

FIFTH JUDICIAL DISTRICT COURT
CHAVES COUNTY NEW MEXICO
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FIFTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

2012 SEP 11 PM 3:18

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

RECEIVED BY DISTRICT CLERK
DISTRICT COURT CLERK
Nos. 20294 and 22600
Consolidated

vs.

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

Hon. James J. Wechsler
Presiding Judge

and

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

Carlsbad Irrigation District
Membership Phase

CV-WH-03-01

vs.

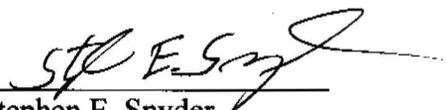
HAGERMAN CANAL CO., et al,
Defendants.

**SPECIAL MASTER’S REPORT RECOMMENDING THAT COURT ENTER
ORDER ESTABLISHING PROCEDURES FOR CONDUCTING *INTER SE*
PROCEEDINGS AND ADJUDICATING OMITTED SUPPLEMENTAL RIGHTS
IN THE CARLSBAD IRRIGATION DISTRICT**

THIS MATTER comes before the Special Master on a motion entitled “Motion to Establish Procedure for Conducting *Inter Se* Proceedings and Adjudicating Supplemental Rights in the Membership Phase of the CID Section of the Pecos River Stream System Adjudication” filed on August 23, 2012 by the State of New Mexico, *ex rel* State Engineer (the “State”). The State submitted to the Special Master with the motion a proposed order entitled “Order Establishing Procedure for Conducting *Inter Se* Proceedings and Adjudicating Omitted Supplemental Rights in the Membership Phase of the CID Section of the Pecos River Stream System Adjudication” (the “Proposed Order”)

The Special Master conducted several working sessions with the State for the purpose of designing a procedure that would allow the State to conduct *inter se* proceedings in the Carlsbad Irrigation District (the "CID") while at the same time providing the members of the CID whose subfiles orders do not adjudicate groundwater as a supplemental supply to their surface rights with the opportunity to assert a claim for such a right. Counsel for the CID and the Pecos Valley Artesian Conservancy District (the "PVACD") attended the working sessions, in person or by telephone. Counsel for the other parties who have appeared in the Membership Phase of the CID were provided with notice of the working sessions but did not attend. The Proposed Order is the final product of those working sessions.

The Proposed Order represents what the Special Master believes to be a fair and relatively efficient procedure for conducting an *inter se* in the CID while at the same time allowing the Court to adjudicate claims for supplemental rights that may have been omitted from certain subfiles orders in the CID. Accordingly, the Special Master recommends that the Court enter the Proposed Order. Counsel for the State, the CID and the PVACD have authorized the Special Master to inform the Court that they concur with his recommendation.



Stephen E. Snyder
Special Master
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STATE OF NEW MEXICO
COUNTY OF CHAVES
FIFTH JUDICIAL DISTRICT COURT

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. James J. Wechsler
Presiding Judge

Carlsbad Irrigation District Section,
Membership Phase

CV-WH-03-01

COPY

**ORDER ESTABLISHING PROCEDURES FOR CONDUCTING *INTER SE*
PROCEEDINGS AND ADJUDICATING OMITTED SUPPLEMENTAL RIGHTS IN
THE MEMBERSHIP PHASE OF THE CID SECTION OF THE PECOS RIVER
STREAM SYSTEM ADJUDICATION**

THIS MATTER comes before the Court on the State of New Mexico's Motion to
Establish Procedures for Conducting *Inter Se* Proceedings and Adjudicating Omitted
Supplemental Rights in the Membership Phase of the CID Section of the Pecos River Stream
System Adjudication filed August 23, 2012.

The COURT, after considering the State's Motion and reviewing the Court's file, FINDS AND CONCLUDES that:

A. On December 10, 2004, the Court entered a Partial Final Decree ("Project Phase Decree") adjudicating between and among the United States, the State of New Mexico, *ex rel.* State Engineer (the "State"), the Carlsbad Irrigation District (the "CID"), the Pecos Valley Artesian Conservancy District (the "PVACD"), and all persons claiming water rights in the CID: (a) the maximum allowable annual diversion and storage rights of the CID and the United States regarding certain waters of the Pecos River Stream System and (b) the right of the CID to deliver surface water to its members.¹ Prior to entry of the Project Phase Decree, the Court had determined in a series of orders (the "Threshold Orders") that the members are the beneficial owners of Project water rights but that the nature and extent of their beneficial interest is governed by certain federal and state laws, the consent or other final orders in all subfile proceedings, the rules and regulations of the CID, and any applicable contracts among the CID and its members. The Project Phase Decree and the Threshold Orders are binding on the members of CID, their successors in interest, and any other persons claiming water rights in the CID. In addition, under the Project Phase Decree, no party to the Settlement shall present any claim or objection in the Membership Phase or any *Inter Se* phase of the adjudication that is inconsistent with the Project Phase Decree.²

