

STATE OF NEW MEXICO  
COUNTY OF DOÑA ANA  
THIRD JUDICIAL DISTRICT

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

DOÑA ANA COUNTY CLERK  
NADINE SANDOZ - 4

No. CV-96-888  
Judge Valentine

Fourth Amended Order Regarding Stream Adjudication Procedures, Revised March 19, 2007

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

**FINDS :**

1. The Third Amended Order Regarding Stream Adjudication Procedures, Sub-file Adjudication Procedures, filed May 26, 2000, should be updated.
2. The original Fourth Amended Order Regarding Stream Adjudication Procedures, filed May 10, 2006, should be revised.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the following Revised Fourth Amended Order Regarding Stream Adjudication Procedures is hereby adopted and the Third Amended Order Regarding Adjudication Procedures filed May 26, 2000 and the original Fourth Amended Order Regarding Adjudication Procedures, filed May 10, 2006 are superseded by this Order. (Forms referred to in this order may be downloaded from the New Mexico Judiciary's website <http://nmcourts.com/> )

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- A. **Definitions** – except as otherwise defined below, all words in this Order shall be given their customary and accepted meanings.
1. "Answer" (Form A) is a claimant's responsive pleading to the summons and the General Adjudication Complaint.
  2. "Expedited *Inter Se* Proceeding" is a type of stream system issue by which the court may resolve all issues regarding a specific water right, including objections of other water right owners, before all sub-file proceedings have been resolved.
  3. "General Adjudication Complaint" means the amended Complaint filed in this matter on December 19, 1997.
  4. "*Inter Se*" Water right owners can object to the water right of any other claimant. This is referred to as an "*inter se*" action. The *inter se* phase typically begins after all sub-files have been adjudicated. At the appropriate time the Court
  5. "Monthly Report" is the Monthly Stream System Issue and Expedited *Inter Se* Report prepared by the Court pursuant to the Case Management Order Authorizing Notice by a Monthly Report filed March 19, 2007.
  6. "Offers of Judgment" are the State's proposals for the Court's determination of claimants' water rights. The Offer of Judgment incorporates the final revised hydrographic survey description of a right. The final revised hydrographic survey is the State's *prima facie* evidence of the water right and is sufficient for the Court to determine the water right unless claimant introduces evidence to the contrary. If there is disputed evidence, the Court will decide by a preponderance of the evidence.
  7. "Response to Offer of Judgment," Form C, is the form that claimant uses to respond to the description of claimant's water right in the State's Offer of Judgment. Filing objections in Form C will start litigation to obtain a Sub-file Order from the Court which will adjudicate the water right.
- B. **Service on Claimants Not Yet Joined as Parties**
1. The State shall promptly serve all claimants not already joined as parties to the Lower Rio Grande Basin Stream Adjudication the following documents (collectively referred to as "Packet") by the most cost efficient service that meets constitutional due process:
    - a. Summons;
    - b. Copy of the General Adjudication Complaint;
    - c. Form A, Answer to Complaint-Lower Rio Grande Basin Adjudication;
    - d. Other such documents as the Court may order.

2. Schedule for Completion of Service: One fourth of claimants not yet served shall be served by June 30, 2007; another one fourth shall be served by Sept 30, 2007, another one fourth shall be served by Dec. 31, 2007 and the remaining claimants shall be served by March 31, 2008.

C. **Service by Publication.**

1. The State shall serve all unknown claimants to the use of the waters of the Lower Rio Grande Stream System, and all known claimants whose addresses cannot be identified with reasonable diligence, by publishing the Summons and General Adjudication Complaint and a notice of adjudication pursuant to Rule 1-004 NMRP.
2. The notice shall describe the consequences of failing to keep addresses and ownership up to date adjudication procedure, and contain an explanation of the service of filed papers using the Monthly Report as ordered by the Court in its Case Management Order authorizing Notice by a Monthly Report entered March 19, 2007.

D. **Assignment of Case and Sub-file Numbers.** The State shall work with the Judicial Information Division (JID) of the Supreme Court to use information technology as practicable to accomplish the following:

The State shall assign separate case numbers for claimants and shall file a list of claimants as they are served by this order. Any case number previously provided to the Court shall not be used. Additionally, the State shall assign sub-file numbers for water rights.

