

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

FIFTH JUDICIAL DISTRICT
CHAVES COUNTY NM
FILED OFFICE

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BEE J. CLEM
DISTRICT COURT CLERK

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

Nos. 20294 and 22600
Consolidated

Plaintiffs,)

vs.)

Hon. Harl D. Byrd
District Judge *Pro Tempore*

L. T. LEWIS, et al.,)
UNITED STATES OF AMERICA,)

Carlsbad Irrigation
District Section

Defendants,)

Membership Phase

and)

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

Plaintiffs,)

vs.)

HAGERMAN CANAL CO., et al.,)

Defendants.)

SECOND SUPPLEMENTAL DECISION AND ORDER

**Second Supplemental Decision and Orders in Response to
Submissions Re The Court's Decision and Order Served on
December 19, 2001**

THIS MATTER comes on for consideration by the Court in connection with the

objections, comments, suggestions and memoranda briefs submitted by counsel in response to the Court's **Supplemental Decision and Order** (Court's December 2001 Decision) served on December 19, 2001.

The Court has reviewed the following submissions:

1. The UNITED STATES' OBJECTIONS, COMMENTS AND SUGGESTIONS TO THE COURT'S DECEMBER 19, 2001, SUPPLEMENTAL DECISION AND ORDER AND BRIEF ON CERTAIN MATTERS REQUESTED BY THE COURT (United States' Submission) served on January 18, 2002.
2. DEFENDANT CARLSBAD IRRIGATION DISTRICT'S MEMORANDUM BRIEF, OBJECTIONS, COMMENTS, AND SUGGESTIONS TO COURT'S DECEMBER 19, 2001 SUPPLEMENTAL DECISION AND ORDER (CID'S Submission) Served on January 22, 2002.
3. The STATE OF NEW MEXICO 'S RESPONSE TO THE COURT'S DECEMBER 19, 2001 SUPPLEMENTAL DECISION AND ORDER (State's Submission) served on January 22, 2002.
4. PVACD'S BRIEF ON SUPPLEMENTAL ISSUES (PVACD'S Submission) served on January 22, 2002.
5. BRANTLEYS', TRACY/EDDYS' ANSWERS AND BRIEF RESPONDING TO THE COURT'S SUPPLEMENTAL DECISION AND ORDER OF DECEMBER 19, 2001 (BRANTLEYS', TRACY/EDDYS' SUBMISSION) served on January 22, 2002.
6. NEW MEXICO STATE UNIVERSITY'S BRIEF ON ISSUES RAISED IN DECEMBER 19, 2001 SUPPLEMENTAL DECISION AND ORDER (NMSU'S Submission)

served on January 22, 2002.

7. A letter to the Court dated January 22, 2002 from Jay F. Stein, Esq. on behalf of Pardue Ltd., Company.

8. Portions of PVACD'S COMMENTS ON THE DECISION AND ORDER OF JANUARY 7, 2002 (PVACD's Comments) filed on February 11, 2002.

9. Portions of the STATE OF NEW MEXICO'S RESPONSE TO THE COURT'S JANUARY (sic)7, 2002 DECISION AND ORDER (State's Response) served on February 11, 2002.

INTRODUCTION

Nothing contained in this decision shall be deemed or construed as a determination of any claim, contention or assertion of any party not specifically set forth in designated portions hereof captioned "Court's Decision".

Matters not specifically determined herein have not been addressed because they are inconsistent with prior determinations of the Court, or they are not well founded, or determinations in connection therewith are not required in order to dispose of matters presently pending before the Court.

ISSUES AND COURT'S DECISIONS

ISSUE NO. 1

Whether, in order to have any private non-Project water rights diverted through or stored by Carlsbad Project facilities, members of CID would have to have an independent contract with the United States under the Warren Act. See Act of February 21, 1911, ch 141, 36 Stat 925, J. B. Bean v. United States, 163 F. Supp. 838, 841 (Cl. Cl. 1958).

The first issue considered in this decision has been rephrased as requested by the United States of America (United States) in the United States' Submission, p.2.

