

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO *ex rel.*
Office of the State Engineer,

Plaintiff,

vs.

CV-96-888
Hon. James J. Wechsler
Presiding Judge

ELEPHANT BUTTE IRRIGATION DISTRICT, *et al.*,

Defendants.

SEVENTH AMENDED ORDER REGARDING STREAM ADJUDICATION PROCEDURES

THIS MATTER having come before the Court on the need to modify the Sixth Amended Order Regarding Stream Adjudication Procedures, filed September 14, 2009, the Court, having considered comments from the parties on the proposed Seventh Amended Order and being fully advised in the premises,

FINDS:

The Sixth Amended Order Regarding Stream System Adjudication Procedures, filed September 14, 2009, should be amended.

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that this Seventh Amended Order Regarding Stream Adjudication Procedures is hereby adopted and the preceding Order superseded.

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A. **Definitions.**

Note: All forms referred to are available on the Lower Rio Grande Adjudication website.

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 subfile proceedings have been resolved.
2. **"Form A, Answer to General Adjudication Complaint"** is a form previously used to respond to the Summons and the General Adjudication Complaint.
3. **"Form B, Notice of Intent to Participate"** is the form that the claimant may use to participate in Court hearings regarding expedited *inter se* and stream system issue proceedings.
4. **"Form C, Objection to Offer of Judgment"** is a form that the claimant may use to object to the State of New Mexico's (State) Offer of Judgment/Stipulated Subfile Order.
5. **"Form D, Notice of Change of Address or Telephone Number"** is a form that the claimant shall use to notify the Court and the State of a change of address or telephone number.
6. **"Form E, Notice of Transfer of Interest"** is a form that a person who acquires any interest in a water right (new owner) shall use to notify the Court and the State of the transfer of interest from a former owner to the new owner.
7. **"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.

8. **"*Inter Se* Proceeding"** is a proceeding in which water right claimants may object to the water right of any other claimant. The *inter se* proceeding begins after all subfiles have been adjudicated.

9. **"Monthly Report"** is the Monthly Stream System Issue and Expedited *Inter Se* Report prepared by the Court pursuant to the Amended Case Management Order Authorizing Notice by a Monthly Report filed September 14, 2009.

10. **"Offer of Judgment/Stipulated Subfile Order"** is the document the claimant and the State sign if there is agreement on the claimant's water right as described therein, based on the final, revised hydrographic survey.

11. **"Stream System Issue"** is any issue which, when resolved, could affect all or a significant number of claimants.

12. **"Threshold Issue"** is any issue which should be decided before the Court can proceed to address other matters.

B. Applicability of the Rules of Civil Procedure. Unless expressly modified by this Order, the Amended Case Management Order Authorizing Notice by a Monthly Report filed September 14, 2009, or any subsequent case management orders issued by the Court, the Rules of Civil Procedure and the Local Rules of the Third Judicial District shall apply.

C. Notice of Change of Address or Telephone Number and Ownership Records.

1. Once joined, any claimant whose address or telephone number changes shall

timely file a Form D, Notice of Change of Address or Telephone Number, with the Court and mail a copy to the State. If a claimant does not file and mail the Notice of Change of Address, all papers mailed to the claimant's last known address will be effective service.

2. In case of any transfer of interest in a water right, the new owner shall mail to the State a Form E, Notice of Transfer of Interest, with supporting documentation. The State will confirm the transfer and file a motion for substitution with the Court, attaching the Form E as an exhibit. If the new owner does not submit a Notice of Transfer, the adjudication may proceed against the former owner and the new owner will be bound by the decisions of the Court.

3. For paragraphs 1 and 2 above, the addresses are as follows:

Third Judicial District Court
201 W. Picacho
Las Cruces, NM 88005
Attn: Lower Rio Grande Adj. Clerk

Office of the State Engineer
Litigation & Adjudication Program
P.O. Box 25102
Santa Fe, NM 87504
Attn: LRG

D. Schedule for Serving Offer of Judgment/Stipulated Subfile Orders. The Court will consult with the State and establish an appropriate schedule for serving Offer of Judgment/Stipulated Subfile Orders on claimants.

E. Offer of Judgment/Stipulated Subfile Orders.

1. The State shall review the hydrographic survey and all information it has obtained from field inspections and public records or received from claimants, revise the

hydrographic survey as necessary, and prepare proposed Offer of Judgment/Stipulated Subfile Orders for all claimants who may have a claim to unadjudicated water rights.

2. Following a schedule set by the Court, the State will mail the claimant a proposed Offer of Judgment/Stipulated Subfile Order along with a copy of the Notice to Water Right Claimants Receiving an Offer of Judgment and a Form C, Objection to Offer of Judgment.

3. The Offer of Judgment/Stipulated Subfile Order shall describe the elements of the claimant's water rights as determined by the final hydrographic survey.

4. The State may serve Offer of Judgment/Stipulated Subfile Orders with the other documents at separate times on claimants who have more than one subfile.

