

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*)
OFFICE OF THE STATE ENGINEER)
And PECOS VALLEY ARTESIAN)
CONSERVANCY DISTRICT.)

Plaintiffs,)

vs.)

L.T. LEWIS, et al., and)
THE UNITED STATES OF AMERICA)

Defendants)

and)

STATE OF NEW MEXICO, *ex rel.*)
State Engineer)
and PECOS VALLEY ARTESIAN)
CONSERVANCY DISTRICT,)

Plaintiffs,)

vs.)

HAGERMAN CANAL CO., et al.,)

Defendants.)

Nos. 20294 and 22600

Consolidated

Hon. Harl D. Byrd

District Judge Pro Tempore

PROJECT ADJUDICATION

Carlsbad Project-Project Offer

Carlsbad Basin General File

ORDER

**Order Re Joint Motion to Extend Stay Re Project Adjudication,
Reports Submitted Pursuant to the Court's September 20, 2000 Order,
Preparation of Prehearing Order, Submissions of Interim Reports and Related Matters**

THIS MATTER comes on for consideration by the Court in connection with the JOINT MOTION FOR EXTENSION OF THE 90 DAY STAY OF PROJECT ADJUDICATION (Joint Motion) filed on September 5, 2000 and the Court's Order (Court's September 2000 Order) filed

herein on September 22, 2000 regarding the Joint Motion.

The initial ORDER GRANTING STAY (Order Granting Stay), which was approved by counsel, was filed on June 12, 2000. The order was entered in connection with a JOINT MOTION FOR 90 DAY STAY OF PROJECT ADJUDICATION (Initial Joint Motion) filed by the United States of America (United States), the Carlsbad Irrigation District (CID), the State of New Mexico (State), the Brantleys, the Tracys and New Mexico State University (NMSU) which was served by mail on May 25, 2000. The Initial Joint Motion requested a stay of this phase of these proceedings (Project Adjudication) involving the proposed STIPULATED OFFER OF JUDGMENT (Offer) filed by the United States, CID, and the State on July 22, 1994. The requested stay extended to matters, including, but not limited to, the determination of all remaining issues pertaining to Threshold Legal Issues Nos. 2 and 3 and the Court's request as set forth in its FINAL DECISION RE THRESHOLD LEGAL ISSUE NO. 2, as amended, filed on May 12, 2000, that a form of interlocutory appealable order be submitted to the Court for review, approval and entry herein.

The Order Granting Stay was entered in order to afford the parties an adequate amount of time to conduct settlement negotiations. Order Granting Stay at page 2. The Order Granting Stay provided that the United States and the CID would "forbear taking any action in connection with any interlocutory appeal concerning the Court's Decision during the time of the stay...". Order Granting Stay at pages 2 and 3. The stay ended on August 30, 2000. Order Granting Stay at 2. The Order Granting Stay, approved by counsel, also provided in pertinent part:

Counsel have represented to the Court that staying this phase of the proceedings, as requested, will afford all parties an adequate amount of time to expeditiously initiate, conduct and conclude

settlement negotiations in an effort to resolve all remaining issues and controversies pertaining to Threshold Legal Issues Nos. 2 and 3 without the necessity of any appeals.

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4. The stay shall not extend to any proceedings involving the "Member Adjudication" which is defined to mean: the claims of CID individual members, associated with Office of State Engineer subfiles within CID.

5. In the event settlement negotiations are not concluded by August 30, 2000, no further extensions of time for negotiations will be granted, the stay shall be deemed automatically lifted and counsel shall expeditiously report to the Court (in any event by September 29, 2000) with their comments and recommendations concerning the Court's proposed **SUMMARY OF SUBMISSIONS AND SCHEDULING ORDER RE REMAINING ISSUES AND CONTROVERSIES- THRESHOLD LEGAL ISSUE NO. 3** and any other matters required in order to expeditiously determine all matters in connection with Threshold Legal Issues Nos. 2 and 3 and the Offer.

Order Granting Stay at pages 2 and 3.

The Court's September 2000 Order requested that counsel submit a status report or reports concerning the matters hereafter set forth in the centered, bolded headings of this order.

I.

2. A. Discussion of what has occurred in the negotiations and where the negotiations stand; and

2. B. Recommendations as to how the Court should proceed if it appears a negotiated settlement can be reasonably anticipated¹;

Counsel for the parties conferred and agreed that a joint status report with regard to the progress of settlement negotiations as specified in paragraph 2, subparagraphs A. and B. of the

¹ See Court's September 2000 Order at page 2.

Court's September 2000 Order would be appropriate, but deemed it preferable that each party separately submit their positions or comments relating to the items referenced in paragraphs 2.C. through F of the Court's September 2000 Order. See **JOINT PARTIAL STATUS REPORT PURSUANT TO ORDER OF SEPTEMBER 20, 2000** (Joint Partial Status Report) served by mail on October 3, 2000, at page 1.

The Joint Partial Status Report was submitted by counsel for the United States, the CID, the State, the Pecos Valley Artesian Conservancy District (PVACD), and NMSU. The attorneys for the Brantleys and the Tracys-Eddys did not endorse the recommendations set forth in the Joint Partial Status Report and were not authorized to approve it. See October 4, 2000 letter from Stuart D. Shanor, Esq. to the Court.

In the Joint Partial Status Report, rather than seeking an additional 90 day extension as requested in the Joint Motion, counsel state that the time required for requisite, adequate hydrological assessment and study would be four (4) to five (5) months and that at least an additional month after the results of the technical studies are available would be required to bring any settlement to closure. Joint Partial Status Report at 2.

Counsel state that complicating the process is the fact that many of the "critical settlement issues" being addressed by the parties are affected by the Court ordered mediation before Magistrate Judge DeGiacomo in *Forest Guardians v. US Corps of Engineers, et al.*, CIV 00-0746 JP/RLP. The critical settlement issues are not identified. See Joint Partial Status Report at page 2.

Counsel state that there were several issues which are of primary concern to the State, the United States and CID. *Id.* These issues were not identified. Counsel state that these issues are

susceptible of being negotiated during the technical assessment period concerning hydrological implications and it is anticipated that negotiations on these issues can produce agreement or deadlock within sixty (60) days. *Id.* Therefore, counsel recommend a further status report to the Court after a sixty (60) day interval. *Id.*

Counsel state that the parties will agree to a provision permitting any party to unilaterally request the Court lift its stay should that party deem negotiations non-productive. *Id.* The ramifications of such a provision in light of the pending objections of counsel for the Brantleys and the Tracy-Eddys are not discussed in any of the submissions of counsel.

