

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

ENDORSED COPY:
ORIGINAL FILED DISTRICT COURT
October 22, 2001
BEE J. CLEM, 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 Section

Membership Phase

DECISION AND ORDER

**This Decision and Order Addresses The Issues Set Forth in the
Court's March 20, 2001 Decision and Order Concerning**

the Quantification, Purpose of Use and Priority of Water Rights Claims of Members of the Carlsbad Irrigation District (CID).

THIS MATTER comes on for consideration by the Court in connection with the issues specified in the Court's March 20, 2001 Decision and Order (Court's Decision) concerning the water rights claims of members of CID.

In connection with this matter, the Court has reviewed the following:

1. The Court's Decision.
2. A letter from Eric Biggs, Esq., one of the attorneys for Pecos Valley Artesian Conservancy District (PVACD), addressed to the Court, dated May 15, 2001 concerning the issue of whether the United States is an indispensable party to the Membership Phase of these proceedings.
3. The BRANTLEYS' MEMORANDUM BRIEF ON THE ISSUE OF WHETHER THE UNITED STATES IS AN INDISPENSABLE PARTY IN THE MEMBERSHIP ADJUDICATION (Brantleys' Brief) filed on May 17, 2001.
4. The TRACYS AND EDDYS MEMORANDUM BRIEF ON THE ISSUE OF THE UNITED STATES BEING AN INDISPENSABLE PARTY IN THE MEMBER ADJUDICATION (Tracy/Eddy Brief) filed on May 17, 2001.
5. The CARLSBAD IRRIGATION DISTRICT'S RESPONSE TO BRANTLEYS' MEMORANDUM BRIEF ON THE ISSUE OF WHETHER THE UNITED STATES IS AN INDISPENSABLE PARTY IN THE MEMBER ADJUDICATION (CID'S Response Brief-Brantleys) filed on May 29, 2001.

6. The CARLSBAD IRRIGATION DISTRICT'S RESPONSE TO TRACY'S MEMORANDUM BRIEF ON THE ISSUE OF WHETHER THE UNITED STATES IS AN INDISPENSABLE PARTY IN THE MEMBER ADJUDICATION (CID'S Response Brief-Tracy/Eddys) filed on May 29, 2001.

7. Counsel for the State's letter to counsel and parties appearing *pro se*, dated July 24, 2001 re the methodology used to quantify consumptive use in the Membership Phase and the Project (Offer) Phase of these proceedings.

8. The UNITED STATES' RESPONSE TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER AND APRIL 6, 2001 (United States' Response) filed on August 1, 2001, insofar as it pertains to the Court's Decision.

9. The CARLSBAD IRRIGATION DISTRICT'S RESPONSE BRIEF TO MATTERS SET FORTH IN THE COURT'S MARCH 20, 2001 DECISION AND ORDER and APRIL 6, 2001 ORDER (CID's Response) filed on August 1, 2001, insofar as it pertains to the Court's Decision.

10. The STATE OF NEW MEXICO'S CONSOLIDATED RESPONSE TO THE COURT'S MARCH 20, 2001 AND APRIL 6, 2001 DECISION AND ORDERS AND THE ISSUES ORDERED TO BE BRIEF THEREIN (State's Response) filed on July 26, 2001 insofar as it pertains to the Court's Decision .

11. PVACD's COMMENTS REGARDING 2001 ORDERS (PVACD's comments) filed on July 30, 2001 insofar as it pertains to the Court's Decision.

12. The BRANTLEYS' ANSWERS AND BRIEF RESPONDING TO THE COURT'S QUESTIONS IN APRIL OF 2001 (Brantley's Response) filed on August 1, 2001

insofar as it pertains to the Court's Decision.

13. NEW MEXICO STATE UNIVERSITY'S BRIEF ON QUANTIFICATION AND ALLOCATION ISSUES (NMSU's Response) filed on August 1, 2001 insofar as it pertains to the Court's Decision.

Other than the Brantleys, members of CID did not file responses or memoranda briefs in connection with the issues set forth in the Court's Decision.¹

INTRODUCTION

The primary purpose of framing issues and requesting submissions and memoranda briefs of counsel and parties appearing *pro se* was to determine whether all elements of the water rights claims of members of CID were being properly addressed and adjudicated as required by NMSA 1978, §72-4-19 which provides, in pertinent part:

Upon the adjudication of rights to the use of the waters of a stream system--[the] decree in every case shall declare, as to the water adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in the article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

Paragraph 6, p. 21 of the Court's Decision provides:

After the Court has considered the submissions of the parties and the memorandum briefs submitted in connection therewith, the Court will enter an order in the Membership Phase of these proceedings setting forth the proper manner of quantifying the water rights claims of members of CID, the purpose of use and priority dates in connection therewith.

