

**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,)

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**

**Carlsbad Irrigation
District Section -
Carlsbad Basin Section**

**SUPPLEMENTAL OPINION AND DECISION
RE THRESHOLD LEGAL ISSUE NO. 2**

THIS MATTER comes on for consideration by the Court in connection with the preparation of a further supplemental opinion re Threshold Legal Issue No. 2 which has been phrased as:

"Whether the decree in United States of America v. Hope Community District, U.S. District Court Cause No. 712 Equity (1933) provides the United States and the District with res judicata and estoppel defenses to filed objections."

See **PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHT CLAIMS**

filed on February 26, 1996 (1996 PHO) at page 6.

I. **BACKGROUND**¹

The matters presently before the Court involve the claimed rights of the United States' to divert, store and distribute water in connection with the Carlsbad Project (hereafter the Project). The United States/CID claim that by virtue of *Hope*, under the doctrines of *res judicata* or collateral estoppel, all of those who have objected (Objectors) to the proposed STIPULATED OFFER OF JUDGEMENT (Offer) (see numbered paragraph 8, page 12, *infra*) are precluded from litigating in these proceedings the factual and legal determinations of the Court in *Hope* concerning the diversion, storage and distribution water rights of the United States in connection with the Project ²

The *Hope* Decree adjudicated to "the Plaintiff, the United States of America " five water rights:

¹The United States of America is referred to herein as the United States, the State of New Mexico is referred to as the State, the Carlsbad Irrigation District is referred to as CID, Pecos Valley Artesian Conservancy District is referred to as PVACD and the Carlsbad Project is referred to as the Project. The proceedings in United States v. Hope Community Ditch, et al., No. 712, Equity, of the United States District Court for the District of New Mexico are hereafter called *Hope*, and the final decree entered therein, the *Hope Decree*.

²On October 6, 1998, the parties agreed that similar claims in connection with the alleged preclusive effect of the proceedings in United States v. Judkins, No. 112, D.N.M. (January 3, 1912) affirmed in United States v. D.R. Harkey, No. 1610, Equity D.N.M. (September 30, 1930), which are collectively referred to as the Black River Proceedings, need not be addressed in this opinion. See paragraph 24, page 14, *infra*.

I

...the absolute and infeasible vested right, formerly exercised through what was known as the Halagueno Ditch, with a priority date as of July, 1887, to divert, perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is known as the Carlsbad Project, to an amount of 300 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose of domestic use and the watering of livestock....

II

...the absolute and infeasible vested right, with a priority date as of July, 1888, to divert perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is now known as the Carlsbad Project to an amount of 700 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose of domestic use and the watering of livestock....

III

...the absolute and infeasible vested right, with a priority date as of the year 1889, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert, impound and store in its Avalon Reservoir, constructed across the stream bed of said River with a capacity of 7,000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefore, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock...

IV

... the absolute and infeasible vested right, with a priority date as of the year 1893, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert, impound and store in its McMillan Reservoir, constructed across the stream bed of said River with a capacity of 90,000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefor, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock....

VI

...under and by reason of its certain written Notice to the Territorial Engineer of the then Territory, now State of New Mexico, that it intended to utilize certain specified waters of the Pecos River, which said Notice was filed with the said Territorial Irrigation Engineer on or about the 2nd day of February, 1906, in conformity with the provision of Section 22 of Chapter 102, Session Laws of 1905, of the then Territory of New Mexico, the Plaintiff, the United States of America has the absolute and indefeasible vested right, with a priority dates as of the 2nd day of February 1906, to divert, impound, store, and utilize through, in, by means of or in connection with its Carlsbad Project, as now constructed, or as it may be enlarged, added to or otherwise changed hereafter, 300,000 acre feet per annum of the perennial and flood waters of the Pecos River and its tributaries, at its Avalon and McMillan Dams and Reservoirs and at such other points above the Avalon Dam as may be available for such diversion or storage; that such right remains and shall remain reserved and vested until formally released in writing by an Officer of the United States thereunto duly authorized, irrespective of lapse of time or failure to utilize the waters so reserved..."

See *Hope Decree*, Vol. II, THE CARLSBAD PROJECT, Water Rights of the United States of America Exercised and to be Exercised Through Its Carlsbad Project, pages 449-452, Exhibit A-1 to the Court's September 22, 1997, **OPINION RE THRESHOLD LEGAL ISSUE NO. 2**, (hereafter 1997 Opinion) at 1 and 3.

The Hope Decree also provides:

V

"... That beneficial use of the waters at any time diverted, impounded or stored by the Plaintiff under its rights last above set forth in paragraphs I, II, III and IV, is and shall be the basis, the measure and the limit of said rights to the Plaintiff's use of waters of the said Pecos River and its tributaries..." Id.

The United States claims that by virtue of the aforesaid determinations of the diversion,

storage and distribution water rights of the United States in *Hope*, Objectors are precluded under the doctrine of *res judicata* or collateral estoppel from litigating the following matters³

- "...1. With respect to diversion right, beneficial use and historic supply, whether:
 - a. The offer of direct diversions in addition to storage rights allows an improper aggregation...
 - c. Reasonable beneficial use of the claimed right has been made by the District...
2. With respect to priorities and acreage, whether:
 - a. Claimed priorities are justified.
 - b. Project acreage must be established by acreage actually and continually irrigated. [Footnote omitted]...
3. With respect to consumptive use, irrigation efficiency, and conveyance loss, whether:
 - b. The claimed project water right has been established or expanded through waste...
5. With respect to impoundment, diversion, and storage, whether:
 - a. Storage claims are excessive..."

The following issues were not submitted for determination or adjudicated in *Hope*; the devotion of water to beneficial use by the United States in connection with the Project; whether the storage of water by the United States constitutes beneficial use; the ramifications of the 1906 notice given in conformity with the provisions of Sec. 22 of Chapter 102, Session Laws of 1905 of the then Territory of New Mexico, including the necessity of devoting water to beneficial use thereunder, or whether the rights and interests of the United States are subject to forfeiture or

³Category numbers and sub-category letters from the 1996 PHO are used. See paragraph 1, *infra*. See **MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2**, filed on November 13, 1998, at page 57, footnote 45, paragraph 31, page 15, *infra*.

abandonment.

Apparently, the United States/CID take the position that the rights and interests quoted above from the *Hope Decree* are those that they contend are precluded from re-litigation. The Court is not clear on how some of the enumerated matters raised by Objectors are related and claimed to be precluded by virtue of the determinations of the Court in *Hope*. Further comments of counsel for the United States/CID clarifying their claims are should be submitted at the time objections are filed and will be considered when oral arguments are entertained.

The parties have filed voluminous requested conclusions of law, ultimate material facts and evidentiary facts. The United States /CID's Statement of Conclusions of Law, Ultimate Material Facts, Evidentiary Facts, filed on October 2, 1998 contains 117 pages and 313 evidentiary entries. (Compare with the Memorandum of the United States and the CID Identifying Material Facts in Relation to Threshold Legal Issue No. 2 filed on February 9, 1998 which contains 32 pages and 99 claimed material fact entries. PVACD's Ultimate Material Facts re Threshold Legal Issue No. 2 served on October 5, 1998 and filed on November 23, 1998 contains 126 pages, over 400 entries and other references and outlines of issues.) The vast majority of the matters contained in these submissions are not limited to the matters which the 1997 Opinion requested be addressed. The 1997 Opinion was not an open invitation to again brief and reargue all of the matters involving Threshold Legal Issue No. 2.

The parties have agreed that "(1) no evidentiary hearing is required in connection with the resolution of issues of fact or other issues involving Threshold Legal Issue No. 2, and dispensing with and waiving said hearing; (2) the issues and controversies in connection with Threshold Legal Issue No. 2 are to be resolved by the Court based upon the parties' joint statement of

conclusions of law; their respective statements of ultimate material facts and evidentiary facts as submitted to the Court and supplements thereto agreed upon among counsel for the parties; [and] the memoranda briefs submitted and to be submitted to the Court." See order set forth in paragraph 43, page 16.

To the extent that requested ultimate material facts or evidentiary facts are not incorporated into this opinion, they have been omitted because they are inconsistent with those set forth herein or they are not necessary in order to resolve genuine issues of material fact and other remaining issues pertaining to Threshold Legal Issue No. 2.

Counsel for the parties have agreed and the court concurs that this opinion should be in a form responsive to the matters set forth in The United States', CID's and PVACD's Joint Statement of Conclusions of Law and Ultimate Material Facts filed on October 2, 1998. (See paragraph 22, page 13, *infra*) but that determinations of the Court may be made in the affirmative or negative of the stated proposition. Subsidiary conclusions of law have been set forth explaining the rationale for the Court's opinions.

The Court has reviewed and considered the following in connection with the preparation of this supplemental opinion:

1. **PRETRIAL ORDER FOR CARLSBAD PROJECT WATER CLAIMS** filed on February 26, 1996. (1996 PHO)

2. **SUPPLEMENTAL PRE-HEARING ORDER-CARLSBAD PROJECT WATER RIGHTS** filed on August 6, 1998 (1998 SPHO) which supplemented the 1996 PHO. The order superseded all prior procedural and pre-trial orders only to the extent that the times and provisions thereof were inconsistent with those contained in the 1998 SPHO.