Counsel then state

The parties recognize that this Status Report does not contain the assurance that 'a negotiated settlement can be reasonably anticipated.' It does contain the assurance to the Court that the parties are each committed to the settlement process, that they believe in good faith that there has been progress made in the negotiations and that there is sufficient optimism that further negotiations will lead to a settlement of most or all of the issues in the case, that the parties are willing to abide the additional delay in the progress of the litigation of Project issues to afford the time and motivation for the settlement negotiations to follow a deliberate course.

Id. at page 3.

Counsel request that the stay be extended for a period ending April 1, 2001, unless negotiations result in deadlock in the next sixty (60) days. Status reports would be submitted to the Court at the end of the sixty (60) day period and such other "interim reports (will be submitted) as the Court may deem appropriate but no less (frequently) than every sixty (60) days during the stay period, subject, however, to the right of any party to apply to the Court for a lifting of the stay if impasse is detected or other compelling reasons are present." *Id.* at page 3.

(Matter in parenthesis added for clarity in context).

Brantleys' Response

In a letter report dated October 3, 2000, from W.T. Martin Jr., Esq. on behalf of the Brantleys (Brantleys' Report) counsel states in response to 2., A. and B to the Court's September 2000 Order that:

There have been settlement negotiations. There is an offer on the table from the PVACD. However, the Brantleys find the offer completely unacceptable because: (i) the proposal will result in the CID pumping its own water and if sufficient water is pumped it will dry up Major Johnson Springs which is a source of water feeding into Brantley Lake. (*Major Johnson Springs is currently under Brantley Lake.*) (ii) In the 1970's, the CID made 3 well applications in the same field to supplement the CID. All three applications were denied by the State Engineer. (iii) Neither the PVACD or the State Engineer has the right to set a limit on the amount of water that is to be pumped from the supplemental wells other than the legal limit of 3.0 acre feet.

The Brantleys did initially agree to an additional 30 days, but in light of the discussions that have ensued since the Brantleys agreed, the Brantleys have grave doubts as to the likelihood of any success of any nature in the settlement negotiations. Among the reasons are the following: (i) Of the four original portions of a proposed settlement, the CID rejected two. (ii) The United States has been insistent that if it was going to sign any settlement, your decision on Legal Threshold Issue #3 would have to be withdrawn or vacated.² (iii) The CID, the U. S., the PVACD and the State Engineer have been negotiating a 'trigger point' that will cause the CID to be entitled to a limited priority call, The 'trigger point' will presumably be at a level less than 3.0 acre feet. However, the land owners who are putting the water to beneficial use own the water rights. The individual landowners are not participating in the negotiations regarding settlement. Therefore, the parties that could in fact make the priority call are not present. The U.S., the CID and the PVACD do not own the water rights, or storage and diversion and have no capacity to make a priority call.

² The Court is unaware of anything that would justify modification, withdrawal or vacating the Court's Opinion Re Threshold Legal Issue No. 3.

Brantleys are very concerned about the proposed 'Agreed Order' in *Forrest (sic) Guardians v. U.S. Army Corps of Engineers, et. al*, in the United States District Court for the District of New Mexico, Cause Number 00-0746/RLP.³ That Agreed Order is between parties that don't have any ownership interest in the water rights, yet appears to affect the water right owners. No water right owners are a party to the federal court action. The **Forrest (sic)Guardians** suit and the Agreed Order should have no play in any settlement nor in this case. If this 'Agreed Order' is in any manner enforced, it will very well result in a taking of property right from the water right owners.

During one of the several telephone conferences regarding settlement, Mr. Hernandez, attorney for the CID, indicated the CID was having to deal with the Pecos River Compact and the Endangered Species Act with the inference that water and water rights might have to be given up to some degree. The CID has no authority to negotiate away water, water rights or any other interest under the guise of the Pecos River Compact or the Endangered Species Act. Neither is involved in this litigation. Because of Mr. Hernandez's injection of these issues into this matter, it is clear the CID is not going to negotiate in good faith toward any settlement. Mr. Hernandez also stated that regardless of any settlement negotiations, he wanted to still litigate the issue of forfeiture. The likelihood of there being any negotiated settlement is somewhere between slim and none.

Brantleys' Report at pages 1 and 2.

Tracy-Eddy Response

In a letter report dated October 4, 2000 from Dick Blendon, Esq., on behalf of the Tracys-Eddys (Tracy-Eddy Report), counsel states that the Tracys-Eddys concur in the response of the Brantleys to issues 2.A. and B. Tracy-Eddy Report at page 1.

³ Hereafter to referred to as *Forest Guardians*.

II.

2. C. Recommendations as to How the Court Should Proceed If it Appears a Negotiated Settlement Cannot Be Reasonably Anticipated

United State's Response

In a report captioned **UNITED STATES' STATUS REPORT PURSUANT TO THE SEPTEMBER 20, 2000 ORDER OF THE COURT** (United States' Report) served by mail on October 3, 2000, counsel states in response to paragraph 2., C. that they believe:

...it is premature to make recommendations as to how the Court should proceed if it appears that a negotiated settlement cannot be reached. As indicated in paragraph D below, the United States will not know for at least 60 days whether or not it wants to pursue an appeal of Threshold Legal Issue No. 3 at this stage of the proceedings. However, as explained in paragraph E below, the United States has concerns about proceeding as the Court proposes in the draft Summary of Submissions and Scheduling Order Re Remaining Issues and Controversies - Threshold Legal Issue No. 3. ('Summary of Submissions') Regardless of those concerns, however, if an interlocutory appeal on Threshold Legal Issue No. 3 is not taken, the United States agrees to submit to the Court a statement of the United States' claims, including further explanation of its ownership rights, duties, and obligations in connection with Project water. And, to the extent possible, the United States will also provide this information as it relates to the other parties. The United States believes that the parties should provide the Court with separate submissions rather than a joint submission which appears to be contemplated by the proposed Summary of Submissions.

If an interlocutory appeal is not taken of Threshold Legal Issue No. 3, and after the submissions by the parties discussed above, the United States recommends that the parties meet and confer to develop a joint recommendation as to how the Court should then proceed to resolve any remaining issues concerning the Carlsbad Project Stipulated *Offer*.

United States Report at pages 1 and 2.

The "concerns" of the United States referred to in its report are not identified.