E. **Form A. Claimant's Answer to Summons and General Adjudication Complaint.** After receiving the packet, claimants shall complete, sign and file an Answer, Form A, with Court within 30 days as required by the Summons or be subject to default.

F. **Procedures for Sub-file Proceedings; Offers of Judgment; Form C Objections.**

1. Unless expressly modified by this Order, the Rules of Civil Procedure apply.
2. After commencement, service of filed papers in a sub-file proceeding shall be limited to the claimant whose water right is at issue, any party who has been joined or who has intervened in the sub-file proceeding, and the State.
3. In expedited *inter se* proceedings, service of filed papers shall be governed by the Case Management Order authorizing Notice by a Monthly Report filed March 19, 2007
4. The State shall prepare offers of judgment for all claimants who timely file Form A.
5. The offer of judgment shall describe the elements of that claimant's water rights as determined by the final revised hydrographic survey.
6. The State shall mail the offer of judgment and Form C, Response to Offer of Judgment to be used by a claimant to respond to the State's offer of judgment.
7. An offer of judgment shall start a sub-file proceeding. The sub-file proceeding will be resolved by the Court's entry of a sub-file order. Offers of judgment to claimants who have more than one sub-file may be served at separate times. Before the State mails its Offer of Judgment, claimants may amend the description of their water right which they gave in their Answer, Form A, without permission of the Court. Thereafter Claimant's may amend the description of their water right with permission of the Court.
8. Within sixty (60) days from the mailing of the Offer of Judgment, the claimant shall mail Form C, Response to Offer of Judgment to the Court. If there is any objection claimant shall state any objection he or she may have to each of the elements of the water

right in the offer of judgment. The claimant's objections shall include any jurisdictional and affirmative defenses to the offer of judgment, if any. Any water right element listed in the offer of judgment shall be determined by default unless the water right owner specifically objects.

9. If the claimant is able to resolve his or her objections to the offer of judgment with the State in informal sessions, the State shall prepare a sub-file order incorporating the parties' agreement and submit it to the Court for approval.

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

1. Once joined, all claimants shall timely file notice of address changes and mail a copy of the notice of address change to the State. If a claimant does not file notice of change of address and mail the notification to the State, all papers mailed to claimant's last known address shall be effective service.
2. In case of any transfer of interest in the water right, the new owner shall file notice of the transfer with the Court, and the former owner shall acknowledge the transfer. If the new owner fails to file notice or fails to obtain the acknowledgment of the former owner, the adjudication will proceed against the former owner and the new owner will be bound by all decisions of the court. If a new owner files notice and requests the former owner to acknowledge the transfer and the former owner refuses to do so, the new owner may file a request for the Court to determine ownership and serve the former owner.

**H. Notice of Adjudication of Additional Water Rights.** If claimants already joined as parties before adoption of this Fourth Amended Procedural Order claim additional water rights, the State shall mail to such defendants a Notice of Adjudication of Additional Water Rights and a Form A, Answer, and an offer of judgment addressing the additional claims. Thereafter the same procedure as set out herein shall control.

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

1. If the State approves a new or pending application for new appropriations of water and there is no appeal, the State shall file a motion to join the applicant as a party to the adjudication. After joinder, the applicant shall be assigned a case number and a sub-file number by the State. A sub-file order shall be drafted by the State and submitted to the Court for approval incorporating the terms and conditions of the permit, subject to all applicable provisions of New Mexico law.
2. Appeals to the district court from final administrative decisions of the State Engineer on new or pending applications for new appropriations of water in the Lower Rio Grande Basin stream system shall be consolidated with this adjudication as follows:
  - a. Within ten (10) days after the Notice of Appeal is filed, the State shall prepare and submit appropriate pleadings to consolidate the appeal with the adjudication. The State shall assign a case number and a sub-file number, and the applicant shall be joined as a defendant in the adjudication.
  - b. This procedure shall not alter or amend the claims or defenses of any party to the administrative proceedings.
3. The approved or appealed applications to be consolidated with this adjudication shall not include the following categories of water rights applications: applications for