The order states in pertinent part:

"...the Court has determined that there are material issues of fact that must be disposed of before final determination of Threshold Legal Issue No. 2 . Further, the Court has stated in its orders of March 19, 1998 and March 23, 1998, that, having due regard for the Court's prior opinions on Threshold Legal Issue No.3, there are remaining issues concerning 'ownership rights, interests, duties and obligations of the parties in connection with Project water' that must be determined before a final ruling on Threshold Legal Issue No. 3 can be made by the Court. This Supplemental Pre-hearing Order describes the procedures that will be followed so that any remaining issues relating to Threshold Legal Issue Nos. 2 and 3 can be resolved by the Court and those issues finally determined.

PROCEDURES FOR RESOLUTION OF THRESHOLD LEGAL ISSUE NO. 2

The Court and any interested party will use the following procedures to identify any genuine issues of material fact concerning Threshold Legal Issue No. 2, and to resolve any such genuine issues of material fact.

1. The parties will develop a statement of conclusions of law, and the ultimate issues of fact relating to the conclusions of law, that they believe may be necessary for the Court to determine in connection with a final ruling on Threshold Legal Issue No.2. Each party will provide to other interested parties a statement of material evidentiary facts with specific reference to exhibits highlighted as to relevant portions which support that party's position on each of its stated ultimate issues of fact and conclusions of law. Any interested party that intends to develop a statement of material evidentiary facts and submit exhibits which support that party's position on ultimate issues of fact and conclusions of law in connection with Threshold Legal Issue No.2, must give notice of that intention to all interested parties and the Court by July 24, 1998, for the purpose of coordinating

with the other parties the development of a schedule for the exchange of statements of material evidentiary facts and supporting exhibits and stipulating to material facts about which there is no genuine issue.

If a referenced exhibit has previously been submitted to the Court and served upon all interested parties, each party shall have the option of either providing to the other interested parties a copy of the exhibit with relevant portions clearly identified by highlighting or, rather than submitting a new copy of the exhibit, the party may instead identify the exhibit and provide references to page and line numbers identifying relevant portions of the exhibit. The procedure suggested herein does not preclude limited discovery if it is later determined to be necessary.

2. The interested parties will meet as necessary to identify (1) those material facts about which there are no genuine issues; and (2) those material facts that do involve genuine issues. At the present time, counsel believe that evidentiary issues can be resolved based upon the designated exhibits and without an evidentiary hearing. By September 22, 1998, the parties will submit to the Court a final statement of conclusions of law, ultimate issues of fact about which there are no genuine issues, and ultimate issues of fact with supporting material evidentiary facts, identifying for the Court those facts which are in dispute and will require resolution by the Court. If an evidentiary hearing is required, proposed alternate dates for such hearing will also be submitted to the Court.

Also by September 22, 1998, each party will identify and proffer to the Court by list or separate exhibit the exhibits upon which they rely, and contemporaneously, each party will submit to the Court a statement, without argument, of any objections to the admissibility of any exhibits of any other party. If a referenced exhibit has previously been submitted to the Court and served upon interested parties, each party shall have the option of either (1) providing to the Court a copy of the exhibit with relevant portions clearly identified by highlighting or otherwise, or (2) if a copy of the exhibit has previously been provided to the

Court and to each interested party, rather than submit a new copy of the exhibit, the party may instead identify the exhibit and provide references to page and line numbers identifying relevant portions of the exhibit.

3. By September 22, 1998, the parties shall also submit for approval by the Court a proposed briefing schedule for matters concerning Threshold Legal Issue No 2 for which there will be no evidentiary hearing.

Oral argument will be scheduled at the convenience of the Court following the completion of the briefing schedule or at the conclusion of the evidentiary hearing if one is required. Thereupon, the Court will rule upon evidentiary issues and decide Threshold Legal Issue No. 2."

Extensions of time were granted to counsel for the filing of required submissions.

The parties have complied with the procedural requirements set forth in the 1998 SPHO.

3. The Court's **OPINION RE THRESHOLD LEGAL ISSUE NO. 2** and referenced submissions, exhibits and attachments filed on September 22, 1997 (1997 Opinion).

In the 1997 Opinion, the Court held that subject to the terms and provisions of the opinion, *res judicata* and collateral estoppel defenses predicated upon proceedings in *Hope* or *Black River*⁴ may be available to the United States and CID. The Court held, however, that there were genuine issues of material fact requiring resolution. The genuine issues of material fact were identified as involving:

1. The identification of those Objectors in these proceedings who are in privity (as defined in the Opinion) with parties in *Hope*. 1997 Opinion at 21.

2. Compliance with due process requirements. 1997 Opinion at 21.

⁴ On October 6, 1998 the parties agreed that the contentions of the United States concerning preclusion, based upon the applicability of the doctrine of *res judicata* and collateral estoppel because of the *Black River* proceedings, were withdrawn. See numbered paragraph 26, *infra*

3. Whether procedures in *Hope* were “so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue.” 1997 Opinion at 23. (Citations omitted.)

4. The parties were granted leave to adduce evidence as to whether incentives for vigorous defenses were afforded, whether there were inconsistencies of forum and whether there were any other matters which might militate for or against application of preclusion doctrines by virtue of *Hope*.

The “rule of property” doctrine and “public interest” doctrines were discussed but decisions thereon were deferred. 1997 Opinion, pages 28-31. The Court held “The exact principles claimed to be rules of property are not clear and the determination thereof involves the determination of factual matters which can only be decided after evidentiary proceedings are conducted as outlined above. Therefore, at this time, the Court will defer ruling on whether the rule of property doctrine should be applied in these proceedings”. *Id.* at 30.

Remaining legal matters involving Threshold Legal Issue No. 2 were determined in the 1997 Opinion. The Court has reviewed the submissions of counsel for the parties reiterating arguments, claims and contentions concerning the legal issues cited in the 1997 Opinion but discerns no good reason or cause to reopen and revise the determinations of matters which have been decided by the 1997 Opinion.

4. **AMENDMENT AND REVISION TO OPINION RE THRESHOLD LEGAL ISSUE NO. 2** filed on September 24, 1997. (First Supplemental Opinion)

5. **SECOND AMENDMENT AND REVISION TO OPINION RE THRESHOLD LEGAL ISSUE NO. 2 AND ORDER REQUESTING THAT COUNSEL**

STIPULATED OFFER OF JUDGEMENT (Offer) filed by the United States, the Carlsbad Irrigation District, and the State filed on June 22, 1994. **SUBMIT ALTERNATE DATES FOR A PRETRIAL CONFERENCE** filed on October 23, 1997. (Second Supplemental Opinion).

6. **ORDER** requiring the United States to specify the nature and extent of its interest in the water rights included within the Carlsbad Irrigation Project filed on October 19, 1984. (1984 Order)

7. **RESPONSE TO COURT ORDER** described in numbered paragraph 6, *supra*, filed by the United States on October 19, 1984. (United States' Response to 1984 Order)

8. **STIPULATED OFFER OF JUDGEMENT (Offer)** filed by the United States, the Carlsbad Irrigation District, and the State filed on June 22, 1994.

9. **PVACD'S GENERAL STATEMENT OF FACTS AND PROCEDURES** filed on October 28, 1996.

10. **JOINT PROPOSED PROCEDURE FOR IDENTIFYING AND RESOLVING ISSUES OF MATERIAL FACT RELATING TO THRESHOLD LEGAL ISSUE NO. 2 --PRECLUSION DEFENSES** filed on November 17, 1997.

11. The Court's **OPINION & ORDER RE PROPOSED PROCEDURES FOR IDENTIFYING AND RESOLVING GENUINE ISSUES OF MATERIAL FACT -- THRESHOLD LEGAL ISSUE NO. 2** filed on November 17, 1997

12. The United States' and CID's **IDENTIFICATION OF MATTERS ACTUALLY AND NECESSARILY DETERMINED IN PRIOR PROCEEDINGS** filed on January 9, 1998.

13. **MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT IDENTIFYING MATERIAL FACTS RELATING TO**

THRESHOLD LEGAL ISSUE NO. 2 filed on February 9, 1998.

14. **PVACD'S INITIAL DESIGNATION OF MATERIAL FACTS** filed on February 23, 1998.

15. **PVACD'S RESPONSE TO US/CID DESIGNATION OF FACTS** filed on February 23, 1998. (PVACD's Response re Facts)

16. **THE UNITED STATES' AND CID'S CONSOLIDATED RESPONSE TO PVACD'S INITIAL DESIGNATION OF MATERIAL FACTS AND REPLY TO PVACD'S RESPONSE TO THE UNITED STATES AND CID'S MEMORANDUM IDENTIFYING MATERIAL FACTS** filed on March 6, 1998.

17. **STATEMENT OF WITHDRAWAL OF LEGAL ISSUE** filed by PVACD on May 14, 1998. The defense of laches in connection with Threshold Legal Issue No. 2 was withdrawn.

18. **NOTICE OF INTENTION OF PVACD TO SUBMIT ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW IN CONNECTION WITH THRESHOLD LEGAL ISSUE NO. 2** filed on July 31, 1998.