CID's Response

Counsel for CID submitted a JOINT PARTIAL STATUS REPORT PURSUANT TO ORDER OF SEPTEMBER 20, 2000 (CID's Report) setting forth its position and comments in connection with paragraphs 2. C. as follows:

The court in its November 7, 1997 Opinion noted that 'the Court will defer further defining the aforesaid rights, interests, duties and obligations of the parties until it has received and reviewed copies of the underlying agreements among the parties which are required to be furnished by counsel as provided at page 8, *supra*'.

The authority of CID over Carlsbad Project water mainly stems from its state statutory authority over its delivery of Project water to its members. State statutes and several court cases have defined the authority of CID over Project water and its members. This authority remains in the CID and is not affected by who actually owns the water right. CID does not believe the court's ruling on who owns the water right has affected CID's statutory duties and obligations to its members.

Recommendation: The court proceed with '...defining the aforesaid rights, interests, duties and obligations of the parties...' as set forth in its November 7, 1997 opinion.

CID's Report at page 2.

State's Response

In a letter report dated October 4, 2000 (State's Report) from counsel for the State in response to 2. C. of the Court's September 2000 Order, counsel state:

If it appears that a negotiated settlement cannot reasonably be anticipated, the Court should deny the motion to continue this summer's stay and proceed with finalizing the Threshold Legal Issue No. 3, as per the Court's intention on March 6, 2000. The parties have all responded to the Court's request in its Second Supplemental Scheduling Order. In addition, the Court has succinctly set out its expectations in a draft document distributed to Project counsel on March 6, 2000. Project litigation would move forward, then, continuing from where it was stayed on June 6, 2000. Parties should confer as directed in the March 6 draft and report to the

Court, within 30 days on the matters addressed therein.

As recited in its February 15, 2000 response, the State submits that remaining issues which need to be determined in connection with Threshold Legal Issue No. 3 are defining the relative rights, duties, and obligations of the US and CID in the diversion, storage, and distribution of Project water which, under the Court's prior rulings, are the property rights and interests of the US and CID within the Project. This process should include not only consideration of the contracts and statutes which govern Project operations, but also some clarification by the Court of the interrelationship between individual member rights and rights held by the US and CID. Defining to what extent the interests of the US and CID in Project water might limit, control, or affect the exercise of individual rights is necessary not only to complete the definition of the nature and extent of the US and CID interests but also to establish the factual context for the litigation of Project Offer issues. Thus, the clarification of this relationship should occur before proceeding to litigate Offer issues, as set out in the Court's Pretrial Order of February 26, 1996.

Many issues surrounding respective rights of the members and of the US/CID still need to be determined. For example, the Court may want to rule on 1) whether the US or CID can exercise their rights for any purpose other than providing water to the members of CID, 2) whether the rights of US or CID as already defined by the Court leave open the possibility that the US and CID have different, though not necessarily diverging, interests from each other, 3) whether, and to what extent, the US or CID need to be responsive to members' request for deliveries of water, 4) whether members can "call water out of the dam," or whether members are solely dependent for their water on decisions of the CID board of directors, 5) whether and/or to what extent the US or CID can prevent members from transferring or alienating their water rights, 6) whether the members of CID can individually call upon the State Engineer for priority administration of the river, or may do so only through a call by the District, 7) whether the United States, independently from CID, can call upon the State Engineer for priority administration of the Pecos River, and 8) whether the United States can enter into a contract for delivery of water with someone other than a CID member when that delivery would be detrimental to the water rights of CID members.

Already, in connection with the litigation of individual member subfiles, the Court has raised questions the answers to which implicate both the members and the Project⁴. Of paramount concern is whether inconsistencies can exist between the adjudication of member duties and

⁴ Please refer to counsel for the State's letter addressed to all counsel in the Project Adjudication phase dated October 23, 2000, captioned "**Concerns raised by the Court during certain exchanges addressing subfile issues**".

the duty set out in the Project Offer as a basis for quantifying the Project diversion. Also of concern is whether, in the final analysis, different priorities can exist between member rights and Project rights. For the foregoing reasons, the State recommends that, as part of defining the relative rights, duties and obligations of the US and CID in the diversion, storage, and distribution of Project water the Court make provision for briefing by the parties and decisions by the Court on how those rights and members rights interact with one another.

State's Report at pages 2 and 3.

NMSU'S Response

In a report captioned **NEW MEXICO STATE UNIVERSITY'S STATUS REPORT PURSUANT TO COURT'S ORDER OF SEPTEMBER 20, 2000** (NMSU Report) which was prepared by Susan C. Kery, Esq. and John W. Utton, Esq., and served by mail on October 4, 2000, counsel state that the requests set forth in Sections 2. A and B of the Court's September 2000 Order are discussed in the Joint Partial Status Report, and, further, the Joint Partial Status Report appears to address, at least preliminarily, the issue raised in Sections 2, C.

Brantleys' Response

In response to 2.C., counsel states:

This Court should proceed with litigation as expeditiously as is possible. If the parties want to seriously conduct negotiations that might lead to settlement, then those negotiations can proceed concurrently with the litigation. This matter has dragged on far too long to have nothing agreed upon. Continued extensions of time will do nothing other than lead to continued inaction and no settlement.

Brantleys' Report at page 2.

Tracy-Eddy Response

In the Tracy-Eddy Report, counsel states that he concurs with the matters set forth in the Brantleys' Report re issue 2.C.

III.

2. D. Positions of the respective parties regarding the United States' expression of intent to pursue an interlocutory appeal and the scope of issues to be embraced by such an appeal

United States' Response

In the United States' Report, in connection with 2.D, counsel state:

Pursuance of an interlocutory appeal by the United States requires approval by high level government officials, first at the Department of the Interior and then at the Department of Justice. Counsel for the United States have begun the process for determining whether or not an appeal will be taken and expect that process to take at least 60 days. Should the United States ultimately decide to pursue an interlocutory appeal, the appeal would be limited to the Court's ruling on Threshold Legal Issue No. 3.

United States' Response at pages 2 and 3.

CID's Response

In CID's Report, in connection with 2.D, counsel states:

CID understands that the United States has not reached a decision on whether to appeal at this point or not. With respect to CID, the definition of CID's storage and diversion right could have a significant affect on CID's position to appeal the water right ownership issue.

CID's Report at page 2.

State's Response

In the State's Report, in connection with 2.D, counsel state:

The State respectfully submits that interlocutory appeals of the Court's Final Decision on either Threshold Legal Issue No.3 or Threshold Legal Issue No. 2 should not take place at this time.

