essence of the discussion that took place in late 1993; noting that the listing would encompass an estimated 6,000 parties, summarizing the effort required for the entire stream system, and urging that the task be given top priority. That effort was specifically associated with the following sections of the Pecos River stream system: Upper Pecos, Gallinas River, Ft. Sumner, Rio Hondo, Roswell Basin, River Pumpers, Rio Penasco, Black River, Carlsbad Project, and Carlsbad Underground.

9. Through staff and contractor effort and through the utilization of several procedures, including the review of State Engineer Office, county tax assessor, and acequia records and personal interviews, the hydrographic survey branch developed the name and address information for the claimants in the Pecos River stream system other than those in the District.

10. The name and address information for the members of the District was provided by the District administrative office.

11. The name and address information provided by the hydrographic survey branch and the District administrative office was delivered to me and, in turn, presented to the Legal Services Division database contractor who produced the service list and address labels utilized for the March 1995 mailing of the notice, offer, and notice of objections form to the parties, members of the District, and known water right claimants in the Pecos River stream system. In March 1995 the Legal Services Division utilized the address labels provided by the database contractor to mail the required documents to the approximately 5,700 known water right claimants.

12. By certified letter dated February 21, 1995, copies of an introduction (which included instructions for securing the notice of objections form), the court-approved notice, and the stipulated offer of judgment entered into by the state, District, and United States were mailed to the following newspapers, with instructions that they be published as a legal notice on March 2, 9, 17, and 23, 1995:

Carlsbad Daily Current Argus
Roswell Daily Record
Ruidoso News
Lincoln County News
DeBaca County News
Santa Rosa News
Las Vegas Optic
Albuquerque Journal
Santa Fe New Mexican

13. Each of the newspapers subsequently submitted affidavits of publication which were filed with the district court clerk May 26, 1995.

In connection with the motion, on December 15, 1995, the Court entered an **ORDER DIRECTING ADDITIONAL SERVICE AND PUBLICATION OF NOTICE AND OFFER AND EXTENDING THE TIME FOR FILING OBJECTIONS.** The order required that the State serve, no later than December 29, 1995, "...a) February 3, 1995 Notice, b) optional form of Notice of Objections, c) Carlsbad Project Stipulated Offer of Judgment, d) this Order and e) State's Report and Proposed Initial Pretrial Order on Carlsbad Project Water Right Claims, filed on August 31, 1995 on any water right claimant in the Pecos

River stream system not previously served with the notice of the Offer and whose name and address are provided in writing to counsel for the State by December 22, 1995...".

The order also required publication of a Supplemental Notice attached as Exhibit A in specified newspapers. [The form of Supplemental Notice is submitted as Attachment B to this letter opinion]. Claimants not previously served were granted until January 31, 1996 to file objections to the Offer.

A summary statement of the case and the general nature of the claims of the parties in connection with the Offer and the determination of the water rights claims of the CID in connection with the Carlsbad Project are set forth in the **PRETRIAL ORDER FOR CARLSBAD WATER RIGHTS CLAIMS** filed on February 26, 1996 (**February 1996 Pretrial Order**). The **February 1996 Pretrial Order** also set forth the procedure and time schedule to be followed in connection with the determination of the remaining **PROCEDURAL ISSUES, THRESHOLD LEGAL ISSUES, and OFFER ISSUES**; provided for public repositories of pleadings, briefs, notice of hearings and orders that are filed pursuant to the pretrial order for informational purposes; established limitations on service of briefs, pleadings and notices; and provided that within sixty (60) days following entry of a Court decision permitting the parties to proceed to the offer issue phase, the parties shall submit to the Court a proposed supplemental pretrial order for disposition of offer issues utilizing the form of pretrial order adopted by the United States District Court for the District of New Mexico.

A description of the water rights claimed by the CID in connection with the Carlsbad Project is set forth in the Offer.

This phase of these proceedings addresses Procedural Issue No. 3 hereinafter set forth.

II. Statement of Procedural Issue No. 3.

The **February 1996 Pretrial Order** identified three (3) procedural issues and adopted a schedule for the filing of memorandum briefs in connection therewith.² Memorandum briefs have not been submitted by any party concerning procedural issues 1 or 2. Therefore, the only procedural issue remaining for determination in this phase of these proceedings is Procedural Issue No. 3 which is phrased as follows:

- 3. Whether The Decree Adjudicating The Project Water Rights Will Be Binding On All Water Right Claimants In The Pecos River Stream System Or Only On Those Claimants Made Defendants Through Personal Service Of Summons And Complaint.**

III. Submissions Re Procedural Issue No. 3.

The Court has received and reviewed the following memorandum briefs concerning Procedural Issue No. 3:

² Procedural Issue 1 was phrased as follows:

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

Procedural Issue 2 was phrased as follows:

Whether the State service of the notice was sufficient since some water rights claimants in the stream system did not receive the notice and since some of the published legal notices contained publication errors. The State has performed additional service as direct by the Court and has filed affidavit(s) setting forth the procedures utilized in making service of the notice of the Offer and the opportunity to object. Whether service by publication in this proceeding required SCRA 1986, 1-004.H, affidavits is a part of this issue.