19. The **BRANTLEY'S PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on July 30, 1998.

20. **NOTICE OF INTENTION OF THE UNITED STATES TO DEVELOP STATEMENT OF FACTS AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2.** filed on August 5, 1998.

21. **NOTICE OF INTENTION OF THE STATE OF NEW MEXICO TO DEVELOP STATEMENT OF FACTS AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2** , certificate of service filed on August 24, 1998.

22. **THE UNITED STATES', CID'S AND PVACD'S JOINT STATEMENT OF CONCLUSIONS OF LAW AND ULTIMATE MATERIAL FACTS (US/CID/PVACD Joint Statement)** filed on October 2, 1998.

23. **STATE OF NEW MEXICO'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** served on October 2, 1998.

24. **THE UNITED STATES' AND CID'S STATEMENT OF CONCLUSIONS OF LAW , ULTIMATE MATERIAL FACTS AND EVIDENTIARY FACTS** filed on October 2, 1998.

25. **PVACD'S STATEMENT OF ULTIMATE FINDINGS OF MATERIAL FACTS RE THRESHOLD LEGAL ISSUE NO. 2** served on October 5, 1998 filed on November 23, 1998.

26. **STIPULATION BY THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT AND PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT RELATING TO EVIDENTIARY SUBMISSION ON THRESHOLD LEGAL ISSUE NO. 2** filed on October 6, 1998. Subject to the terms and conditions contained in the stipulation, PVACD withdrew its objections to the rights of the United States set forth in the stipulated offer involving the Black River and the parties agreed that evidentiary materials would not be submitted relating to the preclusive effect of the *Black River Decree* nor would the parties present arguments in their respective briefs in connection with Threshold Legal Issue No. 2.

27. **November 6, 1998 letter** stipulation among counsel for PVACD, the United States and CID re designation of additional factual material in support of arguments and the filing of objections.

28. **THE UNITED STATES AND THE CARLSBAD IRRIGATION**

DISTRICT'S NOTICE RE: EVIDENTIARY OBJECTIONS filed on November 13, 1998.

29. **PVACD'S OPENING TRIAL BRIEF RE THRESHOLD LEGAL ISSUE NO. 2** filed November 13, 1998.

30. Hennighausen, Olsen & Stevens' Defendants' **CONCURRENCE IN AND ADOPTION OF PVACD'S BRIEF ON THRESHOLD LEGAL ISSUE NO. 2** filed on November 13, 1998.

31. **MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on November 13, 1998. (US/CID Initial Memorandum)

32. **DEFENDANT CARLSBAD IRRIGATION DISTRICT'S OPENING BRIEF RE THRESHOLD LEGAL ISSUE NO. 2 AND IN SUPPORT OF MOTION TO STRIKE BRANTLEY'S SECOND AMENDED PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on November 13, 1998. (CID's Initial Brief)

33. **NEW MEXICO'S BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THRESHOLD LEGAL ISSUE NO. 2** filed on November 16, 1998. (New Mexico's Initial Brief)

34. **ORDER STRIKING BRANTLEY'S PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on November 16, 1998.

35. Letter to Counsel re Determination of Issues Re Threshold Legal Issue No. 2 upon Written Submissions and Waiving Evidentiary Hearing in Connection Therewith dated November 21, 1998.

36. **PVACD'S STATEMENT OF ULTIMATE FINDINGS OF MATERIAL**

FACTS RE THRESHOLD LEGAL ISSUE NO. 2 filed on November 23, 1998.

37. Response dated December 18, 1998 of counsel for the US/CID to Court's November 21, 1998 letter.

38. Response dated December 18, 1998 of counsel for PVACD to Court's November 21, 1998 letter.

39. Response dated December 18, 1998 of counsel for the Brantley's to Court's November 21, 1998 letter.

40. **THE BRANTLEYS' REPLY TO THE BRIEF OF THE STATE OF NEW MEXICO, THE PVACD, THE CARLSBAD IRRIGATION DISTRICT ON THRESHOLD LEGAL ISSUE NO. 2 AND THE CARLSBAD IRRIGATION DISTRICT'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE BRANTLEYS' SECOND AMENDED PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on December 22, 1998.

41. **PVACD'S BRIEF IN RESPONSE TO US/CID OPENING MEMORANDUM** filed on December 22, 1998. (PVACD's Response)

42. **CONSOLIDATED RESPONSE MEMORANDUM OF THE UNITED STATES AND CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on December 23, 1998. (United States' Response)

43. **ORDER APPROVING PARTIES' STIPULATION SUBMITTING REMAINING ISSUES RE THRESHOLD LEGAL ISSUE NO. 2 FOR DETERMINATION UPON WRITTEN SUBMISSIONS TO THE COURT AND DISPENSING WITH AND WAIVING EVIDENTIARY HEARING IN CONNECTION THEREWITH** (Order Approving Stipulation) filed on December 28, 1998.

44. **NEW MEXICO'S REPLY BRIEF REGARDING THRESHOLD LEGAL ISSUE NO. 2** filed on December 28, 1998. (State's Reply)

45. Court's January 11, 1999 letter to Mr. Gehlert, counsel for the United States and Mr. Hernandez, counsel for CID, re their December 18, 1998 letter.

46. **THE BRANTLEY'S AMENDED REPLY TO THE BRIEFS OF THE STATE OF NEW MEXICO, THE PVACD, THE CID ON THRESHOLD LEGAL ISSUE NO. 2 and THE CID'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE BRANTLEYS' SECOND AMENDED PROPOSED ULTIMATE FINDINGS OF MATERIAL FACTS AND CONCLUSIONS OF LAW** filed on January 12, 1999.

47. **PVACD'S REPLY TO US/CID RESPONSE BRIEF ON THRESHOLD LEGAL ISSUE NO. 2** filed on January 25, 1999. (PVACD's Reply)

48. **CONSOLIDATED REPLY MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2** filed on January 25, 1999. (United States' Reply)

The Court has also again reviewed the Court's letter opinion dated July 17, 1996 and Order Relating to Procedural Issues filed on August 16, 1996. The letter opinion includes a discussion and opinion re procedural due process, notice, service, the binding effect of determinations upon unknown claimants in interest, the requirement that all who may be barred or affected by a decree must be afforded notice and an opportunity to be heard "so that they may have their day in court" and other related matters re due process. Letter opinion at page 16, *et seq.* and cases cited therein. Matters in the letter opinion and order are incorporated herein by reference, but will not be reiterated in this opinion.

A summary in this opinion of all of the numerous and voluminous matters contained in the

parties submissions of their claims, contentions, arguments and requested findings of fact and evidentiary matters in support of the claims of the parties thereof would serve no useful purpose.

II. APPLICATION OF FEDERAL LAW FOR PURPOSES OF DETERMINING PRECLUSION.

The parties raise an issue as to whether State or Federal law should be applied in determining preclusion questions. The Court remains unaware of significant differences in state or federal law when applied to the facts and circumstances of this case which would result in modifications or revisions to the 1997 Opinion or the determinations set forth herein. Thus, the issue may be purely hypothetical. In addition to the authorities set forth in Exhibit C, page 1, to the 1997 Opinion, the parties are directed to the Restatement, Second, Judgments, §87, Effect of Federal Court Judgment in a Subsequent Action, Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court, at 314 which provides:

“...The rules of *res judicata* are not easily classifiable for purposes of determining whether a federal rule or a state rule should be used to determine a particular effect of a federal judgment. Some aspects of the rules of *res judicata* reflect primarily procedural policies. Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. See §§17-28. These should be determined by a federal rule.

Other aspects of the rules of *res judicata* reflect policies that seem more distinctively substantive. In particular, the ramifications of the concept of ‘privity’ generally reflect considerations going to stability of legal relationships--not unlike definitions of property. See §§ 43-61. Where the principal relationship is regulated by federal law, the corollary relationships appropriately may also be governed by a uniform federal rule, whether the subsequent action is in federal or state court. On the other hand, if the substantive relationship adjudicated in a federal judgment is governed by state law, the federal courts should adopt state law to determine the effects on others under the rules stated in §§ 43-61. The underlying distinction parallels, and indeed may correspond to, the distinction drawn between ‘procedure’ and ‘substance’ under the Rules of Decision Act and the doctrine of *Erie R.R. v. Tompkins*, 304 U.S.

64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)...”.

This opinion has been prepared with due regard to the aforesaid principles.

III. OPINION OF THE COURT

A. Burden Of Proof

The burden is upon the entity invoking the doctrine of preclusion to introduce sufficient evidence for the Court to rule whether the doctrine is applicable, and, if the record does not provide sufficient reliable evidence to support preclusion, the Court cannot invoke the doctrine. International Paper Co. v. Farrar, 102 N.M. 739, 700 P.2d 642 (1985), citing Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974). Overruled on other grounds, 98 N.M. 690, 652 P.2d 240 (1982).