As the Court has indicated in connection with Threshold Legal

Issue No. 3, the United States' motion for interlocutory appeal was conditioned on the Court's finding that the United States did **not** have any ownership or property rights or interests in the diversion, storage, or distribution of water in connection with the Carlsbad Project. Yet, as the Court pointed out, the Court ruled otherwise. The Court ruled that the United States **did** have such interests, albeit these interests were not 'water rights'. Because the United States' condition precedent for its motion never occurred, the Court denied the request for interlocutory appeal. Nothing has changed with respect to this issue since that denial. Courts in New Mexico generally disfavor interlocutory appeals, for such appeals increase congestion in the courts and cause delay and inefficiency. *See In re Larry K.*, 1999-NMCA-078, 127 N.M. 461 (Ct. App. 1999); *City of Sunland Park v. Paseo del Norte Ltd. Partnership*, 1999-NMCA-124, 128 N.M. 163 (Ct. App. 1999); *Baca v. Atcheson, Topeka & Santa Fe Ry. Corp.*, 1996-NMCA-054, 121 N.M. 734 (Ct. App. 1996). In keeping with this policy, the Court should deny an interlocutory appeal of Threshold Legal Issue No. 3.

Significantly, the State submits that an appeal at this time would be premature since the United States and CID have not explained their claims and the Court has not completed defining their interests. It may be the case that the Project interests the US and CID claim may be satisfied through a definition of those interests in the next phase of the proceedings on Threshold Legal Issue No. 3. The State supports the Court's statement in its March 6, 2000 draft Summary of Submissions and Scheduling Order Re Remaining Issues and Controversies - Threshold Legal Issue No. 3, at pp. 4-5, that the next step should be for the US and CID to now 'reiterate and specifically identify their claimed rights, interests, duties and obligations in connection with Project water.'

Besides the need to obtain from the US and CID a statement specifying their claims, interests, duties and obligations, there are further reasons why an interlocutory appeal of the ownership issue would be premature. There remain critical interests, in the form of the relationship between the rights of the United States/CID and the members of CID, that still need to be determined. It may even be appropriate with respect to the consequences of the Threshold Legal Issue No. 3 opinion for the Court to determine the rights of the United States *vis-a-vis* the rights of CID. For example, is there or should there be a parsing of diversion or distribution rights between the United States and CID? Does CID have any diversion rights, or are CID's rights limited solely to distribution? Does the United States have any distribution rights, or are its rights solely limited to diversion and storage? Does CID have any storage rights independent of any storage rights of the United States? All these questions, and others that could be raised, clearly suggest that an interlocutory appeal at this time

would be premature. Absent a final determination at the trial level of all the rights of the parties and the relationships created by those rights, an appellate court could only address bits and pieces of the ownership issues. This piecemeal approach is not in the interests of justice or in the interests of expediting the conclusion of the Carlsbad Project section of the *Lewis* adjudication.

The State also respectfully requests that the Court deny an interlocutory appeal of Threshold Legal Issue No. 2. Although the Court has finalized its decision with respect to this legal issue and suggested that it would certify it for appeal, the State respectfully opposes such a course of action. An appeal of the preclusion issue would not resolve other pressing issues which are necessary to be determined before the Carlsbad Project section of *Lewis* can be completed. As such, an interlocutory appeal of the preclusion issues would not 'materially advance the ultimate termination of the litigation.' See NMSA 1978 §39-3-4 (1971, as amended 1999). Absent a final determination at the trial level of a number of issues related to the Project as a whole, then, an interlocutory appeal of the Court's Final Decision Re Threshold Legal Issue No. 2 would only delay the final conclusion of the Project litigation. Such a delay is not in the interests of the courts or of the parties.

State's Report at pages 3-5.

PVACD'S Response

In PVACD'S Joint Partial Status Report filed on October 3, 2000, in connection with 2.D, counsel state:

The US has expressed an intent to request an interlocutory appeal concerning Threshold Legal Issue No.3. PVACD strongly objects to certification of an interlocutory appeal on Threshold Legal Issue No. 3, for the following reasons:

First, the US is suggesting an appeal of a decision that the Court has not made. For the reasons stated in Judge Byrd's letter of 22 September 2000 to Lynn Johnson, no interlocutory order adverse to the US on the issues framed by the US has been entered.

Second, an appellate review of the issues suggested by the US for interlocutory appeal would not expedite or terminate the case, even if the appellate decision were favorable to the US/CID. No matter what the decision, this case will have to go forward.

Third, if appeals are allowed on issues of this sort, undue delay will result, to the disadvantage of all litigants. On the other hand, it will

expedite the case to await the final decision after trial on the merits before appeals involving non-determinative issues are undertaken.

PVACD's Report at pages 1 and 2.

NMSU'S Report

In NMSU'S Report in connection with 2.D, counsel state:

Threshold Legal Issue No. 3 is whether the project water rights described in the Offer are rights of the United States and/or the Carlsbad Irrigation District (CID) or rights of the CID members. On November 3, 1997, the Court issued its *Opinion Re Threshold Legal Issue No. 3* (November 3, 1997 Opinion).

In this Opinion, the Court ruled that 'the beneficial ownership of Project water rights is vested in landowners in the Project measured by the amount of water devoted to beneficial use. Ownership of water rights in the Project are appurtenant to land in the Project upon which they are devoted to beneficial use. Project water rights are not owned by the United States or the CID.' November 3, 1997 Opinion, pp.26-7. The Court's Order was then modified by the *Court's Decisions and Orders Re Request For Information, Objections, Comments and Suggestions Re Opinions 2 Threshold Legal Issue No. 3 and Threshold Legal Issue No. 4 and Order Re Preparation of Supplemental Pre-Hearing Order*, dated January 9, 1998 (January 9, 1998 Order). Through these two Orders, the Court further ruled on Threshold Legal Issue No. 3:

The Court is also of the opinion that the United States and the CID have certain diversion, storage and distribution rights and interests in connection with storage and delivery of Project water. Under the Reclamation Act, the United States has authority to divert, store and distribute Project water for the use and benefit of the appropriating landowner. In addition, the United States and the CID have certain rights and interests in storage and distribution of Project water in order to accomplish the purpose of the Reclamation Act and the Project. The rights, interests, duties and obligations of the parties in connection with dams, reservoirs, storage and distribution facilities, and of landowners to receive water therefrom are set forth in the agreements among the respective parties and the New Mexico statutes pertaining thereto.

November 3, 1997 Order, p. 27, as modified by the January 9, 1998 Order, pp. 4-5.

