

Harl D. Byrd

June 5, 2003

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Re: State of New Mexico, ex rel. State Engineer v. Lewis, Nos. 20294 and 22600
Consolidated, Fifth Judicial District - Revised PROPOSED SCHEDULING AND
PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL
FINAL DECREE.

Dear Counsel:

Enclosed is a revised PROPOSED SCHEDULING AND PROCEDURAL ORDER ON
JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE for review and comments of
counsel for the Negotiating Parties.

Please arrange for a presentment hearing by telephone conference call as expeditiously as
possible.

In addition to the proposed revised Scheduling and Procedural Order, I have the following
comments:

- 1) Comments re Exhibits Previously Submitted by the Negotiating Parties.
 - 1) Under the Revised Scheduling and Procedural Order, there is no necessity for an Exhibit "A."

I do not know what forms are being used by counsel for CID concerning withdrawal of objections and consents to entry of partial final decrees.
 - 2) Although reference is made in the proposed Exhibits as to where a form of Statement of Intent to File Objections may be obtained, should a form be included as an exhibit?
 - 3) Old Exhibit "B" **NOTICE TO CID MEMBERS REGARDING PROJECT**

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SETTLEMENT AGREEMENT; OPPORTUNITY TO OBJECT should now become Exhibit "A."

If CID believes that additional notice should be sent to its members and an opportunity afforded to further object, I have no objections to the use of the form of **NOTICE TO CID MEMBERS REGARDING PROJECT SETTLEMENT AGREEMENT; OPPORTUNITY TO OBJECT**; however, I recommend that

1st paragraph, last sentence, change "the" after the word "After" to "an" and change the word "given" to "afforded."

Beginning with the last paragraph, line 4, page 1, the word "Court" should be inserted between the words "District Clerk's" and after the word "District" on line 5. The same changes should be made on page 2 in the portion referring to Ms. Clem and her address, and provide that a copy of the Statement of Intent to File Objections be sent to counsel for the State.

A date should be inserted at the end of the 1st paragraph on page 2.

In the 2nd to the last paragraph on page 2, line 3 and 4, the commas after "Decree" and after the word "Objection," should be deleted. The word "and" should be substituted for the word "as" on line 6 of the same paragraph.

The notice should be executed and mailed by a duly authorized representative of CID. The Court Clerk need not issue the notice.

- 4) **Old Exhibit "C" NOTICE TO BE MAILED TO KNOWN WATER RIGHTS CLAIMANTS ON PECOS RIVER STREAM SYSTEM WHO ARE NOT MEMBERS OF THE CID.**

The Exhibit should be designated Exhibit "B."

In the heading, the word "COURT" should be inserted after the word "DISTRICT."

The sentence after the heading commencing with the words "This notice" should be a new paragraph. A date should be inserted and the word "titled" should be changed to "entitled."

In the next paragraph, 5th line, after "adjudication," insert the word "proceedings."

The District Court Clerk's office for Eddy County in Carlsbad, New Mexico should be included.

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A date should be inserted in the 1st full paragraph on page 2, and the word "Court" inserted between the words "District Clerk," and after the word "District" in the portion setting forth the position and address of Ms. Clem.

Should the notice be issued by the Court Clerk? Should the first full paragraph, page 3, be deleted? Should the notice be mailed by counsel for the State or counsel for the Negotiating Parties?

- 5) **Old Exhibit "D" NOTICE TO BE PUBLISHED IN DESIGNATED NEWSPAPERS** should be designated as Exhibit "C."

In the first full paragraph, a date should be inserted and the words "Counsel for" inserted before the words "the office" in the 1st line of the first full paragraph.

After the notice portion, appearing all in caps on page 1, the 2nd sentence which begins with "This notice" should be a new paragraph and a date inserted.

In the 1st full paragraph, page 2, the "Office of the District Court Clerk in Carlsbad" should be included and the word "Court" should be inserted before each of the words "Clerks."

In the second full paragraph, page 2, the date for filing Statements of Intent to File Objections should be inserted and the word "Court" inserted between the words "District Court" and after "District" in the portion concerning the position and address of Ms. Clem.

On page 3, in the signature portion, set forth for Ms. Clem, the reference to Ms. Clem and her address should be deleted. The notice should be served by counsel for the Negotiating Parties.

The notice should be supplemented and amended as set forth in the revised proposed Scheduling and Procedural Order.