The United States/CID has the burden of proof concerning all Conclusions of Law identified in the US/CID/PVACD Joint Statement except Conclusion of Law #4 for which PVACD bears the burden. (see paragraph 22 at 13, *supra*)

B. Format and Decisions

The United States, CID and PVACD have agreed that the Court should address the resolution of genuine issues of material fact and related matters concerning Threshold Legal Issue No. 2 using the format hereafter set forth in this opinion.⁵

CONCLUSION OF LAW NO. 1: THE *HOPE DECREE* BINDS OBJECTORS THROUGH *RES JUDICATA* AS TO THE INTERESTS OF THE UNITED STATES IN CARLSBAD

⁵See United States', CID's and PVACD's Joint Statement, paragraph 20, at 13 *supra*. The Court's determinations are set forth separately in connection with each corresponding paragraph. In their joint statement, the parties did not set forth the reasons for disagreement which are addressed in their respective briefings. Footnote 1, at 1. Again, supplemental conclusions of law have been used to explain the Court's reasoning and decisions.

PROJECT WATER AND WATER RIGHTS.

1. The Court in Farmers High Line Canal and Reservoir Co., et. al. v. City of Golden, 975 P.2d 189 (1999) held:

“Claim preclusion bars a subsequent action only if, as between prior and present suits, there exists an identity of subject matter, claim or cause of action, parties to the action, and capacity in the persons for which or against whom the claim is made. See Weibert v. Rothe Bros., 200 Colo. 310, 318, 618 P.2d 1367, 1372 (1980); City of Westminster v. Church, 167 Colo. 1, 8, 445 P.2d 52, 55 (1968). At 975 P.2d 199

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Furthermore, ‘[t]he best and most accurate test as to whether a former judgment is a bar in subsequent proceedings . . . is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form.’ Pomponio v. Larsen, 80 Colo. 318, 321, 251 P. 534, 536 (1926). At 975 P.2d 203

The Court also held, citing, Midway Ranches, 938 P.2d 515, that “claim preclusion does not bar the water court from addressing circumstances which have changed subsequent to the previous decree proceedings and which have not been litigated.” See *Id.* at 525

2. The Court has previously held that certain matters were not determined or adjudicated in *Hope* and may be considered during the course of these proceedings. See II. MATTERS WHICH WERE NOT DETERMINED IN THE *HOPE* OR BLACK RIVER PROCEEDINGS AND WHICH MAY BE CONSIDERED IN THESE PROCEEDINGS, 1997 Opinion, pages 11 and 12. These matters are reiterated, affirmed and incorporated herein by reference.

3. The determinations of the United States’ diversion, storage and distribution water rights and interests in the Project were “...fixed as of the date of the testimony and evidence

herein, to wit , the 15th day of June 1931...". *Hope Decree*, paragraph IX, at 5 of Exhibit A to the 1997 Opinion.

4. The determinations of the Court in *Hope* concerning the United States' aforesaid rights and interest are not universally binding on all Objectors in these proceedings under the doctrine of *res judicata*. The determinations of the Court in the *Hope Decree*, subject to the terms and provisions thereof, are binding upon persons joined as parties to *Hope*, those who entered an appearance or participated in *Hope*, and all unknown claimants in interest, provided that they were afforded procedural due process (given proper notice, were properly served and given an opportunity to assert their objections, claims and contentions concerning the diversion, storage and distribution water right claims of the United States in connection with the Project - see Court's July 17, 1996 Opinion and Order Relating to Procedural Issues filed on August 16, 1996), those who were not joined as parties but were notified of the aforesaid claims and contentions of the United States and afforded an opportunity to assert objections and defenses thereto, and those in privity with the aforesaid persons and their successors in interest.

5. The *Hope Decree* is a validly entered decree of a Federal Court.

6. The *Hope Decree* itself limits its applicability as follows: "...this Decree shall not be construed as having adjudicated determined or affected the title to any lands or rights in any property other than the rights to the diversion and use of water as herein determined and established." *Hope Decree*, General Findings and Conclusions Section III, at 3, Exhibit A to 1997 Opinion, at 4.

7. The New Mexico Supreme Court held in *Cartwright v. Public Service Company of New Mexico* that the *Hope* Court's pronouncements did not affect any rights except those specifically adjudicated therein. Persons who were not named and joined as parties to the *Hope*

adjudication are not bound by *res judicata* or collateral estoppel under the Decree. Cartwright v. Public Service Company of New Mexico, 66 N.M. 64, 343 P.2d 654 (1958).

8. In Bounds v. Carner, 53 N.M. 234, 205 P.2d 216, 221 (1949), the New Mexico Supreme Court recognized that if proper notice was given and served, the *Hope Decree* binds all of the approximately 3,500 to the Decree, their privies and their successors in interest.

9. The New Mexico Supreme Court held in Bounds v. Carner, 53 N.M. 234, 243, 205 P.2d 216 (1949) that "...The fact that all of the persons entitled to the use of water from the Pecos River Stream System were not made parties to the Federal suit [*Hope* suit] does not invalidate the decree. It is binding on all who were parties...".

10. This Court has held that " 'The provisions of the *Hope Decree* are not binding upon persons who were not parties to said proceeding except as herein above provided'. State v. Lewis, Gallinas River Section, City of Las Vegas Subfiles, Decision and Orders, p. 6 (filed August 1, 1994)." In addition, this Court has held "that the State could not assert *res judicata* in connection with the *Hope Decree* because it was not a party to the *Hope* adjudication. *Id.* at 5. The City of Las Vegas, however, which was the successor in interest to certain rights that were adjudicated in the *Hope Decree*, was bound under the doctrine of collateral estoppel from relitigating matters which were decided in *Hope*. *Id.* at 5 and 6."

11. The New Mexico Court of Appeals has held "In 1933, the United States was decreed to be the owner of water rights in the Project in United States of America v. Hope Community Ditch, U.S. District Court Cause No. 712 (1933)" and relied on that fact in determining that the United States was an indispensable party to the dispute involving the operation of the Carlsbad Project. Brantley Farms v. Carlsbad Irrigation District, 124 N.M. 698, 954 P.2d 763 (N.M. Ct. App. 1998).

12. "A prior judgment bars a subsequent action on the same claim only between the same parties or their privies (see 3, *below* (discussion of when a person may be considered to be in privity with a party for purposes of claim preclusion)). As the Supreme Court stated in *Hansberry v. Lee*, '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' The *Hansberry* principle has been repeated by the Supreme Court on several occasions and followed by many courts in innumerable cases holding that preclusion cannot be applied to an action by or against a person who was not a party to the prior adjudication." 18 *Moore's Federal Practice*, §131.40[1] (Matthew Bender 3d ed.) at 131-128.

13. "The basis for limiting operation of the claim preclusion doctrine to the parties involved in the previous litigation is the concept that everyone is entitled to his or her 'day in court' before they are bound by an in personam judgment. This right is protected by the Due Process Clause. This requirement for identity of the parties is one major difference between claim preclusion and issue preclusion. Issue preclusion may sometimes be applied in favor of someone who was a stranger to the prior litigation." 18 *Moore's Federal Practice*, §131.40[1] at 131-130.

14. "There is no such thing as 'preclusion by association.' If, within a group of plaintiffs or defendants in litigation, some of the parties are precluded from proceeding with the action because of a judgment in a prior action, those persons within the group who were not parties in the previous case are not precluded from participating in the pending case." 18 *Moore's Federal Practice*, §131.40[1] at 131-130.

15. "The existence of privity for purposes of claim preclusion is usually considered to be a question of fact." 18 *Moore's Federal Practice*, §131.40[3][a] (Matthew Bender 3d ed.) at

131-136.

16. "Because there is no definite formula for the determination of privity, the Restatement (Second) of Judgments has abandoned the term in favor of identifying specific relationships between parties and nonparties that may preclude nonparties. However, the term is still widely used as a convenient shorthand way of describing the various circumstances under which a nonparty may be bound by judgment." 18 *Moore's Federal Practice*, §131.40[3][b] (Matthew Bender 3d ed.) at 131-137.

17. A person may be bound by a judgment, even though not a party if the parties to the prior suit are so closely aligned with that person's interest as to be his virtual representative. See Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), pages 22-26 of Exhibit C to 1997 Opinion. The Court's are " sharply divided on how to implement this strand of issue preclusion." Exhibit C at 23.

18. "Some courts have held that a nonparty may be bound by a prior judgment if the interests of a party to the prior action were so closely aligned with the nonparty's interest of a party his or her *virtual representative* in the prior action. The doctrine of virtual representation binds parties to a subsequent action who were not parties to the prior action when a party to the prior action with interest that are closely aligned to those of the subsequent party vigorously litigated the prior action." 18 *Moore's Federal Practice*, §131.40[3][e] (Matthew Bender 3d ed.) at 131-142, 143.