B. The Project Phase Decree determined two elements of the surface water rights of the members: priority and amount of water. The remaining elements of the members' surface water rights (the "Remaining Elements") and the members' rights to groundwater as a

¹ Attached to the Project Phase Decree as an exhibit is a Settlement Agreement ("Settlement") executed on March 25, 2003 among the State, the CID, the United States, and the PVACD. The Settlement Agreement is a part of and incorporated into the Project Phase Decree.

² Settlement Parties' Joint Declaration of Settlement Implementation entered June 11, 2009.

supplemental supply to surface water rights (“supplemental rights”) remained for determination in the so-called “Membership Phase” of the adjudication of the CID Section of the Pecos River. In the Membership Phase, the State joined the members as defendants and adjudicated, by means of consent orders, default judgments, or other final orders (collectively “Subfile Orders”), each member’s individual water rights. The Subfile Orders are binding on the members who were joined as defendants and their successors in interest. For ease of reference, the term “Members” refers to the members of CID who were joined as defendants and their successors in interest.

C. The Court has entered Subfile Orders in all subfile proceedings in the CID. Those orders adjudicate, as between the State and each Member, the Remaining Elements of the Members’ surface water rights and supplemental rights associated with a Member’s surface rights. As stated, the other elements of the Members’ surface water rights were adjudicated by the Project Phase Decree.

D. What remains for determination in the CID Section is whether the Subfile Orders adjudicating each Member’s water rights are binding on all Members. This determination is to be made in an *Inter Se* Proceeding concerning the CID Section initiated by the State. The State has informed the Court that, as it was preparing to initiate an *Inter Se* Proceeding, it discovered that the Subfile Orders of some Members did not adjudicate a supplemental right even though those Members may in fact have been entitled to such a right.

E. The State is willing to consent to the amendment of the Subfile Orders that do not adjudicate a supplemental right for those Members who are entitled to such a right. However, the State is concerned that any significant delay in the commencement of *Inter Se* Proceedings pending an evaluation of omitted supplemental rights would be inefficient.

F. The delay in *Inter Se* Proceedings pending the adjudication of any supplemental

rights omitted from Subfile Orders can be avoided by:

(1) Adjudicating as between the State and each affected Member, the Member's claim for an omitted supplemental right while *Inter Se* Proceedings are on-going; and

(2) Prior to the conclusion of *Inter Se* and the entry of a Partial Final Decree, providing all Members with an opportunity to object to any omitted supplemental rights adjudicated to certain Members during the *Inter Se* process.

IT IS THEREFORE ORDERED THAT:

1. The State shall initiate an *Inter Se* Proceeding for the purpose of adjudicating each Member's water rights as against all other Members and in that *Inter Se* Proceeding provide Members whose supplemental rights were omitted with the opportunity to assert those rights.

The *Inter Se* Proceeding shall be conducted in three phases:

- In Phase One, the Members will be provided with notice of and an opportunity to object to the adjudication of the Remaining Elements and supplemental rights as set forth in all Subfile Orders entered as of the date of this Order. For ease of reference, the rights to the use of water adjudicated by Subfile Orders entered to date are referred to as the "Presently Adjudicated Rights."
- In Phase Two, Members whose Subfile Orders do not include a supplemental right may assert such rights and those omitted supplemental rights found to be valid will be adjudicated as between the Member and the State.
- In Phase Three, the Members and all other persons claiming water rights in the CID will be provided with notice of and an opportunity to object to any additional supplemental rights that are adjudicated as between the State and a Member during Phase Two.

Phase One and Two shall proceed concurrently, followed by Phase Three. After all *Inter Se* Objections have been resolved, the Court will enter a Partial Final Decree adjudicating all water rights in the CID Section as among all persons claiming an interest in those water rights.