As a matter of interest, and as you're probably aware, the principal participants in the adjudicating proceedings conducted in the northern part of the State aside from the United States and the State included the Storrie Project represented by Paul Kastler, Esq., and Edward Benevidez, Esq., with Northern New Mexico Legal Services, one of the attorneys for the acequias. In the south, O.J. Olsen, Esq. and Kelly Mack Cassels represented several water rights claims, particularly in connection with relation back claims. Obviously, there may be other principal participants or participating counsel who should be served.

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At the presentment hearing, I will be interested in a discussion of issues, if any, regarding the proposed procedure and the binding effect of the proposed Scheduling and Procedural Order on persons not joined as parties and unknown claimants in interest to water in the Pecos River Stream System. See my July 17, 1996 letter, and NMSA 1978, Section 72-4-17 (2003).

Thank you for your cooperation and assistance.

Very truly yours,

Harl D. Byrd

HDB:cj

cc: Steven Hernandez, Esq.
Beverly J. Singleman, Esq.
David W. Gehlert, Esq.
Stuart D. Shanor, Esq.
Fred H. Henninghausen, Esq.
Richard A. Simms, Esq.
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Paul L. Bloom, Esq.
Benjamin Phillips, Esq.
W. T. Martin, Esq.
Arnold J. Olsen, Esq.
B.J. Clem, Clerk of the
5th Judicial District Court

FIFTH JUDICIAL DISTRICT COURT
 COUNTY OF CHAVES
 STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.)	
State Engineer)	
and PECOS VALLEY ARTESIAN)	
CONSERVANCY DISTRICT,)	
Plaintiffs,)	Nos. 20294 and 22600
)	Consolidated
vs.)	
L.T. LEWIS, et al.,)	Honorable Harl D. Byrd
UNITED STATES OF AMERICA,)	District Judge <i>Pro Tempore</i>
Defendants,)	
)	Carlsbad Basin Section
and)	Carlsbad Irrigation District
STATE OF NEW MEXICO, ex rel,)	Sub- Section
State Engineer)	Project (Offer) Phase
and PECOS VALLEY ARTESIAN)	
CONSERVANCY DISTRICT,)	
Plaintiffs,)	
)	
vs.)	
HAGERMAN CANAL CO., et al.,)	
Defendants.)	

**SCHEDULING AND PROCEDURAL ORDER
 ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE**

THIS MATTER comes on for consideration by the Court in connection with the JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE filed March 26, 2003, by the United States of America ("United States"), the State of New Mexico ("State"), the Carlsbad Irrigation District ("CID"), and the Pecos Valley Artesian Conservancy District ("PVACD") (collectively the "Negotiating Parties") ("Negotiating Parties March 2003 Joint Motion") and the JOINT MOTION FOR ENTRY OF SCHEDULING AND PROCEDURAL ORDER ON JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE of the Negotiating Parties filed on May 29, 2003. The Court being sufficiently advised in the premises, ORDERS that:

The following procedure should be and it is hereby established and adopted for the purpose of considering the proposed Partial Final Decree (the "Proposed Partial Final Decree"), with attached Settlement Agreement, filed with the Court by the Negotiating Parties pursuant to the Negotiating Parties March 2003 Joint Motion.

A. SOLICITING AND FILING WITHDRAWALS OF OBJECTIONS AND CONSENTS TO ENTRY OF PROPOSED PARTIAL FINAL DECREE BY CID AND PVACD.

The CID and the PVACD are in the process of soliciting and filing with the Clerk of the Court withdrawals of objections of members of CID and PVACD filed with the Clerk of the Court pertaining to the Stipulated Offer of Judgment in the Project (Offer) Phase filed by the State on June 22, 1994, and obtaining consents from said members to the entry of the Proposed Partial Final Decree. The CID and the PVACD shall complete the process of soliciting and filing such withdrawals within thirty-five days after the entry of this Scheduling and Procedural Order. Upon completion of the process, counsel for CID and PVACD shall file a certificate of service with the Clerk of the Court. Parties who do not file a withdrawal of objections and consent to the entry of the Proposed Partial Final Decree within thirty-five days after the entry of this Scheduling and Procedural Order shall thereafter be subject to the provisions of Paragraph F, below, provided, however, that withdrawals of objections and consents to the entry of the Proposed Partial Final Decree received later than thirty-five days after the entry of this order shall be accepted by the Court as timely filed at any time prior to the entry of the Partial Final Decree.