1. **PVACD'S BRIEF ON PROCEDURAL QUESTION #3** (PVACD's Brief) filed on March 26, 1996, by Fred Hennighausen, Esq., Stuart Shanor, Esq. and Eric Biggs, Esq.
2. 20 Joinder Briefs on Procedural Question #3 adopting the matters set forth in the PVACD's Brief submitted by W.T. Martin, Esq. for clients Robin Eddy, Draper Brantley, Jr., Delaware Ranch Corp., George and Mary Brantley Estates, George and Nancy Brantley, Will M. Brantley, Bette Anne Brantley, Jean K. Tracy, John D. Tracy, Francis G. Tracy, Charles G. Tracy, Josephine T. Eddy Trust, Francis G. Tracy Credit Trust, Francis G. Tracy Marital Deduction Trust, Francis G. Tracy, Jr. and Bessie D. Tracy Revocable Trust, Joel Eddy, Mr. & Mrs. Wayne Carpenter, Mr. & Mrs. Jack Volpatos, Riverside Country Club and Flora Louise Tracy, filed on March 26, 1996.
3. **RESPONSE OF THE UNITED STATES TO PVACD'S BRIEF ON PROCEDURAL ISSUE NO. 3** (United States' Response), filed April 17, 1996, by David Gehlert, Esq.
4. **STATE'S BRIEF IN RESPONSE TO PVACD'S BRIEF ON PROCEDURAL ISSUE #3** (State's Brief) filed April 25, 1996, by Rebecca Dempsey, Esq.
5. **CID RESPONSE TO PVACD'S BRIEF ON PROCEDURAL ISSUE NO. 3** (CID's Response) filed on April 26, 1996, by Beverly Singleman, Esq. and Steven L. Hernandez, Esq.
6. **RESPONSE OF MESCALERO APACHE TRIBE TO PVACD'S BRIEF ON PROCEDURAL QUESTION NO. 3** (Mescalero's Response) filed on April 25, 1996, by Leslie L. Seckler, Esq.
7. **PVACD's Consolidated Reply Brief on Procedural Issue #3** (PVACD's Reply) filed on May 14, 1996, by Fred Hennighausen, Esq., Stuart Shanor, Esq. and Eric Biggs, Esq.

IV. Issues for Determinations Included Within Procedural Issue No. 3.

PVACD raises no questions concerning the efforts of the State to determine known water rights claimants in the Pecos River stream system.

PVACD states in PVACD's Brief:

This question [Procedural Issue No. 3] refers not only to the actual

notice procedures, readvertisement, and personal service undertaken by the state in this matter, but to also the statutory jurisdiction of the Court. *Cf.* Pretrial Order at 4. The issue could be framed as whether the legislature has authorized the Court to order constructive notice by publication as to water rights claimants in the Pecos River basin not previously joined to this action, simultaneously with efforts to personally serve reasonably known water users, making such order sufficient to bind absent parties served constructively to the outcome of this matter. PVACD submits that, based on the decisions of the New Mexico Supreme Court spanning half a century in the cases discussed below, the decisions in water adjudications like this one bind only those that have been made parties.

(Matter in brackets added.)

In PVACD's Reply counsel states that they are concerned:

...that there has been a short cutting of the process of making people parties to this case without sufficient authorization to do so. If this is true, as PVACD is convinced it is, there is a serious problem concerning the binding effect of this Court's decree on absent parties (e.g. all parties who have not actually entered an appearance in these proceedings).

At 1 and 2.

PVACD claims that:

...it is necessary to join, as parties, all those who claim the right to use water of the Pecos River stream system before they will be bound. The jurisdiction of the Court is not in question. Its decree will be 'binding on all who were parties' herein. *Sharp* (citations omitted).

At 3.³

In support of its contentions, in PVACD's Brief, PVACD relies primarily upon NMSA 1978, §§72-4-13 through 72-4-19 and especially §72-4-17; *D'on Mott v. Sun County Garden Prods.*, 34 N.M. Bar Bull., No. 34, at 24 (Ct.App. 1995); *Armijo v. Atchison, Topeka*

³ Other provisions of PVACD's submissions indicate, however, that there may be questions of the Court's jurisdiction. *See* PVACD's Reply, at page 7 and 14.