¹ The motion of the Carlsbad Water Defense Association, Inc. and certain of its members to file a memorandum brief as *amicus curiae* is pending. See Court's Decision and Order filed on September 24, 2001.

Pertinent excerpts from the submissions of the parties addressing each issue are set forth in Appendix A, attached, the content of which is incorporated herein by reference.

Except as specifically determined in this opinion, nothing contained herein shall be deemed or construed as a determination of any matter set forth in the respective responses or memoranda briefs of the parties.

ISSUE NO. 1

What is the effect and what are the ramifications of the rules of law that the right to the use of water in connection with reclamation projects is appurtenant to the land irrigated and that beneficial use is the basis, the measure and the limit of water rights? See Section 8 of the Reclamation Act, the NM Const., Art. XVI, § 3, §72-1-2 NMSA (1978), part III of the Hope Decree, and pertinent provisions of water rights applications and agreements relied upon by the United States in connection with its claims of diversion, storage and distribution rights?

COURT'S DECISION

The Court finds and concludes that there are no genuine issues of material fact and concludes, as a matter of law, based primarily upon citations set forth in Issue No. 1 and *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914); *Ickes v. Fox*, 300 U.S. 82, 81 L.Ed. 525, 575 S.Ct. 412 (1957); *State of Nebraska v. Wyoming*, 325 U.S. 589, 614 89 L. Ed. 1815, 655 S.Ct. 1332, 1349 (1945); *California v. United States*, 438 U.S. 645, 665, 57 L. Ed. 2d 1018, 98 S.Ct. 2985; *State ex rel Erickson v. McLean*, 62 N.M. 264, 271, 308 P.2d 983, 990 (1957); and, NMSA 1978 §72-1-2 that the water rights of members of CID should be determined and quantified upon the basis of beneficial use, which is the measure and the limit of the water rights so determined.

Irrigation water rights so determined, are appurtenant to the specific tracts of land upon which it is determined that water has been devoted to beneficial use. See NMSA 1978 §§ 72-1-2 and 72-4-19.

The diversion and storage rights of the United States and the distribution rights of CID associated with the Carlsbad Project, which the Court has determined are held for the use and benefit of the members of CID, are applicable to the entire Carlsbad Project.

Deliveries of water by CID to members of CID shall be subject to the availability of supply and shall be made in accordance with contracts between CID and its members.

All water shall be distributed and apportioned by the board of directors of CID to its members in accordance with Acts of Congress, rules and regulations of the Secretary of the Interior, applicable provisions of existing contracts and as provided in NMSA 1978, §§73-10-16 and 73-10-24. See also *Brantley Farms v. Carlsbad Irrigation District*, 124 N.M. 698, 954 P.2d 763, 1998 NMCA 023 (Ct. App. 1998).

The assessment rolls of CID shall describe and set forth the amount of acreage upon which it is determined that members of CID have devoted water to beneficial use. The amount of such acreage shall be the basis upon which assessments shall be made by CID and paid by members of CID.

For the purpose of determining the "*pro rata* basis" upon which water is to be distributed to its members, the amount of water available for distribution shall be multiplied by a fraction, the numerator of which shall be the amount of acreage upon which water has been devoted to beneficial use and assessed to a member and the denominator which shall be the total amount of assessed acreage based upon the total amount of acreage upon which water has been devoted to beneficial use in the Carlsbad Irrigation District. NMSA 1978, §73-10-17.

ISSUE NO. 2

Should the water rights of members of CID be quantified on the basis of (1) the amount of acreage upon which water is devoted to beneficial use, (2) the amount of acreage of individual members as set forth on the assessment rolls of CID, or (3) the entire irrigable acreage within the Carlsbad Project, i.e. 25,055 acres?

COURT'S DECISION

Please refer to the Court's decision re Issue No. 1.

The Court determines that there are no genuine issues of material fact and concludes, as a matter of law, that the water rights of members of CID shall be quantified on the basis of the amount of water which is devoted to beneficial use by each member.