B. SERVICE OF NOTICES OF JOINT MOTION FOR ENTRY OF PARTIAL FINAL DECREE; OPPORTUNITY TO OBJECT.

1. Notice to Members of the Carlsbad Irrigation District. Counsel for CID shall mail by

first class U.S. mail, postage prepaid, a "NOTICE TO CID MEMBERS REGARDING PROJECT SETTLEMENT AGREEMENT; OPPORTUNITY TO OBJECT" in the form attached hereto as Exhibit A, the content of which is incorporated herein by this reference, to members of CID as shown on the CID's most recent assessment roll no later than thirty-five days after the date of entry of this Scheduling and Procedural Order. Included with the Notice in the mailed packet shall be a copy of the Negotiating Parties' Joint Motion for Entry of Partial Final Decree, together with the proposed Partial Final Decree and the Settlement Agreement between the CID, the PVACD, the United States, and the State (the "Settlement Agreement"), and the Agreement between the New Mexico State Engineer, the New Mexico Interstate Stream Commission, and the Fort Sumner Irrigation District (the "FSID/ISC Agreement"), that the Negotiating Parties have previously filed with the Court. Upon completing the mailing to CID members, counsel for CID shall file an affidavit of such mailing with the Clerk of the Court.

2. Notice to All Defendants and Water Rights Claimants on the Pecos River Stream System Who are Not Members of CID.

Counsel for the State shall mail by first class U. S. mail, postage prepaid, a notice in the form attached hereto as Exhibit B, the content of which is incorporated herein by this reference, no later than thirty-five days after the entry of this Scheduling and Procedural Order to all persons whose names appear on the list attached to the Certificate of Service filed with the Court by counsel for the State on April 4, 1995 (the "April 4, 1995 Service List"), plus any additional persons whose names appear in:

1. Pecos River stream system water rights claim files, other than files identified in the database as domestic well permits filed under NMSA 1978, § 72-12-1 (2003), that have

been abstracted into the State's W.A.T.E.R.S.¹ database as of May 1, 2003.²

2. All water rights claimants whose names appear on a list prepared by the Office of the State Engineer's Office, of water rights claims in the Roswell Artesian Basin ("RAB"), of the Middle Pecos River Pumpers, and on the Black River.
3. All names appearing on a list obtained from the Chaves County Tax Assessor's Office intended to include all irrigators located within the boundaries of the PVACD.³

Upon completion of the mailing of the notice in the form attached as Exhibit B. The State shall file an affidavit of such mailing with the Clerk of the Court.

C. NOTICE BY PUBLICATION TO ALL DEFENDANTS AND ALL PERSONS CLAIMING WATER RIGHTS IN THE PECOS RIVER STREAM SYSTEM, INCLUDING ITS TRIBUTARIES AND UNDERGROUND BASINS, WITHIN THE STATE OF NEW MEXICO AND ALL UNKNOWN PERSONS WHO MAY CLAIM AN INTEREST IN OR THE RIGHT TO USE WATER IN THE PECOS RIVER STREAM SYSTEM. Upon the preparation and filing with the Clerk of the Court of a sworn pleading or affidavit as required by Rule 1-004 H (1) NMRA 2003 and the issuance by the Court clerk of notice of the pendency of action or proceeding, the Negotiating Parties shall cause to be published as legal notices, a notice in the form attached hereto as Exhibit C, once each week for four consecutive weeks, commencing not later than fifteen days following entry of this Scheduling and Procedural Order in the following newspapers: the Carlsbad

¹ "Water Administration Technical Engineering Resource System"

² As of May 1, 2003, the files abstracted into the W.A.T.E.R.S. database are primarily for claims in the Fort Sumner area, and in the Roswell Artesian Basin (the "RAB") from the current date back to the early 1930s.

³ The State will endeavor to eliminate duplicate entries from the lists described above where there is an exact match of names and addresses. The April 4, 1995 list included CID members. As those members will be served separately, the State will endeavor to eliminate CID members from the compiled list where there is an exact match.

Current Argus, the Roswell Daily Record, the Ruidoso News, the Lincoln County News, the De Baca County News, the Santa Rosa News, the Las Vegas Optic, the Albuquerque Journal, and the Santa Fe New Mexican. Upon completion of publication as set forth above, the State, CID, and PVACD shall file a publishers' affidavits of publication with the Clerk of the Court.

