

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

FILED

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**DISTRICT COURT
DONA ANA COUNTY, NM
GREGORY F. TOOMEY**

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

Plaintiff

vs.

ELEPHANT BUTTE IRRIGATION DISTRICT, *et al.*,

Defendants.

CV-96-888

Jerald A. Valentine

District Judge Division IV

SIXTH AMENDED ORDER REGARDING STREAM ADJUDICATION PROCEDURES

FILED SEPTEMBER 14, 2009

THIS MATTER having come before the Court *sua sponte* on the need to modify the Fifth Amended Order regarding Stream Adjudication Procedures, filed August 15, 2008, the Court having published the Proposed Sixth Amended Order on the Judiciary Website inviting comments, having considered the comments and being fully advised in the premises,

FINDS:

The Fifth Amended Order Regarding Stream System Adjudication Procedures, filed August 15, 2008, should be amended.

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that this Sixth Amended Order Regarding Stream Adjudication Procedures is hereby adopted and the preceding Order superseded.

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A. **Definitions.**

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

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

1. **"Expedited *Inter Se* Proceeding"** is a proceeding in which the Court may resolve all issues regarding a specific water right, including objections of other water right owners, before all sub-file proceedings have been resolved.
2. **"Form A, Answer to General Adjudication Complaint"** is a form which a claimant may use to respond to the Summons and the General Adjudication Complaint.
3. **"Form B, Notice of Intent to Participate"** is the form that the claimant may use to participate in Court hearings regarding expedited *inter se* and stream system issues proceedings.
4. **"Form C, Objection to Offer of Judgment"** is a form that the claimant may use to object to the State's Offer of Judgment.
5. **"Form D, Notice of Change of Address or Telephone Number"** is a form that the claimant may use to notify the Court and the Office of the State Engineer of a change of address or telephone number.
6. **"Form E, Notice of Transfer of Interest"** is a form that a person who acquires any interest in a water right (new owner) may use to notify the Court and the Office of the State Engineer of the transfer of interest from a former to the new

owner.

7. **"General Adjudication Complaint"** means the Amended Complaint filed in this matter on December 19, 1997. The State's mailing of the General Adjudication Complaint and a Summons joins the claimant as a party to the adjudication.
8. **"Inter Se Proceeding"** is a proceeding in which water right claimants may object to the water right of any other claimant. The *inter se* proceeding begins after all sub-files have been adjudicated.
9. **"Monthly Report"** is the Monthly Stream System Issue and Expedited *Inter Se* Report prepared by the Court pursuant to the Amended Case Management Order Authorizing Notice by a Monthly Report filed September 14, 2009.
10. **"Offer of Judgment"** is the State's proposal for the Court's determination of claimant's water rights based on the final, revised hydrographic survey.
11. **"Stream System Issue"** is any issue, which when resolved, could affect all or a significant number of claimants.
12. **"Threshold Issue"** is any issue which should be decided before the Court can proceed to address other matters.

B. Applicability of the Rules of Civil Procedure. Unless expressly modified by this Order, the Rules of Civil Procedure and the Local Rules of the Third Judicial District shall apply.

C. Continued Joinder of Water Right Claimants. If the State discovers previously unidentified water right claims of record, it shall promptly join the owners of the rights by mailing them a packet containing a Summons and General Adjudication Complaint.

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

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

2. In case of any transfer of interest in a water right, the new owner shall file a Notice of Transfer of Interest, Form E, with the Court and mail a copy to the State.

If the new owner does not file a Notice of the Transfer, the adjudication may proceed against the former owner and the new owner will be bound by the decisions of the Court.

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

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

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

E. Schedule for Serving Offers of Judgment. The Court will consult with the State and establish an appropriate schedule for serving Offers of Judgment on claimants.

F. Offers of Judgment.

1. The State shall review the hydrographic survey and all information it has obtained from field inspections or received from claimants, revise the hydrographic survey as necessary, and prepare Offers of Judgment with proposed Stipulated Sub-file Orders for all

claimants who may have a claim to un-adjudicated water rights.

2. Following a schedule set by the Court, the State will mail the claimant an Offer of Judgment and a proposed Stipulated Sub-file along with a copy of the Notice to Water Right Claimants Receiving an Offer of Judgment, and a Form C, Objection to Offer of Judgment.
3. The Offer of Judgment shall describe the elements of the claimant's water rights as determined by the final hydrographic survey.
4. The State may serve Offers of Judgment with the other documents at separate times on claimants who have more than one sub-file.

G. Coordination with the Joe M Stell Ombudsman Program.

1. The State shall provide the Ombudsman Program with a form Offer of Judgment for each type of water right to be adjudicated. It shall send the Ombudsman Program a list of claimants and relevant details as the Offers of Judgment are mailed to claimants.
2. Upon receipt of the State's list, the Ombudsman Program has agreed to mail a postcard to the claimant providing Ombudsman contact information to each claimant within thirty (30) days of the mailing of the Offer of Judgment.