- supplemental wells or replacement wells; applications for changes in use as set forth in NMSA 1978, § 72-12-7 (1997), a category which includes changes in purpose or place of use or in point of diversion; transfers of offset rights; and administrative proceedings involving return flow plans.
4. After consolidation, all parties to an appeal from a final administrative decision of the State on applications to appropriate water including protestants shall participate in the Court mandated ADR process set out in Section II, Paragraph B.
  5. After a mediator files a Notice of Termination after unsuccessful mediation, the State and the appealing Claimant shall file a request for a scheduling order for a trial *de novo* and mail a copy to the opposing party. The Court or Special Master will schedule a trial *de novo* and adjudicate the issues raised in the appeal and the Court will enter a sub-file order. Other parties who have a statutory or constitutional right to participate in the trial *de novo* may intervene upon motion.

**J. Court Annexed Mediation for Sub-file Proceedings; Form D, Request for Mediation.**

When the following circumstances occur:

1. a claimant has been served an offer of judgment and,
2. has filed Form C Response to State's Offer of Judgment, and
3. the objection to the offer has not been informally resolved with the State within one hundred twenty (120) days from the date of service of the offer, the State and the claimant shall participate in the Court mandated Alternative Dispute Resolution (ADR) process as follows:
  - a. A claimant may file Form D, Request for Mediation any time after filing objections in Form C.
  - b. One hundred twenty (120) days from the date of service of an offer of judgment, if objections to the offer have not been resolved informally and claimant has not filed Form D, the State shall file a Request for Mediation with the Court and mail or deliver a copy of the Request to the ADR Staff of the Third Judicial District Court.
  - c. At every quarterly status conference, the State shall file a report with the Court explaining the status of all sub-files for which the 120 day deadline for requests for mediation has expired. The report shall explain reasons for delay and shall advise the Court of the State's best estimate when the matter may be ready to refer to a mediator. This report shall be included on the next Monthly report.
  - d. Upon receipt of the Request for Mediation, the ADR staff will appoint a mediator from the Court's list of trained mediators.
  - e. The ADR staff will notify the selected mediator who shall set the time, date, and place of the mediation and notify the claimant and the State.
  - f. The fees for mediation services and who will pay the fees will be determined by the Court.
  - g. Unless the time is enlarged by the Court, the mediation shall be concluded within sixty (60) days from the date the Court notifies the claimant, the State and the mediator, provided however, that the mediator is authorized to approve

and grant one extension without an additional order of the Court. If the mediator grants an extension, the mediator shall file a report with the Court explaining the reason for the extension, how long an extension was granted and the mediator's estimate when mediation will be concluded. Any further extensions may only be granted by leave of Court.

4. The participants in such mediation shall be the mediator, the claimant, and a representative of the State with authority to negotiate, and their respective counsel. Persons with technical expertise or witnesses that can assist the mediation may also participate.
5. If the mediation is unsuccessful, then within thirty (30) days after the conclusion of the mediation session, the mediator shall file with the Court a Notice of Termination with a certificate of mailing and mail a copy to the claimant, the State, and the ADR staff of the Third Judicial District Court.
6. All parties to the mediation must participate in good faith. The Court, after hearing, may order appropriate sanctions if the Court determines that a party has not participated in good faith.
7. A settlement reached in mediation with the United States or other governmental entities is a conditional settlement. The United States and other governmental entities will be allowed a period of twenty-one (21) days from the date of the completion of the mediation session where a conditional settlement agreement has been reached to have governmental officials possessing ultimate settlement authority review the conditional settlement. The conditional settlement will be void if, within twenty-one (21) days from that date, governmental officials possessing ultimate settlement authority or their attorneys file a notice of rejection. If the governmental entity has not filed a notice of rejection within the twenty-one (21) days, or such additional time as the Court may grant on good cause shown, the condition is satisfied and the Court will approve the settlement reached in mediation.

