

**STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT**

**State of New Mexico, ex rel.** )  
**Office of the State Engineer,** )  
**Plaintiff,** )  
v. )  
 )  
**Elephant Butte Irrigation District, et al.,** )  
**Defendants.** )

**No. CV - 96 - 888  
Jerald A. Valentine  
District Judge**

**FIFTH AMENDED ORDER REGARDING STREAM ADJUDICATION PROCEDURES,  
FILED AUGUST 15, 2008**

**THIS MATTER** having come before the Court following briefing and oral argument on the need for sub-file adjudication procedures, the Court having considered the matter, and being fully advised in the premises,

**FINDS:**

The following Orders should be superseded:

1. The Third Amended Order Regarding Stream Adjudication Procedures, Sub-file Adjudication Procedures, filed May 26, 2000.
2. The original Fourth Amended Order Regarding Stream Adjudication Procedures, filed May 10, 2006.
3. The Fourth Amended Order Regarding Stream Adjudication Procedures, Revised October 16, 2007.
4. The Fourth Amended Order Regarding Stream Adjudication Procedures, Revised June 10, 2008.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that this Fifth Amended Order Regarding Stream Adjudication Procedures is hereby adopted and the preceding Orders superseded.

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A. **Definitions.** Except as otherwise defined below, all words in this Order shall be given their customary and accepted meanings.

1. **"Expedited *Inter Se* Proceeding"** is a proceeding in which the Court may resolve all issues regarding a specific water right, including objections of other water right owners, before all sub-file proceedings have been resolved.
2. **"Form A, Answer"** is a form which a claimant may use to respond to the Summons and the General Adjudication Complaint.
3. **"Form B, Notice of Intent to Participate"** is the form that the claimant shall use to participate in Court hearings regarding expedited *inter se* and stream system issues.
4. **"Form C, Objection to Offer of Judgment/Stipulated Sub-file Order"** is a form that the claimant may use to object to the State's Offer of Judgment/Stipulated Sub-file Order.
5. **"Form D, Request for Mediation"** is the form the claimant may use to initiate mediation when agreement cannot be reached with the State.
6. **"General Adjudication Complaint"** means the Amended Complaint filed in this matter on December 19, 1997. The State's mailing of the General Adjudication Complaint and a Summons joins the claimant as a party to the adjudication.
7. **"*Inter Se*"** is a proceeding in which water right claimants can object to the water right of any other claimant. The *inter se* phase begins after all sub-files have been adjudicated
8. **"Monthly Report"** is the Monthly Stream System Issue and Expedited *Inter Se*

Report prepared by the Court pursuant to the Case Management Order  
Authorizing Notice by a Monthly Report filed March 19, 2007.

9. **"Offers of Judgment/Stipulated Sub-file Order"** are the State's proposals for the Court's determination of claimants' water rights based on the final revised hydrographic survey.
10. **"Stream System Issue"** is any issue, which when resolved, could affect all or a significant number of claimants.

**B. Applicability of the Rules of Civil Procedure.**

Unless expressly modified by this Order, the Rule of Civil Procedures and the Local Rules of the Third Judicial District shall apply.

- C. Continued Joinder of Water Right Claimants.** If the State identifies additional water right claimants, it shall promptly join them by mailing a packet containing a Summons and General Adjudication Complaint and the Offer of Judgment/Stipulated Sub-file Order, along with a copy of the Notice to Water Right Claimants Receiving an Offer of Judgment, a blank Form C, Objection to Offer of Judgment and a Letter of Explanation.

**D. Offers of Judgment/Stipulated Sub-file Order.**

1. The State shall review the hydrographic survey, revise it as necessary, and prepare Offers of Judgment with proposed Stipulated Sub-file Orders for all claimants who have not heretofore been mailed Offers of Judgment.
2. The Stipulated Sub-file Order shall describe the elements of the claimant's water rights as determined by the final hydrographic survey, as revised.

3. The State shall mail to the claimant, the Offer of Judgment/Stipulated Sub-file Order, along with a copy of the Notice to Water Right Claimants Receiving an Offer of Judgment, and a blank Form C, Objection to Offer of Judgment.

4. The State may serve Offers of Judgment/Stipulated Sub-file Orders with the other documents at separate times on claimants who have more than one sub-file.