19. "Because of the controversy surrounding the virtual representation doctrine, some understanding of its history is important to assessment of its current viability. Although the doctrine of virtual representation is sometimes represented as a recent creation of the federal courts, in fact the doctrine is rooted in English property law that is centuries old. Courts of

equity bound persons with certain interests in real property, such as remainders, to prior judgments to which they were not a party, in which the owner of the first vested estate was a party to the prior litigation. The owner of the first vested estate was said to 'represent' the remainder interests. Similarly, a person whose representative suffered a defeat in a prior action could not pursue another such action on his or her own behalf. The doctrine of virtual representation was applied in a variety of contexts in nineteenth century American law. One example is taxpayer suits, in which a prior action by one group of city taxpayers challenging the sale of municipal bonds, was held to bind taxpayers who were not parties to the prior action. Another example is the application of claim preclusion when the prior adjudication determined a trustee of a life estate interest had a right to sell land. The prior adjudication was binding on persons holding a contingent remainder estate subsequent to the life estate if one remainderman was made a party to the suit and thus served as a representative of all those holding such interests." 18 *Moore's Federal Practice*, §131.40[3] (Matthew Bender 3d ed.) at 131-143,144

20. "The prerequisites for application of the virtual representation doctrine are not well-defined. The doctrine requires something more than a showing of similar interests between the virtual representative and the plaintiff. Some courts have emphasized that the nonparty must have received actual or constructive notice of the prior litigation. Other courts have held that there must be an express or implied legal relationship between the party and the nonparty. Relevant criteria include participation in the first litigation by the nonparty, apparent consent to be bound, apparent tactical maneuvering to avoid preclusion, and a close relationship between the party and the nonparty. Due to the problems inherent in seeking to bind nonparties to a judgment, the theory should be kept within strict confines." 18 *Moore's Federal Practice*, §131.40[3](Matthew Bender 3d ed.) at 131-144,145. Thus, virtual representation should only be

applied when the Court finds the existence of some special relationship between the parties justifying preclusion.

21. As stated in Romero v. Star Markets, Ltd., 82 Haw. 405, 922 P.2d 1018 (Haw. App. 1996. (Exhibit C to 1997 Opinion, page 26) “[T]he requirement of reasonable notice must be regarded as a part of the due process limitation on the jurisdiction of a court. (Citation omitted) The basis for this fundamental precept is that

‘in Anglo-American jurisprudence ... one is not bound by a judgment in personam in a litigation in which he [or she] is not designated as a party or to which he [or she] has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115 [117], 85 L. Ed. 22 (1940)... This rule is part of our ‘deep-rooted historic tradition that everyone should have his [or her] day in court.’ 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, at 417 (1981).

Richards v. Jefferson County, Ala., 517 U.S. 793, 797, n. 4, 116 S.Ct. 1761, 1765-66, 135 L.Ed.2d 76, 83 (1996).” . Exhibit C to 1997 Opinion at 27. (Citation to U.S. Reporter added although not included in quote).

See also New Mexico cases cited at Exhibit C, 1997 Opinion, pages 27 and 28.

22. The Court finds and concludes that:
- A. Generally, there is no close or other special relationship between the defendants in *Hope* and the Objectors in these proceedings.
 - B. Generally, there is no express or implied legal relationship between the defendants in *Hope* and the Objectors in these proceedings.
 - C. There is no evidence that omitted parties from *Hope* consented to be bound by the determinations in *Hope*.
 - D. There is no evidence that omitted parties from *Hope* received actual or constructive notice of the proceedings in *Hope*.

E. There is no evidence of tactical maneuvering on the part of Objectors to avoid preclusion.

Therefore, the Court is of the opinion that the doctrine of virtual representation should not be applied as contended by the United States/CID.

23. The prior proceedings in *Hope* need only have provided a party a full and fair opportunity to litigate. A party's failure to take advantage of such opportunity will not defeat preclusion. 18 *Moore's Federal Practice*, §131.41[1] (Matthew Bender 3d ed.) at 131-166.

24. "Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the prior proceeding. When a state court judgment is being asserted as the basis for preclusion in federal court, this requirement is met by a determination that the state proceedings satisfy the minimal procedural requirements for due process. In *Kremer v. Chemical Constr. Corp.*, [456 U.S. 461, 485 (1982)] the Supreme Court stated 'We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause'. Thus, a court may look behind a judgment to the extent of determining whether the procedures utilized in the prior proceeding comported with current notions of procedural due process.

Given the variety of judicial and administrative procedures resulting in a final judgment and the variations on such procedures employed by various tribunals, it is difficult to make any generalizations about what will or will not constitute a full and fair opportunity to litigate." 18 *Moore's Federal Practice* §131.41[1]18 (Matthew Bender 3d ed.) at page 131-164, 165.

25. The Restatement, Second, Judgments §27 provides "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is

essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether of the same or a different claim.”.

26. “When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this section.” for the purpose of determining whether it is precluded in a subsequent action.

Restatement, Second, Judgments §27, Issue Preclusion-General Rule-Comment d, *When an issue is actually litigated* at page 255.

27. The defendants in *Hope* were afforded an opportunity to adduce evidence, cross examine witness and otherwise present their claims and contentions regarding the rights and interests claimed by the United States in connection with the diversion, storage and distribution of water in connection with the Project.

28. None of the defendants in *Hope* vigorously contested the claims of the United States regarding its diversion, storage and distribution water rights in connection with the Project.

29. The structure of the litigation in *Hope* and the treatment of stipulations by the federal attorneys, other counsel, the Special Master and the Court did not deny the defendants in *Hope* an adequate opportunity to challenge the claims of the United States regarding its diversion, storage and distribution of water rights in connection with the Project.

30. The Court finds and concludes that those joined as parties in *Hope* and those properly notified of the United States’ claims regarding its diversion, storage and distribution water rights and served with notice had a full and fair opportunity to litigate their claims and defenses to the United States’ claimed diversion, storage and distribution water rights.

31. “Under the doctrine of issue preclusion, a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery,

cannot be disputed in a subsequent suit between the same parties or their privies.

The doctrine of issue preclusion applies only when the issues presented in each matter are identical. Issue preclusion does not apply when the issues in the prior and current litigation are not identical, even though similar." 18 *Moore's Federal Practice*, §132.02[2][a] (Matthew Bender 3d ed.) at 132-18 and 22.

32. Those in "privity" are to be determined in accordance with the definition of "privity" set forth in the 1997 Opinion, pages 15-18 and B. Persons Bound By Determinations And Decrees In The *Hope* Proceedings And The *Black River* Proceedings, at page 21. The question of who is in "privity" involves a factual issue requiring a case by case examination. See 1997 Opinion, page 15.

The extensive submissions and briefings of the parties do not resolve the issue of the determination of those persons in "privity", nor can the matter be resolved based upon these submissions. See Court's letter to counsel mailed on November 21, 1998, the response of counsel for the United States/CID dated November 18, 1998, the response of counsel for PVACD dated November 18, 1998, the response of counsel for the Brantley's dated November 18, 1998 and the Court's letter dated January 11, 1999 to counsel for United States/CID. Counsel should confer and resolve the issue of those who are in privity under the definitions set forth in the 1997 Opinion. If the matter is not resolved within thirty (30) days after oral arguments in connection with counsels' objections, recommendations, and comments concerning this opinion, counsel are requested to confer and submit alternate dates and an estimate of the time required for an evidentiary hearing to determine those entities who are in privity and precluded under this opinion.

33. The United States argues that the State, although not named as a party in *Hope*,

should be considered a party and precluded from litigating matters in subject proceedings previously determined in *Hope* because in 1927 the State obtained water rights for the New Mexico Hospital for the Insane (Hospital). See United States/CID's November 13, 1998 memorandum at pages 27-28. The State responds that the United States ignores this Court's 1994 Opinion that the State was not a party to *Hope*, that the Supreme Court in State v. Valdez, 88 NM 338, 341, 540 P.2d 818, demonstrated that the State and the Hospital are not one and the same and, therefore, the United States/CID's position is untenable. See State's Reply at 4.

34. In determining the applicability of *res judicata* the "...capacity or character of persons for or against whom the claim is made..." must be considered. Silva v. State, 106 N.M. 472, 745 P.2d 380, 382, Three Rivers Land Company v. Madeoux, 98 N.M. 690, 652 P.2d 240 (1982); Adams v. United Steel Workers of America, AFL-CIO, 97 N.M. 369, 640 P. 2d 475 (1982).

35. The Court determines that the Hospital is precluded by *Hope* from relitigating matters concerning the diversion, storage and distribution water rights of the United States but that the State, since it was not acting in any capacity other than on behalf of the Hospital, is not bound by the determinations in *Hope* concerning these matters.

36. The United States argues that PVACD should be considered a party to *Hope* and should be precluded from litigating matters previously determined in *Hope* because it acquired certain water rights from third parties in connection with Sub-File No. RP 4 (see Exhibit K to PVACD's Response).

PVACD argues that the water rights in connection with Sub-File No. RP 4 were acquired in connection with PVACD's statutory powers of acquisition and retirement. PVACD's Response at 33. PVACD further argues that it acted in its governmental capacity in acquiring

rights to protect ground water resources of the Roswell Artesian Basin citing Pecos Valley Artesian Conservancy District v. Peters, 50 NM 165, 173 P.2d 490 (1945) and N.M. Stat. Ann. §73-1-1 (1978) et seq. PVACD then argues that the predecessor water right owners under the Sub-File did not appear in the *Hope* proceedings nor did they have a real opportunity to participate therein.

The United States responds that PVACD's predecessor in interest, through counsel, filed an answer raising several issues now raised by PVACD, including disputing that the United States should be allowed to store water in its reservoirs and at the same time irrigating from the stream, actively objecting to evidence adduced by the United States and was otherwise afforded a full fair opportunity to litigate any and all claims and defenses concerning the United States' diversion, storage and distribution water rights. See United States' Reply at pages 20 et seq., United States' Facts 318 and 319 attached as Exhibit 3 and 4 to the United States' Reply and United States' Facts, Vol. 1, Nos. 31-32 attached as Exhibit 3 to the United States' Reply.

