

Harl D. Byrd

May 17, 2002

FIFTH JUDICIAL DISTRICT  
CHAVES COUNTY NM  
FILED IN MY OFFICE

02 MAY 20 PM 3:02

BEE J. CLEM  
DISTRICT COURT CLERK

David W. Gehlert, Esq.  
US Department of Justice  
Environment & Natural Resources Division  
999 - 18<sup>th</sup> Street Suite 945  
Denver, CO 80202

**Re: State v. Lewis et al., Chaves County Cause No. 20294 and 22600  
Consolidated, Carlsbad Irrigation District, Carlsbad Basin Section - Motion  
of the United States of America for Clarification of the Court's SECOND  
SUPPLEMENTAL DECISION AND ORDER Filed on March 4, 2002**

Dear Mr. Gehlert:

This matter comes on for consideration by the Court in connection with THE UNITED STATES' MOTION FOR CLARIFICATION AND RESPONSE TO PVACD'S MOTION FOR CLARIFICATION OR RECONSIDERATION (United States' Motion) served on March 22, 2002, insofar as it requests clarification of certain portions of The Court's SECOND SUPPLEMENTAL DECISION AND ORDER (March 2002 Decision) filed on March 6, 2002.<sup>1</sup>

The United States' Motion states, in part in the footnote at p. 1:

Pursuant to Rule 1.007.1 NMRA 2001, Counsel for the United States has called opposing Counsel to seek their consent to the United States' Motion. Counsel for CID supports the United States' Motion; Counsel for New Mexico State University and counsel for the State take no position on the Motion. Counsel for PVACD Eric Biggs has opposed the motion. Counsel for the United States left a message for counsel for the Brantleys and Tracys. The United States assumes the Brantleys and Tracys oppose the motion.

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<sup>1</sup> In this letter decision, the United States of America is referred to as the United States; the Carlsbad Irrigation District is referred to as CID and the Pecos Valley Artesian Conservancy District is referred to as PVACD.

In connection with the United States's Motion, the Court has reviewed the following:

1. The Court's March 2002 Decision.
2. The portion of the United States' Motion requesting clarification of portions of the Court's March 2002 Decision.

3. The STATE'S COMBINED RESPONSE TO PVACD'S MARCH 14, 2002 MOTION FOR CLARIFICATION OR RECONSIDERATION AND MARCH 22, 2002 REQUEST FOR ORAL ARGUMENT, AND THE UNITED STATES'S MARCH 22, 2002 MOTION FOR RECONSIDERATION (State's Combined Responses) served on April 2, 2002 insofar as it pertains to the United States' Motion.

4. PVACD'S RESPONSE TO THE UNITED STATES' MOTION FOR CLARIFICATION (PVACD's Response) filed on April 10, 2002.

PVACD has no objection to the United States' proposed distinction between Project Water and Non-project Water, "...relegating to the latter category any pre-Project rights, rights served by excess waters, rights that do not involve use of Project works, and both supplemental and primary ground water rights ... provided that the Court is mindful 1) of its statutory responsibility to adjudicate all of the interrelated surface and groundwater rights in the Pecos River Stream System and 2) that all of the rights to the use of public waters within the CID, including supplemental and primary groundwater uses, will have to be adjudicated *inter se* before any junior upstream uses can be curtailed. *Cf.* §72-4-17 NMSA 1978 (1997 Repl.); *see also State v. Pecos Vly. Artes. Conservancy District*, 99 N.M. 702, 633 P.2d 358 (1983)." PVACD's Response at pp. 1-2.

The United States' Motion sets forth four (4) separate requests for clarification which will

be considered and determined by the Court in the same order and under the following paragraph headings which are quoted from the United States' Motion:

**A. The Court's Ruling on Legal Issue No. 1<sup>2</sup> Should Be Clarified to Explain That the Membership Phase of This Proceeding Does Not Address Non-project Water.**  
At p. 1.

Contrary to counsel for the United States's analysis, the Court does not consider that all water used within the boundaries of the Carlsbad Irrigation District Project should be defined as "Project Water". The Court considers that "Project Water" is water diverted and stored or which should be diverted and stored by the United States for the use and benefit of members of CID and distributed to them by CID in connection with the Carlsbad Irrigation District Reclamation Project (Project Water).

The Membership Phase of these proceedings addresses Project Water, not Non-project Water.

**B. The Court Should Clarify Whether Its Ruling on Issue No. 2<sup>3</sup> Is Addressing Priority Dates for Project or Non-project Water Rights.** At p. 6.