F. Coordination with the Joe M Stell Ombudsman Program.

1. The State shall provide the Ombudsman Program a list of claimants and relevant details as the Offer of Judgment/Stipulated Subfile Orders are mailed to claimants.

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

G. Stipulation or No Response to Offer of Judgment/Stipulated Subfile Order.

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

2. If the claimant agrees with the description of the water right presented in the Offer of Judgment, the claimant shall sign the Offer of Judgment/Stipulated Subfile Order

and return it to the State. The State shall approve the Offer of Judgment/Stipulated Subfile Order by signing it and shall forward it to the Court. If the Court approves and enters the Offer of Judgment/Stipulated Subfile Order, it will mail the State a file-stamped copy, and the State shall mail a copy to the claimant.

3. If after forty-five (45) days the claimant has not timely responded to the Offer of Judgment/Stipulated Subfile Order, the State shall initiate procedures for one of the following forms of subfile order:

a. If the claimant has made an appearance in the case by filing Form A or by other means, the State will sign a "Subfile Order - Implied Consent" and submit it to the Court.

b. If the claimant has not made an appearance, the State will sign a "Subfile Order – Default" and submit it to the Court.

The description of the water right in both of the above forms shall be the same as that in the Offer of Judgment/Stipulated Subfile Order. If the Court approves and enters the Subfile Order - Implied Consent or Subfile Order - Default, it will send the State a file-stamped copy and the State shall mail a copy to the non-responding claimant.

4. A non-responding claimant shall have twenty (20) days following entry of the Subfile Order in which to file a motion to reconsider.

H. Objections to the Offer of Judgment/Stipulated Subfile Order.

1. If a claimant objects to the description of a water right in the Offer of Judgment/Stipulated Subfile Order, the claimant shall complete a Form C, Objection to the Offer of Judgment, and mail it to the State within forty-five (45) days of the date of the

State's mailing the Offer/Order to the claimant.

2. The claimant shall state all objections that they may have, including any objections to elements of the water rights as they are described in the Offer of Judgment/Stipulated Subfile 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 in accordance with the State's Offer of Judgment/Stipulated Subfile Order.
4. When the State receives a claimant's Form C or other form of objection, the State shall promptly file the claimant's Form C or other objection with the Court.
5. The State will have sixty (60) days from the date the objection was filed in which to contact the objecting claimant and negotiate informally to resolve any issues. For good cause shown, the Court may enlarge the period for informal negotiation.
6. If the State is able to resolve objections to the Offer of Judgment/Stipulated Subfile Order with the claimant in informal sessions, the State shall prepare an Offer of Judgment/Stipulated Subfile Order incorporating the agreement. After obtaining the claimant's signature, the State shall sign and submit the Order to the Court for approval and entry. If the Court approves and enters the Offer of Judgment/Stipulated Subfile Order, the Court will mail a file-stamped copy to the State, and the State shall mail a copy to the claimant.
7. If the State and the claimant are unable to resolve objections, they will proceed to mediation and, if necessary, to trial.

8. Before every status conference the State shall file a report with the Court explaining the status of all subfiles with unresolved Form C objections, whether in informal negotiations, in Court-annexed mediation (or pre-mediation consultation with the Ombudsman Program), or in trial.

I. Court-Annexed Mediation and Trial.

1. If the State and the claimant are unable to reach agreement on a disputed issue in an Offer of Judgment/Stipulated Subfile Order, the State may refer the subfile to the Ombudsman Program for a pre-mediation consultation between the Ombudsman Program and the claimant, providing the Ombudsman Program with the Offer of Judgment/Stipulated Subfile Order and the Form C or other objection. The Ombudsman Program does not offer legal advice to the claimant regarding the claimant's objection, but may provide information about the adjudication process, including mediation and trial. The Ombudsman Program will submit a Pre-Mediation Report to the State and the Court as to the outcome of its consultation.

2. If the claimant no longer objects to the Offer of Judgment/Stipulated Subfile Order after consultation with the Ombudsman Program, the parties shall sign the Offer/Order and the State shall submit it to the Court for approval. If approved and entered, the Court will mail a file-stamped copy of the Order to the State and the State will mail a copy to the claimant.

3. If the claimant continues to object after consultation, or if the State did not refer the matter to the Ombudsman Program for consultation, the State shall request that the Court submit the case to mediation and shall file with the Court the proposed

Offer of Judgment/Stipulated Subfile Order and Form C objection.

4. The Court's Alternative Dispute Resolution (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 Subfile Order, Form C or other objection, 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. A party may file an objection with the Court to the mediator selection.

5. 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, the length of the extension, and the mediator's estimate of when the mediation will be concluded. Any further extensions may only be granted by leave of the Court.

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

7. The fees for mediation services and the party responsible to pay the fees will be determined by the Court.

8. Within thirty (30) days following the conclusion of mediation, the mediator shall file an Outcome Report with the Court and mail a copy to the parties. If the mediation was conducted, the Report shall indicate whether the disputed issues were

settled, the parties agreed to work further on the disputed issues informally, or the parties reached an impasse on some or all of the issues. If the mediation was not held, the Report shall indicate the cause.