The United States' comments that:

...the membership phase of these proceedings only involves the adjudication of CID members' rights to water they receive from the Project. It does not involve independent claims for water rights that existed prior to the Project and with priority dates senior to the Project water rights. The requirements of the Warren Act are relevant only if CID members claim Carlsbad Project facilities as a point of diversion or place for storage for those rights. United States' Submission at p. 2.

Court's Decision

The United States' arguments concerning the Warren Act may have been misinterpreted by the Court. The Court interpreted the United States' arguments in regard to the Warren Act to mean that members of CID were not entitled to claim or have the Court determine Project water rights of members of CID with individual priority dates earlier than Project priority dates unless they had a Warren Act contract. See Court's December 2001 Decision, pp.9-13.

The issues raised by the United States in connection with the Warren Act involve a consideration of the proper utilization of Project distribution facilities, and, possibly, the proper manner of allocating "excess" water, if any, in connection with a reclamation project. The Warren Act applies only if "...storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project." (See 42 U.S.C. §523)

The Court is not aware of any excess water or excess storage or carrying capacity in connection with the Carlsbad Irrigation District Project. (Matter underscored for emphasis). Issues in connection with the Warren Act might involve a determination of the rights, duties and

obligations of the United States, CID and members of CID concerning the delivery or use of water through facilities of the Carlsbad Irrigation District Project. These issues are wholly separate and apart from issues involved in the Membership Phase of these proceedings concerning the determination of claimed elements of water rights of members of CID in connection with the Carlsbad Irrigation District Project.

The Membership Phase of these proceedings does not involve a determination of water rights in connection with lands outside the Project. The Membership Phase of these proceedings does not involve a determination of the priority dates of water rights claims of members of CID which may have existed and which may be senior to Project priority dates. The Membership Phase of these proceedings is limited and restricted to a determination of the elements of the claimed water rights of members of CID in connection with the Project pertaining to lands located within the Carlsbad Irrigation District Project.

The Court concludes that the Warren Act is not relevant for the purpose of determining priority dates of Project water rights claimed by members of CID in connection with the Project in the Membership Phase of these proceedings.

ISSUE NO. 2

Are members of CID entitled to have individual priority dates determined in connection with their Project water rights claims in the Membership Phase of these proceedings separate and apart from those determined as Project priority dates, with the understanding that Project water is to be distributed equitably and on a pro rata basis among members of CID?

Claims of the Parties

Claims of the United States :

The United States argues that it is not mandatory that " individual priority dates be determined for CID members under NMSA 1978, §72-4-19 (1907) or State ex rel v. Aamodt. D.N.M. No. CIV. 6639-M, Memorandum Opinion and Order (February 26, 1987)." United States' Submission at pp. 4-10.

Claims of CID:

CID claims that members of CID, by virtue of certain contracts and stockholder subscription agreements with PWUA, waived and relinquished their rights to a determination of separate priority dates in connection with their water rights claims and that NMSA 1978, §72-4-19 does not require that individual priority dates for members of CID be determined. CID's Submission at pp. 10-12. CID further argues that the determinations of Judge Mechem in *State ex rel v. Aamodt*, unpublished Memorandum Opinion, February 28, 1987, Cause No. 6639-Civil, United States District Court for the District of New Mexico concerning the determination of individual priority dates are not applicable to the facts and circumstances involved in this phase of these proceedings. CID Submission at pp. 12-16.¹

Claims of the State:

The claims of the State (State's Submission, pp. 3-5) may be summarized as set forth in the last paragraph of its submission as follows:

Sections 72-4-19, 73-10-16, 73-10-24 and 72-1-2 must be read in *pari materia* in order to give full effect to legislative intent behind

¹ As an aside, CID claims that Judge Mechem, in basing his decision in *Aamodt* on *Millheiser v. Long*, 10 N.M. 99, 61 P. 111, 116-18 (1900), misread the case. CID's Submission at pp. 15-16. The opinion in *Millheiser* was cited in *Aamodt* for the proposition "that priority of appropriation to beneficial use, not priority of diversion, determined water rights." at p.24. *Millheiser* was not misread by Judge Mechem. *Millheiser* supports the quoted proposition.

them. When read in *pari materia* and interpreted in light of the purposes of the Carlsbad Project, the Court should find that the priority dates assigned to tracts irrigated by individual CID members relate back to the priority dates set forth in the Hope and Judkins Decrees. Those are the dates set forth in the Project Offer and the Offers of Judgment the State has sent to individual CID members. State's Submission at p. 5.