**E. Coordination with the Joe Stell Ombudsman Program.**

1. The State shall provide the Ombudsman Program with a form Offer of Judgment/Stipulated Sub-file Order for each type of water right to be adjudicated. It shall send the Ombudsman Program a list of claimants and relevant details as the Offer of Judgment/Stipulated Sub-file Order are mailed to claimants.

2. Upon receipt of the State's list, the Ombudsman Program has agreed to mail a postcard providing Ombudsman contact information to each claimant within thirty (30) days of the mailing the Offer of Judgment/Stipulated Sub-file Order to the claimant.

**F. Agreement, Objection or No Response to Offer of Judgment/ Stipulated Sub-file Order;**

1. The claimant shall have forty-five (45) days to respond to the State's Offer of Judgment/Stipulated Sub-file Order.

2. If the claimant agrees with the description of his/her water right set out in the proposed Stipulated Sub-file Order, the claimant shall approve the Stipulated Sub-file Order by signing and return it to the State. The State shall approve the Stipulated Sub-file Order by signing and forward it to the Court. If the Court approves and enters the

Stipulated Sub-file Order, it will forward a copy of the filed-stamped Stipulated Sub-file Order to the State, and the State shall mail a file-stamped copy to the claimant.

3. If the claimant disputes the description of the water right in the Offer of Judgment/Stipulated Sub-file Order, he/she shall object to the State's Offer by filing Form C or other Response within forty-five (45) days of the date of State's mailing the Offer to the claimant.

4. If after forty-five (45) days the claimant does not timely respond to the Offer of Judgment/Stipulated Sub-file Order, the State shall submit a Sub-file Order to the Court. The description of the water right shall be the same as that proposed in the Stipulated Sub-file Order. If the Court approves and enters the Sub-file Order, it will sent the State a file-stamped copy and the State shall mail a file-stamped copy to the non- responding claimant.

**G. Sub-file Proceedings When Claimant Files Objections.**

1. The filing of Form C or other Response objecting to the Offer of Judgment/Stipulated Sub-file Order description of a water right shall commence sub-file litigation to determine the water right.

2. In the response, the claimant shall state all objections he or she may have including objections, if any, to each of the elements of the water rights as they are described in the Offer of Judgment/Stipulated Sub-file Order.

3. Only those elements of the water right to which there is a specific objection will be at issue. Each element for which the claimant has not stated a specific objection shall be determined by the description in the State's proposed Stipulated Sub-file Order.

4. The Court will make available to the State and the Ombudsman Program a copy of each Form C or other Response filed by claimant.
5. Upon obtaining a copy of a claimant's objection, the Ombudsman Program has agreed to call the claimant to provide information about the adjudication process, and within thirty (30) days of the filing of the objection, to submit a report to the Court and the State.
6. If the Ombudsman Program reports to the Court that the objecting claimant still does not accept the Offer, or the Program is unable to contact the claimant, the State will have sixty (60) days from the date of the Ombudsman Program Report in which to contact the objecting claimant and negotiate informally to resolve any issues. On motion for good cause shown, the Court may enlarge the period for informal negotiation.
7. If the State is able to resolve objections to the Offer of Judgment/Stipulated Sub-file Order with the claimant in informal sessions, the State shall prepare a Stipulated Sub-file Order incorporating the parties' agreement. After obtaining the claimant's signature, the State shall sign and submit the Order to the Court for approval and entry. The State shall mail a file-stamped copy to the claimant.
8. If the State is unable to resolve objections, the Court will refer the matter to mediation pursuant to Section M, below.
9. If mediation is successful, the State shall proceed pursuant to Paragraph 7, above.
10. If mediation is unsuccessful, the mediator shall mail Notice of Termination of the Mediation to the Court's ADR Coordinator.

11. After mediation has been terminated, the Court may refer the sub-file proceeding to a Referee who shall assist the Court in trial preparation.
12. The Court may refer the matter to a special master. After the Court has referred the sub-file to a Special Master, references in this Order to "the Court" shall be deemed to apply to the Special Master.
13. Preparation for trial:
  - a. Within thirty (30) days after the Notice of Termination of mediation is mailed, the claimant and the State shall file a Joint Scheduling Report as explained in Local Rule LR-3-502 and mail a copy to the Court.
  - b. If parties cannot agree on a scheduling report, each shall submit a scheduling report and mail to the Court and opposing party. Alternatively, the parties shall file a request for scheduling conference and mail a copy of the request to the Court and opposing party.
  - c. After review of the scheduling reports or after conference with the parties, the Court will enter a Scheduling Order.
  - d. If the parties do not timely submit scheduling reports or request a scheduling conference, the Court *sui sponte* may file a Scheduling Order.
  - e. The Scheduling Order shall set the trial date to adjudicate the water rights at issue and set appropriate pre-trial deadlines.
14. Service of filed papers in sub-file proceedings shall be limited to the claimant whose water right is at issue, any party who has been joined or who has intervened in the sub-file proceeding, and the State.



