

M&M

MARZULLA & MARZULLA

ATTORNEYS AT LAW

1350 CONSTITUTION AVENUE, N.W., SUITE 410 • WASHINGTON, DC 20006 • TEL: (202) 822-6760 • FAX: (202) 822-6774

March 7, 2005

By U.S. Mail and Facsimile

Ms. Gabriela Alvarez-Avila
 Senior Counsel
 International Centre for the Settlement of Investment Disputes
 1818 H Street NW
 Washington, D.C. 20433



Re: Request for Arbitration, January 19, 2005

Dear Ms. Alvarez-Avila:

In your letter to me dated February 17, 2005, you asked us to provide you with the following information. The following is our attempt to respond to your requests:

Question:

[W]e ask that you provide us with the following information and/or documentation: (2) The agreement required by Article 1125 of the NAFTA.

Answer:

We confirm that Claimants intend to and will comply with Article 1125(b) of NAFTA, agreeing in writing to the appointment of each individual member of the Arbitral Tribunal, after the members of selection in accordance with the procedures set forth in NAFTA Chapter 11 and under the ICSID Additional Facility Rules. Claimants, of course, also reserve their rights under NAFTA Chapter 11 and the Additional Facility Rules, to select or object to the appointment of each individual member of the Arbitral Tribunal. *See* NAFTA, art. 1124; ICSID Additional Facility Rules, Schedule C, art. 9.

Question:

[W]e ask that you provide us with the following information and/or documentation: (3) Copy of the notice of intent for N.H. Kitayama, Bernadette M. Oeser and Timothy Reid. These three persons do not appear listed in the notice of intent attached to the request for arbitration.

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Answer:

The notice of intent identified water rights owned by N.H. Kitayama and Bernadette Oeser. Due to a clerical error, however, the tenants on the land associated with these water rights were erroneously identified as the water rights owners; Bell Brothers and SRS Farms were incorrectly identified, respectively, for these water rights.

Timothy Reid, who was identified in the owner of the water rights for Reid Farms in the notice of intent, is a partner in the Reid Farms partnership. Under Texas law, he can act on behalf of the partnership, and did so in authorizing the filing of the notice of intent on behalf of the Reid Farms partnership. Tex. Business Organizations Code Ann. § 152.302 (Vernon 2003). Subsequently, both he and the estate of Jesse Reid, which is the general partner in that partnership, signed consent forms approving the filing of the Request for Arbitration.

Question:

We further ask that you explain to us: (1) In what capacity the persons were acting when signing the "Consent to Arbitration and Waiver" as well as the "Verification and Authorization for Notice of Arbitration" on behalf of Bayview Irrigation District #11, Cameron County Irrigation District #2, Delta Lake Irrigation District, Hidalgo County Irrigation District #1, W.G. Bell Jr. Trust, Capote Farms, Ltd., Electric Gin Company of San Benito, and Theimer Trust.

Answer:

- Gordon Hill was acting as General Manager when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Bayview Irrigation District # 11.
- Sonia Kaniger was acting as General Manager when she signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Cameron County Irrigation District # 2.
- Troy Allen was acting as General Manager when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Delta Lake Irrigation District.
- Sonny Hinojosa was acting as General Manager when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Hidalgo County Irrigation District # 2. (During your February 23, 2005 phone conversation with Barbara Wally, you said that you wanted information about Hidalgo County Irrigation District # 2, not Hidalgo County Irrigation District # 1 as stated in your letter.)
- Conly Bell was acting as Trustee when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for W.G. Bell Jr. Trust.

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- M.G. Dyer was acting as General Manager when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Capote Farms, Ltd.
- Robert Duncan was acting as President when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Electric Gin Company of San Benito.
- H.O. Hovda was acting as Manager when he signed the Consent to Arbitration and Waiver and the Verification of Authorization for Notice of Arbitration for Theimer Trust.

Question:

We further ask that you explain to us: (2) The title given under the signature of Ms. Julie G. Uhlhorn in the "Consent to Arbitration and Waiver."

Answer:

Trustee

Question:

We further ask that you explain to us: (3) The legal status of the Irrigation Districts, Trusts, and Estates mentioned in the request for arbitration, considering that they would need to qualify either as natural persons or juridical persons.

Answer:

The irrigation district and the trusts are juridical persons, and the estates are natural persons, under Texas law.

a. Irrigation Districts

Under Texas law are political subdivisions of the State. *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955). The primary purpose of irrigation districts is to deliver untreated water for irrigation, and to provide for drainage. See Tex. Water Code Ann. § 58.121 (Vernon 1977). Irrigation districts may enter into water delivery contracts, and may acquire property necessary to extend, enlarge or improve the district or its facilities and services. *Id.* § 58.122. State law allows irrigation districts to "institute and maintain any suit or suits to protect the water supply or other rights of the district, to prevent any unlawful interference with the water supply or other rights of the district, or to prevent a diversion of its water supply by others." *Id.* § 58.181.

Irrigation districts are also "persons" under Chapter 11 of NAFTA. See NAFTA art. 201 (defining "person" as "a natural person or an enterprise" and defining

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"enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.") Irrigation districts squarely satisfy the definition of enterprise, and governmental entities such as the irrigation district Claimants are entitled to bring claims under Chapter 11 of NAFTA.

Specifically, Article 1116(1) of NAFTA, provides that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . ." Article 1139 of 1139 defines an investor as "a Party or a state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." NAFTA art. 1139. Article 1139 also defines "enterprise" as "an 'enterprise' as defined in Article 201 (Definitions of General Application), which provides that an "enterprise" is "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." NAFTA art. 201.