ISSUE NO. 3

Memorandum briefs are requested from all counsel concerning the effect of NMSA 1978, §73-13-4 and NMSA 1978 §72-9-4.

COURT'S DECISION

NMSA 1978 §73-13-4

The parties are referred to para. J. , p. 14 of DEFENDANT CARLSBAD IRRIGATION DISTRICT's STATEMENT OF CLAIMS, RIGHTS, DUTIES AND OBLIGATIONS WITH RESPECT TO STORAGE, DIVERSION, AND DISTRIBUTION OF PROJECT WATER SUPPLY WITHIN THE CARLSBAD PROJECT (CID'S Statement of Claims) filed on January 22, 2001 for the context in which CID raised the subject matter of Issue No. 3 pertaining to the proper interpretation of NMSA 1978, §73-13-4.

NMSA 1978, §73-13-4 provides, in pertinent part, as follows:

Upon the application of any landowner in the district or upon its own motion, the board of directors of any such district may transfer any water rights appurtenant to lands held by or within

such district, which for any cause are not suitable for irrigation or capable of being properly irrigated,, to any other lands held by or within such district and which, in their judgment may be profitably and advantageously irrigated. Said action shall be taken by first publishing a notice in any newspaper published within the county where the office of said district is located, of the board's intention to consider a resolution setting a time and place thereof, which resolution shall have for its purpose the transfer of such water rights from certain lands described in said notice to certain other lands described in said notice, and the reason for such transfer. At such time and place protest or protests from any person or persons interested may be heard and thereafter said board of directors shall take formal action upon said resolution. Any protestant or protestants may appeal direct to the district court from any action taken by said board upon said resolution, provided said appeal be taken and notice thereof served within ten (10) days from the date of the adoption or rejection of such resolution....

This statute addresses the transfer of water rights appurtenant to lands "not suitable for irrigation or capable of being properly irrigated," to other lands "held by or within such district" which the board of directors of an irrigation district determines "may be profitably and advantageously irrigated." The statute provides that such transfers may be made by the board of directors of an irrigation district "upon the application of any land owner in the district or upon its own motion."

The statute applies to applications for transfer by individual members of CID and for transfers involving lands and water rights acquired by an irrigation district under NMSA 1978, §73-13-3. It should be noted that NMSA 1978, §72-5-28, F. provides that members of CID have the right to apply the full amount of water for agricultural purposes appurtenant to designated or specified lands to any part of the designated or specified tract without penalty or forfeiture.

The secretary of the board of directors is required to immediately certify and file with the State engineer a copy of the board of directors' resolution approving the transfer and action taken

effecting the transfer. NMSA 1978, §73-13-5.

Except for receiving certified copies of the action taken by the board of directors of the irrigation district as provided in NMSA 1978, §73-13-5, the State engineer is not involved in the transfer process.

Determinations by the board of directors of CID as to whether lands are capable of being irrigated and whether they are suitable for irrigation should be made in accordance with generally accepted agricultural standards.

NMSA 1978, §72-9-4

The parties are referred to paragraph G., p. 13 of CID's Statement of Claims for the context in which CID raised the subject matter of Issue No. 3 pertaining to the proper interpretation of NMSA 1978, §72-9-4.

The Court will restrict its interpretation concerning the impact of NMSA 1978, §72-9-4 to issues concerning the transfer of water rights acreage and changes in places of use and distribution points of diversion. Nothing contained herein, however, should be deemed or construed as a determination of any issues concerning whether the statute should be given a broad interpretation or a restricted interpretation concerning exemptions afforded under the statute. Determinations in connection with these interpretation matters will be considered and determined from time to time in the context of specific factual situations that may hereafter arise.

The claims and contentions of the Brantleys concerning their water rights claims, their contractual rights, the applicability of statutes enacted after the time that their water rights became vested and related matters set forth in Appendix A, at pp. 62-68, will be addressed in connection with the determination and adjudication of the Brantleys water rights in the

Membership Phase of these proceedings.

NMSA 1978, §72-9-4 provides as follows:

Except as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978] of this act nothing herein shall be construed as applying to or in any way affecting any federal reclamation project heretofore or hereafter constructed pursuant to the act of congress approved June 17, 1902, known as the Federal Reclamation Act, or acts amendatory thereof or supplementary thereto.