15. After trial on the merits for disputed sub-files, the State shall prepare a Sub-file Order obtain the signatures of the claimant approving the form and forward to the Court.

16. The Court will enter the Order or set a hearing to resolve disputes over the form of order pursuant to Local Rules of the Third Judicial District. After the Court approves and enters the Order, the State shall mail a filed stamped copy to the claimant.

**H. Schedule for Serving Offers of Judgment.** The State shall serve Offers of Judgment on claimants joined since March 2007 pursuant to the following schedule:

1. 150 Offers of Judgment by September 1, 2008 and another 150 Offers of Judgment by December 10, 2008.

2. On Thursday December 10, 2008 at 1:30 pm, the next Status Conference scheduled after entry of this Order, the State shall propose an expedited schedule for serving the remaining Offers of Judgment/Stipulated Sub-file Orders.

**I. Inter Se Proceedings.**

1. Sub-file Orders are subject to the *inter se* phase of the adjudication process.

2. *Inter se* proceedings typically begin after all Sub-file Orders have been entered.

3. Before the *inter se* phase begins, the Court will enter a Case Management Order controlling *inter se* procedures that are not expressly stated in this Order.

4. If a sub-file Order is modified as a result of the *inter se* phase of the adjudication, parties to the *inter se* proceeding may appeal those *inter se* issues decided by the Court. A water right owner may not take an appeal from a non-modified Sub-file Order, but an appeal may be taken by those who were not parties to the original sub-file proceeding.

**J. Expedited Inter Se and Stream System Issue Proceedings.** An expedited *inter se*

proceeding may be commenced before all sub-file orders have been entered. Expedited *inter se* proceedings and stream system issue proceedings shall be governed by the Case Management Order Authorizing Notice by a Monthly Report filed March 19, 2007. A claimant must file Form B, Notice of Intent to Participate if he/she intends to participate in these types of proceedings.

**K. Limitation for Legal Entities to Participate Without Counsel.** All legal entities such as trusts, partnerships, and corporations which otherwise could not represent themselves without an attorney, may answer and file other responsive pleadings without an attorney. However, in any hearing where relief or action of the Court is requested, such entities shall not be permitted to participate either by filing motions, memoranda, or briefs or making an oral argument without an attorney.

**L. Claimant's Obligations to Keep Address and Ownership Records Up to Date.**

1. Once joined, all claimants shall timely file a Notice of address and telephone changes and mail a copy of the Notice to the State. If a claimant does not file and mail the Notice of change of address to the State, all papers mailed to the claimant's last known address will be effective service.

2. In case of any transfer of interest in the water right, the new owner shall file a Notice of the transfer. If the new owner does not file a Notice of the Transfer, the adjudication will proceed against the former owner and the new owner will be bound by the decisions of the Court.

**M. Notice of Adjudication of Additional Water Rights.** If claimants already joined as parties claim additional water rights, the State shall mail to these claimants Offers of

Judgment/Stipulated Sub-file Order addressing the additional claims pursuant to a schedule determined by the Court. Thereafter, the same procedures as set out herein shall control.

**N. Joinder of Applicant After Administrative Proceeding.**

1. If the State approves a new or pending application for new appropriations of water and there is no appeal, the State shall join the applicant as a party to the adjudication and assign a case number and sub-file number. A Sub-file Order shall be drafted by the State and submitted to the Court for approval incorporating the terms and conditions of the permit, subject to all applicable provisions of New Mexico law.