Claims of PVACD:

PVACD argues in its submission that priority dates for each member of CID in connection with their water rights claims should be determined rather than Project priority dates. PVACD's Submission at pp. 4-8.

In PVACD's Comments² (pp. 1-5) it argues that a determination of individual priority dates in connection with the water rights claims of members of CID is required and, in summary, states:

In order to afford due process to upstream juniors in a future priority call, individual priorities must be assigned to individual water rights. Accordingly, as a threshold matter, this Court should conclude that as against upstream water users priority of appropriation applies to the individual water rights within the Carlsbad Irrigation District. *Id.* at p. 5.

Claims of the Brantleys, Tracy/Eddys:

The Brantleys, Tracy/Eddys argue that individual priority dates should be determined in connection with the water rights claims of members of CID and that such determinations should be made on a tract-by-tract basis, citing NMSA 1978, §72-4-19. They

² In PVACD's Comments and the State's Response, counsel argue matters which are more properly the subject matter of the Court's December 2001 Decision and should have been addressed in connection therewith. See PVACD's Comments, at pp. 1-6 and State's Response at pp. 3-7. The Court has hesitated to consider these submissions in the context of the December 2001 Decision, but, reluctantly, will do so.

also cite, in support of their arguments, NMSA 1978, §72-1-2 and the New Mexico Constitution. Art. XVI, §3. Brantleys', Tracy/Eddys' Submission at pp. 4-5.

Court's Decision

Neither NMSA 1978, §72-4-19 nor the Memorandum Opinion and Order (February 26, 1987) in *Aamodt*, require that priority dates for each member of CID in connection with their water rights claims for each tract of land owned by members of CID be determined and adjudicated in the Membership Phase of these proceedings. The facts and law in *Aamodt* are distinguishable from the facts and applicable law involved in these proceedings.

The Court is of the opinion that the determination of individual priority dates for water rights of members of CID, separate and apart from priority dates in connection with the Project, is not within the scope of the Membership Phase of these proceedings. See Court's Decision re Issue No. 1, *supra*.

All determinations by the Court of priority dates shall be without prejudice to the right of members of CID to assert and claim priority dates prior to Project priority dates in proper proceedings separate and apart from those involved in the Membership Phase of these proceedings.³

³ In connection with the right of members of a reclamation project to litigate issues involving distribution of Project water, CID argues: Of what use would individual priority dates be for CID's members? Federal law is clear that Project members have no private right of action to litigate issues involving distribution of Project water. As recognized by the United States Supreme Court, reclamation project water users have no private right of action, in the absence of the Secretary of the Interior to litigate issues involving distribution of project water. '[P]rivate suits against parties other than the Secretary to enforce project water rights could very well undermine the discretion the Secretary enjoys in distributing water under the reclamation statutes.' *Arizona v. California*, 373 U.S. 546, 582-85 (1963); accord *Long v. Salt River Valley Water Users Assoc.*, 820 F. 2d 284, 288 (9th Cir. 1987).

ISSUE NO 3

Did members of CID relinquish or waive their right to claim individual priority dates in connection with their Project water rights' claims?

Court's Decision

"Waiver" is the intentional relinquishment or abandonment of a known right resulting from express agreement or which is inferred from conduct or circumstances warranting the inference of an intent to waive or abandon. *Albuquerque Nat. Bank v. Albuquerque Ranch Estates, Inc.*, 99 NM 95, 101, 654 P.2d 548, citing *Moss Theatres, Inc. v. Turner*, 94 NM 742, 616 P. 2d 1127 (Ct. App. 1980), quoting *Bastanchury v. Times-Mirror, Co.*, 68 Cal. App. 2d 217, 156 P.2d 488 (1945). "Waiver", if implied by conduct, must be manifested by clear, unequivocal and decisive acts of a party showing such purpose so consistent with an intent to waive that no other reasonable explanation is possible. *Lyon Development Co. v. Business Men's Assur. Co. of America*, 76 F.3d 1118, 1125 (10th Cir., 1996) citing Missouri law and *Errante v. Kadean Real Estate Serv., Inc.*, 664 S.W. 2d 27, 29 (Mo. Ct. App. 1984).