The Court's determination of Threshold Legal Issue No. 3 was further clarified in the *Decision and Orders Re United States Motion for Reconsideration and Clarification of Court's Decisions and Orders Re Threshold Legal Issue No.3 or for Entry of judgment Pursuant to Rule 54(C)*, dated March 19, 1998 March 19, 1998 Order). The Court ruled that 'property rights and interest in connection with the diversion, storage, and delivery of Project water (and perhaps other property rights and interests) are ownership rights and interests in Project water. These rights and interests, however, neither separately, nor together, constitute 'water rights.' March 19, 1998 Order, p. 5. NMSU agrees with the Court's ruling on Threshold Legal Issue No. 3.

NMSU is opposed to an interlocutory appeal of Threshold Legal Issue No. 3. Pursuant to § 39-3-4 NMSA 1978, an interlocutory appeal is appropriate if the Court believes 'the order or decision involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation....' An appeal of Threshold Legal Issue No. 3 will not materially advance the ultimate termination of the litigation, since other remaining issues must be resolved or litigated in the Project adjudication. Further, Judge Byrd's letter of September 22, 2000 clearly states that an Order necessary to trigger an interlocutory appeal has, in fact, not been entered.

NMSU's Report at pages 2 and 3.

Brantleys's Response

In the Brantleys' Report in connection with 2.D, counsel states:

Brantleys are opposed to the U.S. being allowed an interlocutory appeal. An interlocutory appeal will do nothing other than delay the badly needed adjudication of each water right owner's individual water rights. Further, an interlocutory appeal at this stage leaves several issues in Legal Threshold Issue #3 that have yet to be decided. Those issues are (i) what interest does the U.S. have in storage and diversion, as well as what obligations does the U.S. have in relation to storage and diversion. (ii) what interest, if any, does the CID have in storage and diversion, as well as what obligations does the CID have in relation to storage and diversion. Without a doubt, the litigation of issues on Legal Threshold Issue #3 needs

to proceed. The appellate process should be used when all issues are ripe for appeal, not just one issue among many.

Brantleys' Report at page 2.

Tracy-Eddy Response

In the Tracy-Eddy Report, counsel concurs with the matters set forth in the Brantleys' Report re issue 2.D.

IV.

2. E. Preliminary general comments of the respective parties regarding 'Further Submissions by Counsel' identified by the Court beginning on page 11 of the Court's draft SUMMARY OF SUBMISSIONS AND SCHEDULING ORDER RE REMAINING ISSUES AND CONTROVERSIES - THRESHOLD LEGAL ISSUE NO. 3

United States' Response

In the United States' Report in connection with 2.E, counsel state:

The Court proposes in the Summary of Submissions that the parties meet and develop an order for submission to the Court setting forth "a clear and concise statement of the claims of the parties identifying the current respective ownership rights, interests, duties and obligations of the United States, CID, members of CID, the State and any other interested party in connection with Project water." Summary of Submissions, p. 11 The United States is unclear what the Court is requesting as believes it already has provided the Court with a clear and concise statement of its water right claims for the Carlsbad Project in the numerous briefs filed on Threshold Legal Issue Nos. 2 & 3. It is the storage and diversion water rights for the Carlsbad Project that are the subject of the proceedings in this water rights adjudication.

In addition, the Court has previously requested that the ownership rights, interests, duties and obligations of the United States, and other parties, in connection with Project water be defined. In response to the Court's request, the United States filed the United States' Submission in Response to the Court's Request in the Court's Opinion re Threshold Legal No. 3, on December 7. In that Submission the United States provided

references to numerous documents and provided the historical context in which the documents were generated, in an attempt to address the Court's request that the United States ownership rights, interests, duties and obligations be further defined.

If these documents and previous submissions do not provide the elucidation the Court desires, as set forth in paragraph C above, the United States will file a statement of its claims and ownership rights, duties, and obligations in Project water.

The Court also proposes that the parties provide a statement of stipulated material facts and a statement of issues of material fact that must be resolved in order to determine the remaining issues and controversies among the parties concerning Threshold Legal Issue No. 3. Summary of Submissions, p. 11. The United States does not understand what additional facts the Court contemplates should be identified by the parties that relate to the legal issue to be resolved in Threshold Legal Issue No.3. The United States has previously provided statements of fact, and supporting documentation, relating to the United States' purchase and appropriation of the water rights for the Carlsbad Project in prior filings in the briefing of Threshold Legal Issues No.2 and 3. The United States would appreciate guidance from the Court on what additional facts the Court believes need to be determined to resolve Threshold Legal Issue No. 3.

United States' Report at pages 3 and 4.

CID's Response

In CID's Report in connection with 2.E, counsel states:

CID's position to the court has not changed. CID could proceed with defining for the court our duties and obligations as defined by contract, state law and case law. The more important issue that remains is the binding nature of the Pecos River Compact to the Offer. CID's position is that the compact raises issues of whether this court has jurisdiction to reduce the 25,055 acres and diversion right incorporated in the compact. The compact is also binding on the state and the state is also estopped from reducing the 25,055 acres as set forth in the Offer as well as the diversion right. These issues are ready to be ruled upon prior to proceeding with other Offer issues.

CID's Report at page 3.

State's Response

In the State's Report in connection with 2.E, counsel state:

A. A clear and concise statement of the claims of the parties identifying the current respective ownerships, rights, interests, duties and obligations of the United States, CID, members of the CID, the State and any other interested Party in connection with Project water.

Although the State recognizes that the parties will each have different inputs to the Court based on their perspectives, the State is in agreement with the Court's 19, 1998 decisions and orders regarding the United States' motion for reconsideration. The United States/CID's diversion, storage and distribution rights are property rights that fall short of being 'water rights.' In addition, the United States/CID can exercise those rights only pursuant to federal and state law and only for the benefit of the members of the CID, who are the beneficial users, and thus the owners, of Project water rights.

As mentioned above, many issues still remain to be determined with respect to the relationship between US/CID rights and member rights. The State has not formulated its final position on these issues. Briefing these issues may be beneficial, both for clarification and for reducing them to their essential components.

B. A statement of stipulated relevant material facts in support of the claims of the parties concerning the aforesaid rights, interests, duties and obligations.

The issues of fact in connection with the claims of the State involve the contracts establishing the relationships among the United States, CID, and its members. These contracts are identified on page 6 and 7 of the Court's November 3, 1997 on Re Threshold Issue No. 3. The State intends to rely on those contracts in any additional proceedings on this issue. At this time, the State is not aware of any facts to which it would stipulate.

C. A statement of genuine issues of material fact that must be resolved in order to determine the remaining issues and controversies among the parties concerning Threshold Legal Issue No. 3

The issues of material fact will depend on the type of conditions and requirements which may be asserted by the US and CID in relation to the

exercise of individual water rights within the Project. At this time, the State has not identified specific issues of fact with respect to defining the remainder of Threshold Legal Issue No. 3.