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<sup>2</sup> Legal Issue No. 1 is:

Whether, in order to have **any private non-Project water rights diverted through or stored by Carlsbad Project facilities**, members of CID would have to have an independent contract **with the United States** under the Warren Act. See Act of February 21, 1911, ch 141, 36 Stat 925, J.B. Bean v. United States, 163 F. Supp. 838, 841 (Ct. Cl. 1958), March 2002 Decision at p. 3.

<sup>3</sup> Legal Issue No. 2 is:

Are members of CID entitled to have individual priority dates determined in connection with their Project Water rights claims in the Membership Phase of these proceedings separate and apart from those determined as Project priority dates, with the understanding that Project water is to be distributed equitably and on a pro rata basis among members of CID? March 2002 Decision at p. 5.

In connection with the Court's ruling on Issue No. 2, the Court in addressing priority dates of water rights of members of CID, in connection with Project Water and Non-project Water. Non-project Water rights may have a priority date earlier or later than Project Water rights..

**C. The Court Should Clarify That its Ruling on Issue No. 3<sup>4</sup> Is Not Addressing Project Water. At p. 7.**

The United States requests that the Court clarify that the "individual water rights claims" the Court is addressing in its March 2002 Decision are claims to Non-project Water in connection with the Court's ruling that:

Except in connection with the distribution of Project Water by CID to its members, the Court concludes that members of CID did not waive or relinquish their right to claim individual priority dates in connection with their individual water rights claims by virtue of their agreements with the PWUA or with the United States or CID. (Court's March 2002 Decision at p. 10, last full paragraph).

In its ruling the Court is addressing the priority dates of water rights of members of CID in connection with Non-project Water.

**D. The Court's Ruling on Issue No. 4<sup>5</sup> Should Be Clarified as to Whether it is Talking about the Project Water Rights, or Non-project Water Rights Which May Be Held by Project Members. At p. 8.**

The Court's ruling on Issue No. 4 refers to water rights of members of CID in connection

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<sup>4</sup> Legal Issue No. 3 is:

Did members of CID relinquish or waive their right to claim individual priority dates in connection with their Project Water rights' claims? March 2002 Decision p. 9.

<sup>5</sup> Legal Issue No. 4 is:

What happens to the water rights of members of CID if they are forfeited or abandoned? March 2002 Decision p. 11.

with Non-project Water and Project Water. Thus, the Court concluded that abandoned or forfeited water rights of members of CID in connection with Project Water or Non-project Water revert to the public for appropriation to beneficial use, unless the water has been transferred to other lands as provided in NMSA 1978, §73-13-4. Court's March 2002 Decision at p. 11.

In further response to the United States' Motion and as requested by the State, the Court enters the following additional orders in connection with the United States' Motion:

**The State Requests:**

- A. **The Court Should Reaffirm That the Membership Phase of the Carlsbad Irrigation District Section of the Lewis Adjudication Does Not Address Non-project Water.** At p. 3.

**Court's Response:**

The Membership Phase of these proceedings involves Project Water and does not involve claims that individual CID members may have to water rights pertaining to Non-project Water.

**The State Requests:**

- B. **The Court Should Affirm That All Individual CID Members Will Have as Single Set of Priority Dates for the Claims to Project Water.** At p. 4.

**Court's Response:**

The Court reiterates that individual members of CID are not entitled to have individual priority dates determined in connection with their water rights claims in connection with Project Water.

**The State Requests:**

- C. The Court Should Affirm That Individual CID Members Relinquished Their Rights to Claim Individual Priority Dates for Project Water.** At p. 5.

**Court's Response:**

The State's request that the Court reconsider its decision that the right to the determination of an individual priority date was not waived or relinquished is denied.

**State Requests:**

- D. The Court Should Affirm That Project Water Can Be Forfeit or Abandoned.** At p. 8.

**Court's Response:**

The Court reiterates and reaffirms its ruling in connection with Project Water that "in the event of forfeiture or abandonment of water rights of members of CID, unless the water has been transferred to other lands, as provided in NMSA 1978, §73-13-4, water reverts to the public and is regarded as unappropriated public water." March 2002 Decision at p. 11.

Except as specifically determined and set forth in this letter decision, nothing contained herein shall be deemed or construed as a determination of any matter argued or otherwise set forth in the submissions of counsel in connection with the United States' Motion.

Counsel for the United States, and the State are requested to jointly prepare an order in accordance with this letter decision, obtain approval of other counsel as to form and then submit it to the Court for review, execution and entry in these proceedings.

Counsel for the State is requested to serve a copy of this letter upon all interested counsel, other than those set forth on Exhibit A, and parties appearing *pro se* in connection with this

phase of these proceedings.

Very truly yours,

A handwritten signature in black ink, appearing to read "Harl D. Byrd". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Harl D. Byrd

HDB/jes

cc: To counsel set forth on Exhibit A

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