The Court has again reviewed the submissions of the parties concerning the March 1906 Contract between Pecos Water User's Association (PWUA) and the United States, the Articles of Incorporation of PWUA, the 1932 Contract between the United States and CID, the Eddy County District Court Decree approving the contract between the United States and CID and PWUA and the stock subscription agreements with members of CID submitted by counsel in support of their arguments. The Court has not been able to find any provisions in the foregoing documents which manifest an intent to relinquish, waive or abandon any claims of priority dates separate and apart from Project priority dates; however, as previously held by the Court, all Project water

must be distributed among members of CID on an equitable, *pro rata* basis regardless of claimed individual priority dates of members of CID.

Significantly, Article XII of PWUA's Articles of Incorporation provides in pertinent part that "Nothing in these Articles of Incorporation, or in the fact of becoming a member of this Association, shall be construed as affecting, or intended to effect, or in any way interfere with the *vested rights of any person to the prior use, or delivery, of any waters.*" (Italics added for emphasis). Exhibit 3, United States's Statement of Claims. In addition, the 1906 Contract provides that the Secretary of the Interior "...shall impose no rule or regulation interfering with any vested right of the shareholders of the association as defined or modified by said articles of incorporation and by laws...". Paragraph 6 at p. 5.

Except in connection with the distribution of Project water by CID to its members⁴, the Court concludes that members of CID did not waive or relinquish their right to claim individual priority dates in connection with their individual water rights claims by virtue of their agreements with the PWUA or with the United States or CID. Further, in connection with the water rights claims of members of CID, except as herein above provided, the Court concludes that there is no evidence of a course of conduct or circumstances that would warrant the inference of relinquishment or waiver of the right to assert a priority date separate and apart from a Project priority date.

⁴ The Court has previously determined that members of CID are entitled to have Project water "...distributed and apportioned by the board of directors of CID to its members in accordance with Acts of Congress, rules and regulations of the Secretary of the Interior, applicable provisions of existing contracts (between CID and its members) and as provided in NMSA 1978, §§73-10-16 and 73-10-24.", with due regard to the provisions of NMSA 1978, §72-5-28 F. See Court's Decision and Order filed on October 22, 2001, pp. 6 and 12.

ISSUE NO. 4

What happens to the water rights of members of CID if they are forfeited or abandoned?

Court's Decision

Under NMSA 1978, §72-5-28 A. (2002), when there is a forfeiture of water rights because of failure to beneficially use all or any part of the water claimed, except as to waters for "storage reservoirs", the water reverts "...to the public and shall be regarded as unappropriated public water...". By analogy, this rule is also applicable in the event of abandonment.

Therefore, in the event of forfeiture or abandonment of water rights of members of CID, unless the water has been transferred to other lands, as provided in NMSA 1978, §73-13-4, the water reverts to the public and is regarded as unappropriated public water.

ADDITIONAL OBJECTIONS, COMMENTS AND SUGGESTIONS OF THE UNITED STATES AND RESPONSES OF THE STATE AND PVACD

Respective Claims of the United States, the State and PVACD

At the request of the State, the Court modified its prior rulings concerning forfeiture and abandonment that "... the right to use water of the United States [in connection with the Project] may not be lost through laches or the neglect of its officers or employees. *United States v. Ballard*, 184 F. Supp. 1, 12 (D.N.M. 1960). (Matter in brackets added for clarity). (See October 19, 2001 Decision at p. 12) by adding:

The Court determines that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of CID's individual members. Court's December 2001 Decision at p. 30.

The United States comments that it believes that the Court's previous ruling is correct and should not have been modified. United States' Submission at p. 15.

Counsel for the United States states:

"The State's proposed modification suggests that the State wants the Court to rule prematurely on the quantification of the storage and diversion rights [of the United States] and that the acreage appurtenant to the Project may be something less than 25, 055. [acres] despite the fact that 25,055 Project acres have been historically irrigated." (Matter in brackets added for clarity).

The United States' Submission at p. 15.

