

FIFTH JUDICIAL DISTRICT COURT
CHAVES COUNTY NM
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KATIE ESPINOZA
DISTRICT COURT CLERK

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, <i>ex rel.</i>)	Nos. 20297 and 22600
STATE ENGINEER, and PECOS VALLEY)	Consolidated
CONSERVANCY DISTRICT,)	
)	Honorable James J. Wechsler
Plaintiffs,)	Presiding Judge
)	
v.)	Cow Creek Section
)	Upper Pecos Surface Water Section
L.T. LEWIS, <i>et al.</i> , and the UNITED)	
STATES OF AMERICA,)	Court No. CV-WS-19000001
)	
Defendants.)	

**JOINT MOTION TO CORRECT EXHIBITS B, F, AND G TO COURT’S
PROCEDURAL ORDER GOVERNING THE ADJUDICATION OF WATER RIGHTS
IN THE COW CREEK SECTION**

The Cow Creek Basin Acequia Association (“CCBAA”) and the State of New Mexico (collectively, “Movants”), by and through their respective counsel, submit this joint motion and respectfully request that the Court make corrections to certain statements in three exhibits to the Court’s *Procedural Order Governing the Adjudication of Water Rights in the Cow Creek Section* (January 25, 2017) (“Procedural Order”): Exhibit B Cow Creek Section Water Rights Adjudication Process and Instructions; Exhibit F Notice of Termination of Consultation Concerning Proposed Subfile Judgment; and Exhibit G Order Setting Deadline for Filing Statement of Water Right Claim. The statements are inconsistent with the Procedural Order – specifically, the Procedural Order’s process governing the filing of a Statement of Water Rights Claim. Additionally, the Exhibits should be corrected to reflect the correct contact information for the State of New Mexico and The Utton Transboundary Resources Center. As grounds for this motion, the Movants state the following:

Corrections to Exhibit F

1. Pursuant to the Procedural Order, the filing of a Statement of Water Right Claim ("Statement") may occur only after the State has filed a Notice of Termination of Consultation and the subfile at issue has been transferred by the Court or Special Master to the contested subfile docket. Procedural Order at 7-8. The filing of a Statement results from an order from the Court at a scheduling conference. The filing of a Statement is not mandatory. Id. at 8. The Court has the discretion to order the filing, and may do so, presumably, if it will assist the Court and the parties in the context of the contested subfile proceeding. Default judgment may result from failure to file the Statement after the Court has ordered a claimant to do so. Id. at 9.

2. Exhibit F of the Procedural Order, Notice of Termination of Consultation Concerning Proposed Subfile Judgment, states that:

"the State of New Mexico (State) hereby...2. Requests that the Court enter an order setting a deadline for the claimant(s) to file a Statement of Water Right Claim identifying the elements of each water right claimed by the claimant(s) in the Cow Creek Section." Exhibit F.

While this statement in Exhibit F is consistent with previous versions of the Procedural Order, specifically the Special Master's recommended procedural order attached to his September 26, 2016, Special Master Report¹, the statement creates confusion when compared to the process described in the Procedural Order. The statement suggests that the Court may issue an order setting a deadline to file a Statement *prior to the Court making a determination at a scheduling conference* whether filing a Statement is appropriate. In fact, the Court is obligated by the terms of the Procedural Order to deny the State's request to enter the order. Movants request that

¹ The CCBAAs objected to the process in the Special Master's recommended procedural order that allowed for default judgment for failure to file a Statement prior to a subfile being transferred to the contested subfile docket. *Cow Creek Basin Acequia Association's Objections to the Special Master Report and Proposed Procedural Order and Motion to Amend Proposed Procedural Order* (October 11, 2016). The CCBAAs believe that the Court accepted this particular objection and adjusted the procedural order to allow for default judgment for failure to file a Statement only after a scheduling conference and only if the Court or Special Master believes filing a Statement would be helpful in the contested subfile proceeding.

Paragraph 2 be struck from Exhibit F. The purpose of the Notice of Termination as described in the Procedural Order – to provide notice to the Court that consultation has terminated and to trigger the transfer of the subfile to the contested subfile docket– is accomplished with the remaining language.

Corrections to Exhibit G

1. As state above, the filing of a Statement of Water Right Claim may occur only after the State has filed a Notice of Termination of Consultation and the subfile at issue has been transferred by the Court or Special Master to the contested subfile docket. Procedural Order at 7-8. The filing of a Statement results from an order from the Court issued *at a scheduling conference*. Id. at 8.

2. Exhibit G to the Procedural Order, Order Setting Deadline for Filing Statement of Water Right Claim (“Order Setting Deadline”), misstates what the Procedural Order’s process is for filing Statements:

“After consultations between the State and the water right claimant(s) are terminated, the Procedural Order Governing the Adjudication of Water Rights in the Cow Creek Section requires that a deadline be set for the claimants to file a Statement of Water Right Claim...”. Exhibit G at 1.