A. Phase One: *Inter Se* for Presently Adjudicated Rights

2. The State shall commence *Inter Se* Proceedings by filing a Motion for Entry of Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication (the “Motion for Decree”). In the Motion for Decree, the State shall request that the Court enter a Partial Final Decree adjudicating all surface water rights and all supplemental rights associated with those surface rights. The State shall not serve the Motion for Decree. Rather, notice of the filing of the Motion for Decree and of the time for filing *Inter Se* Objections shall be as provided in this Order.

3. Attached as exhibits to the Motion for Decree shall be (a) a Proposed Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication (the “Proposed Decree”) and (b) Appendices summarizing the Presently Adjudicated Rights. Specifically, the Appendices to the Motion, a description of which is provided by Exhibit A to this Order, shall:

(a) Summarize the surface water rights and supplemental rights adjudicated by each Subfile Order entered in the Membership Phase as of the date of this Order;

(b) Clearly differentiate between the provisions of the Subfile Orders that are not subject to objection during *Inter Se* because they were determined by the Threshold Orders and Project Phase Decree, and the provisions to which *Inter Se* Objections may be

filed because they relate to the Remaining Elements or to supplemental rights adjudicated by the Subfile Orders.

The Appendices, as subsequently modified to reflect what transpires during *Inter Se*, will serve as appendices to the Partial Final Decree to be entered by the Court at the conclusion of *Inter Se*. In the event of any conflict between the Appendices and the Subfile Orders, the Subfile Orders control.

4. All Members shall be notified of the opportunity to object to the water rights of other Members in accordance with the following procedure:

(a) The State shall provide notice of the Proposed Decree by mail and by publication. The State shall provide notice by mail by preparing a Notice of Proposed Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication (the "*Inter Se* Notice"). The State shall serve the *Inter Se* Notice, together with a Notice of Filing of the Motion for Decree, and copies of a form for making *Inter Se* Objections, and the Notice of Intent to Participate form described in Paragraph 5, below, by first class mail to the last known address of each Member who was adjudicated a water right, as listed in the Court's records, and, in addition, to the current Members, as listed on the CID Tax Roll for 2012. The State shall file a Certificate of Service with the Court following service of the *Inter Se* Notice. The *Inter Se* Notice shall be in the form of Exhibit B to this Order.

(b) The State shall also provide notice of the Proposed Decree by publishing the Notice to be Published: Notice of Filing of Proposed Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of

the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication, which is attached hereto as Exhibit C (the "Published Notice") once each week for four consecutive weeks in the Carlsbad Current Argus, which the Court finds is a newspaper of general circulation in the CID, the City of Carlsbad, and Eddy County, New Mexico. The State shall file a Proof of Publication with the Court following publication of the Published Notice.

5. The *Inter Se* Notice and the Published Notice shall inform all persons, known and unknown:

(a) They have a right to object to the determination of water rights described in the Proposed Decree and offer evidence in support of their *Inter Se* Objections, that this *Inter Se* Proceeding will be their only opportunity to file objections to the determination of water rights described in the Proposed Decree, and that all *Inter Se* Objections to the Proposed Decree must be filed by November 19, 2012.

(b) On or before December 19, 2012, the State will (i) serve a copy by certified mail of the applicable *Inter Se* Objection on each Member whose subfile is the subject of an objection and (ii) file a Report with the Court identifying each Subfile in which an *Inter Se* Objection is filed and make copies of the Report available for inspection at the locations described below in Paragraph 7.

(c) Members whose subfiles are the subject of an objection and all persons who filed an *Inter Se* Objection in that subfile must participate in court proceedings to resolve the objection.

(d) Members may (but are not required to) participate in any subfile proceeding in which an *Inter Se* Objection was filed by another member provided they

file a Notice of Intent to Participate identifying the specific subfile in which they wish to participate by January 18, 2013. Members will only be notified by certified mail if an objection is filed in their own subfile but can determine whether an objection has been filed in another subfile by examining the Report filed by the State.

6. A form entitled *Inter Se* Objection to Water Rights Used Within the CID (the “*Inter Se* Objection”) that may be used for filing *Inter Se* Objections is attached as Exhibit D to this Order, and a form entitled Notice of Intent to Participate which members may use to give notice of their intent to participate in the resolution of an *Inter Se* Objection filed by another member is attached as Exhibit E. Members who do not file an objection, whose subfiles are not the subject of an objection, and who do not file a Notice of Intent to Participate will receive no further notice of any *Inter Se* Proceedings except as set forth in this Order. Regardless of their participation, all members will be bound by the determinations and orders of the Court in the *Inter Se* Proceedings. Copies of the *Inter Se* Objection and Notice of Intent to Participate forms shall be included with and served on the Members as listed in the court record and on the current Members, as listed on the CID Tax Roll for 2012, when the *Inter Se* Notice is served. In addition, blank *Inter Se* Objection forms and Notice of Intent to Participate forms shall be available to the public with the Proposed Decree at the Office of the State Engineer (“OSE”) website and at the locations described in Paragraph 7 below.