The United States suggests that the modification be deleted and the following substituted therefore:

The Court determines that the Project storage and diversion rights of the United States cannot be forfeited or abandoned and that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be determine in the Project (Offer) Phase of the proceedings.
Id.

The United States further comments that "...the State's requested modification goes beyond the issues being addressed by the Court at this stage of the proceedings." *Id.* at 16.

While not set forth in the State's Submission, but, rather in the State's Response, the State argues that the property rights of the United States "... are not property rights of the type that are entitled to the protection of the Property Clause of Article IV, Section III of the United States Constitution." at p. 2. The State argues that the rule that forfeiture or abandonment cannot occur through laches or the neglect of the officers or employees of the United States applies only "when the United States actually owns the right to use water, as was the case in *Ballard v. United States.*" State's Response p. 4. The State continues:

The United States has stated that this is not the proper time for the Court to address the language proposed by the State because the quantification of diversion and storage rights is to be made in the Project Offer Phase. Although, as noted above, the United States' position in this regard seems to have varied, nevertheless the Decisions and Orders that the Court is currently issuing are the proper place to state that, applying the principle of beneficial use and relevant federal and state law, the actual amount of water that the United States may divert and store for the Carlsbad Project will be that amount necessary to serve the water rights of the members of the CID.

The State agrees that the determination of the actual amount of water that the United States can store and divert should occur after the water rights of the members have been determined. At that point, technical experts for the parties can calculate and present evidence regarding the amount that must be diverted and stored so that sufficient water will be in (sic) placed into the CID's delivery system to serve those water rights. *State's Response* at pp. 6-7.

The State requests that the Court:

- (1) Reaffirm the language in its December 19, 2001 Supplemental Decision and the legal principles upon which the determination in that Supplemental Decision was made; and,
- (2) Reaffirm that the actual amount of water that United States can divert and store for the Carlsbad Project will be determined after the water rights that are owned by the individual members have been determined and that the parties will be able to present evidence on that amount at the time such a determination is made. *Id.* at 8.

In PVACD's Comments, and while not set forth in PVACD's Submission in connection with the Court's December 2001 Decision, PVACD argues:

Under certain circumstances, property of the United States that is controlled by Congress under the property clause cannot be lost by laches or the neglect of its officers and employees. *See* Art. IV, Sec. III, Cl. 2. The United States' interest in the diversion and storage of CID water, however, is not property controlled by Congress under the property clause. After referring to the passages in *Ickes v. Fox*, 300 U.S. 82 (1937), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), that

make it clear the ownership of water or water rights in reclamation projects does not vest in the United States, the Supreme Court made it equally clear in *Nevada v. United States*, 463 U.S. 110 (1983), that the United States' interest in the diversion and storage reclamation project water does not rise to the level of a property right:

In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear.

Id. at 126. In sum, the diversion and storage "rights" of the United States in connection with Carlsbad Project waters are not rights to which concepts of sovereign immunity have any application. The United States' interest in the diversion and storage of Project water will be defined in the course of these proceedings. At this juncture, however, it is clear that the United States' interest is not proprietary in nature.

pp. 8-9.

Court's Decision

Counsel for the State and PVACD argue that in order for the decision in *United States v. Ballard*, 184 F. Supp. 1 (D.N.M. 1960)⁵ to apply that the rights of the United States must be

⁵ In *Ballard*, the Court decided that "it is held in *United States v. State of California*, 332 U.S. 19, 67, s. ct 1658, 91 L. Ed. 1889, that property of the United States may not be lost through

"proprietary" (apparently meaning that they must be owned by the United States absolutely) and that *Ballard* would not apply if the rights were owned by the United States for the use and benefit of member of CID. While these arguments are noted, citations in support thereof are not submitted and the citations do not support the arguments of counsel.