& Santa Fe Ry., 754 F.Supp. 1526, 1534-35 (D.N.M. 1990); *State ex rel. Clark, Coll & Buffett v. Johnson*, 34 N.M. Bar Bull., No. 32, at 7 (1995); *Elephant Butte Irrig. Dist. v. United States*, 115 N.M. 229, 849 P.2d 372 (Ct.App. 1993), *cert. denied*, 115 N.M. 359, 851 P.2d 481 (1994); *El Paso & R.I. Ry. Co. v. District Court*, 36 N.M. 94, 8 P.2d 1064 (1931); *Bounds v. Carner*, 53 N.M. 234, 205 P.2d 216 (1949); and *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959).

PVACD argues that under *El Paso*, *Bounds* and *Sharp*, parties are not bound by the determinations of the court in this phase of these proceedings until they have been joined as parties and served with summons.

PVACD recognizes the decisions in *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983) concerning the binding effect of determinations made pursuant to procedures which are in substantial compliance with our water rights adjudication statutes and result in a reasonable and practical way to accomplish desired purposes. PVACD also recognizes the adoption of procedures concerning notice and service in the Mescalero case, *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (Ct.App.), *cert. denied* 115 N.M. 709, 858 P.2d 85 (1993) which are closely analogous to the procedures used by the State in these proceedings. PVACD argues, however, that under previous practice, parties who are known must generally be joined prior to the use of publication. If "...(1) the legislative role in setting standards for water adjudications is not being usurped by the judiciary, (2) the Court-ordered publication is considered 'subsequent' to the effort to provide personal service even though it is not, and (3) previous state efforts to personally notify people were reasonably adequate..." the

order of the court in connection with service may be construed as reasonably implementing the statutory standards as discussed and permitted in *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, *supra*. At 11. Otherwise the court lacks power to authorize service in the manner followed by the State and the determinations of the court in connection with the Offer and the water rights claims of the CID would not be binding upon all water rights claimants in the Pecos River stream system.

The responses and arguments of the State, the United States, the CID and the Mescaleros have been considered in connection with the Court's analysis and decision set forth in this letter opinion; however, to set them forth or to summarize them would serve no useful purpose.

PVACD's Reply analyzes the cases upon which it relies in greater detail and responds to the arguments and citations of authorities of the State, the United States, the CID and the Mescaleros.

The CID raises the issue of PVACD's standing and waiver of its right to assert the arguments advanced; however, because of the importance of the issues of notice and service considered in this opinion, the Court will not address the issue of standing or waiver. *See* CID's Response, page 8.

Unfortunately, the issues and sub-issues submitted for determination are not clearly defined or free from doubt.

To the extent that claims or arguments of any party are not incorporated into this letter decision, they have been omitted because specific determinations or citations of authority in connection therewith are not necessary in order to resolve Procedural Issue

No. 3.

V. Analysis and Decision.

Based upon all the submissions of the parties, it appears that the following issues and sub-issues may be involved in connection with the determination of Procedural Issue No. 3. These issues and the Court's opinion in connection with each are as follows:

A. Issue 3 A - Jurisdiction.

Whether The Court Has Jurisdiction Over Persons Who Have Not Been Served With Summons, But Who Have Been Joined As Parties And Served By Mail Or Served Or Publication With Notice Of This Phase Of These Proceedings In Order That Determinations Of The Court As To Whether The Offer Should Be Approved Or Disapproved, And, If Approved, Whether Determinations Of The Water Rights Claims Of The CID In Connection With The Carlsbad Project Are Binding Upon Those Served As Aforesaid.

PVACD claims concerning the Court's jurisdiction are unclear. PVACD does not seem to raise any issue concerning subject matter jurisdiction, but questions whether the Court has *in personam* jurisdiction over parties not served with summons in connection with issues involving the Offer. Thus, PVACD states at page 3 of PVACD's Reply that: "...The jurisdiction of the court is not in question. Its decree will be 'binding on all who are parties' herein. *Sharp*, 66 N.M. at 196, 344 P.2d at 945...".

PVACD states at page 7 of PVACD's Reply that:

If this Court and the parties who are before it in this proceeding want the judgment of this Court to be binding upon more parties than those who have voluntarily subjected themselves to the jurisdiction of the Court by entry of appearance, then take heed that jurisdiction over such parties is now defective and should be corrected before proceeding further.

See also page 14.

The legislature has given the judiciary exclusive jurisdiction to resolve and finalize

water rights in comprehensive general stream adjudications. *El Paso & R.I. Ry. Co. v. District Court*, 36 N.M. 94, 100, 8 P.2d 1064 (1931); *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 772, 508 P.2d 577 (1973).

In *United States v. Bluewater*, 580 F.Supp. 1434, 1438 (D.N.M.1984), the Court stated:

The United States Supreme Court has recognized New Mexico's 'elaborate procedures for allocation of water and adjudication of conflicting claims to that resource,' along with the procedures of four other southwestern states. *Colorado River Water Cons. Dist. v. United States*, (hereinafter referred to as *Colorado River*), 424 U.S. 800 at 804, 804 n.2, 96 S.Ct. 1236, at 1239, 1240 n. 2, 47 L.Ed.2d 483 (1976).

