

FIFTH JUDICIAL DISTRICT COURT  
COUNTY OF CHAVES  
STATE OF NEW MEXICO

ENDORSED COPY  
ORG. FILED DIST. COURT

OCT 27 1997

BEE J. CLEM, CLERK

STATE OF NEW MEXICO ex rel.	)	
State Engineer and	)	
PECOS VALLEY ARTESIAN	)	
CONSERVANCY DISTRICT,	)	
	)	
Plaintiffs,	)	Nos. 20294 & 22600
	)	CONSOLIDATED
vs.	)	
	)	
L.T. LEWIS, et al.,	)	Carlsbad Basin Section
UNITED STATES OF AMERICA,	)	Carlsbad Irrigation District
	)	
<u>Defendants.</u>	)	

**COURT'S DECISIONS AND ORDERS RE COMMENTS OF US/CID  
AND PVACD RE OPINION - THRESHOLD LEGAL ISSUE NO. 2 - REQUEST  
OF US/CID FOR ADDITIONAL TIME TO SUPPLEMENT SUBMISSIONS AND  
FOR A TELEPHONIC STATUS CONFERENCE**

**THIS MATTER** comes on for consideration by the Court in connection with the following submissions:

1. The UNITED STATES' AND THE CARLSBAD IRRIGATION DISTRICT'S COMMENTS ON THE COURT'S OPINION RE THRESHOLD LEGAL ISSUE NO. 2<sup>1</sup> AND REQUEST FOR ADDITIONAL TIME TO PRESENT SUPPLEMENTAL EVIDENTIARY MATERIALS served on October 17, 1997;
2. PVACD's Comments on Court's Opinion re Threshold Legal Issue No. 2 served on October 17, 1997;

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<sup>1</sup>This opinion is hereafter referred to as the Court's opinion.

and the Court having considered said submissions and being sufficiently advised in the premises;

IT IS THEREFORE ORDERED that:

In connection with the US/CID comments, the following issues are raised and determined by the Court:

I. **Whether Due Process Issues are Subsumed in the Question of Privity**

The US/CID inquires as to whether the Court considers that issues of due process are subsumed in the question of privity.

The answer is no.

While issues of due process are involved in resolving the question of privity, two separate inquiries are involved. Procedural due process requirements and matters to be considered in connection therewith are set forth in part **C. Due Process Requirements**, pages 21 and 22 of the Court's opinion. This section also refers to matters pertaining to the issue of whether:

"...(3) persons claimed to be precluded under either doctrine were afforded a full and fair opportunity to participate in the proceedings and present their claims and contentions as to the water and storage rights claims of the United States in connection with the Project;..."

This aspect of the matter is expanded upon in that portion of the Courts' opinion which requires that US/CID establish that:

...Procedures in connection therewith (the Hope Proceedings and the Black River Proceedings) were 'so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue'. See *Richards v. Jefferson County*, Exhibit C, pages 21 and 22, *Tyus v. Schoemehl*, Exhibit C, page 16..."

Page 23 of the Court's opinion. (Matter in parenthesis added).

The aforesaid matters overlap but are considered separate requests by the Court. Persons to be bound must be afforded adequate notice and an opportunity to be heard, be adequately represented and procedures must have been adopted to ensure full and fair consideration of their claims concerning the nature and extent of the Project water rights claimed by the United States. See *a/so*, Susan P. Koniak and George M. Cohen, *Under the Cloak of Settlement*, 82 Va.L.Rev. 1051, n173.

## **II. Definition of Privity.**

As more fully explained in the opinion, the definition of the term "privity" depends upon the facts of each particular case. See discussion at pages 15 -18 of the opinion.

It appears that in connection with this phase of the proceedings, we are in realm of "virtual representation".

The definition of "privity" set forth in the penultimate paragraph at page 15 of the opinion is particularly appropriate in connection with these proceedings. The referenced discussion and citations of authority in connection therewith, however, set forth the totality of matters that will be considered by the Court in determining whether there is "privity" and isolated specific matters in and of themselves are not determinative.

Further clarification of the opinion is not required at this time.

## **III. Necessity of Evidentiary Hearing.**

The Court's reference to an evidentiary hearing in order to determine due process and privity matters should not be construed to mean that the Court is insistent

that evidentiary hearings be held.

The Court's principal concern is that the aforesaid matters and matters pertaining to laches and the doctrine of "rule of property" cannot be determined as legal issues at this phase of the proceeding because they all involve factual issues and genuine issues of material fact exist. If possible, the factual issues may be determined under summary judgment procedures set forth in Rule 1.056, Rules of Civil Procedure, by stipulations, or in some other manner which would avoid the cost and expense of an evidentiary proceeding. Again, however, there can be no genuine issues of material facts if these matters are to be determined as threshold legal issues.

If the Rules of Civil Procedure concerning summary judgment are utilized, there must be strict compliance with all aspects of the rule.

Again, and to reiterate, if genuine issues of material fact exist, which cannot be resolved, an evidentiary hearing is required.

**IV. Request of US/CID For An Extension of Time to Supplement Submissions re Matters Which Should Be Precluded From Redetermination Under the Doctrines of *Res Judicata* and Collateral Estoppel Together With Transcript References.**

Pertinent portions of the opinion concerning this aspect of the matter are set forth at pages 7-11 and 23-24 of the Court's opinion.