The Court has previously determined that the diversion and storage rights and the appropriation of water by the United States in connection with the Project are for the use and benefit of members of CID. See Opinion Re Threshold Legal Issue No. 3 at pp. 24-25, filed on November 4, 1997 and *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 655 S.Ct. 1332, 89 L. Ed. 1815 (1945) (Quoted at p. 16 of Opinion Re Threshold Legal Issue No. 3)

United States v. California (relied upon in *Ballard* regarding laches or neglect of officers or employees of the United State) involved the right of the federal government in submerged land off the coast of California between the coastal low-watermark and the three-mile limit and the claimed superior right of the United States to take or authorize the taking of quantities of oil and gas underneath that land. The State of California claimed that the rights of the United States had been lost by reason of conduct of its agents barring it from enforcing its claimed rights by reason of principles similar to laches, estoppel or adverse possession. The rights and interests were held by the Federal government in trust for all the people. The Court held that:

The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their

the laches or neglect of its officers and employees."

acquiescence, laches, or failure to act."⁶ 332 U.S. at 40.

In *Utah v. United States*, *supra* the Court stated:

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *United States v. Kirkpatrick*, 9 Wheat. 720, 735; *Steele v. United States*, 113 U.S. 128, 134; *United States v. Beebe*, 127 U.S. 338, 344; *United States v. Insley*, 130 U.S. 263, 265-266; *United States v. Dalles Military Road Co.*, 140 U.S. 599, 632; *United States v. Michigan*, 190 U.S. 379, 405; *State ex rel. Lott v. Brewer*, 64 Alabama, 287, 298; *State v. Brown*, 67 Illinois, 435, 438; *Den v. Lunsford*, 20 N. Car. 407; *Humphrey v. Queen*, 2 Can. Exch. 386, 390; *Queen v. Black*, 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey v. United States*, 240 U.S. 399, 402.

Utah Power and Light Co. v. United States, 243 U.S. at p. 409.

In reaching the determinations in *Ballard*, *United States v. California* and *Utah Power and Light Co.* the Courts did not base their decisions concerning laches, estoppel or similar matters concerning acts or omissions of officers or employees of the United States upon a requirement that the rights of the United States be owned absolutely. Whether laches, estoppel or similar principles

⁶ In support of the Supreme Court's determination, it cited: *United States v. San Francisco*, 310 U.S. 16, 31-32; *Utah v. United States*, 284 U.S. 534, 545, 546; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409. See also *Sec'y of State for India v. Chelikani Rama Rao*, L. R. 43 Indian App. 192, 204 (1916).

in connection with acts or omissions of officers or employees of the United States may be applied (based upon the general principles set forth in *Utah Power and Light Co. v. United States*, quoted above) should be determined on the particular facts and circumstances of the case with due regard to possible applicable exceptions, if any, to the general principles; however, the Court perceives of no reason why the general rules announced in *Ballard, The United States v. California* and *Utah Power and Light Co.* should not apply in a situation where the rights and interests of the United States in the diversion and storage of Project water are held by the United States for the use and benefit of members of CID.

In summary, with due regard to the foregoing determinations:

1. The Court, at this time, vacates the following provision set forth in the Court's December 2001 Decision and said provision is deleted therefrom:

The Court determines that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of CID's individual members. At p. 30.

Issues in connection with the amount of water that the United States may divert and store and that CID may distribute in connection with the Project will be considered and determined in the Project (Offer) Phase of these proceedings.

2. The suggestion and request of the United States that the following be substituted for the quoted portion of the Court's December 2001 Decision which is deleted as provided in paragraph 1, to wit:

The Court determines that the Project storage and diversion rights of the United States cannot be forfeited or abandoned and that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be

determined in the Project (Offer) Phase of the proceedings. United States Submission at p. 15.

is rejected and denied.

3. With due regard to the foregoing determinations of the Court, in connection with *Ballard, United States v. California and Utah Power and Light Co.*, the following provision set forth in the Court's Decision and Order filed on October 22, 2001 at p. 12, is deleted:

In connection with matters involving forfeiture and abandonment, the right to use water of the United States may not be lost through laches or neglect of its officers or employees. *United States v. Ballard*, 184 F. Supp. 1, 12 (D.N.M. 1960).

because the statement is overly broad and generalized.

4. Finally, to reiterate, the Court has held that the quantification of Project diversion and storage rights and the amount of acreage appurtenant to Project storage and diversion rights will be determined in the Project (Offer) Phase of these proceedings.