NMSA 1978, Section 72-4-17 (Repl. Pamp. 1985) confers jurisdiction upon the Court to adjudicate rights to the use of water in any stream system and describes procedures for joinder of parties and service. This statute will be discussed in further detail under **Issue 3 B**.

In my opinion, the Court has subject matter jurisdiction over the matters to be determined in connection with the Offer. The necessity of further defining jurisdiction of the Court is discussed under Issue 3 C, *infra*. The remaining issues involved are discussed and determined in connection with Issue 3 B, *infra*.

B. Issue 3 B - State's Procedures - Compliance With Statutes And Procedural Rules.

Whether The State's Procedures In Serving Notice By Mail And Publication Substantially Complied With Applicable Statutes And Procedural Rules In Order That Determinations Of Issues Concerning The Offer, And, If Approved, The Water Rights Claims Of CID Will Be Binding On Those Served As Aforesaid.

The fundamental issue to be determined in connection with Procedural Issue No. 3 is whether the procedures adopted by the State Engineer in serving notice by mail and

publication are in substantial compliance with applicable statutes, procedural rules and meet due process requirements in order that determinations of the Court as to whether the proposed Offer should be approved, and, if approved, whether a determination of the water rights of CID in connection with the Carlsbad Project will be binding upon all water rights claimants in the Pecos River stream system so served or only upon those served with summons and complaint.

The principal pertinent New Mexico water rights adjudication statute pertaining to joinder of parties and service is NMSA 1978, §72-4-17 (Repl. Pamp. 1985) which provides, in pertinent, part as follows:

In any suit for the determination of a right to use the waters of any stream system, all those who claim to the use of such water are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties...and all unknown persons who may claim any interest or right to the use of the waters of any such system ... may be made parties in such suit by their names as near as the same can be ascertained,...said unknown persons by the name and style of unknown claimants of interest to water in such stream system, and service of process on, and notice of such suit, against such parties may be made as in other cases by publication.

(Underscoring for emphasis added.)

On August 30, 1991, Judge Paul Snead entered an Order concerning joinder of parties to these proceedings which provides in pertinent part as follows:

1. All water rights claimants on the Pecos River stream system shall be joined on the ex parte motion of the state as they are identified by the hydrographic survey of the state engineer.
2. Service of the order joining a party shall be limited to the claimant to be joined as a party. The order joining a party shall become effective upon service.

SCRA 1986, 1-005 provides in part:

A. **Service; when required.** Except as otherwise provided in these rules, every order required by its terms to be served,...every written notice,...and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 1-004 of these rules.

B. **Service; how made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing...

(Underscoring for emphasis added.)

See also NMSA 1978, §14-11-10 and SCRA 1986, 1-004H.

In *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, **99 N.M. 699, 701, 663 P.2d 358 (1983)**, the Court rejected an argument by Pecos Valley Artesian Conservancy District that a decree fixing all rights must be entered before individual rights may be determined in separate segments. In *United States v. Bluewater-Toltec Irrigation District*, **580 F.Supp. 1434, 1438 (D.N.M. 1984) aff'd 806 F.2d 986 (10th Cir. 1986)**, the Court recognized that under New Mexico procedure:

Before a decree as provided in Section 72-4-19, N.M.Stat. Ann. (1978) can be entered, known claimants must be impleaded. *New Mexico ex rel. Reynolds v. Sharp*, **66 N.M. 192, 196, 344 P.2d 943, 945 (1959)**. That is not to say, however, that all potential claimants must be made parties at the time the complaint is filed.

(Underscoring for emphasis added.)

In *State v. Allman*, 78 N.M. 1, 3, 427 P.2d 886, 888 (1967), the Court stated, "...There can be no doubt that due process requires all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court...". (Quoted with approval in *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. at 701.)

Due process requires that all who may be bound or affected by a decree in a water rights adjudication proceeding are entitled to notice and an opportunity to be heard. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73; *State v. Allman, supra*; *State ex rel. Reynolds and Pecos Valley Artesian Conservancy District v. Lewis et al. and State ex rel. Reynolds v. Hagerman Canal Co., et al.* 84 N.M. 768, 508 P.2d 577.

In *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) the Supreme Court, in discussing the requirements of due process and the necessity of personal service, service by mail and service by publication stated:

An elementary and fundamental requirement of due process in any proceedings which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested parties to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314, (Citations omitted.)

In considering how service must be made upon known parties in interest the Court stated:

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be as such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id. at 318.

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However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication... .

Id. at 319.

Finally, in discussing publication, the Court stated:

This court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probable futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

(Citations omitted.)