9. All parties to the mediation must participate in good faith. If the mediator reports to the Court that a party has failed to appear for mediation or otherwise acted in bad faith, the Court may issue an order to show cause, and after hearing may order appropriate sanctions, including default.

10. If the mediation successfully resolved the issues, the parties shall sign an Offer of Judgment/Stipulated Subfile Order reflecting their agreement, and the State shall submit it to the Court for approval. If approved and entered, the Court will mail a file-stamped copy to the State and the State will mail a copy to the claimant.

11. 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 in which 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.

12. If the mediation did not resolve all disputed issues, the case shall proceed to trial.

13. Preparation for trial:

a. Within thirty (30) days after the Mediator's Outcome Report is filed, the State shall file a request that a Special Master be appointed for trial and a scheduling conference be set. The State shall mail a copy of the request to the claimant.

b. The Court may appoint a Special Master or, *sua sponte* or on motion of a party, may retain the subfile for trial before the Court. If a Special Master is appointed, references in this Order to "the Court" shall be deemed to apply to the Special Master.

c. After conference with the parties, the Court will enter a Scheduling Order. 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 subfile proceedings shall be limited to the claimant whose water right is at issue, any party who has been joined or has intervened in the subfile proceeding, and the State.

15. After trial on the merits for a disputed subfile, the State shall prepare a Subfile Order, obtain the signature(s) of the claimant(s) approving the form, and forward it 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 Court will mail a file-stamped copy to the State and the State shall mail a copy to the claimant.

J. Modification of Subfile Orders.

1. Offer of Judgment/Stipulated Subfile Orders are not appealable or modifiable except as may be permitted under Rule 1-060 NMRA.
2. Subfile Orders - Implied Consent and Subfile Orders - Default entered when claimants did not respond to the Offer of Judgment/Stipulated Subfile Order are not appealable or modifiable, except as permitted under Rule 1-060 NMRA and Paragraph G (4) of this Order.
3. The Subfile Orders entered after trial on the merits are final appealable orders in accordance with the procedures set forth in Rule 1-054(B) NMRA.
4. All Subfile Orders are subject to modification by orders deciding *inter se* proceeding issues.

K. Inter Se Proceedings.

1. *Inter se* proceedings will begin after all Subfile Orders have been entered.
2. 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.
3. If a Subfile 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.
4. A water right owner may not take an appeal from a Subfile Order that was not modified by an order in the *inter se* proceeding.

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

proceeding may be commenced before all Subfile Orders have been entered. Expedited *inter se* proceedings and stream system issue proceedings shall be governed by the Amended Case Management Order Authorizing Notice by a Monthly Report filed September 14, 2009, or any subsequent case management orders issued by the Court. An individual claimant must file Form B, Notice of Intent to Participate, if the claimant intends to participate in these types of proceedings.

- M. **Several Parties Represented by One Attorney.** An attorney may represent more than one claimant for so long as there is no conflict of interest among the clients regarding the issues that are before the Court.
- N. **Corporate Entities - Stream System Issues.** Individual claimants may form an independent, non-governmental, voluntary, non-profit corporation or other appropriate corporate entity to jointly resolve issues between its members and the State. Any corporate entity must be represented by counsel as set out in Paragraph O below. The corporate entity shall file a Motion to Intervene accompanied by competent evidence that its members have authorized the corporate entity to act on their behalf. When the Court has entered an Order Commencing Stream System Issue or Expedited *Inter Se* proceeding, the corporate entity, if authorized by its members, shall file a Form B, Notice of Intent to Participate.
- O. **Limited Participation for Legal Entities to Participate Without Counsel.** All legal entities such as trusts, partnerships, and corporations that otherwise could not represent themselves without an attorney, may answer and file other responsive pleadings and file updates of their address and ownership records without an attorney.

However, in any hearing at which relief or action of the Court is requested, such entities must be represented by an attorney and shall not be permitted, as unrepresented parties, to participate either by filing motions, memoranda, or briefs or making an oral argument before the Court.

P. Notice of Adjudication of Additional Water Rights. If a claimant already joined for specific water rights claims additional, unrelated water rights, the State shall assign a different case number and subfile number to the additional rights and mail an Offer of Judgment/Stipulated Subfile Order for the additional claims. Thereafter, the same procedures as set out herein shall control.


Q. Addition of Rights to the Hydrographic Survey.

1. When the State learns of a previously unidentified water right or when a person or legal entity has obtained a permit for a new appropriation of water from the state engineer, the State shall assign a case number and subfile number and add the right to the hydrographic survey. Unless previously joined, the owner shall be joined concurrently with service of the Offer of Judgment/Stipulated Subfile Order.

2. All other administrative decisions of the state engineer regarding a claimant's water right before a Subfile Order has been entered in a pending subfile shall be incorporated into the claimant's subfile.

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.


James J. Wechsley
Presiding Judge
Lower Rio Grande Adjudication