7. The Proposed Decree, including Appendices and hydrographic survey maps showing the location of all rights described in the Appendices, shall be posted on the OSE website at <http://www.ose.state.nm.us/LAP/CID/decree.html>, and paper copies shall be available for public inspection at the offices of the CID in Carlsbad, the State Engineer’s Offices in Roswell and Santa Fe, the Eddy County Court House in Carlsbad, and the Chaves County Court

House in Roswell.

8. All *Inter Se* Objections must be filed by November 19, 2012, and the Court will not consider any objections filed after that date, except on a showing of excusable neglect. *Inter Se* Objections may be filed by successors in interest to Members who were joined as defendants without first being substituted as a party as required by Rule 1-026 NMRA, but the objections may not be prosecuted until the successor is substituted as a party.

9. On or before December 19, 2012, the State shall file with the Court a Report summarizing all timely filed *Inter Se* Objections and make the Report available for public inspection at the repositories and website described in Paragraph 7 above. In addition, the State shall serve by that same date by certified mail, return receipt requested, a copy of the applicable *Inter Se* Objection on each Member whose subfile is the subject of an objection.

10. Members may participate in the resolution of *Inter Se* Objections filed in subfiles in which they did not file an objection provided they file a Notice of Intent to Participate with the Court by January 18, 2013. As stated, Notices of Intent to Participate shall be in the form of Exhibit E to this Order and copies of the form shall be available for the Members use at all document repositories identified in Paragraph 7. In addition, copies shall be available for downloading from the OSE website at <http://www.ose.state.nm.us/LAP/CID/decreed.html>.

11. After the deadline for filing Notices of Intent to Participate has expired, the Court will set a Scheduling Conference in the Fifth Judicial District Court in Carlsbad for the purpose of establishing the procedure to be used for resolving *Inter Se* Objections. The State shall serve a notice of the Scheduling Conference at least 30 days prior to the conference on the persons who were the subfile claimants in the subfiles in which an objection is filed, their successors in interest, all persons filing an *Inter Se* Objection, and all persons filing a Notice of Intent to

Participate. Attendance at the Scheduling Conference is mandatory and the Court, except for good cause shown, will deny the objection of any person who fails to attend the Scheduling Conference.

12. The Court will conduct one or more contested proceedings to resolve any objections filed but will not enter a Partial Final Decree for the CID until Phase 3 of the *Inter Se* Proceeding is concluded. The only persons who may participate in a contested proceeding for the resolution of an *Inter Se* Objection are the persons who file an *Inter Se* Objection, the Member whose subfile was subject of an objection, and any other Members who filed a Notice of Intent to Participate by the required date. Regardless of their participation in the *Inter Se* Proceedings, all Members or other persons claiming water rights in the CID shall be bound by the outcome of the contested proceedings to resolve any *Inter Se* Objections.

B. Phase Two: Adjudication of Omitted Supplemental Rights

13. Only those Members whose Subfile Orders **do not** contain a supplemental right may assert a claim for such a right provided they (a) file with the Court on or before November 19, 2012, using a form provided by the State, a Rule 1-060 NMRA Motion requesting that their Subfile Orders be amended to adjudicate such a right and (b) otherwise comply with the requirement of this Order. Members whose Subfile Orders do contain a supplemental right may not assert a claim for an omitted supplemental right. Members who are successors in interest to Members who were joined as defendants may file Rule 1-060 Motions without being first substituted as a party as required by Rule 1-026, but may not prosecute their motions until they are substituted as a party.

14. On or before October 15, 2012, the State shall serve all Members in subfiles that **do not** contain a supplemental right with (a) a Notice of Opportunity to Assert Omitted Claim for

Right to Groundwater as a Supplemental Supply to Surface Water Rights in the CID (the “Supplemental Claim Notice”) and (b) a form for the Member’s use when asserting such a claim entitled Rule 1-060(B)(6) NMRA Motion Requesting Adjudication of Omitted Supplemental Right (the “Supplemental Right Motion”). Service shall be by first class mail to the last known address of each Member, as listed in the Court’s records, who is a current water right owner of a subfile with a possibly omitted supplemental right, and, in addition, to the Members who are current water right owners of subfiles with possibly omitted supplemental rights, as determined from the 2012 Tax Rolls of the Carlsbad Irrigation District. The Supplemental Claim Notice shall be in the form of Exhibit F to this Order and the Supplemental Right Motion shall be in the form of Exhibit G.