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Id. at 317.

The procedure utilized in the case at bar was followed in connection with the trial of the issues involving the Mescalero Apache Tribe's water rights in the Rio Hondo Basin.

***State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (Ct.App. 1993) cert. denied 115**

N.M. 709, 858 P.2d 85 (1993). In that case, in 1986, proceedings to determine water rights of the Mescalero's in the Hondo Basin Section vis-a-vis the State were first held. Then an *inter se* proceeding was held in 1987 which involved all water right claimants in the Pecos River stream system. These claimants were notified by mail, if known, and by publication, if not known, of their opportunity to appear and contest the Mescalero's claimed water rights (order of September 23, 1986, *State of New Mexico v. Lewis, et al, Cause Nos. 20294 and 22600 Consolidated; Rio Hondo Section, Mescalero Section*). The State Engineer procedures regarding notice, service by mail and publication, there and here, were practical, reasonable and in substantial compliance with our water adjudication statutes. As stated in the Mescalero case, the judgment in connection with the Mescalero water rights is "...final and binding on the State of New Mexico and all claimants to the use of water in the Pecos River system within the State of New Mexico...". Final Judgment, July 11, 1989, at 8; *State ex rel. Martinez v. Lewis, 116 N.M. 194.*

In *State ex rel. State Eng. v. Aragon, No. CIV 7941-SC*, the Court entered an order on July 17, 1995 directing the mailing and publication of notice of a proposed final decree which would adjudicate the rights of the Jicarilla Apache Tribe which provided that all water right claimants must file objections to the proposed decree or be forever barred.

In *Bentz v. Peterson, 107 N.M. 597, 672 P.2d 259*, the Court held:

Under a statute providing for service by publication upon an unknown person in a suit to quiet title, where the service was properly completed, a judgment obtained in the quiet title action is binding upon such unknown persons. *Jensen v. Schwartz, 90 N.W.2d 716 (N.D.1958)*. See also R. 1-004(H)(6).

In *State v. Pecos Vly. Artes. Conservancy District*, 99 N.M. 699 at 701, the

Court stated:

Where a procedure that was not required or prohibited by statute was challenged, this Court has previously held that such procedure could be adopted by the state engineer because it was in 'substantial compliance with the requirements of the adjudication statutes, and a reasonable and practical way to accomplish the desired purposes.' *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 197, 344 P.2d 943, 946 (1959). The procedure adopted by the court in the instant case meets this standard. The usual procedure followed in such adjudications is not inviolate.

The procedures followed by the State in notifying known water right claimants in the Pecos River stream system by mail and unknown water right claimants in by publication was authorized by NMSA 1978, Section 72-4-17 (Repl. Pamp. 1985). In the case at bar as in the case of *State ex rel. Reynolds v. Pecos Vly. Artesian Conservancy District, supra*, the procedures utilized by the State represent a reasonable and practical way to accomplish the desired result of putting all persons claiming water rights in the Pecos River stream system on notice that the Court will conduct a hearing to consider whether or not the Offer should be approved, and, if approved, the Court will determine the water rights claims of the CID in connection with the Carlsbad Project. The determinations of the Court in connection with these matters will be binding upon the named water right claimants and all unknown persons who may claim any interest or right to the use of the waters in the Pecos River stream system.

C. Issue 3 C - Necessity of Characterizing Nature of Proceedings.

Whether A Determination Must Be Made As To Whether This Phase Of These Proceedings Is *In Rem*, *In Personam* Or *Quasi In Rem*, Or Whether Such A Determination Is Unnecessary Because The Ultimate Issues Which Must Be Determined Is Not The Nature Of The Proceedings, But, Rather, Whether Due Process Has Been Afforded By Giving Notice Of The Proceedings And Affording An

Opportunity To Be Heard And Whether Determinations Of The Court Will Be Binding Upon Persons Not Served With Summons.

It is not necessary to determine whether subject proceedings are *in rem*, *in personam* or *quasi in rem*. With due regard to the decision in *Mullane, supra*, the ultimate issue in determining the binding effect of orders, judgments and decrees determining the water rights claims of claimants, other than a party served with summons, is whether our statutes have been followed and whether the party sought to be bound has been afforded due process by giving adequate notice of the purpose of the proceedings and an opportunity to be heard in connection therewith. If these requirements are met, determinations of the Court will be binding upon those served in accordance with our statutes.

