

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
CHAVES COUNTY NM
JUL 1 2001

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DEE J. SLEM
DISTRICT COURT CLERK

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

Plaintiffs,)

vs.)

L.T. LEWIS, et al.,)
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*

Carlsbad Irrigation District
Membership and Project (Offer) Phases

Order

**Order Denying The State's Motion to Reconsider the Court's
Decision and Order dated March 20, 2001 and the Court's April
6, 2001 Order Consolidating the Membership Phase and the
Project (Offer) Phase of These Proceedings**

TO RECONSIDER (STATE'S MOTION) of the State of New Mexico, *ex rel* the Office of the State Engineer (the State) served on June 8, 2001 requesting that the Court reconsider its orders consolidating the Membership Phase and Project (Offer) Phase of these proceedings as set forth at paragraph 1, page 20 and paragraph 11, page 22 of the Court's Decision and Order filed on March 20, 2001 and paragraph E.1, page 14 of the Court's Order filed on April 6, 2001 (collectively the 2001 Orders).

The 2001 Orders pertain solely to the adjudication of water rights claims of members of the Carlsbad Irrigation District (CID) in connection with the Carlsbad Irrigation District Project (Project) and the claims of the United States of America (United States) and the CID in connection with their respective rights, duties and obligations pertaining to the diversion, storage and distribution of water in connection with the Project.

As grounds for its motion, counsel for the State claims:

1. The consolidation ordered in the 2001 Orders "...needlessly duplicates the steps this Court took in 1996,¹ without adding any due process protection as to what this Court already provided in 1996." State's Motion, paragraph 1, page 1.

2. "...the consolidation ordered in the 2001 orders raises new questions regarding due process for interested and potentially affected persons." State's Motion, paragraph 2, pages 1-2.

Counsel for the State claims that the 2001 Orders "...effect water rights claimants on the entire Pecos River Stream System, as well as CID members and those parties already participating in these

¹ This reference is to the STATE'S MOTION TO CONSOLIDATE MEMBER AND PROJECT ADJUDICATION IN PART filed on April 12, 1996 attached as Exhibit B to the State's Motion and the Court's Order Granting State's Motion to Consolidate in Part filed on September 3, 1996 attached as Exhibit C to the State's Motion. The Court notes that counsel for the State urged consolidation in the 1996 submissions but now opposes consolidation.

proceedings. While the 2001 Orders allow CID members who have not previously participated an additional opportunity to submit comments on the issues to be addressed, those Orders do not allow water rights claimants on the stream system outside the CID members a similar opportunity. By reopening the opportunity to brief questions related to the Offer and to Threshold Legal Issue No. 3 to only CID members who have not previously participated, the 2001 Orders give rise to new concerns about the due process protections afforded other potentially affected water rights claimants." State's Motion, first full paragraph , page 2.

In addition to counsel for the State's Motion , the Court has reviewed the UNITED STATES' PARTIAL OPPOSITION TO THE STATE'S MOTION TO RECONSIDER served on June 22, 2001.

COURT'S DECISION AND ORDERS

The State's Motion to Consolidate and the Court's Order Permitting Consolidation entered in 1996 was limited to two (2) issues:

- (1) Whether the water rights in the Project are owned by the United States, the CID or the members of the CID, and
- (2) if water rights are owned by the members of the CID, whether the elements of the water rights which are common to the Project should be adjudicated the same for all those who have an ownership interest in the Project waters.

Court's Order Granting State's Motion to Consolidate in Part at page 1.

Questions arise as to whether the limited issues quoted above would encompass all of the issues to which responses are requested and the submission of memoranda briefs permitted as set forth in the 2001 Orders. Therefore, the Court is unable to find or conclude as requested by the State that the 2001 Orders unnecessarily duplicate the steps taken in connection with the State's Motion to Consolidate and the Court's Order Permitting Consolidation.