37. In the Court's opinion, the evidence adduced by the United States is not sufficient to establish that PVACD should be considered a party and precluded from raising issues concerning the United States' diversion, storage and distribution water rights in connection with the Project and to so hold would constitute a stretch of reasoning and result in unfair treatment of PVACD.

38. The Court determines that since PVACD did not act in a representative capacity generally, in its statutory capacity, or on behalf of others in connection with any aspect of the *Hope* proceedings, PVACD is not bound by the determinations in *Hope* concerning the diversion, storage and distribution water rights of the United States.

39. As to Objectors who are not determined to be parties or properly notified of the

United States' claims or afforded due process or in privity or successors in interest, the Court is of the opinion that the determinations in *Hope Decree* concerning the United States' diversion, storage and distribution water rights should be given prima facie effect. Those Objectors, those in privity with them and their successors in interest are granted leave to submit specific objections to the diversion, storage and distribution water rights of the United States as set forth in the *Hope Decree*, together with references to highlighted documentary evidence and summarized testimony of proposed witnesses in support of their objections within forty five (45) days after entry of this decision. Counsel for the US/CID are granted leave to respond within forty five (45) days after service of objections and related submissions. The matter will then be set down for further appropriate action by the Court.

ULTIMATE MATERIAL FACT 1-1: United States v. Hope Community Ditch, et al., No. 712, Equity (May 8 1933)(The *Hope Decree*) Is a Final Judgement On the Merits.

40. The parties agree that the *Hope Decree* is a final judgement on the merits.

ULTIMATE MATERIAL FACT 1-2: The *Hope Decree* Involved The Same Cause Of Action As The Present Proceeding.

41. The proceedings in the case at bar involves a comprehensive stream adjudication of the Pecos River stream system filed in accordance with state statutes to adjudicate both surface and underground water rights in the Pecos River stream system.

42. The *Hope Decree* was a suit in equity.

43. The issue in connection with this ultimate material fact is whether there is a common nucleus of operative facts in these proceedings with those involved in *Hope* leading to

the same judicial choice pertaining to determination of the United States' diversion, storage and distribution water rights as presented in *Hope*. These are the issues presently pending before the Court. The characterization of the *Hope Proceeding* for purposes of Material Fact 1-2 as a quiet title proceeding, a proceeding in equity, a general statutory water rights adjudication proceeding or some other type of proceeding is immaterial. The issue is whether the essential common nucleus of operative facts is present. See Silva v. State of New Mexico, 106 NM 472, 745 P. 2d 380; Kepler v. Slade, 119 NM 802, 896 P. 2d 482 (1995).

44. With due regard to the foregoing authorities cited in connection with determining the applicability of *res judicata* to the determinations of the Court in *Hope* regarding the diversion, storage and distribution water rights claimed by the United States in connection with the Project, the Court is of the opinion that *Hope*, as to such matters, involved the same cause of action as that involved in these proceedings. See 1997 Opinion, A. Issues In Connection With The Requirement That In Order For Res Judicata To Apply, The Proceedings Now Before The Court And Those Involved In The *Hope* Proceedings And The Black River Proceedings Must Involve The Same "Cause of Action", pages 20 and 21.

ULTIMATE MATERIAL FACT 1-3: All Objectors In The Current Proceeding Were Parties In *Hope* Or Are In Privity With Parties In *Hope*.

45. The submissions of the parties do not support the adoption of this ultimate material fact. See Court's determinations and discussion re **CONCLUSIONS OF LAW NO. 1**, *supra*.

ULTIMATE MATERIAL FACT 1-4: The Objectors Here, Or Their Privies, Had A Full and Fair Opportunity To Litigate Their Claims and Defenses, And To Challenge The Claims Of The United States In The *Hope* Proceedings.

ULTIMATE MATERIAL FACT 1-5: *Hope* Defendants Were Accorded Due Process.

Ultimate material facts 1-4 and 1-5 are closely related and will be considered together for purposes of determination by the Court.

46. The ultimate issue is whether parties claimed to be bound by the determinations in *Hope* were given adequate notice of the claims of the United States and afforded a full and fair opportunity to contest the diversion, storage and distribution water rights claims of the United States in connection with the Project.

47. Procedural due process issue requirements are discussed in the Court's letter opinion dated July 17, 1976 re Procedural Issue No.3, and the Court's August 16, 1996 Order the content of which is incorporated herein by reference.

48. The 1997 Opinion discusses the requirements of affording a full and fair opportunity to litigate and other due process requirements at C. Due Process Requirements, at 21-22 and D. An Evidentiary Hearing Will Be Required to Determine Whether Procedures Were Adopted In The *Hope* Proceedings...For The Protection Of Omitted Parties Of The Same Class As Those Joined As Parties And To Ensure A Full And Fair Consideration Of The Common Issue at 23. These discussions are incorporated herein by reference.

49. In the 1997 Opinion, the Court identified the following material fact issues pertaining to the adequacy and service of notice and due process:

Whether "(1) claimants of water rights in the *Hope* Proceeding ...were properly categorized into those who were living, those who were deceased, heirs at law of deceased persons, unknown heirs of law of deceased persons and unknown claimants in interest; (2) required notices were served and omitted parties put on notice that the water and water storage rights claims of the United States would be conclusively determined against them by virtue of the

Hope Proceedings; (3) persons claimed to be precluded under either [preclusion] doctrine were afforded a full and fair opportunity to participate in the proceedings and present their claims and contentions as to the water and storage rights claims of the United States in connection with the Project; and (4) application of collateral estoppel would be fundamentally fair." at 22 (citations omitted). In addition, a material fact issue exists as to whether procedures in the prior proceedings were "so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue..." at 23 (citations omitted).

50. The categorization of claimants is not required in order to meet the requirements of due process; however, it is required in order to determine those who the United States seeks to preclude and whether they were properly notified and served. See Memorandum of the United States and the Carlsbad Irrigation District Identifying Material Facts Relating To Threshold Legal Issue No. 2, paragraph 11, at 12, *supra* at 15 and 16.

51. The Court agrees with the United States that a requirement that a party have an expectation of being precluded as a result of pending litigation goes beyond the mandate of due process.

52. The Court, based upon the submissions of Counsel, has been unable to locate the following materials pertaining to the issues of whether persons claimed to be bound were afforded procedural due process and had a full and fair opportunity to litigate their claims and defenses to the United States' diversion, storage and distribution water rights in connection with the Project:

A. The form or content of summons, notices concerning the determination of issues involving the diversion, storage and distribution water rights of the United States in connection with the Project, orders to show cause, subpoenas or other

documents in connection therewith which were personally served or published and when these events occurred. Nor has the Court been able to locate such documents which were published in Spanish. The citations of the United States in support of requested findings 11, 14, 17 and 18 to the U.S./CID Opening Brief do not answer these questions.

B. Lists of persons served by personal service.⁶

C. Lists of alleged deceased persons and their alleged heirs at law and any notices or pleadings served by publication upon them.

D. Notices published and addressed to unknown claimants in interest.

53. No issues have been raised by any of the Objectors concerning the due diligence efforts of the United States to join all claimants of water rights in the Pecos River System as parties to the *Hope* proceedings.

54. Numerous claimants of water rights in the Pecos River System who were not originally named as parties in *Hope* or served with summons, subpoenas, orders to show cause, or other notices entered their appearances therein by filing answers. They have not been identified.

55. At the request of the United States, the Court in *Hope* ordered the State Engineer to conduct a Hydrographic Survey. Order filed January 24, 1920- Ex. 8 to U.S./CID Opening Brief. Persons not included as parties in *Hope*, but identified in the hydrographic survey and joined as parties, are not identified in the submissions of counsel for any of the parties. Further, notices or other documents served upon such persons, the manner of service and when service was made have not been identified.

⁶ The Court has been unable to find lists identifying persons within the scope of requested findings 47-49 at 17 and 18 of Memorandum Of The United States and Carlsbad Irrigation District Identifying Material Facts Relating to Threshold Legal Issue No. 2.

56. Notices that the determination of diversion, storage and distribution water rights of the United States would be adjudicated in *Hope* which were published and the dates of such publications have not been identified.

57. No citations to rules of procedure regarding the requirements of publication have been identified.

58. The form and content of all notices published, or the frequency of publication are not identified except a notice requiring that certain specified persons "...appear, answer, demur or otherwise plead to the bill of complaint of plaintiff in this action, on or before September 16, 1925..." was published in the Albuquerque Herald once a week for six consecutive weeks, the first of which was on September 14, 1925 and the last on October 19, 1925. Exhibit 14, to U.S./CID Opening Brief.

59. No authority has been cited by counsel for Objectors that either the solicitation or use of form answers constitutes a denial of due process.

60. PVACD's criticism of the Court's treatment of the Spanish speaking community is not supported by transcript references or citations of authority. Some notices may not have been published in Spanish, but PVACD cites no authority that this failure should result in vitiating the determinations of the Court concerning the United States rights or interests.