The compiler's notes to this statute provides:

Compiler's notes. — Laws 1941, ch. 126, § 27 of which enacted this section, was principally amendatory of Article 1 of Chapter 151 of the 1929 Compilation, and therefore this section may have application to the entire article, which is compiled in 19-7-26, 72-1-1, 72-1-2, 72-1-5, 72-2-1 to 72-2-7, 72-2-9 to 72-2-11, 72-3-1 to 72-3-5, 72-4-1, 72-4-13 to 72-4-19, 72-5-1 to 72-5-4, 72-5-6 to 72-5-24, 72-5-26 to 72-5-31, 72-5-33, 72-7-1 to 72-7-3, 72-8-1 to 72-8-6, 72-9-1 to 72-9-3 NMSA 1978. If its application is to be restricted to the 1941 act, it would apply only to 19-7-26, 72-1-1, 72-2-5, 72-2-6, 72-4-20, 72-5-1, 72-5-3, 72-5-4, 72-5-6 to 72-5-9, 72-5-14, 72-5-17, 72-5-20, 72-5-23, 72-5-24, 72-5-27, 72-5-28, 72-5-32, 72-5-33, 72-8-4, 72-9-1, 72-9-3, 72-9-4 NMSA 1978.

Federal Reclamation Act. —The act of congress approved June 17, 1902, and referred to in this section, is compiled as 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, 498. The reclamation law which included the Act of June 17, 1902 and all acts amendatory thereof and supplemental thereto is compiled as 43 U.S.C. §371 et seq.

The Court concludes that this section should not be interpreted in such a manner to adversely impact the basic principles of beneficial use discussed in connection with Issue No. 1 and Issue No. 2, or the jurisdiction of this Court to determine the water rights of members of CID, the elements to be determined in connection therewith, the diversion and storage rights of the United States or the distribution rights of CID in these proceedings.

The parties are in disagreement and it is unclear as to whether the statute should be given

a broad interpretation which would drastically limit the jurisdiction and authority of the State engineer and grant authority to the board of directors of CID concerning matters pertaining to the transfer of water rights to lands within and outside the irrigation district, changes in use and points and places of diversion, and the distribution and apportionment of water in connection with the Carlsbad Project. See *Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 678 P.2d 1170 (1984).

NMSA 1978, §73-13-4 specifically controls the transfer of water rights appurtenant to lands owned by members of CID which, for any reason, are not suitable for irrigation or being properly irrigated to other lands held by the owner of water rights or CID within the district. The statute is specific, as distinguished from the broad language of NMSA 1978, §72-9-4, and the terms and provisions of NMSA 1978, §73-13-4 would govern all of such matters. Subject to the terms and provisions of NMSA 1978, §73-13-4, the board of directors of CID, without the intervention of the State engineer, is authorized to approve transfers of the use of project water to lands within the district so long as the requirements of state and federal law and existing contracts have been complied with. To the extent that incidental matters, such as changes in places of use and distribution points of diversion are involved, the Court concludes that the board of directors of CID would have authority to make requisite determinations. All decisions of the board of directors of CID concerning the suitability of lands for irrigation shall be made in accordance with generally accepted agricultural principles. See also NMSA 1978, §§73-10-16.

Matters set forth by counsel in connection with this issue pertaining to abandonment will be considered under Issue No. 4 of the Court's Decision.

ISSUE NO. 4

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

COURT'S DECISION

The water rights of members of CID may be forfeited in accordance with and subject to the provisions of NMSA 1978, §72-5-28 (2001).

The water rights of members of CID may be forfeited or abandoned in accordance with the criterion set forth in the decision of *State ex rel Reynolds v. South Springs Co.*, 80 N.M. 144, 452 P.2d 478 (1969). For distinctions between the loss of water rights under the doctrines of forfeiture and abandonment, see *State ex rel Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983, (1957), *South Springs Co., supra*. See also *State ex rel Martinez v. McDermott*, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995). In connection with matters involving forfeiture and abandonment, the right to use water of the United States may not be lost through laches or neglect of its officers or employees. *United States v. Ballard*, 184 F. Supp. 1, 12.(D. N.M. 1960).

Issues and controversies concerning the 25, 055 Project acreage figure and other matters set forth in **B. OFFER ISSUES THAT DO NOT REQUIRE THE SUBMISSION OF MEMORANDUM BRIEFS AT THIS TIME**, pp. 5-7 of the Court's Order filed on April 6, 2001, will be determined in the Project (Offer) Phase of these proceedings.