PVACD's Response

In PVACD's Report in connection with 2.E, counsel state:

PVACD adheres to its position that 'the Court has decided Threshold Legal Issue No. 3 and ... there remain no further issues to be determined.' Draft Summary of Submissions and Scheduling Order at 10; *see* Decision and Orders re United States' Motion for Reconsideration and Clarification at 5-6 (Mar. 23, 1998).

Ancillary questions regarding federal interests in storage and diversion are fact intensive and are inextricably intertwined with many of the Offer Issues. These matters ought to be dealt with at trial rather as a part of any threshold issue.

There should be no further evidentiary or documentary procedure modeled after the procedure by which Threshold Legal Issue No. 2 was decided.

PVACD does not desire to participate in strictly contract issues between the US and CID or its members which do not affect PVACD. However, PVACD does wish to participate in litigation of any issues involving or affecting Offer issues, e.g. (i) what is the nature, extent and priority of US storage and diversion interests, and (ii) what is the nature of US ownership interests in project water. The claims of PVACD in regard to the two issues mentioned here are generally that: (i) US storage and diversion rights and interests are derivative of CID members' rights, not independent rights, and must be defined and limited accordingly. (ii) Ownership of water in New Mexico resides in the state. The US has subsidiary interests in project water resulting from the federal statutory authority of the Reclamation Act of 1902, as amended. These interests, either separately or together, do not constitute ownership of the water itself. Because the US has ownership of the dams, reservoirs and other works of the Project, it has some authority to manage those works.

PVACD's Report at pages 2 and 3.

NMSU's Response

In the NMSU Report in connection with 2.E, counsel state:

...Any remaining material facts would relate to claims made by the United States and the Carlsbad Irrigation District to certain diversion, storage and distribution rights and interests in connection with storage and delivery of Project water. These claims must be understood before material facts can be identified. Therefore, without knowing precisely what these claims are, at this juncture, NMSU cannot identify specific issues of fact as requested by the Court. NMSU stands ready and willing to assist the Court as relates to these issues in whatever procedure the Court deems appropriate.

NMSU Report at pages 3 and 4.

Brantleys' Response

In the Brantleys' Report in connection with 2.E, counsel states:

- 1) The United States does not own any water rights of any nature. The United States has an 'interest to protect' the water right owners in diversion and storage of water from the Pecos River. That interest to protect requires the U.S. to divert and store water from the Pecos River for the sole and only purpose and benefit of the water right owners for irrigation. The U.S. has the obligation to protect the water right owners from upstream users who are not members of the CID. *(It should be noted the U.S. Bureau of reclamation debt has been fully paid and any rights that may have arisen, if any, ceased to exist upon full payment.)*

The CID has the sole and only purpose of performing as a delivery system for delivery of water to the water right owners. The CID owns no water rights of any nature. The CID has no right to control permanent transfers of water rights or stacking of the water rights. *(It should be noted the CID does have the legal right to make one year temporary transfers of water rights.)* In light of the CID's actions and settlement negotiations, it must be noted the CID has no right or authority to in any manner negotiate away, compromise or otherwise infringe upon the property rights of the water right owners who are members of the CID.

The State of New Mexico has the legal authority to regulate all waters within the State of New Mexico. The State of New Mexico has the legal authority to control all permanent transfers and stacking of water rights including those within the CID.

The CID members are the owners of the water rights as well as the diversion and storage rights. The U.S.'s interest is an 'interest to protect' the water right

owners. The CID's interest is solely that of a delivery system. The CID members have the right to permanently transfer water rights and to stack water rights without CID approval and that the only limitation is subject to approval by the State Engineer.

- 2) As to the rights, interests, duties and obligations of the U.S. and the CID regarding what interest, if any, each has, the Brantleys are not aware of any material facts that can be stipulated to by the parties.
- 3) As to the remaining issues in Legal Threshold Issue #3 which are material issues of fact that need to be resolved, the Brantleys are unaware of any material issues of fact. Brantleys see the remaining issues as purely legal issues. However, no party is aware of how the U.S. and CID are going to define their interest in diversion and storage. Brantleys submit it would be very helpful if the Court would require the U.S. and the CID to define and clarify their interests or claims first so one may then determine whether there exist disputed material issues of fact. With such an approach, there may surface material issues of fact that need to be determined. It is imperative that this Court require the U.S. and CID to first define and characterize their claimed interest in diversion and storage before any other party can properly respond to the Court's request for a listing of material issues of fact. This Court, on pages 1 through six of the proposed Order, has recognized the need for the U.S. to define and characterize the U.S.'s interest. The same is true for the CID.

Brantleys' Report at pages 2 and 3.

Tracy-Eddy Response

In the Tracy-Eddy Report in connection with 2.E, counsel states:

Navigation Servitude is the doctrine that defines the rights the United States needs to protect and the obligations they would have to properly operate the storage and delivery facilities on the Pecos River without affecting ownership of the water rights.

The United States retains no sovereign ownership of the dams, storage rights, diversion rights, water stored or other project works in the Carlsbad Project. The United States has only a proprietary ownership interest subject to the contractual obligations of the CID and individual water users of the Carlsbad Irrigation District. The laws which make this clear are the Reclamation Act, Sec. 8, 43 U.S.C. 383, and the McCarran Amendment, 43 U.S.C. 666. Congress has disclaimed any sovereign ownership remaining or being reserved in the United States by these laws.

The United States does retain a sovereign interest in navigation. The navigation servitude has been expanded beyond the power to prevent

obstruction of a navigable in fact river to build a dam. The navigation servitude is based on the Commerce Clause and also includes the power to prevent flooding on tributary streams to navigable waters and hydroelectric power generation. The navigation servitude does not allow the United States to claim any rights to use of water. In *U.S. v. Gerlach Live Stock Co.*, 339 U. S. 725, --(1950), the United States Supreme Court found the commerce power over navigation did not alter the intent of the Reclamation Act to respect state acquired water rights and that the Reclamation Act does not allow federal reallocation of those rights without payment of just compensation by the United States to the water users. There is only one storage right for the Carlsbad Irrigation Project which is the right acquired from the purchase of the Pecos Irrigation Company for the project. The fact the Territory of New Mexico added a Santa Fe filing in addition to the county by county filings for water storage did not create a separate water storage permit under state law. There is no new commerce power or reserved power in the United States which changes the requirement that the federal government obtain its storage permit for a dam under the terms of Section 8 of the Reclamation Act. The United States has already tried to evade the state permit process required by Section 8 and lost. *California v. United States*, 438 U.S. 645 (1978).