61. A system was recommended by the Special Master, approved by the Court and implemented by the parties pursuant to which the vast majority of the *Hope* defendants entered into stipulations with the United States concerning the quantification of the defendants water rights in connection with the Project.

62. Counsel for PVACD have raised objections and devoted substantial time to a discussion of alleged *ex parte* communications among the Special Master and counsel for the

United States and other counsel regarding procedures adopted in connection with the disposition of issues and controversies involving individual water rights of defendants. These communications primarily involve the determination of water rights asserted by individual defendants and not the claimed rights and interests of the United States concerning diversion, storage and distribution water rights which were litigated and were not based upon stipulation.

Counsel for PVACD contends that the *ex parte* contacts created a "high degree of unfairness", and apparently contend that this would vitiate the preclusive effect of the determination made by the court in *Hope* concerning the diversion, storage and distribution water rights of the United States, but cites no authority in support of its arguments. PVACD's Brief at 81-85. The United States responds stating that "in addition to corresponding with attorneys for the defendants, the Special Master also met with them [and] ...attorneys for the defendants also contacted the Special Master *ex parte* regarding substantive legal issues." United States/CID Response at 53 and 54.

The United States/CID argue that these "...contacts were an accepted part of the practice of the day...". Citing Cyclopedia of Federal Procedure, Vol. 3, CH.16, §1002 (1928). United States/CID Response at page 54. The United States/CID claim that "...the practice of the Special Master circulating material to counsel and gaining their insight was not considered improper. Instead it was considered 'altogether admirable; [and] conducive to minimizing of errors in, and to the clearness and accuracy to the master's report'. Dobie, Handbook of Federal Jurisdiction and Procedure, § 192 (1928)...". United States/ CID Response at page 54.

63. No matters pertaining to *ex parte* contacts regarding the substance of the rights and interests claimed by the United States in connection with its diversion, storage and distribution water rights are cited by any party.

64. Counsel for PVACD have failed to establish whether and how the *ex parte* communications which occurred and are relied upon by PVACD affected the determinations of the Court concerning the diversion, storage and distribution water rights of the United States in connection with the Project. Its arguments are rejected.

65. PVACD and other Objectors have failed to show how they may have been damaged as a result of the alleged *ex parte* communications concerning the issues now before the Court.

66. Among the documentary evidence adduced by the United States during the course of the *Hope* proceedings concerning the determination of the United States' diversion, storage and distribution water rights were:

- "(a) Exhibit 5: Warranty Deed transferring project from Pecos Irrigation Company to the United States. Transcript Vol. 1 at 8.
- (b) Exhibit 16: Certificate of Incorporation of the Pecos Irrigation Company dated August 17, 1900. Id. at 16.
- (c) Exhibit 17: Deed conveying real-estate and water rights of the Pecos Irrigation and Improvement Company to the Pecos Irrigation Company. Id.
- (d) Exhibit 18: Articles of Incorporation of the Pecos Irrigation and Improvement Company dated May 15, 1890. Id. at 19.
- (e) Exhibit 19: Articles of Incorporation of the Pecos Irrigation and Investment Company dated July 18, 1888. Id. at 20.
- (f) Exhibit 20: Articles of Incorporation of the Pecos Valley Land and Ditch Company, dated October 31, 1887, Id. at 21."

67. The testimony and evidence adduced by the United States in connection with its claims in connection with Section 22, Chapter 102, Laws of 1905 are summarized as follows:

A. The United States' notice of appropriation to the Territorial Engineer was received as Plaintiff's Exhibit 8 in *Hope*. 1. Transcript, Vol. 1, at 11.

B. The State Engineer's Certificate attesting that the United States had not released any part of the 300,000 acre feet reserved by the February 2, 1906 notice

to the Territorial Engineer was Plaintiff's Rebuttal Exhibit D in *Hope*. Transcript, Vol. 16, at 3158.

C. State Engineer from Jan. 1927 until April 1931. Transcript, Vol. 16, at 3183. Mr. Yeo testified that: "On January 23, 1906, B.M. Hall, Supervising Engineer of the United States Geological Survey, Reclamation Service, wrote to David L. White, Territorial Engineer, stating that the United States proposed to undertake certain construction under the terms of the Reclamation Act approved June 17, 1902 (32 Stat., 388) and cited Section 22, Chapter 102, Laws of 1905 of the 36th Legislative Assembly of the Territory of New Mexico for authority. The quantity of water to be appropriated was the equivalent of 300,000 acre feet per year..." Id. at 3199.

D. Mr. Yeo also testified that under the 1905 New Mexico statute, "the State Engineer grants no license to a federal appropriator. They [the federal government] are not required to make proof of beneficial use of water, so this project has complied, so far as I know, with the Law of the State of New Mexico ... individuals have to make proof of beneficial use in order to get a license or a water right, but under the Law, the federal government does not have to make any showing of even having built their works or applied their waters." Id. at 3200-01.

E. Finally, Mr. Yeo testified that there had been no release of the government's appropriation during his terms as State Engineer and no record of any prior releases. Id. at 3201.

68. On June 6, 1932, Judge Neblett entered an Order giving the parties until August 15, 1932 to file objections or exceptions "to the Report of the Special Master and to the Findings

of Fact and Conclusions of Law therein contained."

69. On June 23, 1932, Special Master Remley filed a Certificate attesting that "on the 8th day of June, 1932, he did mail to all attorneys of record representing all defendants claiming water rights on the entire stream system of the Pecos River down to and including the plaintiff's Carlsbad Project, the Order of this Court bearing date June 6th, 1932, requiring that all objections and exceptions, if any, to the Report of the Special Master and to his Findings of Fact and Conclusions of Law therein contained concerning water rights in the middle basin of said Pecos River Stream System, to be filed with the Clerk of this Court on or before the 5th [sic. 15th] day of August, A.D. 1932."

70. By letter of January 9, 1933, Wm. D. Bryars, Clerk of the U.S. District Court notified 45 attorneys and law firms "that the Special Master has submitted a proposed Final Decree in the above-entitled and numbered cause; that all objections or exceptions thereto, by order of the Court must be filed on or before the 15th day of March, A.D. 1933, and that all objections or exception, if any are filed on or before the last mentioned date, will thereafter be heard by the Court on a date or dates to be later fixed." (emphasis in original). Mr. Bryars' letter also informed the attorneys that the proposed final Decree would be made available for inspection in Las Vegas (Vol. 1, lands in San Miguel and Guadalupe Counties), Roswell (Vol. 11, lands in De Baca, Chaves, Lincoln, Eddy and Otero Counties) and Santa Fe (both volumes).

71. On July 14, 1932, Special Master Remley held a hearing "upon and discussion of the General Provisions of the Decree to be submitted to the Court for approval and signature." Notice at paragraph 1. The notice for that hearing provided that the Special Master "earnestly requests every attorney of Record to be present at such hearing and will welcome suggestions upon these matters." Notice at paragraph 2.

72. No evidence of any objections to the Court's determination of the United States' diversion, storage and distribution water rights are referred to by any party.

73. Ultimately there were approximately 3,500 defendants joined as parties in *Hope*. These parties have not been identified in the submissions of counsel for any of the parties in these proceedings.

74. The *Hope Decree* provides in pertinent part:

"...This cause having come on regularly to be determined and adjudged upon the Bill of Complaint of the Plaintiff with amendments thereof and substitution of parties therein, and upon the pleas, answers, entries of appearance and stipulations of the defendants herein and upon the reports, findings of fact, conclusions of law and recommended decree of Geo. E. Remley, Special Master in Chancery appointed herein, to whom this matter was referred by Order of this Court entered on the 19th day of November, A.D. 1925, and upon the evidence adduced before said Special Master at hearings before him held and by him reported into court, and

THE COURT Being satisfied from the reports of said Special Master in Chancery that the said testimony by him taken and returned into Court and upon which his findings of fact and conclusions of law herein returned were made, was taken upon due and lawful notice in all respects according to the Laws of the United States of America and the Rules and Orders of this Court, and that notice of the filing of said Reports of said Special Master, including the filing of his said Findings of Fact and Conclusions of Law, and of the Orders of this court fixing the time for the filing of objections and exceptions to such Reports, Findings and Conclusions, has been duly given and served upon all Attorneys of Record in this cause as by Law, Rules and Orders of this Court provided in relation thereto, and

THE COURT, Having duly heard and considered all objections and exceptions to all Reports and Findings of Fact and Conclusions of Law by the Special Master filed herein, doth hereby overrule each and all of said objections and exceptions and doth hereby adopt the same as and for the findings of fact and conclusions of law of the Court itself, save and except in so far as the same...'. ...". Pages 1 and 2.

75. Subject to confirmation of matters requested by the Court concerning notice and

service, the Court is of the opinion that the defendants in *Hope* who were properly notified and served were afforded a full and fair opportunity to litigate their claims, defenses and contentions concerning the diversion, storage and distribution water rights of the United States in connection with the Project and were accorded due process.

ULTIMATE MATERIAL FACT 1-6: The *Hope* Defendants Were Provided Fundamental Fairness

[The United States /CID dispute that Ultimate Material Fact 1-6 applies].