D. REPOSITORIES. For the purposes of providing water rights claimants additional notice and opportunity to review the Negotiating Parties March 2003 Joint Motion, the proposed Partial Final Decree, the Settlement Agreement, and the FSID/ISC Agreement, and for the purpose of providing water claimants on the Pecos River Stream System an opportunity to object thereto, counsel for the State is directed to carry out the measures set forth in this Paragraph D.

1. Counsel for the State will place on file with the District Court Clerk's Office for the Fifth Judicial District, the CID and PVACD repositories, the Office of the State Engineer's Roswell District Office, and the State Engineer's Litigation and Adjudication Program office, copies of the Joint Motion for Entry of Partial Final Decree, the proposed Partial Final Decree, the Settlement Agreement, and the FSID/ISC Agreement.

2. From the time of entry of this Scheduling and Procedural Order until the Court has entered its order on the Negotiating Parties' Joint Motion for Entry of Partial Final Decree, the State is directed to re-establish the repositories with the District Court Clerk's Offices in DeBaca County and Guadalupe County,⁴ and is further directed to establish repositories with the District Court Clerk's Offices in San Miguel County and Lincoln County. Such repositories shall be the official repositories of the Court. The State will place on file with those repositories copies of the Joint

⁴ The Guadalupe County Courthouse and the DeBaca County Courthouse repositories were terminated by an Order of the Court entered on February 11, 2003.

Motion for Entry of Partial Final Decree, the proposed Partial Final Decree, the Settlement Agreement, and the FSID/ISC Agreement. After the Court has made its determination on whether to enter the Partial Final Decree in this phase of these proceedings and entered its order on the Joint Motion for Entry of Partial Final Decree, these four repositories shall be discontinued and copies of all documents deposited as herein provided may be destroyed without further order of the Court.

3. The State has posted copies of the Negotiating Parties March 2003 Joint Motion, the proposed Partial Final Decree, the Settlement Agreement, and the FSID/ISC Agreement on the Office of the State Engineer's web site for review by the public. The documents are located at the following web address: "www.state.seo.state.nm.us/hot-topics/index.html" under the heading "Pecos River - Carlsbad Project Settlement". The State is directed to maintain these documents on its web sites at the location described until the Court has entered its order on the Negotiating Parties' Joint Motion for Entry of Partial Final Decree.

The State has informed the Court that it does not have available a current, complete list of all water rights claimants in the Pecos River stream system and that compiling such a list is a time-consuming, expensive process; given frequent changes in the ownership of property and claims to water rights, and there is no means to ensure that such a list will remain accurate or complete once compiled. The Negotiating Parties have represented to the Court that the notice process set forth in Paragraphs B and C above should ensure that broad notice is provided to water rights claimants within the Pecos River stream system of the Negotiating Parties March 2003 Joint Motion and the proposed Partial Final Decree and the Settlement Agreement, particularly to those most likely to be affected by the terms of the proposed decree and settlement, that such notice will provide ample opportunity for interested persons to object to the entry of the Partial Final Decree submitted to the

Court by the Negotiating Parties, should they choose to do so and that the procedures set forth in *Mullane v. Central Hanover Bank & Trust Co., et al*, 339 U.S. 306, 314 (1950) will be complied with and due process requirements met.

E. PERSONS INTENDING TO FILE OBJECTIONS; STATEMENT OF INTENT TO FILE OBJECTION. All persons served with notices provided pursuant to Paragraphs B and C above who intend to file objections to the entry of the Proposed Partial Final Decree, must file them with the Court and serve on counsel with the negotiating parties no later than thirty days after the date of the mailing of the Notice provided by Paragraph B, or thirty days after the last date of publication provided by Paragraph C, a statement declaring their intent to file objections pursuant to the procedure set forth in this Order. Such statements of intent to file objection shall include a residential or business address or other location for service of process. Any person who chooses to file a statement of intent to file objections shall thereafter be subject to the procedures set forth in Paragraph F, below.

F. ORDERS TO SHOW CAUSE, SCHEDULING CONFERENCES, AND HEARINGS ON OBJECTIONS NOT WITHDRAWN. The procedures set forth in this paragraph are designed to expedite the hearings on the Orders to Show Cause to be issued by the Court and the Court's ultimate decisions on any objections made to the entry of a Partial Final Decree. All parties who previously filed objections to the Stipulated Offer of Judgment in the Project (Offer) Phase and who have not subsequently withdrawn such objections and all persons who file statements of intent to file objections in response to the notice set forth in Paragraphs B and C (collectively, the "Objectors") shall comply with the provisions of this Paragraph F.