2. Appeals to the District Court from final administrative decisions of the State Engineer on new or pending application for new appropriations of water in the Lower Rio Grande Basin stream system shall be consolidated with this Adjudication as follows:

a. Within ten (10) days after the Notice of Appeal is filed, the State shall prepare and file documents to consolidate the appeal with the adjudication. The State shall assign a case number and a sub-file number, and the applicant shall be joined as a party in the adjudication.

b. This procedure shall not alter or amend the claims or defenses of any party to the administrative proceedings.

c. The approved or appealed applications to be consolidated with this adjudication shall not include the following categories of water rights applications:

i. applications for supplemental wells or replacement wells;

- ii. applications for changes in use as set forth in NMSA 1978, § 72-12-7 (1997), a category which includes changes in purpose or place of use or in point of diversions;
  - iii. transfers of offset rights; and
  - iv. administrative proceedings involving return flow plans.
3. After consolidation, all objecting parties to an appeal from a final administrative decision of the State on applications to appropriate water shall participate in the Court-mandated mediation process.
4. If the mediation is unsuccessful, the State and the appealing claimant shall confer and file either a joint Scheduling Report or separate Reports if they cannot agree. The Court will set a trial *de novo* based on the Scheduling Report(s). On a Motion for good cause shown, the Court may grant the right to intervene in the trial *de novo* to other persons who have a statutory or constitutional right.

**O. Court-Annexed Mediation for Sub-file Proceedings.**

1. At every status conference, the State shall file a Report with the Court explaining the status of all sub-files for which Offers of Judgment/Stipulated Sub-file Orders have been served but no Sub-file Order has been entered.
2. After the State's report at the Status Conference, the Court will refer to mediation all cases for which claimants have filed objections to the proposed Stipulated Sub-file Order and the time authorized in this Order for informal negotiation has expired.
3. The ADR staff will select a mediator from the Court's list of trained mediators

and notify the selected mediator. The ADR staff will mail the Offer of Judgment/  
Stipulated Sub-file Order, Form C and other relevant documents to the mediator. The  
mediator shall set the time, date, and place of the mediation and notify the claimant and  
the State.

4. The mediation shall be concluded within sixty (60) days after the entry of the  
Order of referral. The mediator is authorized to approve and grant one extension without  
an additional order of the Court. If the mediator grants an extension, the mediator shall  
file a Report with the Court explaining the reason for the extension, how long an  
extension was granted and the mediator's estimate of when mediation will be concluded.  
Any further extensions may only be granted by leave of Court.

5. The participants in such mediation shall be the mediator, the claimant,  
representative of the State with authority to negotiate, and the parties' respective counsel.  
Persons with technical expertise or witnesses that can assist the meditation may also  
participate.

6. The fees for mediation services and who will pay the fees will be determined by  
the Court.

7. If the mediation is successful, the parties shall sign the Stipulated Sub-file Order,  
and the State shall submit it to the Court for approval and entry.

8. If the mediation is unsuccessful, the mediator shall file a Notice of Termination  
with a Certificate of Mailing and mail a copy to the claimant, the State, and the ADR staff  
within thirty (30) days following the conclusion of the mediation session.

9. All parties to the mediation must participate in good faith. The Court after hearing, may order appropriate sanctions if the Court determines that a party has not participated in good faith.

10. A settlement reached in mediation with the United States or other governmental entities is a conditional settlement. The United States and other governmental entities will be allowed a period of twenty-one (21) days from the date of the completion of the mediation session where a conditional settlement agreement has been reached to have governmental officials possessing ultimate settlement authority review the conditional settlement. The conditional settlement will be void if, within twenty-one (21) days from that date, government officials possessing ultimate settlement authority or their attorneys file a Notice of Rejection. If the governmental entity has not filed a Notice of Rejection within the twenty-one (21) days, or such additional time as the Court may grant on good cause shown, the condition is satisfied and the Court will approve the settlement reached in mediation.

**P. Modification of Sub-file Orders.**

1. Stipulated Sub-file Orders are not appealable or modifiable except as may be permitted under Rule 1-060 NMRA.

2. Sub-file Orders entered when claimants did not respond to the Offer of Judgment/Stipulated Sub-file Order are not appealable or modifiable, except as permitted under Rule 1-060 NMRA.

3. The Sub-file Orders after trial on the merits are final appealable orders in accordance with the procedures set forth in Rule 1-054(B), NMRA.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this Order shall take effect immediately upon filing. This Order shall apply to all matters relating to this stream adjudication.

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Jerald A. Valentine,  
Presiding Judge,  
Lower Rio Grande Adjudication