H. Stipulation or No Response to Offer of Judgment.

1. The claimant shall have forty-five (45) days to respond to the State's Offer of Judgment.
2. If the claimant agrees with the description of the water right described by the Offer of Judgment, the claimant shall approve the Stipulated Sub-file Order by signing and return it to the State. The State shall approve the Stipulated Sub-file Order by signing and

shall forward it and one copy to the Court. If the Court approves and enters the Stipulated Sub-file Order, it will mail the State a file-stamped copy, and the State shall mail a copy to the claimant.

3. If after forty-five (45) days the claimant has not timely responded to the Offer of Judgment, the State shall submit one of the following forms of Sub-file Order to the Court.
 - a. if the claimant has made an appearance in the case by filing Form A or by other means, the State will sign a “Sub-file Order - Implied Consent” and forward it and one copy to the Court.
 - b. if the claimant has not made an appearance, the State will sign a “Sub-file Order - Default” and forward it to the Court.

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

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

I. Objection to the Offer of Judgment.

1. If a claimant objects to the description of a water right in the Offer of Judgment, he/she shall object to the State's Offer by completing Form C, Objection to the Offer of Judgment and mail it to the State within forty-five (45) days of the date of the State's mailing the offer to the claimant.
2. The claimant shall state all objections he/she may have including any objections to

elements of the water rights as they are described in the Offer of Judgment.

3. Only those elements of the water right to which there is a specific objection will be at issue. Each element for which the claimant has not stated a specific objection shall be determined in accordance with the State's Offer of Judgment.

4. When the State receives a claimant's Form C or other form of objection from the claimant, the State shall promptly file the claimant's Form C or other objection with the State's Offer of Judgment attached as an exhibit. This filing shall begin the sub-file litigation.

5. The State shall mail copies of the Form C or other objection to the Ombudsman Program. The Ombudsman Program has agreed to review the objection and, if appropriate, to call the claimant to provide information about the adjudication process. Within forty-five (45) days of the filing of the objection, the Ombudsman Program will file a Report and mail a copy to the State.

6. When the Ombudsman Program Report states that the objecting claimant still does not accept the Offer of Judgment, or the Program is unable to contact the claimant, the State will have sixty (60) days from the date of the Ombudsman Program Report in which to contact the objecting claimant and negotiate informally to resolve any issues. On motion, for good cause shown, the Court may enlarge the period for informal negotiation.

7. If the State is able to resolve objections to the Offer of Judgment with the claimant in informal sessions, the State shall prepare a Stipulated Sub-file Order incorporating the agreement. After obtaining the claimant's signature, the State shall sign and submit the Order to the Court for approval and entry. If the Court approves and enters the Stipulated

Sub-file Order, the Court will mail a file stamped copy to the State, and the State shall mail a copy to the claimant.

8. If the State and the claimant are unable to resolve objections, they will proceed to mediation as described in Section R, below.

9. If mediation is successful, the State shall proceed pursuant to Paragraph 7, above.

10. If mediation is unsuccessful, the mediator shall proceed as described in Section R, Paragraph 8 below.

11. The Court may refer the matter to a Special Master. After the Court has referred a sub-file to a Special Master, references in this Order to "the Court" shall be deemed to apply to the Special Master.

12. Preparation for trial:

a. Within thirty (30) days after the Notice of Termination of mediation is mailed, the claimant and the State shall file a Joint Scheduling Report as explained in Local Rule LR-3-502 and mail a copy to the Presiding Judge.

b. If parties cannot agree on a scheduling report, each shall file a scheduling report and mail it to the Presiding Judge and opposing party.

Alternatively, the parties shall file a request for a scheduling conference and mail a copy of the request to the Presiding Judge and opposing party.

c. After review of the scheduling reports or after conference with the parties, the Court will enter a Scheduling Order.

d. If the parties do not timely submit scheduling reports or request a scheduling conference, the Court *sua sponte* may file a Scheduling Order.

- e. The Scheduling Order shall set the trial date to adjudicate the water rights at issue and set appropriate pre-trial deadlines.
13. Service of filed papers in sub-file proceedings shall be limited to the claimant whose water right is at issue, any party who has been joined or has intervened in the sub-file proceeding, and the State.
14. After trial on the merits for a disputed sub-file, the State shall prepare a Sub-file Order, obtain the signature(s) of the claimant(s) approving the form, and forward it to the Court.
15. The Court will enter the Order or set a hearing to resolve disputes over the form of order pursuant to Local Rules of the Third Judicial District. After the Court approves and enters the Order, the Court will mail a file-stamped copy to the State and the State shall mail a copy to the claimant.

J. Modification of Sub-file Orders.

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

K. Inter Se Proceedings.

1. *Inter se* proceedings will begin after all Sub-file Orders have been entered.
2. Before the *inter se* phase begins, the Court will enter a Case Management Order controlling *inter se* procedures that are not expressly stated in this Order.
3. If a Sub-file Order is modified as a result of the *inter se* phase of the adjudication, parties to the *inter se* proceeding may appeal those *inter se* issues decided by the Court.
4. A water right owner may not take an appeal from a Sub-file Order that was not modified by an order in the *inter se* proceeding.