Under the reclamation laws there is no federal preemption of state water laws other than those necessary for the operation of the project. *California v. United States*, 438 U.S. 645 (1978). CID is the agent of the water users by contract and under state law for the delivery of the stored water to the water users. The actual details of daily operation are too technical for the Tracys to attempt to define.

The water stored by the United States by the dams built under the terms of the Carlsbad Project is allocated to the users of the CID under contracts to provide water on privately owned lands within the district boundaries. The Tracys move the Court make a direct finding that the individual water rights are protected under the terms of *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), to require the payment of just compensation if the United States 'takes' the water rights for another purpose.

To avoid needless litigation that all differences in state and federal reclamation laws are preemptive or unnecessary to the operation of the project, a general determination needs to be made that state and federal reclamation laws need to be balanced by the Bureau of Reclamation and State Engineer's Office to ensure the smooth operation of the Project. The State adjudication needs to divide the common public trust responsibilities as a matter of state law under the Erie Doctrine as previously argued by the Tracys. This is nothing more than a declaration of "cooperative federalism" as previously defined by the Federal Courts. By actually

placing 'federalism' as a principle into the state adjudication, it allows this Court to determine as a part of the adjudication the limits of the public trust responsibilities of the respective sovereigns over the Pecos River. The navigation servitude is the part of the public trust doctrine that does not transfer to the states upon statehood. the navigation power of the United States can be defined by this Court in relation to the Carlsbad Project within a federalism context. The Court can determine that cooperative federalism requires that the United States water storage in the Carlsbad Project is subject to the state permit as defined in California v. United States, 438 U.S. 645 (1978), and that the storage permit is the quantity of water necessary to supply the individual water rights of the district users.

The Tracys do request the opening of Discovery to require the United States to provide documents as to its assertions of sovereignty and federal preemption under the navigational servitude if the United States disagrees with this Court having the jurisdiction to adjudicate the cooperative federalism components listed above.

Tracy-Eddy Report at pages 1-3.

V.

2. F. Any recommendations for further proceedings for the Court's consideration on which the Court might take action upon in order to pursue a more expeditious resolution of the Project Offer adjudication

United States' Response

In the United States' Report in connection with 2.F, counsel state:

The United States has no further recommendations at this time and respectfully reserves the right to provide such recommendations in the future if the settlement negotiations are not successful.

United States Report at page 5.

CID's Response

In CID's Report in connection with 2.F, counsel states:

See answer to 2.D., 2.E. and 2.F.

State's Response

In the State's Report in connection with 2.F, counsel state:

Due to concerns the Court has raised with respect to the litigation of member rights, the Court should take certain Offer issues out of turn and address them at the outset. Specifically, the Court has suggested the modified Blaney-Criddle approach to establishing duty amounts within the Project for individual members. The Court has also suggested that individual priorities be deferred until after the phase of the proceedings touching on *Hope and Judkins* preclusion. It is the State's position that both priorities and duty must be the same in both the Project Offer and in individual member subfiles. In order to bring the litigation of member claims to a more expeditious conclusion, the Court should address the duty and priority components of the Offer Issues in the near term. A final decision from the Court on both those issues would guide the State in its adjudication of member claims and help avoid protracted proceedings on those issues.

It also may be desirable to address other Offer issues in conjunction with their relationship with litigation of member claims. For example, one of the Offer issues is whether the domestic and livestock use language of the Offer should be made more definite. In litigating member claims, the Office of the State Engineer has adopted the purpose of use found in the Project Offer. Modifying the Offer language, then, would have implications for subfile orders.

In addition, the Court should consolidate briefing on the Project Offer issues or request stipulations, if possible. There are currently 19 Offer Issues of record, not including issues that may arise as a result of further Threshold Legal Issue No. 3 proceedings. It may be beneficial for the Court to consolidate some of those issues, or ascertain whether stipulations are possible, or even ascertain whether some of these issues are still of concern to the parties.

State's Report at pages 6 and 7.

PVACD's Response

In PVACD's Report in connection with 2.F, counsel state:

The pretrial procedure outlined in the Draft Summary of Submissions and Scheduling Order at page 11 is similar to that utilized in connection with the presentation of threshold legal issues. While appropriate for deciding threshold legal issues, such a procedure is not suitable for use in

connection with a trial on the merits. Rather, traditional pretrial proceedings should be used.⁵

PVACD suggests that a pretrial conference should be held and a conventional Rule 16 scheduling order should be entered., establishing time lines for the completion of paper discovery and the conduct of deposition discovery, identification of potential expert and other witnesses, and other normal elements of a scheduling order. Ultimately, the court should enter a pretrial order covering trial matters such as submission of requested findings of fact and conclusions of law.

Certain issues arising in the Member Adjudications, such as duty of water questions and issue related to supplement wells, have project-wide implications. These questions should be decided once in the Project Adjudication and then applied uniformly to all Member subfiles containing those elements. CID represents member water users in the Project matter. Case-by-case treatment of these matters is futile when they can be adjudicated better and many times faster in a project-wide ruling.

PVACD's Report at pages 3 and 4.

NMSU'S Response

In NMSU's Report there are no responses to 2.F.

Brantleys' Response

In the Brantleys' Report in connection with 2.F, counsel states:

The Brantleys recommend this Court first require the U.S. and CID to define and characterize their respective interest, if any, in diversion and storage. Then, if any material issues of fact arise, they can be determined. A time limit should be placed upon the U.S. and CID to submit their definition and characterization of their interest in diversion and storage. Coincident with requiring the information from the U.S. and the CID, this Court should proceed to set up a briefing schedule for the remaining issues in Legal Threshold #3. The briefing should include the rights, duties and

⁵ The Court notes that counsel for the parties agreed that the format used in the draft, SUMMARY OF SUBMISSIONS AND SCHEDULING ORDER RE REMAINING ISSUES AND CONTROVERSIES - THRESHOLD LEGAL ISSUE NO. 3 was proper for purposes of determining the remaining issues involving Threshold Legal Issue No. 3. See **SUPPLEMENTAL PREHEARING ORDER-CARLSBAD PROJECT WATER RIGHTS** filed on August 6, 1998, page 6.

obligations of each of the parties in relation to diversion and storage as well as any remaining issues and controversies between the parties.