If a determination of the character of the proceedings must be made, proceedings involving the determination of issues pertaining to the Offer in connection with the Carlsbad Project are in the nature of *in rem* proceedings. In *Elephant Butte Irr. v. Regents of N.M.*, **115 N.M. 229, 849 P.2d 37**, the Court held in pertinent part that:

Water rights are real property rights that are generally tied to specific land. *See New Mexico Prods. Co.*, 42 N.M. at 321, 77 P.2d at 641; *see also State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 618 P.2d 359 (1980) (all water rights are appurtenant to specific acreage); *Posey v. Dove*, 57 N.M. 200, 257 P.2d 541 (1953) (water rights are real property rights); NMSA 1978, § 72-1-2 (Repl.1985) (waters appropriated for irrigation purposes are appurtenant to specified land unless severed from that land in the manner provided by law); *cf. Heath v. Gray*, 58 N.M. 665, 274 P.2d 620 (1954) (holding that petition that asserted interest in oil and gas lease was a suit in which a interest in lands was the object).

115 N.M. at 238. *See also Roberson v. People*, **90 P. 79, 80 (1907)** holding that decrees adjudicating the priority rights for the use of water are *in rem* rather than *in personam*.

The Supreme Court of the United States in *Nevada v. United States*, 463 U.S. 110 held that "... water adjudications are more in the nature of *in rem* proceedings...". at 144.

For the reasons set forth in connection with **Issue 3 B**, determinations of the Court in connection with the Offer are not limited in their binding effect upon those persons served with summons and are binding upon persons served in accordance with our statutes and afforded due process.

D. Issue 3 D - Sufficiency of Notice - Parties Not Served With Summons.

Whether Parties Not Served With Summons Have Been Given Adequate Notice Of The Proceedings Involved In This Phase Of These Proceedings And Afforded An Opportunity To Be Heard In Order For Determinations Of The Court Concerning The Offer And The Water Rights Claims Of The CID In Connection With The Carlsbad Project To Be Binding Upon Them.

The Court finds and concludes that the notices served and published by the State adequately advise all known and unknown water rights claimants in the Pecos river stream system of matters to be heard and determined by the Court in connection with this phase of these proceedings and that if objections are not filed, claimants will be forever barred from making subsequent objections to the determinations of the Court concerning the Offer and the water rights of the CID claimed for the Carlsbad Project.

The remaining matters set forth under this sub-issue and the Court's determinations in connection therewith are sufficiently discussed and determined under **Issue 3 B**.

E. Issue 3 E - Simultaneous Mailing Of Notice And Publication.

Whether A Procedure Of Simultaneously Mailing Notice Of These Proceedings To Known Claimants And Publication Of The Notice To Unknown Claimants In Interest, If Utilized By The State, Is Permissible, And Whether, If Such A Procedure Is Followed, Determinations Of The Court Concerning The Offer And The Water

Rights Claims Of The CID In Connection With The Carlsbad Project Will Be Binding Upon Persons Served In Accordance With The Procedures.

Under point 2 of PVACD's Brief, pages 3 to 5, PVACD argues that NMSA 1978, Section 72-4-17 (Repl.Pamp. 1985) requires that parties to stream adjudication proceedings be joined in the following order: 1) based on the results of a hydrographic survey or through the exercise of reasonable diligence all known claimants to the use of water be made parties; and, 2) only then, after all known existing claimants are joined may the State notify "unknown absent parties by publication." At 4. PVACD argues that the process of simultaneously mailing notice to known claimants and publication to unknown claimants is not permissible and contrary to NMSA 1978, Section 72-4-17. Apparently, this argument is premised upon "the structure of the statute." At 4.

In *El Paso and R.I. Co. v. District Court*, 36 N.M. 94, 104, 8 P.2d 1064, 1070, the Supreme Court of New Mexico rejected a similar argument in the context of the purported difference between adjudication proceedings by the attorney general and private parties and held that the fact that the publication requirement was put at the end of the 1917 amendment to the adjudication provisions of our Water Code (1929 Comp., §§ 151-101 to 151-179) was of no particular significance. The Court stated "...Undoubtedly, it would have been better and clearer if the amendment of 1917 had been inserted higher up in the section rather than tacked on at the end...". *Id.* at 104. The placement of the phrase in the statute was not considered dispositive of the issues before the Court.

PVACD cites no authorities or reasons not previously discussed that would require that known claimants of water rights be served with summons before publication

procedures are initiated. If due process requirements of notice and opportunity to be heard are afforded, sequencing of service by mail and publication should have no significance in determining whether the procedures used by the State should be approved. PVACD never satisfactorily explains why the process of simultaneously mailing notice to known claimants and publication to unknown claimants, if used by the State, was inadequate or failed to afford due process.

PVACD does not claim that the State did not exercise reasonable diligence in order to identify known water rights claimants. The Warren Affidavit manifests that reasonable diligence was exercised. Known claimants were properly served by mail. (*See Warren Affidavit.*) The State has also complied with the provisions of NMSA 1978, Section 72-4-17 (Repl. Pamp. 1985) by publishing notice. The efforts of the State Engineer and its counsel as described in the Warren Affidavit, under the circumstances of this case, meet the requirements of *Mullane, supra* in affording due process. Therefore, all those who claim the right to water in the Pecos River stream system and all unknown persons who may claim any interest or right to use water in the stream system, will be bound by determinations of this Court concerning the Offer and the water rights claims of the CID in connection with the Carlsbad Project. PVACD's arguments are not well founded.