ISSUE NO. 5

Should Consumptive Irrigation Requirement (CIR) Farm Delivery Requirement and Project Delivery Requirement and Off Farm Diversion Requirement be defined and incorporated into an order which would apply to all Member Adjudication proceedings or should they be incorporated into individual Prehearing Orders? See my letter to Mr. Levy dated September 15, 2000 and Mr. Levy's letter to me dated September 26, 2000 re the Vasquez Subfiles. See

suggested provisions under II. State's Requests Re Approval of Prehearing Order, A. 2, (pp. 18-20).

COURT'S DECISION

Based upon the submissions of counsel this issue is answered in the affirmative as to water used by members of CID for irrigation purposes.

Determinations of the proper figures to be used for CIR, Farm Delivery Requirement, Project Delivery Requirement and Off Farm Diversion Requirement may require factual determinations which will be made and other issues determined in connection with the Project (Offer) Phase of these proceedings.

ISSUE NO. 6

In quantifying the water rights claims of members of CID, Should Off-Farm Conveyance Efficiency and On-farm Irrigation Efficiency percentages and adjustments for Off-farm Diversion or Farm Delivery amounts as set forth in the Stipulated Offer of Judgment of the State, the United States, and the Carlsbad Irrigation District (at paragraph I. C. Allowable annual diversion, 2, page 4) be used or should other efficiency percentages or amounts be used?

COURT'S DECISION

The United States and CID respond that there is no necessity for making determinations re Off-Farm Conveyance Efficiency, On-Farm Irrigation Efficiency percentages and adjustments for Off-Farm Diversions or Farm Delivery in connection with individual subfile determinations of members of CID. The State does not disagree. No responses to this issue were submitted by any other party.

Based upon the submissions of the parties, the Court agrees with the responses of the United States and CID and all remaining issues and controversies concerning these elements will

be considered and determined during the Project (Offer) Phase of these proceedings.

ISSUE NO. 7

The proposed Stipulated Offer of Judgment, paragraph 1 C. Allowable annual diversion. 1. b., at page 4, provides, in part:

For any transfer, conversion, or change of a water right, allotment, or entitlement that is within, part of, or diverted through the project water right described herein for (1) a purpose inside the Carlsbad Irrigation District other than that described in paragraphs I.A.2 and I. B.2 of this STIPULATED OFFER OF JUDGMENT or for (2) any place or purpose of use outside the boundaries of the Carlsbad Irrigation District described in paragraph I.A.5. of this STIPULATED OFFER OF JUDGMENT said water right, allotment, or entitlement shall, for each irrigable acre per year, incorporate and be based on a diversion of 4.997 acre-feet, a farm delivery of 3.697 acre-feet, and a consumptive irrigation requirement of 2.218 acre-feet. For each irrigable acre affected by such transfer, conversion, or change, the combined annual diversion of water described in paragraph I.C.1 of this Stipulated Offer of Judgment shall be reduced by 4.997 acre-feet of water and the total annual depletion of water described in paragraph I.C.1 of this Stipulated Offer of Judgment shall be reduced by 2.218 acre-feet of water.

Are the Diversion, Farm Delivery and Consumptive Irrigation Requirement figures being used by the State in connection with the Membership Phase appropriate and correct with due regard to the underlined portion of the above-quoted provisions? Counsel for the State is requested to respond to this inquiry.

Counsel for the State is requested to clarify the methodology to be used to quantify consumptive use in connection with the Membership Phase and the Project (Offer) Phase of these proceedings and advise all other counsel and parties appearing pro se in the Membership Phase of the methodology it proposes to use. After counsel have conferred, if there are unresolved issues concerning methodology, they should be submitted to the Court for determination.

COURT'S DECISION

All issues and controversies re Diversion, Farm Delivery and Consumptive Irrigation Requirements will be determined in the Project (Offer) Phase of these proceedings. Individual subfile orders shall reflect that these elements will be determined in the Project (Offer) Phase of these proceedings and incorporated by reference into individual members' subfile orders.

None of the responses of counsel for the parties state that any of the figures being used by the State in the Membership Phase are inappropriate or incorrect with due regard to the underlined portions of Issue No. 7. See page 14, *supra*.