15. In addition to filing a Supplemental Right Motion by the required date, all Members asserting a claim for an omitted supplemental right must, within thirty days after they file their Motion, deliver for inspection and copying by the State, all deeds, abstracts of title, and other documents of title relevant to determining whether a supplemental right should be adjudicated for the Member’s subfile. The documents must be submitted to the Roswell Office of the State Engineer, 1900 West Second Street Roswell, New Mexico 88201 or to a representative of the Roswell Office at a field office hosted each Monday, except holidays, on the second floor of the Eddy County Office Complex, 101 West Greene Street, Carlsbad New Mexico.

16. After a Member files a Supplemental Right Motion and otherwise complies with Paragraph 14 above, the State shall investigate whether the Member’s claim to a supplemental right is valid. If the State determines the claim is valid, the Member will be contacted by the State and will be required to complete and file a Change of Ownership Form with the Office of

the State Engineer using the form prescribed by the State Engineer. Upon filing of the Change of Ownership, the State shall prepare a proposed Rule 1-060 Order granting the Supplemental Right Motion and adjudicating the Member a right to supplemental groundwater; the Member and the State shall sign the proposed order; and the State shall present the proposed order to the Court. If the Order is otherwise satisfactory, the Court will enter the Order, subject to the other Members' right to assert *Inter Se* Objections as set forth below. If the State determines the claim is not valid, the State shall file a response objecting to the Supplemental Right Motion and the Court will resolve the objection.

17. Except for good cause shown, the Court will deny the Supplemental Right Motion of any Member who does not file the required Change of Ownership form or does not produce the required documents within the prescribed 30-day period.

C. Phase 3: *Inter Se* for Supplemental Rights Adjudicated in Phase 2

18. After all Rule 1-060 Motions are resolved, the Court will set a Scheduling Conference in the Fifth Judicial District Court in Carlsbad for the purpose of establishing the procedures to be used for giving notice to all Members and persons claiming water rights in the CID of the opportunity to file *Inter Se* Objections to any supplemental rights adjudicated as between the State and a Member in Phase 2 of this *Inter Se*. The procedures to be followed and forms to be used will be similar to the forms used in Phase 1 but the Court may modify those procedures and forms, if necessary to address any issues that are unique to Phase 3.

19. The Court will enter a Partial Final Decree adjudicating all water rights in the CID as against all persons claiming a water right in the CID after Phase 3 is completed.

D. Miscellaneous

20. The following exhibits are attached to and by this reference made a part of this

Order:

Exhibit A: Description of Appendices Summarizing Presently Adjudicated Rights

Exhibit B: Notice of Proposed Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication

Exhibit C: Notice to be Published: Notice of Filing of Proposed Partial Final Judgment and Decree on Surface Water Rights and Supplemental Rights in the Membership Phase of the Carlsbad Irrigation District Section of the Pecos River Stream System Adjudication

Exhibit D: *Inter Se* Objection to Water Rights Used Within the CID

Exhibit E: Notice of Intent to Participate

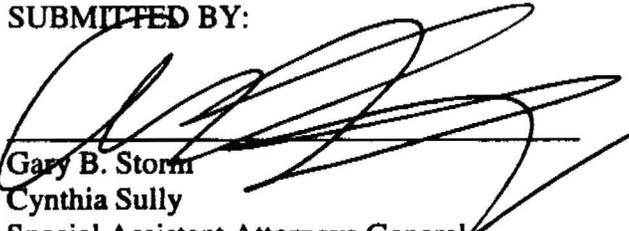
Exhibit F: Notice of Deadline to Assert Claim for Supplemental Right

Exhibit G: Rule 1-060(B)(6) NMRA Motion Requesting Adjudication of Omitted Supplemental Right

IT IS SO ORDERED.

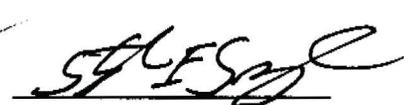
James J. Wechsler
Presiding Judge

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