VI. Conclusion.

Based upon the foregoing authorities and the affidavit of Mr. Warren, in my opinion, the terms and provisions of the order, judgment and decree in connection with the Offer and adjudicating water rights of the CID in connection with the Carlsbad Project will not be restricted in their binding effect on water rights claimants made defendants through

personal service of summons and complaint. The order, judgment and decree concerning whether the Offer should be approved or disapproved, and, if approved, the water rights of the CID in connection with the Carlsbad Project determined in connection therewith when entered will be binding upon:

1) All persons served with summons and mailed a copy of the notice of proceedings (there are no issues raised concerning this aspect of the matter);

2) All persons joined as parties in accordance with Judge Snead's August 30, 1991 Order and mailed a copy of the notice of proceedings (*see* SCRA 1986, 1-005);

3) Those who have entered appearances or have participated in these proceedings. *San Juan Water Com'n v. Taxpayers*, 116 N.M. 106, 860 P.2d 748, 751 (1993); *Stetz v. Skaggs Drug Centers Inc.*, 114 N.M. 465, 469, 840 P.2d 612 (Ct.App. 1992); *Matter of Doe*, 99 N.M. 517, 521 660 P.2d 607 (Ct.App. 1983); *Marchman v. NCNB Texas Nat'l Bank*, 120 N.M. 741, 898 P.2d 709, 719 (1995); *Insurance Corp. v. Campagnie des Bauxites*, 456 U.S. 694, 703 and *Chavez v. Valencia County*, 86 N.M. 205, 521 P.2d 1154, 1158.

4) All water users through the Pecos Valley Artesian Conservancy District (notwithstanding that they are not individual parties) to the extent that PVACD is the agent of such water users. *Pecos Valley Artesian Conservancy District v. Peters*, 52 N.M. 148, 154, 193 P.2d 418 (1948).

5) All known water rights claimants of the Pecos River stream system ascertained as provided in the Warren Affidavit and served as therein provided by mail. (See discussion under **Issue 3 B.**)

6) All unknown persons who may claim an interest or right to the use of the water of the Pecos River stream system. NMSA 1978, §72-4-17 (Repl.Pamp.1985), *Bentz v. Peterson*, 107 N.M. 597 (Ct.App. 1988).

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

Counsel for the State is requested to notify all parties appearing by counsel or *pro se* that the adjudication shall now proceed the phase of filing responses by the United States and the CID to all filed objections to the Offer and the preparation and filing of legal briefs as provided in the **February 1996 Pretrial Order**, page 5.



HARL D. BYRD
District Judge Pro Tem

cc: Fred Hennighausen, Esq.
Stuart Shanor, Esq.
Eric Biggs, Esq.
W.T. Martin, Jr., Esq.
Stephen Shanor, Esq.
David Gehlert, Esq.
Lynn Johnson, Esq.
Rebecca Dempsey, Esq.
Beverly Singleman, Esq.
Steven Hernandez, Esq.
Leslie Seckler, Esq.

You are hereby notified that the adjudication or determination of the water right claims of the United States of America and the Carlsbad Irrigation District for the Carlsbad Project has been initiated by a Stipulated Offer of Judgment entered into by the State of New Mexico, United States of America, and Carlsbad Irrigation District, a copy of which accompanies this notice.

The purpose of this notice is to inform all defendants in the Pecos River stream system water right adjudication and all water rights claimants in the Pecos River stream system whose water right interests may be affected by the water rights claimed for the Carlsbad Project and described in the Stipulated Offer of Judgment of (1) their right to contest all or any part of the [→]those described water right claims and (2) the manner in which they may preserve that right.

If you do not wish to contest all or any part of the water rights claimed for the Carlsbad Project and described in the Stipulated Offer of Judgment, you do not have to take any action.

If you wish to contest all or any part of the water rights claimed for the Carlsbad Project and described in the Stipulated Offer of Judgment, you must file your objections with the Fifth Judicial District Court clerk. A notice of objections form accompanies this notice, should you wish to use the form for your objections. Objections must be sent or delivered to the Fifth Judicial District Court clerk for filing no later than Monday, May 9, 1995, at the following address:

Bee J. Clem
District Court Clerk
Fifth Judicial District Court
Chaves County Courthouse
P.O. Box 1776
Roswell, NM 88201

You are further notified that after notice to persons filing objections, prehearing conferences and other hearings will be conducted to review objections timely filed, to adopt appropriate procedures for consideration and determination of said objections, and to adopt appropriate scheduling orders in connection therewith.