Again, while this statement is consistent with the Special Master’s proposed procedural order, it is not in line with the Court’s Procedural Order. The Procedural Order in fact *does not* require that a deadline be set for the filing of a Statement upon termination of consultation. There is no requirement to file a Statement at all unless the Court or Special Master decides in the context of a scheduling conference that filing a Statement is appropriate.

3. In addition, the introductory paragraph and the paragraph on page 2 of Exhibit G beginning with “After the Claimant files the form...” need correction to account for the changes the Court has adopted in its Procedural Order. For example, the introductory paragraph of the

Order Setting Deadline states, "This Subfile is before the Court on the Notice of Termination of Consultations Concerning Proposed Subfile Judgment, filed by the State of New Mexico (the 'State') on _____, ____." While this may be technically correct, that the Notice triggered the transfer of the subfile to the contested docket and is therefore before the Court, a more accurate statement concerning the issuance of the Order Setting Deadline would reflect the fact that a scheduling conference has already been held and that the Order is being issued as a result of that particular scheduling conference.

4. Likewise, the statement on page 2 of Exhibit G that states, "After the Claimant files the [Statement], the Court will conduct a scheduling conference where it will schedule appropriate proceedings for resolving the claimant(s)' water rights claim" is incorrect and fails to account for the fact that a scheduling conference has already occurred and that the Order Setting Deadline is a result of the scheduling conference. The entire sentence may be struck without compromising the intent of the Order, namely, to give the Claimant notice that as a result of the scheduling conference the Claimant must file a Statement within the proscribed time given in the Order – 30 days – or risk default judgment.

5. Paul D. Bossert is no longer the Pecos River Adjudication Bureau Managing Attorney, and therefore, his name should be replaced with Kelly Brooks Smith as one of the contacts for the State of New Mexico on page 2 of Exhibit G.

Correction to Exhibit B

1. Section 4 of Exhibit B, Cow Creek Section Water Rights Adjudication Process and Instructions, titled "What will happen next?", states that:

"If an agreement is not reached, [the claimant] will need to file a Statement of Water Right Claim form by a deadline that will subsequently be set by the Court, and the Court thereafter [sic] schedule a process to resolve your case." Exhibit B at 2.

For the same reasons stated above, this misstates the process and timing concerning the filing of a Statement. The Procedural Order allows, but does not make mandatory, the Court or Special Master to issue an order requiring the filing of a Statement as a result of a scheduling conference. Again, the process laid out in the Procedural Order for the filing of a Statement is:

- 1) Notice of Termination of Consultation served on the defendant and filed with the Court by the State;
- 2) Court transfers subfile to the contested subfile docket;
- 3) Court sets a scheduling conference;
- 4) At the scheduling conference the Court *may* enter an order requiring the defendant to complete and file a Statement of Water Right Claim.

2. Section 7 of Exhibit B, should reflect the correct contact information for the State of New Mexico, and therefore, Paul D. Bossert's name should be replaced with Kelly Brooks Smith. Additionally, Darcy S. Bushnell no longer works for The Utton Transboundary Resources Center.

To the extent that both the State and claimants rely on the exhibits to the Procedural Order, and in particular the instructions provided in Exhibit B, Movants respectfully request the Court to correct the exhibits to the Procedural Order in order to eliminate confusion about the process and timing of the filing of a Statement of Water Right Claim. The inclusion in the Procedural Order of the exhibits that were part of the Special Master's proposed procedural order was likely an oversight and the corrections proposed in this Motion seek to clarify and correct the Exhibits B, F, and G so that they are consistent with the Court's Procedural Order.

For the Court's convenience, attached to this Motion are Exhibits B, F, and G which include Movants' suggested corrections.

Respective Counsel for Cow Creek Ranch, LLC; Rancho O’Rainbow, LLC; Russell Tuckel Jr. and Penny Tuckel; Los Pueblos Altos Corp.; and the United States concur in this Motion. No parties have been joined and no other counsel have entered an appearance.

WHEREFORE, the Movants respectfully request that the Court adopt the proposed corrections to Exhibits B, F, and G.

Respectfully submitted,

NEW MEXICO LEGAL AID, INC.



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Attorneys for Cow Creek Basin Acequia Association, Limited Entry of Appearance

/s/ electronically on 2/23/2017

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Attorneys for the State of New Mexico

Exhibit B to Procedural Order

COW CREEK SECTION WATER RIGHTS ADJUDICATION PROCESS AND INSTRUCTIONS**1. What is this all about?**

The State of New Mexico (State) has filed a lawsuit to adjudicate the rights to use water in the Cow Creek section of the Pecos River Stream System. The Cow Creek section is located within San Miguel County.