THE BRANTLEY REQUIRED RESPONSE:

Brantleys submit the following issues remain to be determined:

- 1) What is the interest, if any, of the United States in diversion and storage of water from the Pecos River?
- 2) What is the interest, if any, of the CID in diversion and storage of water from the Pecos River? Is the CID anything other than a delivery system?
- 3) Does the CID have any right to control permanent transfers of water rights and stacking of water rights within the district?
- 4) Does the State Engineer have the authority to control permanent transfers of water rights and stacking of water rights within the CID?
- 5) Should there be more than one priority date for members of the CID? (*Brantleys submit there should be more than one priority date.*)
- 6) Whether the individual members of the CID, who own the water rights, can control the demand for water and delivery of the water? Or, does the U.S. and/or the CID, neither of which own the water rights, have any right or authority to control delivery of the water when demanded by the individual water right owners?

The Brantleys have submitted a substantial number of documents for this Court's consideration. The documents have not been challenged by any party. Clearly, the 'ancient documents' rule is applicable to virtually all the documents. The legal issues which need to be determined, may very well necessitate reference to portions of the documents which have been submitted, though other portions of the documents will clearly apply to the subsequent individual adjudication of the amount of water rights owned and their priority date. This Court has requested the Brantleys specifically identify documents and portions of documents upon which the Brantleys rely. The Brantleys find this to be difficult, if not impossible, until such time as the U.S. and the CID define and clarify their interest in diversion and storage. When the U.S. and CID have responded, then Brantleys may very well be in position to make such identification. Certainly, some identification can most easily be done during the briefing process, itself.

Brantleys' Report at page 3 and 4.

Tracy-Eddy Response

In the Tracy-Eddy Report, counsel concurs in the matters set forth in the Brantleys' Report re issue 2.F.

Tracy-Eddy Report at page 1.

Having considered the aforesaid submissions and being otherwise sufficiently advised in the premises;

IT IS THEREFOR ORDERED that:

1. On or before November 15, 2000

A. Counsel shall submit their recommendations to the Court as to whether an on-site inspection of the physical facilities of the Carlsbad Project by counsel and the Court would be beneficial in connection with the settlement negotiations among the parties or of assistance in understanding and determining the remaining issues and controversies involved in the Project Adjudication.

B. Counsel shall submit their recommendations to the Court as to whether the appointment of a mediator or facilitator selected by the parties would be of benefit in connection with the conduct of settlement negotiations.

C. Counsel for the United States shall prepare and circulate among counsel for approval as to form an order in accordance with the Court's Opinion re Threshold Legal Issue No. 2 and then submit it to the Court for review, approval and entry in connection with the Project Adjudication. The order shall include a provision that the United States has elected to forego any appeals pursuant to Rule 54(C) in connection with Threshold Legal Issue No. 2.

2. Regardless of the outcome of settlement negotiation, the rights, duties and obligations

of the United States and CID in connection with the diversion, storage and distribution of water in connection with the Carlsbad Project will have to be determined and the overlapping issues involving the Project Adjudication proceedings and the Membership Adjudication proceedings will have to be determined. Therefore, on or before December 29, 2000, counsel for the parties shall meet and submit to the Court an agreed upon order defining these rights, duties and obligations or develop a prehearing order in connection with the determination of these rights, duties and obligations. Counsel shall use as a guideline, the draft of **SUMMARY OF SUBMISSIONS AND SCHEDULING ORDER RE REMAINING ISSUES AND CONTROVERSIES-THRESHOLD LEGAL ISSUE NO. 3**, but shall include all provisions usually incorporated into a prehearing order concerning pretrial matters, the submission of memorandum briefs concerning legal issues, if appropriate, and tentative requested findings of fact and conclusions of law.

In connection with the preparation of the prehearing order, please incorporate provisions concerning the issues raised by counsel for the State quoted at pages 10, 13, 24 and 25 of this order, those raised by the Brantleys, quoted at page 27 of this order and issues concerning the Pecos River Compact, the Endangered Species Act and ramifications of the "Agreed Order" entered in *Forest Guardians*.

The cooperation and assistance of all counsel is requested in reiterating in a clear, concise statement, all of their claims and contentions concerning the diversion, storage and distribution rights of the United States and CID in connection with Project water and their respective duties and obligations in connection therewith. See **SUMMARY OF SUBMISSIONS AND SCHEDULING ORDER RE REMAINING ISSUES AND CONTROVERSIES-THRESHOLD LEGAL ISSUE NO. 3**. The comments of counsel for the United States and

CID concerning these matters⁶ have been carefully considered obviously, however, the Court's request is extremely important in properly clarifying and defining any issues and controversies among the parties concerning these matters. The Court trusts that the request is not unduly onerous.

3. In connection with the submissions of counsel concerning the United States' expressions concerning an interlocutory appeal re Threshold Legal Issue No. 3, no application is presently pending before the Court and the Court expresses no opinion as to whether an application for an interlocutory appeal is proper or should be granted. All parties will be afforded an opportunity to present their respective claims and contentions in connection with this issue if an application for an interlocutory appeal is filed and before the Court makes any determination as to whether an interlocutory appeal is proper or should be granted.

4. At the time a proposed prehearing order is submitted for consideration by the Court, counsel shall advise whether a conference among counsel and the Court would be desirable, and, if so, they are requested to recommend alternate times for the prehearing conference.

5. Except as hereinabove provided, in order to provide an additional period of time for technical assessment of hydrological implications by the parties respective consultants and for continued settlement negotiations, all matters in connection with the Project Adjudication proceedings shall be and are hereby stayed until December 6, 2000 or the further order of this Court.

⁶ See, for example, pages 8, 17 and 18 of this order.

6. The parties shall continue, vigorously, to pursue settlement negotiations and shall provide joint or separate reports to the Court on or before December 6, 2000, on the progress of settlement negotiations generally and on several issues which are of primary concern to the State, the United States and CID.

7. If the negotiations among the State, the United States and CID have resulted in deadlock by the time for the submissions of the December 6, 2000, status report, the Court will consider the entry of an Order terminating the stay.

8. During the period of the extended stay, any party may unilaterally request the Court to lift the stay should that party continue to deem the negotiations to be nonproductive or hopelessly stalled. A hearing shall then be set, and, notice thereof given to all interested parties. After hearing, the Court may terminate the stay.



HARL D. BYRD
District Judge *Pro Tempore*

CERTIFICATE OF MAILING

The undersigned does hereby certify that he caused to be mailed, postage prepaid, a copy of the forgoing order to counsel and repositories specified on attached Exhibit A on this 26th day of October, 2000.



Harl D. Byrd
District Judge *Pro Tempore*

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