**K. Sub-file Trials After Mediation is Unsuccessful.** After the Notice of Termination of the Mediation has been mailed:

1. The Court may refer the sub-file proceeding to a special master.
2. Within thirty (30) days after the Notice of Termination of mediation was mailed, the claimant may amend his objections to the offer of judgment without leave of court.
3. Within forty-five (45) days, the claimant and the State shall each file a scheduling report as explained in Local Rule LR3-502 and mail a copy to the judge or special master if the Court has referred the matter to a Special master, and the opposing party or alternatively shall file a request for scheduling conference and mail a copy of the request to the special master and opposing party.
4. The judge or special master will either enter a scheduling order based on the scheduling reports or set a scheduling conference and after consultation with the parties enter a scheduling order. The scheduling order shall set the trial date to adjudicate the water rights at issue and set appropriate pre-trial deadlines.

**L. Sub-file Orders - Trial on the Merits.** After the judge has referred the sub-file to a Special Master, references in this order to "the judge or the Court" shall be deemed to apply to the Special

Master. After trial on the merits for disputed sub-files, the State or such other party as the Court may direct shall prepare a sub-file order and mail a copy to the claimant. If an opposing party objects to the form of order, the objecting party must file any written objections with the Court and serve a copy on the opposing party within ten (10) days after mailing. The party preparing the proposed order shall submit it to the Court with a copy of any objections within ten (10) days after the deadline for objections. If the Court signs the order, the State shall mail a copy of the sub-file order to the claimants at their address of record. The Court may enter the order or set a hearing to resolve disputes over the form of order. These sub-file orders are final appealable orders in accordance with the procedures set forth in Rule 1-054(B), NMRA.

**M. Default Sub-file Orders - No Form A Answer Filed.**

1. If a claimant has not timely responded to the Summons and General Adjudication Complaint by filing Form A, the State shall timely proceed, pursuant to the New Mexico Rules of Civil Procedure and Local Third Judicial District Court rules to enter a default and move for the Court to enter a default sub-file order.
2. Provided however, that the State shall serve the motion and proposed default sub-file order on the non-responding claimants via first class mail. The Court shall not act on the motion until thirty (30) days after mailing. Thereafter, for all claimants who have not responded to the motion for default sub-file order, the State shall submit the default sub-file orders to the Court and the Court will adjudicate the water rights of the non-responding claimant's water rights without further notice.
4. After the Court signs the default sub-file order, the State shall mail a copy of the sub-file order of each defaulting claimant to their address of record.

**N. Summary Sub-file Orders - No Form C Objections Filed.**

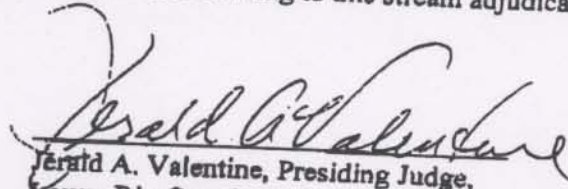
1. For claimants who filed Form A Answer, but did not file Form objections in Form C to the offer of judgment after the time for filing Form C has expired, the State shall file a motion for summary sub-file order and attach to the motion a draft sub-file order based on the final revision of the hydrographic survey requesting that the Court adjudicate the water rights.
2. The State shall mail the motion and attached documents on the non-objecting claimants. If the claimant fails to timely respond to the motion or to raise an issue of material fact, the State shall request the Court to enter the proposed summary sub-file order adjudicating the non-objecting claimant's water rights. The State shall mail a file stamped copy of the sub-file summary order to each non-objecting claimant.

**O. Appeals - Inter Se Proceedings**

1. Sub-file orders entered by default are not appealable or modifiable, except as permitted under Rule 1-055 or Rule 1-060 NMRA.
2. Sub-file orders entered by stipulation are not appealable or modifiable except as may be permitted under Rule 1-060 NMRA.
3. Sub-file orders are subject to the *inter se* part of the adjudication process. After trial on the merits, if a stipulated sub-file order or a sub-file order entered is modified as a result of the *inter se* part of the adjudication process, parties to the *inter se* proceeding may appeal those *inter se* issues decided by the Court.

4. After an *inter se* proceeding, the water right owner may not take an appeal from a non-modified sub-file order by but an appeal may be taken by those who were not parties to the original sub-file proceeding.
5. Before the *inter se* phase begins, the Court will enter a case management order controlling *inter se* phase procedures that are not expressly Stated in this order.

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

  
Gerald A. Valentine, Presiding Judge,  
Lower Rio Grande Basin Adjudication