Failure by defendants in the Pecos River stream system water right adjudication and persons claiming water rights in the Pecos River stream system to file objections as required by this notice shall forever bar their subsequent objections to the water rights claimed for the Carlsbad Project and described in the Stipulated Offer of Judgment.

Before April 1, 1995, this notice and the accompanying Stipulated Offer of Judgment shall also be published once a week for four consecutive weeks in newspapers of general circulation in the Pecos River stream system, including the Carlsbad Daily Current Argus, Roswell Daily Record, Ruidoso News, Lincoln County News, DeBaca County News, Santa Rosa News, and Las Vegas Optic. The notice and Stipulated Offer of Judgment shall also be published once a week for four consecutive weeks in the Albuquerque Journal and the Santa Fe New Mexican. All publications of the notice and Stipulated Offer of Judgment shall also state that the notice of objections form referenced in the notice may be obtained from the

New Mexico State Engineer Offices in Roswell and Santa Fe, New Mexico.

by *Claudia Cole*

Bee J. Clem
District Court Clerk
Fifth Judicial District Court
Chaves County Courthouse
P.O. Box 1776
Roswell, NM 88201
(505) 622-2212

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.)	
STATE ENGINEER and PECOS VALLEY)	
ARTESIAN CONSERVANCY DISTRICT,)	
)	
Plaintiffs,)	
)	
vs.)	Nos. 20294 and 22600
)	Consolidated
L.T. LEWIS, et al., and)	
UNITED STATES OF AMERICA,)	Carlsbad Basin Section
et al.)	Carlsbad Irrigation District Section
Defendants.)	
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SUPPLEMENTAL NOTICE

TO: ALL DEFENDANTS IN THE PECOS RIVER STREAM SYSTEM WATER RIGHT ADJUDICATION AND TO ALL PERSONS CLAIMING WATER RIGHTS IN THE PECOS RIVER STREAM SYSTEM, INCLUDING ITS TRIBUTARIES AND UNDERGROUND BASINS, WITHIN THE STATE OF NEW MEXICO.

You are hereby notified that the adjudication or determination of the water rights for the Carlsbad Project has been initiated by Stipulated Offer of Judgment entered into by the United States ("US"), Carlsbad Irrigation District ("CID"), and State of New Mexico. The purpose of this Supplemental Notice is to inform all defendants in the Pecos River stream system water right adjudication and all water rights claimants in the Pecos River stream system of their right to contest all or any part of the water rights claimed for the Project and the manner in which they may preserve that right.

The Stipulated Offer of Judgment sets forth the rights of the US and CID to divert, impound and store public surface waters of the Pecos River stream system. The Offer describes the claimed purposes (irrigation, domestic and livestock uses), sources (Pecos River mainstem and Black River), points of diversion (Avalon Dam and junction of CID Black River Canal with

Attachment
B

Exhibit A

Black River), place of use (3 acres within the Project boundaries al diversion amounts (the lesser of 125,200 acre feet or quantity of water necessary to supply an annual depletion of 55,572 acre feet) and priorities (Pecos River - July, 1887 for part and July, 1888 for part; Black River - 1889). The Offer also describes the claimed storage reservoirs for the Project, i.e. Lake Avalon, Brantley Lake, Lake Sumner and Santa Rosa Lake, listing their purposes, source, locations, amount of water and priorities.

Copies of the Stipulated Offer of Judgment containing in full the elements of the claimed water rights for the Carlsbad Project and a form which may be utilized for filing a notice of objection to the Offer may be obtained from the New Mexico State Engineer Offices in Roswell (505) 622-6467 and Santa Fe, New Mexico (505) 827-6150.

If you do not wish to contest any part of the water rights claimed for the Project, you do not have to take any action. If you wish to contest all or any part of the water rights claimed for the Project, you must file your objections with the Fifth Judicial District Court clerk no later than January 31, 1996 at the following address: District Court Clerk, Fifth Judicial District Court, P.O. Box 1776, Roswell, NM 88201. Any defendant in the Pecos River stream system adjudication or claimant to water rights in the Pecos River stream system who does not file an objection shall be forever barred from making any subsequent objections to the water rights claimed for the Project.

Notice of this action was previously provided in March, 1995. ANY PERSON WHO HAS ALREADY FILED AN OBJECTION TO THE PROJECT OFFER MAY NOT FILE ANY ADDITIONAL OBJECTION.

The name of the plaintiff State of New Mexico's attorney is Rebecca Dempsey, Special

Assistant Attorney General Site Engineer Office whose address and phone number are P. O. Box 25102, Santa Fe, NM 87504-5102, (505) 827-6150.

Witness my hand and seal of the Fifth Judicial District Court, County of Chaves, State of New Mexico.

Bee J. Clem, District Court Clerk

By: _____