76. The discussion and determinations of the Court re Ultimate Material Facts 1-4 and 1-5 are incorporated herein by reference as though set forth in detail.

77. Subject to the matters set forth in paragraph 75, the Court determines that the defendants in *Hope* were provided fundamental fairness.

CONCLUSIONS OF LAW NO. 2: THE *HOPE DECREE* ESTABLISHED "RULES OF PROPERTY."

78. The issues involved in connection with this conclusion of law are whether the determinations in *Hope* concerning the United States diversion, storage and distribution water rights in connection with the Project are rules of property or involve matters of strong public interest which preclude re-litigation of these rights and interests in this proceeding.

79. Initially, PVACD argues that the United States/CID have waived their rule of property arguments. PVACD's Response at 56, footnote 6. The United States/CID respond that the issues were not waived because they were clearly identified as Conclusions of Law #2 in US/CID/PVACD Joint Statement, paragraph 20, page 13 *supra*.

80. "Waiver usually requires clear evidence to that effect..." 18 Moore's Federal

Practice, §132.05[8][a] (Matthew Bender 3d ed.) at 132-188.

81. Conclusion of law No. 2 in the US/CID/PVACD Joint Statement provides:

"...CONCLUSION OF LAW NO. 2: THE HOPE DECREE ESTABLISHED 'RULES OF PROPERTY.'..."

82. The Court determines that the claims and contentions of the United States/CID concerning the applicability of the rule of property doctrine were not waived.

83. In the 1997 Opinion, the Court deferred determining whether the rule of property doctrine or the doctrine concerning matter of strong public interest should be applied in connection with the determination of the Court in *Hope* regarding the United States' diversion, storage and distribution water rights. See discussion of the rule of property at 28-30 of the 1997 Opinion.

84. The principles involved in determining the existence of rules of property or matters involving strong public interest are discussed in some detail in the above cited references to the 1997 Opinion and Bogle Farms v. Baca, 122 N.M. 421, 925 P.2d 1184 (1996).

85. The Court recognizes that if the determinations of the Court in *Hope* concerning the diversion, storage and distribution water rights of the United States concerning the Project are rules of property, they may be binding on those who were not parties to *Hope*.⁷

86. The rule of property doctrine and the doctrine pertaining to matters of strong public interest are generally considered applicable to general legal propositions and settled legal principles rather than to specific determinations of property rights and interests of a party or the results of a particular case.

87. Matters involving the rule of property and public interest doctrines can essentially

⁷See United States v. Maine, 120 U.S. 515, 527-528 (1975); EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986).

be determined as matters of law; however, there are genuine issues of material fact concerning reliance. The United States/CID sets forth various manuals, procedures, reports, summaries, memoranda, correspondence, applications, protests, operating procedures, matters involving the State Engineer's Office, memoranda of understandings, reports of Water Masters, hydrographic surveys, numerous individual transactions, records of County Clerks and the State Engineer, contending that cumulatively these materials establish reliance upon the continued viability of the determinations in *Hope* as a rule of property. The great vast majority of these matters are evidentiary in nature. See requested findings 138-313.⁸

88. In the Court's opinion, the determinations in *Hope* concerning the diversion, storage and distribution water rights of the United States in connection with the Project are rules of property, although they are not general legal propositions.

89. The authorities establish that rules of property or determinations of great public interest should not be disturbed except for the most cogent reasons.

90. The rule of property doctrine is an adjunct of the rule of stare decisis and whether the doctrine should be applied involves a consideration of whether those sought to be bound were afforded due process.. See discussion in Bogle Farms v. Baca, 925 P.2d 1192, *supra*.

91. With due regard to the authorities cited and reviewed, the Court is of the opinion that the application of the rule of property and public interest doctrines should be limited to the application of the preclusive effect of the determinations in *Hope* concerning the United States'

*To the extent that Counsel for US/CID continue to assert the applicability of these doctrines, reliance thereon and that they should be generally applied as a matter of stare decisis, when counsel file their objections, they are requested to recommend a procedure which would involve summarizing requested evidentiary findings based on the existing record and otherwise drastically reducing the number of requested findings which would then be included in the Court's opinion.

diversion, storage and distribution water rights to those properly given notice and served and otherwise afforded due process, those in privity with them and their successors in interest.

CONCLUSIONS OF LAW NO. 3: THE OBJECTORS ARE PRECLUDED FROM RELITIGATING THOSE ISSUES IDENTIFIED IN THE US/CID'S IDENTIFICATION OF MATTERS ACTUALLY AND NECESSARILY DETERMINED IN PRIOR PROCEEDINGS (ISSUES) THROUGH THE APPLICATION OF COLLATERAL ESTOPPEL.

92. To the extent that it may be determined that the doctrine of *res judicata* is not applicable to matters determined in *Hope*, the Court determines that issues of fact in connection with the diversion, storage and distribution water rights of the United States in connection with the Project determined in *Hope* are binding upon persons given proper notice of the claims of the United States and properly served with such notice in *Hope*, and otherwise afforded due process, those in privity with said parties and their successors in interest under the doctrine of collateral estoppel. See the Court's discussion of corresponding similar matters pertaining to the applicability of the doctrine of *res judicata*, *supra*.

ULTIMATE MATERIAL FACT 3-1: The Issues And Subject Matter Adjudicated In The *Hope* Proceedings Are Identical To The Issues And Subject Matter Being Adjudicated In These Proceedings.

[The United States and CID dispute that Ultimate Material Fact 3-1 applies]

93. The issues and subject matter concerning the diversion, storage and distribution water rights claims of the United States adjudicated in *Hope* are identical to the issues and subject matter being adjudicated in connection with said rights and interests in these proceedings.

ULTIMATE MATERIAL FACT 3-2: The Matters Upon Which The United States Seeks Preclusion Were Actually And Necessarily Litigated And Determined In The *Hope* Proceedings And Incorporated Into A Final Judgment On The Merits.

94. Matters pertaining to the diversion, storage and distribution water rights of the

United States were actually and necessarily litigated and determined in *Hope* and incorporated into the *Hope Decree*, a final judgement on the merits.

ULTIMATE MATERIAL FACT 3-3: All Objectors In The Current Proceeding Were Parties In *Hope* Or Are In Privity With Parties In *Hope*.

95. The submissions of the parties do not support the adoption of this Ultimate Material Fact. See discussion re Ultimate Material Fact 1-3, *supra*.

ULTIMATE MATERIAL FACT 3-4: The Objectors Here, Or Their Privies, Had A Full And Fair Opportunity To Litigate Their Claims And Defenses In The *Hope* Proceedings.

96. See discussion re Ultimate Material Facts 1-4 and 1-5 *supra*.

ULTIMATE MATERIAL FACT 3-5: the *Hope* Defendants Were Accorded Due Process.

97. See discussion re Ultimate Material Facts 1-4 and 1-5, *supra*.

ULTIMATE MATERIAL FACT 3-6: The *Hope* Defendants Were Provided Fundamental Fairness.

[The United States and CID dispute that Ultimate Material Fact 3-6 applies].

98. See discussion re Ultimate Material Fact 1-6, *supra*.

CONCLUSION OF LAW NO. 4: Intervening Changes In Law Subsequent To 1933 Have Rendered Any Preclusive Effects From The *Hope Decree* Regarding Carlsbad Project Water Rights Inapplicable In The Current Proceeding.

99. "The fundamental rule, that issue preclusion applies only if the issue in the prior litigation is identical to the issue in a subsequent litigation, entails the corollary that an intervening change in the law may create a difference, even when the issues appear on their face to be

identical: if the issue is different, then issue preclusion does not apply. For this reason, a change or development in the controlling legal principles governing a case may sometimes prevent the application of issue preclusion even though an issue has been litigated and decided, because application of the issue preclusion doctrine is confined to prevention of repetitive situations in which the controlling facts and applicable legal rules remain unchanged" 18 *Moore's Federal Practice* §132.02[2][f] (Matthew Bender 3d ed.) at 132-29, 30.

100. While the Court recognizes that there have significant decisions since *Hope* affecting water rights in connection with reclamation projects generally, Objectors do not cite any changes in law which would have any significant impact upon the Court's determinations of the United States' diversion, storage, and distribution water rights set forth in *Hope*. Therefore, Objector's claims that these determinations are inapplicable to the current proceedings are not well founded and are rejected.

MISCELLANEOUS ORDERS

Counsel are requested to submit their objections to the findings of fact and conclusions of law set forth herein and the failure of the Court to adopt requested findings of fact or conclusions of law, other comments and suggestions, and a time and place for oral arguments in connection with Threshold Legal Issue No. 2 within forty-five (45) days after service of a copy of this Supplemental Opinion.

Counsel for the State is requested to serve a copy of this opinion upon counsel other than those specified in Exhibit A and appearing *pro se* who have elected to participate in this phase of these proceedings and designated depositories.



HARL D. BYRD
DISTRICT JUDGE PRO TEMPORE

CERTIFICATE OF MAILING

The undersigned does hereby certify that he caused to be mailed, postage prepaid, a copy of the foregoing opinion to counsel specified on attached Exhibit A on this 30th day of September, 1999.



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District Judge Pro Tempore

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