THE FOLLOWING IMPLEMENTAL ORDERS ARE ENTERED:

The following are pertinent excerpts from the Court's prior decisions concerning implementation of matters involved in the Membership Phase of these proceedings:

1. Paragraph 6, page 21 of the Court's Decision and Order filed in the Membership Phase of these proceedings on March 20, 2001 provides in pertinent part:

After the Court has considered the submissions of the parties and the memorandum briefs submitted in connection therewith, the Court will enter an order in the Membership Phase of these proceedings setting forth the proper manner of quantifying the water rights claims of members of CID, the purpose of use and priority dates in connection therewith. (Underscoring for emphasis added.)

2. The Court's October 19, 2001 Decision and Order filed in the Membership Phase of

these proceedings on October 22, 2001, p. 20, provides in pertinent part:

5. After the Court has had an opportunity to review the comments, suggestions, objections and memoranda briefs of counsel as provided in numbered paragraph 3. above, the Court will request that counsel for the State prepare an order as provided in paragraph 6, p. 21 of the Court's Decision incorporating pertinent provisions of this decision concerning the determination of water rights claims of members of CID, circulate it for approval or objections as to form or content by all other counsel and interested parties appearing *pro se*, and then submit it to the Court for review, approval and entry in the Membership Phase of these proceedings. Underscoring for emphasis added.

3. After the filing of the Court's December 2001 Decision, paragraph 3, p. 37 thereof, was vacated and the following substituted therefor:

Issues concerning the necessity of submitting requested findings of fact and conclusions of law and the time for such submissions are referred to Committee Counsel for appropriate recommendations to the Court. Recommendations of Committee Counsel shall be submitted to the Court within thirty (30) days after the Court has filed a second supplemental decision and order in connection with the December Supplemental Decision.

If requested findings of fact are recommended and submitted, they shall include page references to exhibits relied upon in support of each requested findings of fact.

If requested conclusions of law are recommended and submitted, authorities shall be cited in connection with each conclusions of law.

Court's Order served on February 13, 2002, paragraph 6, pp. 4-5.

4. The Court's Order served on February 13, 2002 also provided in pertinent part:

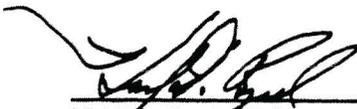
5. In Connection with the Court's January 7, 2002 memorandum:

On or before March 29, 2002, interested parties may submit comments and suggestions concerning the Court's January 7, 2002

memorandum pertaining to a proposed draft Offer of Judgment for use by the State in connection with efforts of the State to resolve water rights claims of members of CID. The Court's previous order requiring that comments and suggestions be filed within thirty (30) days of service of the January 7, 2002 memorandum is hereby vacated. (Underscoring for emphasis added). At p. 4.

After the Court has received (1) recommendations of Committee Counsel concerning the necessity of submitting requested findings of fact and conclusions of law and other recommendations concerning the form and content of an order to be entered in the Membership Phase of these proceedings setting forth the proper manner of quantifying the water rights of members of CID; and (2) comments and suggestions concerning the proposed Court's January 7, 2002 draft Offer of Judgment and the Court has had an opportunity to review these submissions, the Court will enter an appropriate implementing order.

DATED: 03-04-2002



HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*

Harl D. Byrd

March 4, 2002

Ms Trudy Hale
Deputy Clerk
Fifth Judicial District Court
P O Box 1776
Roswell, NM 88202-1776

**Re: State v. Lewis et al., Chaves County Cause No. 20294 and 22600
Consolidated, Carlsbad Irrigation District Section, Membership Phase -
Second Supplemental Decision and Order in Response to Submissions Re the
Court's Decision and Order Served on December 19, 2001**

Dear Ms. Hale:

Enclosed please find the above-captioned decision and order for filing in the Membership phase of these proceedings.

I am forwarding a copy of the decision and order to counsel for the State who are requested to serve copies upon all counsel and parties appearing *pro se* in this phase of these proceedings. If conformed copies are required by any party, they should make arrangements directly with the Clerk of the District Court.

Thank you for your cooperation and assistance.

Very truly yours,



Harl D. Byrd

HDB/jes

cc w/ Decision and Order:
cc w/o enc.

Counsel for the State
All counsel and repositories on Exhibit A.

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