The Court is in receipt of a copy of a letter dated July 24, 2001 from counsel for the State to all counsel and parties *pro se* in the Carlsbad Irrigation District Section responding to the Court's request that counsel for the State clarify the methodology to be used in quantifying consumptive use in connection with the Membership Phase and the Project (Offer) Phase of these proceedings. The content of the letter is incorporated herein by reference. The Court is uncertain as to whether counsel and other interested parties have now conferred and agreed upon the proposed approach to be used in order to quantify consumptive use as outlined in counsel for the State's letter. Counsel for the State is requested to advise the Court of the status of these matters within thirty (30) days after the effective date of service of this Decision. See page 19, *infra*.

PURPOSE OF USE

COURT'S DECISION

All counsel and parties appearing *pro se* in the Membership Phase and Project (Offer) Phase of these proceedings agree that the purpose of use in connection with determining the

water rights claims of members of CID and the diversion, storage and distribution rights of the United States and CID are for irrigation and domestic and livestock water uses incidental to irrigation use.

PRIORITY DATES

Should priority dates for the water rights of members of CID be those determined to be appropriate in the Project (Offer) Phase or should priority dates be the date that water is devoted to beneficial use by a claimant or the date that a claimant is determined to be entitled to an earlier priority date on a relation back basis?

COURT'S DECISION

The Court is not satisfied that this issue, as framed, adequately addresses the issues involved in determining the proper priority date(s) in connection with the of water rights claims of members of CID. Also, the Court is not satisfied with the responses of counsel for the parties.

The claims and positions of the parties are essentially diametrically opposed. The United States and CID respond suggesting that individual priority dates for members of CID should not be determined. Appendix 1, pages 109-111. The State responded, suggesting use of the priority dates set forth in the Stipulated Offer of Judgment. Appendix A, pages 111-112. PVACD responded, suggesting that the priority dates be the dates when it is determined that water has been devoted to beneficial use by each landowner. Appendix A, pages 113-115. The Brantleys responded, suggesting that individual priority dates be determined for each landowner. Appendix A, pages 115-121. The Tracy/Eddys and NMSU did not respond to this issue.

A subsidiary issue arises as to whether members of CID waived or relinquished the right to claim an individual priority date prior to the priority date determined for the Project.

It would seem that all of these issues would have been addressed by courts on numerous

prior occasions and that there would be an abundance of pertinent legal authority that would be useful in determining these issues.

The primary purpose of determining priority dates is to establish a criterion for allocating water among owners of water rights where there is a conflict among claimants and there is an inadequate supply. Under the prior appropriation doctrine in New Mexico, first in time is first in right. NMSA 1978, §72-1-2. Generally, priority dates should be determined in connection with this statute. Perhaps, however, consideration should be given to determining priority dates in the following contexts:

1. A priority date(s) in connection with the diversion and storage of Project water by the United States.

2. A priority date for inclusion in subfile orders of members of CID based upon the date when it is determined that water was devoted to beneficial use or on a relation back basis, but with appropriate provisions stating that (a) the distribution of water among members of CID will be made in accordance with NMSA 1978, §§73-10-16 and 73-10-24 in the event there is a shortage of supply, and (b) nothing contained in any determination of the priority date of water rights of members of CID would be deemed or construed to prevent a member of CID from asserting a priority date prior to a Project priority date if such priority date can be established.

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

The parties are requested to submit further memorandum briefs concerning these matters at the time set for filing objections to the form or content of this Decision as hereinafter provided.

See page 19, *infra*.

**WHETHER THE UNITED STATES IS AN INDISPENSABLE
PARTY TO THE MEMBERSHIP PHASE
OF THESE PROCEEDINGS**

Discuss the New Mexico Court of Appeals decision that the United States was an indispensable party in Brantley Farms et al. v. Carlsbad Irrigation District, 124 NM 698, 954 P.2d 763 (N.M. Ct. App. 1998) and whether the United States should be considered an indispensable party in connection with the Membership Phase of these proceedings

COURT'S DECISION

The Court concludes that there are no genuine issues of fact, and, based upon the submissions of counsel for the parties, the Court finds and concludes that:

1. The Membership Phase of these proceedings involves the determination of the individual water rights claims of members of CID and not a determination of the rights of the United States to the diversion and storage of water in connection with the Carlsbad Project.