The case is in the New Mexico Fifth Judicial District Court and is named the *State of New Mexico, ex rel. State Engineer vs. L.T. Lewis, et al.*, Case No. CV-WS-19000001. The case will define all water rights established and maintained by putting water to beneficial use according to state law and regulations.

This packet concerns the determination of your water right. You also have the opportunity to participate in the determination of other Cow Creek water rights. Likewise, other water right owners may participate in the determination of your water right. The Court will publish proposed determinations of water rights in the Monthly Adjudication Report and on the Cow Creek adjudication website for evaluation by other water right claimants.

2. How was I identified as a water rights claimant?

The OSE's Hydrographic Survey Bureau conducted a hydrographic survey to identify all water uses within the basin. The Bureau relied on aerial photography, OSE records, field checks, and land ownership information obtained from county records. This information was assembled into a hydrographic survey report (Report).

The Report includes the following information for each potential water right:

- owner(s) of the water right
- place of use
- purpose of use
- priority date
- source of water
- point of diversion
- amount of any irrigated acreage
- amount of water

The Report also includes maps showing water usage in the Cow Creek section. A copy of the hydrographic survey is available for inspection at the office of the OSE Litigation and Adjudication Program, 130 South Capitol Street, Concha Ortiz y Pino Building, Santa Fe, New Mexico 87501 and on the OSE website:

(http://www.osc.state.nm.us/HydroSurvey/legal_ose_hydro_cow_creek.php). The State assigned a *subfile number* to each water right identified in the Report. The Court uses the subfile numbers to keep track of the water rights being adjudicated.

3. What has happened so far?

In October, 2015, the State served the Notice of Adjudication of Water Rights in the Cow Creek Section of the Pecos River Stream System on all known and unknown water right claimants, advising them of their responsibility to subscribe to the Monthly Adjudication Report.

The Court issued a Procedural Order, dated January 25, 2017, that sets out the steps to be taken for determining water rights claims in an expedited inter se proceeding.

4. What will happen next?

The State has described your potential water rights in a document titled *Subfile Final Judgment*. This document is a proposed judgment that describes the proposed water right based upon the information in the OSE's hydrographic survey.

If you **agree** with the State's description of your rights, sign the proposed Subfile Final Judgment and return it to the State at the address below. The proposed Subfile Final Judgment will be subject to evaluation by all other claimants.

If you **do not agree** with the State's description of your rights, fill out the form titled *Response and Request for Consultation* and mail that to the State. The State will meet with you and try to resolve any differences. If you reach an agreement, the State will send you a new or revised proposed subfile final judgment for your signature (again subject to evaluation from other claimants). If an agreement is not reached, you will need to attend a mandatory scheduling conference on a date to be determined by the Court.

5. What do I need to do?

Respond: You must respond to the State on or before the deadline given in the Summons by sending in either the signed Subfile Final Judgment or your completed Response and Request for Consultation form to the State.

Although you are not required to use an attorney, if you are already represented in this case or plan on using an attorney, you should give the attorney these papers and have the attorney respond on your behalf on or before the deadline.

It is important that you keep a copy of the documents that you complete and return to the State.

If you do not respond, the Court will adjudicate your water rights by default. The Court will rely on the State's description in the proposed Subfile Final Judgment, and you will lose your opportunity to object.

Subscribe: If you have not yet done so, you should subscribe to the mailing list to receive the Court's monthly adjudication report and other important information regarding the water rights proceeding, including deadlines that may apply to you. Instructions on how to subscribe and other useful information, documents and links are available on the Court's website at <https://cowcreek.nmcourts.gov>.

6. Once I respond, what happens next?

All of the signed proposed subfile final judgments and other documents will be posted on the Court's website by the Court clerk. The website and the monthly adjudication report will give the deadline to file any responses or other documents.

If no one challenges your proposed Subfile Final Judgment, the Court will enter the Subfile Final Judgment and your water rights adjudication will be complete.

If you wish to support or challenge another claimant's water rights, or if other claimants wish to support or challenge your water rights, a form titled *Inter Se Objection to Proposed Subfile*

Judgment – Notice of Intent to Appear in Support of Proposed Subfile Judgment must be filed with the Court by the deadline posted by the Court clerk.

After the deadline for the filing of *Inter Se* Objection to Proposed Subfile Judgment – Notice of Intent to Appear in Support of Proposed Subfile Judgment, if a proposed subfile final judgment is contested by you or another water right claimant, the Court will set a schedule that may include mediation and, if necessary, a trial. The Court will enter a subfile final judgment after the necessary proceedings.

7. What else should I know?

The Court's orders and all the other documents filed in the adjudication can be found on the Court's website at <https://cowcreek.nmcourts.gov>. **You should regularly monitor the website and review the monthly adjudication report to find out what is happening, check for any pleadings or documents that may affect your water rights, and see if there are any deadlines you must meet.** The State will file monthly status reports with the Court, and the Court may from time to time schedule a conference regarding the overall status of the adjudication process.