1. Issuance and Mailing of Orders to Show Cause. If objections to the entry of the

Partial Final Decree remain and have not been withdrawn within thirty-five days after the entry of this Scheduling and Procedural Order, or if any person files a statement of intent to file an objection, the Court will direct that Orders to Show Cause be entered requiring that the remaining Objectors show cause why the Proposed Partial Final Decree should not be made final and binding upon them (the "Orders to Show Cause"). The Orders to Show Cause will include notice of the provisions of this Paragraph F and will direct the Negotiating Parties to serve the Orders to Show Cause upon the remaining Objectors. Service of the Orders to Show Cause shall be made by the Negotiating Parties by first class mail, postage prepaid, to the last known address of the remaining Objectors no later than fifteen days after the issuance of the Orders to Show Cause. Upon the mailing of such notice the Negotiating Parties shall file an affidavit of mailing with the Court. If the Negotiating Parties are unable to locate the whereabouts of an Objector after due inquiry and search, the Negotiating Parties shall ask the Clerk of the Court to issue a notice of the pendency of the Order to Show Cause in accordance with the provisions of Rule 1-004 H NMRA 2003 and counsel for the State shall publish such notice in accordance with the provisions of said Rule.

2. Filing Statement Setting Forth Objections with Specificity. Within thirty days after service of an Order to Show Cause, each Objector shall file with the Court and serve on all parties to the Project (Offer) Phase, a statement setting forth with particularity the grounds for objection to entry of the Partial Final Decree, together with a statement setting forth with particularity how the water rights of the Objector will be adversely affected by the priority, amount, purpose, periods and place of use, together with other conditions as set forth in the Proposed Partial Final Decree.

3. Rule 1-016 Scheduling Order and Pretrial Conferences. After filing of the statements provided for in the preceding sub-paragraph from Objectors, the Court will schedule a scheduling

and prehearing conference as provided by Rule 1-016 NMRA 2003. The conference shall establish a pretrial scheduling order, clarify, simplify and consolidate the issues presented, consolidate hearings on all issues where possible, establish a schedule and procedures for discovery, and address such other matters as may aid in disposition of the objections. The Court will also establish a schedule for hearings on the objections so that hearings will be completed and determinations made on the objections as expeditiously as possible.

4. Dismissal of Objections for Failure to Comply with Procedures Set Forth Herein. If any Objector does not fully comply with the requirements of this Paragraph F, the Negotiating Parties may file a Motion requesting the Court to enter its order dismissing objections for failure to comply with the procedures set forth in this Order. Alternatively, the Court, *sua sponte*, may issue its order dismissing objections for failure to comply with the procedures set forth in this Order.

5. Hearings on Orders to Show Cause. At the hearings on the Orders to Show Cause, the Objector shall bear the initial burden of introducing evidence showing how the water rights of the Objector will be adversely affected by the priority, amount, purpose, periods and place of use, or other matters as set forth in the Proposed Partial Final Decree. The Negotiating Parties shall have the ultimate burden of establishing that the Partial Final Decree should be entered by the Court. If the Court determines that the entry of the Partial Final Decree will adversely affect valid rights of the Objector, the Court shall afford the Negotiating Parties an opportunity to propose terms or conditions in the Proposed Partial Final Decree which would prevent or ameliorate such effect.

G. ENTRY OF PARTIAL FINAL DECREE. Subsequent to completion of hearings on the Orders to Show Cause and issuance of its determinations on such Orders, the Court shall make its decision as to whether to enter the Partial Final Decree in this Phase of these proceedings. The

Partial Final Decree shall include any additional or revised terms and conditions agreed upon by the Negotiating Parties and Objectors, but shall not otherwise be amended by the Court. Nothing contained in this paragraph, however, shall be deemed or construed to prevent the Court from determining that the Proposed Partial Final Decree should or should not be approved by the Court.

Further action by the Court in connection with the Negotiating Parties March 2003 joint Motion shall be deferred until the Court has completed the proceedings contemplated by this Scheduling and Procedural Order. Pending completion of such proceedings and the Court's decision on the Negotiating Parties March 2003 Joint Motion, all proceedings in connection with the Project (Offer) Phase shall be and they are hereby stayed subject to the further order of this Court.

IT IS SO ORDERED.

HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

Approved as to form:

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