L. Expedited Inter Se and Stream System Issue Proceedings. An expedited *inter se* proceeding may be commenced before all Sub-file Orders have been entered. Expedited *inter se* proceedings and stream system issue proceedings shall be governed by the Amended Case Management Order Authorizing Notice by a Monthly Report filed September 14, 2009. An individual claimant must file Form B, Notice of Intent to Participate if he/she intends to participate in these types of proceedings.

M. Several Parties Represented by One Attorney. An attorney may represent more than one claimant for so long as there is no conflict of interest among the clients regarding the issues that are before the Court.

N. Corporate Entities - Stream System Issues. Individual claimants may form an independent, non-governmental, voluntary, non-profit corporation or other appropriate corporate entity to jointly resolve issues between its members and the State. Any corporate entity must be represented by counsel as set out in Paragraph O below. The corporate entity shall file a Motion to Intervene which shall be accompanied by competent evidence that its members have

authorized the corporate entity to act on their behalf. When the Court has entered an Order Commencing Stream System Issue or Expedited *Inter Se* proceeding, if authorized by its members, the corporate entity shall file a Notice of Intent to Participate, Form B.

O. Limited Participation for Legal Entities to Participate Without Counsel. All legal entities such as trusts, partnerships, and corporations which otherwise could not represent themselves without an attorney, may answer and file other responsive pleadings and file updates of their address and ownership records without an attorney. However, in any hearing where relief or action of the Court is requested, such entities must be represented by an attorney and shall not be permitted, as unrepresented parties, to participate either by filing motions, memoranda, or briefs or making an oral argument before the Court.

P. Notice of Adjudication of Additional Water Rights. If claimants already joined for specific water rights, claim additional, unrelated water rights, the State shall assign a different case number and sub-file number to the additional rights and mail offers of judgment addressing the additional claims. Thereafter, the same procedures as set out herein shall control

Q. Joinder of Applicant After Administrative Proceeding.

1. When a person or legal entity has applied to the state engineer for a permit for a new appropriation of water, the state engineer has issued a permit and the driller's well record has been filed, the State shall join the applicant as a party to the adjudication. The State shall assign a case number and sub-file number and draft Stipulated Sub-file Order to be signed by the State and the applicant. The Stipulated Sub-file Order shall incorporate the terms and conditions of the permit, subject to all applicable provisions of New Mexico law and the orders of this Court.

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

R. Court-Annexed Mediation for Sub-file Proceedings.

1. At every Status Conference, the State shall file a Report with the Court explaining the status of all sub-files for which:

- a. Offers of Judgment have been served,
- b. a Form C or other objection and an Ombudsman Program Report have been filed, but no Sub-file Order has been entered.
- c. At the Status Conference the State shall file a request for mediation or file an explanation when the State intends to request the matter be sent to mediation.

2. After the State's report at the Status Conference, the Court may refer to mediation any cases for which claimants have objected to the Offer of Judgment and the time authorized in this Order for informal negotiation has expired.

3. The ADR staff will select a mediator from the Court's list of trained mediators and notify the selected mediator. The ADR staff will mail the Offer of Judgment, Form C or other objection, and other relevant documents to the mediator. The mediator shall set the time, date, and place of the mediation and notify the claimant and the State.

4. The mediation shall be concluded within sixty (60) days after the entry of the Order of Referral. The mediator is authorized to approve and grant one extension without an additional order of the Court. If the mediator grants an extension, the mediator shall file a Report with the Court explaining the reason for the extension, how

long an extension was granted and the mediator's estimate of when the mediation will be concluded. Any further extensions may only be granted by leave of the Court.

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

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

7. If the mediation is successful, the parties shall sign the Stipulated Sub-file Order, and the State shall submit it to the Court for approval. If approved and entered, the Court will mail a file stamped copy to the State and the State will mail a copy to the claimant.

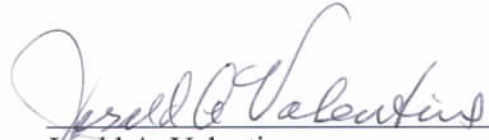
8. If the mediation is unsuccessful, the mediator shall file a Notice of Termination with a Certificate of Mailing and mail a copy to the claimant, the State, and the ADR staff within thirty (30) days following the conclusion of the mediation session.

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

10. A settlement reached in mediation with the United States or other governmental entities is a conditional settlement. The United States and other governmental entities will be allowed a period of twenty-one (21) days from the date of the completion of the mediation session where a conditional settlement agreement has been reached to have governmental officials possessing ultimate settlement authority review the conditional

settlement. The conditional settlement will be void if, within twenty-one (21) days from that date, government officials possessing ultimate settlement authority or their attorneys file a Notice of Rejection. If the governmental entity has not filed a Notice of Rejection within the twenty-one (21) days, or such additional time as the Court may grant on good cause shown, the condition is satisfied and the Court will approve the settlement reached in mediation.

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.



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