The Court's suggestion that the US/CID might want to amplify their submissions concerning matters claimed to have been precluded, together with requested transcript references was not mandatory. Leave was granted to US/CID to supplement their

submissions. The effect of failure to set forth matters claimed to be precluded is discussed, however, at pages 23 and 24 of the Court's opinion.

The US/CID state:

The United States and CID understand the Court to seek by October 20 transcript references which address only the question of what issues were 'actually and necessarily determined' in the Hope and Black River Proceedings, rather than addressing all of the factual questions identified in the Court's Opinion...".

Footnote 4, page 3, US/CID comments. While submission of the information is discretionary, the US/CID interpretation of the scope of the submissions is correct.

In support of their requests, the US/CID set forth two alleged reasons.

First, the United States and CID need additional time to gather transcript material. At a minimum, the United States and CID need to copy additional material from the Federal Records Center in Denver, review new material which has recently come to light there, and investigate potentially relevant materials located in Albuquerque and Washington D.C. The United States and CID will endeavor to complete this investigation as soon as possible and suggest that the final date for submission of transcript references be set at the status conference proposed below.

Second, to the extent the Court is only looking for transcript references addressing the question of what issues were actually and necessarily determined in Hope and the Black River proceedings, in Section II.C., below, the United States and CID demonstrate that the Court's decision regarding 'cause of action' (Op. at 20) has rendered the question moot.

Page 4, US/CID comments.

The request of US/CID for an extension of time in order to submit the aforesaid matters is denied for the following reasons:

1. To the extent that investigations were required, and, if the information

properly falls within the scope of Threshold Legal Issue No. 2 at this time, requisite investigations should have been completed and information as to the matters deemed to have been precluded from redetermination should have been included in connection with prior submissions and briefing of US/CID in connection therewith. Granting the extension of time would only unduly prolong these proceedings, encourage delay, and might result in a request for a further round of briefing which the Court does not consider necessary or desirable at this time.

2. The request for an extension of time is vague and indefinite. No time is specified for submissions by the US/CID.

3. The US/CID state under part C, page 10 of their comments that:

“...it appears that the Court’s statement ‘regarding the need to determine what issues were actually and necessarily determined properly applies only to the doctrine of collateral estoppel.’ Moreover, as is shown immediately below the Court’s holding regarding ‘cause of action’ renders any discussion of the requirements of collateral estoppel superfluous.”

With due regard to this portion of the US/CID’s submission, it would appear that US/CID may be waiving their collateral estoppel arguments if their position is correct.

In retrospect, particularly since there is no objection to the granting of an extension of time by opposing counsel, if necessary, the submission of information concerning precluded matters, with transcript references, may be deferred until such time as a statement of claims and responses are incorporated into a prehearing order.

The issues before the Court at this time is:

Whether the decree in United States of America v. Hope Community

District, U.S. District Court Cause No. 712 Equity (1933) provides the

United States and the District with res judicata and estoppel defenses to filed objections.

not the precise factual or legal issues which may be precluded.

**V. US/CID Comments re Laches and Rules of Property - PVACD's Request That The Arguments of the US/CID In Connection With the Rule of Property Doctrine Be Disregarded.**

The comments of the US/CID and the PVACD are noted.

Summary judgment, stipulations or procedures short of an evidentiary hearing may be required since there are genuine issues of material fact which must be resolved in connection with the matters pertaining to laches and the rule of property doctrine. Resolution of these and other matters raised by PVACD concerning disregarding the arguments of the US/CID pertaining to the rule of property doctrine will be resolved in connection with future pretrial matters.

**VI. Request for Telephonic Status Conference.**

A proposed procedure should be adopted in order that all genuine issues of material fact are eliminated concerning due process and privity issues, laches and the rule of property doctrine. Preferably the procedure should be agreed upon among counsel. If counsel cannot agree, counsels' comments should be submitted to the Court and the Court will order adoption of a procedure. Remaining issues concerning Threshold Legal Issue No. 2 will be determined after a procedure has been adopted. Submissions of counsel to the Court should be made by November 24, 1997.

If counsel agree that a telephonic status conference would be helpful at this

time, counsel for US/CID are requested to confer with all other counsel, counsel should agree upon a time and date for a conference call and counsel for the US/CID should then place the call. The Court will be available for a conference call through November 19, 1997.

The request that counsel submit alternate dates for an evidentiary hearing as set forth in the SECOND AMENDMENT AND REVISION TO OPINION RE THRESHOLD LEGAL ISSUE NO. 2 AND ORDER REQUESTING THAT COUNSEL SUBMIT ALTERNATE DATES FOR A PRETRIAL CONFERENCE (Court's Amended Opinion) is premature, and should be disregarded. The November 17, 1997 date for the submissions is vacated. A trial setting will be set after a pretrial order has been prepared by counsel and submitted and approved by the Court and a pretrial conference (if deemed appropriate) has been held. Please note that counsel have been requested to submit alternate dates for a pretrial conference by November 17, 1997. See Court's Amended Opinion.

Dated: 10/24/97

  
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HARL D. BYRD  
District Judge Pro Tempore