2. The United States has been afforded and continues to be afforded the opportunity to participate in subfile order proceedings of members of CID which may pertain to its diversion and storage of water by the United States in connection with the Carlsbad Project. This opportunity is afforded to the United States primarily through the consolidation of the Membership Phase and the Project (Offer) Phase of these proceedings for the purpose of determining the issues set forth in the Court's Decision and those set forth in the Court's April 2001 Order. See paragraphs 1 and 2 of the Court's Decision.

3. The United States is not an indispensable party to the Membership Phase of these proceedings so long as the United States continues to be afforded an opportunity to object to

matters in connection with the individual member subfile proceedings which may pertain to the rights of the United States to divert and store Carlsbad Project water.

The United States is invited to continue its participation in any aspect of subfile proceedings involving CID members which may involve the right of by the United States to divert or store water in connection with the Carlsbad Project.

**OTHER ISSUES CONCERNING THE QUANTIFICATION
OF WATER RIGHTS OF MEMBERS OF CID**

COURT'S DECISION

None of the parties have identified any other overlapping issues that should be addressed at this time.

IT IS THEREFORE ordered that:

1. The water rights claims of members of CID be determined and quantified in accordance with the terms and provisions of this Decision as hereafter supplemented and amended.
2. Within thirty (30) days after the effective date of service of this Decision, counsel for the State is requested to advise the Court as to whether all counsel and other interested parties have conferred and agreed upon the proper approach to be used in order to quantify consumptive use. If an approach is agreed upon, the State shall also advise the Court as to the approach. If an approach has not been agreed upon, within the aforesaid time frame, counsel for the State shall advise the Court of all remaining issues and controversies concerning these matters. See page 15, *supra*.
3. Comments, suggestions and objections, if any, as to the form or content of this

Decision and memorandum briefs addressing the issues set forth under the heading, **PRIORITY DATES**, at page 16-17, *supra*, shall be filed and submitted to the Court within thirty (30) days after the effective date of service hereof.

4. Requests, if any, for oral arguments shall be filed withing thirty (30) days after service hereof. In the event oral arguments are requested, a written request shall be submitted to the Court specifying, with particularity, the matters which a party requests be considered and counsel and parties appearing *pro se* shall confer and submit alternate times and a place for hearing oral arguments simultaneously with any such request.

5. After the Court has had an opportunity to review the comments, suggestions, objections and memoranda briefs of counsel as provided in numbered paragraph 3, above, the Court will request that counsel for the State prepare an order as provided in paragraph 6, p. 21 of the Court's Decision incorporating pertinent provisions of this decision concerning the determination of water rights claims of members of CID, circulate it for approval or objections as to form or content by all other counsel and interested parties appearing *pro se*, and then submit it to the Court for review, approval and entry in the Membership Phase of these proceedings.

6. Counsel for the parties are requested to advise the Court of the status of their settlement negotiations within thirty (30) days after the effective date of service of the Court's Decision.

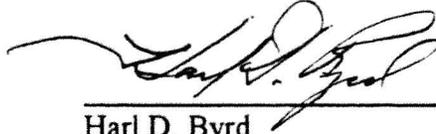
7. Counsel for the State is requested to serve a copy of this Decision and Order upon all counsel and parties appearing *pro se* in this phase of these proceedings other than those set forth on attached Exhibit A.



HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he caused to be mailed, postage prepaid, a copy of the forgoing decision to counsel and the repositories specified on attached Exhibit A on this 19th day of October, 2001.

A handwritten signature in black ink, appearing to read "Harl D. Byrd", written over a horizontal line.

Harl D. Byrd
District Judge *Pro Tempore*

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Harl D. Byrd

October 19, 2001

Ms Trudy Hale
Deputy Clerk
Fifth Judicial District Court
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**Re: State v. Lewis et al., Chaves County Cause No. 20294 and 22600
Consolidated, Carlsbad Irrigation District, Carlsbad Basin Section -
Decision and Order Re Issues in March 20, 2001 Decision and Order**

Dear Ms. Hale:

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

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

Counsel for the State is requested to serve copies upon all counsel and parties appearing *pro se* in this phase of these proceedings other than those set forth on Exhibit A to the Decision and Order.

If there are any questions concerning any aspect of this matter, please do not hesitate to contact me.

Thank you for your cooperation and assistance.

Very truly yours,



Harl D. Byrd

HDB/jes

cc: All counsel on Exhibit A