While the Court's March 20, 2001 Decision and Order states in part that "(T)he United States, the CID and all other parties appearing by counsel or *pro se* in the Project (Offer) Phase would be considered parties to the Membership Phase for the purpose of responding to the Court's inquiries set forth and submitting briefs in connection therewith." (Paragraph No. 2, page 20), this provision must be construed with due regard to the provisions of the PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHTS CLAIMS (Pretrial Order) filed on February 26, 1996, which provides in pertinent part that:

- a. Every party intending to file a brief or other pleading and to present argument at the hearing on the Procedural, Threshold Legal, or Offer issues established in this Pretrial Order, which issues were included in that party's objections to the Offer, shall so indicate on the form attached hereto as Exhibit A. (Parties participating in litigation of the Offer issues may be subject to discovery and may be required to share in the cost of depositions in which they participate.) The completed forms must be returned to the State within 15 days after service of this Pretrial Order. Parties who do not intend to file briefs and present argument may review pleadings filed by others at the

public repositories.

xxx

- g. Failure of any objector to file a brief or other pleading related to issues included in the Procedural, Threshold Legal, or Offer categories will be deemed a waiver of further notice of proceedings as to the issues included in those categories.

LIMITATIONS ON SERVICE, subparagraphs a. and g., pages 10 and 11.

Therefore, the 2001 Orders do not extend to all water rights claimants on the Pecos River Stream System, but, rather, are limited to those claimants who have elected to participate in connection with the Project (Offer) Phase of these proceedings as permitted under the Pretrial Order. In addition, of course, the 2001 Orders extends to all of those claimants involved in the Membership Phase of these proceedings.

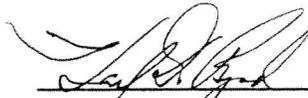
Counsel for the State's argument that the 2001 Orders undermine "the due process protections afforded in 1996 to all water rights claimants on the Pecos River stream system." is not precise and is not clear. State's Motion, page 7. The State does not cite any legal authority in support of its claims. I do not know whether counsel for the State is belatedly arguing that the Court did not have the right or authority to enter the quoted provisions contained in the Pretrial Order. In any event, the court finds and concludes that genuine issues of material fact exist as to whether a particular claimant of water outside the Project would be adversely affected by determinations and decisions to be made in connection with the 2001 Orders.

The Court also finds and concludes that the 2001 Orders would not necessarily, as a matter of law, adversely affect the due process protection of any party to these proceedings. If, however,

any claimant in the Pecos River stream system (other than those permitted to participate in connection with the Pretrial Order) files an appropriate motion and establishes that the claimant would be adversely affected by the determinations to be made in connection with the issues set forth in the 2001 Orders, they will be granted leave to submit responses and memoranda briefs.

IT IS THEREFORE ORDERED THAT:

1. Except as provided in this Order, the State's Motion should be and it is hereby denied
2. Counsel for the State shall serve a copy of this Order upon all parties appearing by counsel or *pro se* in the Membership Phase and the Project (Offer) Phase of these proceedings and all depositories.



HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

Harl D. Byrd

June 29, 2001

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

**Re: State v. Lewis et al., Chaves County Cause No. 20294 and 22600
Consolidated, Carlsbad Irrigation District, Carlsbad Basin Section -Order
Denying The State's Motion to Reconsider the Court's Decision and Order
dated March 20, 2001 and the Court's April 6, 2001 Order Consolidating the
Membership Phase and the Project (Offer) Phase s of These Proceedings**

Dear Ms. Hale:

Enclosed are two (2) executed copies of the above-captioned Order for filing.

I am not certain how you intend to handle the filing of the order. I have executed two (2) copies of the order because I assume that you might want to file one in Membership Phase and one in the Project (Offer) Phase of these proceedings as indicated in the caption. Just a suggestion. Please advise of your preference and I will comply.

I have requested at paragraph 2, page 6 of the Order, that counsel for the State serve a copy of the order upon all parties appearing by counsel or *pro se* in the Membership Phase and the Project (Offer) Phase of these proceedings and all depositories. If there are changes resulting from your preference re filing, please coordinate with counsel for the State.

If counsel or any *pro se* party desires a conformed copy of the order they should make arrangements directly with you.

Very truly yours,



Harl D. Byrd

HDB/jes

cc w/enc.: Pierre Levy, Esq.

LEWIS SERVICE LIST – CARLSBAD SECTION

Membership and Project (Offer) Phases

June 29, 2001

Presiding Judge

Honorable Harl D. Byrd
District Judge *Pro Tem*
P. O. Box 7985
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Participating Counsel

(Includes all parties who have either filed an entry of appearance in response to the Court's Order of March 7, 2001 or who have participated in recent briefing on Project (Offer) Phase and Membership Phase issues)

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