You can contact the State for more information or if you have questions. You may call the State's attorneys, Leila Reilly or Kelly Smith, at the telephone number below. Because they represent the State, they cannot act as your attorney. However, they can answer questions about these documents, particularly any questions you may have about the description of your rights.

There is also a water ombudsman program through the University of New Mexico that is available to help claimants, particularly those without attorneys. Although the staff cannot give legal advice, they can assist you in understanding the adjudication process and what you need to do to complete the various forms you have received.

To contact the State for further information please write, call or email:

Leila J. Reilly
Kelly Brooks Smith
Special Assistant Attorneys General
Litigation and Adjudication Program, Pecos River Adjudication Bureau
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150
Leila.reilly@state.nm.us
Kelly.smith@state.nm.us

To contact the Joe M. Stell Water Ombudsman Program, please write, call or email:

The Utton Transboundary Resources Center
UNM School of Law, MSC 11-6070
1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-0551

Exhibit F to Procedural Order

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

Nos. 20294 and 22600
Consolidated

STATE OF NEW MEXICO, *ex rel.*)
STATE ENGINEER)
and PECOS VALLEY ARTESIAN)
CONSERVANCY DISTRICT,)

Hon. James J. Wechsler
Presiding Judge

Plaintiffs,)

Pecos River Stream System
Cow Creek Section

v.)

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

Court No. CV-WS-[insert #]
OSE Subfile No. [insert #]
Claimant(s): [insert name(s)]

Defendants.)

**NOTICE OF TERMINATION OF CONSULTATION CONCERNING PROPOSED
SUBFILE JUDGMENT**

In accordance with the Procedural Order Governing the Adjudication of Water Rights in the Cow Creek Section, the State of New Mexico (State) hereby:

1. Notifies the above-named claimant(s) that the State has terminated its consultation on the proposed Subfile Final Judgment for the water rights associated with the subfile referenced above.

2. The Court will notify the claimant(s) of a mandatory scheduling conference concerning the rejection of the proposed Judgment by the claimant(s).

Leila J. Reilly
Kelly Brooks Smith
Attorneys for Plaintiff State of New Mexico

Exhibit G to Procedural Order

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

Nos. 20294 and 22600
Consolidated

STATE OF NEW MEXICO, *ex rel.*)
STATE ENGINEER)
and PECOS VALLEY ARTESIAN)
CONSERVANCY DISTRICT,)

Hon. James J. Wechsler
Presiding Judge

Plaintiffs,)

Pecos River Stream System
Cow Creek Section

v.)

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

Court No. CV-WS-[insert #]
OSE Subfile No. [insert #]
Claimant(s): [insert name(s)]

Defendants.)

_____)

**ORDER SETTING DEADLINE FOR FILING
STATEMENT OF WATER RIGHT CLAIM**

The Court conducted a scheduling conference on _____, _____, following the State of New Mexico's filing of Notice of Termination of Consultation Concerning Proposed Subfile Judgment on _____, _____. _____ appeared for the State of New Mexico and [_____ appeared for the claimant(s)] [claimant(s) _____ appeared pro se].

At the scheduling conference it was determined that a deadline be set for the claimant(s) to file a Statement of Water Right Claim describing the elements of each water right claimed by the claimant(s). Therefore, the Court hereby ORDERS THAT, **within 30 days after the date this Order is served**, the claimant(s) shall file with the Court a Statement of Water Rights Claim, using the form attached hereto as Exhibit A. The claimant(s) shall mail the completed form to the Clerk, Civil Division, Attention: Pecos Water Rights Adjudication, Fifth Judicial District Court of the State of New Mexico, P.O. Box 1776, Roswell, NM 88202-1776. By the same date, the claimant(s) shall also mail a copy of the completed form to the State at:

Leila J. Reilly
Kelly Brooks Smith
Special Assistant Attorneys General
Litigation and Adjudication Program
P.O. Box 25102
Santa Fe, NM 87504-5102

Compliance with this order is mandatory. The Court may enter sanctions against any claimant who fails to comply. Those sanctions could include entry of a judgment adjudicating the water rights of the claimant(s) by default in the manner described in the State's proposed Subfile Final Judgment.

IT IS SO ORDERED

James J. Wechsler
Presiding Judge

Certificate of Service

I /s/ Enrique Romero hereby certify that on February 23, 2017, I submitted a true and correct copy of the foregoing JOINT MOTION TO CORRECT EXHIBITS B, F, AND G TO COURT'S PROCEDURAL ORDER GOVERNING THE ADJUDICATION OF WATER RIGHTS IN THE COW CREEK SECTION to the clerk of the Court for filing, by facsimile;

And to the following parties by email:

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And to the following party by first class mail:

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