The irrigation districts are also proper claimants under the ICSID Additional Facility Rules. The Additional Facility Rules apply to "proceedings between a State . . . and a national of another State." Additional Facility Rules, art. 2. Here, the State is Mexico and the claimants are "national(s) of another State." "National of another State" is defined in the Additional Facility Rules as "a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding." Additional Facility Rules, art. 1(6). Here, Mexico is the State party to the proceeding, and the irrigation districts are not nationals of Mexico.

Finally, the irrigation districts are investors under the ICSID Convention, which uses the phrase "national of another Contracting State" to describe an investor, in a similar context to that found in the Additional Facility Rules. ICSID Convention, art. 25(1). Notably, the irrigation districts are not acting as agents for either the state of Texas or the federal government.¹ Rather, the irrigation districts are bringing suit with a sizable number of private parties. The districts' and private parties' interests here are identical: they wish to be compensated for the property rights they own, and to which they have been denied access. That the irrigation districts deliver water to other users does not make them agents for the government. Rather, their delivery of water to end users is similar to a supplier of goods who sells those goods to retailers. Moreover, the

¹ The drafters of the ICSID Convention specifically considered the issue of whether investors were required to be private entities. See Christoph H. Schreuer, *The ICSID Convention: A Commentary* 159-61 (2001). According to commentator Aron Broches, for purposes of the ICSID Convention, a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function. A. Broches, *The Convention on the Settlement of Investment Disputas, Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l L. 263, 354-5 (1966), reprinted in Schreuer, *supra*, at 160.

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or an enterprise of such Party, that seeks to make, is making or has made an investment." NAFTA art. 1139.

The term "investment" is defined in the North American Free Trade Agreement by an exhaustive list. See NAFTA art. 1139. This list, although broad, provides both positive definitions – stating what an investment is – and negative definitions – stating what an investment is not. The presence of both positive and negative definitions indicates that NAFTA's drafters intended to define the term "investment" with some precision. The presence of the negative list also suggests that they intended to exclude certain types of transactions from defining investment.

The NAFTA language has also been described as narrower than the definition of "investment" found in a typical bilateral investment treaty ("BIT"). See Christoph Schreuer, *The ICSID Convention: A Commentary* 131 (2001). This is because a typical BIT includes a nonexhaustive list, as opposed to NAFTA, which includes an exhaustive list. See *id.* at 129. Because the drafters of NAFTA could have allowed for a broader definition of investment, but chose not to, they plainly intended that the investments identified be under the ambit of Chapter 11. This conclusion is bolstered by the presence of the negative definitions in NAFTA: if the drafters had wanted to specifically exclude a transaction, they would have excluded it. See NAFTA art. 1139(i)-(j).

The investment described in ¶¶ 53-57 of the Request for Arbitration complies with NAFTA Article 1101(1) because it meets the definition of "investment" found in NAFTA Article 1139(g). Claimants are investors of the United States, a NAFTA Party, as defined in Article 1139. Each Claimant is the owner of an integrated investment. This investment includes rights to water that are located in Mexico, facilities to store, distribute and deliver this water, irrigated fields and farms, and farm buildings and machinery. Without the water, the rest of this investment – such as water delivery facilities and irrigation equipment – is rendered meaningless.

Each Claimant owns the adjudicated right to use the water that forms part of this investment. The right to use the water is an investment because it is "real estate or other property, tangible or intangible, acquired in the expectation or used for economic benefit or other business purposes." Specifically, the right to use the water is a property right. Water rights have long been recognized as property rights under the laws of the United States and the laws of the State of Texas. See, e.g., *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 97 S.W. 686, 688 (Tex. 1906) ("The right of a riparian owner to take water from the stream is property."); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950) ("[The right to irrigate land is] a recognized and adjudicated private property right."). Claimants' water rights were acquired in the expectation of and used for economic benefit or other business purposes, specifically agricultural production. Thus, the water, and the concomitant right to use it, is an investment within the meaning of NAFTA Article 1139(g).

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irrigation districts are not performing an essentially governmental role in the transactions underlying this case. To the contrary, the districts are performing a commercial role, supplying and delivering goods for which they receive payment. Plainly then, the irrigation districts are entitled to file a claim under the ICSID Additional Facility Rules.

b. Trusts

Trusts are also juridical persons under Texas law. See *Starcrest Trust v. Berry*, 926 S.W.2d 343, 350 n.3 (Tex. App. 1996) (stating that the Texas Uniform Commercial Code, Tex. Bus. & Com. Code Ann. §§1.201(28), (30), defines "persons" as individuals or organizations, and that defines "organization" as including trusts). In actions adverse to trusts, a trustee may sue or defend in its own name. See *id.* at 355. Thus, either the trust itself or the trustee may bring suit for the trust. If the trust sues, it is a legal person; if the trustee sues, it is either a legal or a natural person, depending on its individual status.

c. Estates

Finally, estates are natural persons under Texas law, which provides that the estate of a deceased person in a lawsuit has the status of a natural person if the estate's personal representative appears in or joins in the suit. See *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975); *Sarny Holdings, Ltd. v. Letsos*, 896 S.W.2d 274, 275-76 (Tex. App. 1995); *Dueitt v. Dueitt*, 802 S.W.2d 859, 861 (Tex. App. 1991). An estate's personal representative may be its executor; indeed, the executor or the administrator has the exclusive right to bring suit for the recovery of property belonging to the estate. *In re Estate of York*, 951 S.W.2d 122, 127 n.4 (Tex. App. 1997) (citing *Chandler v. Welborn*, 294 S.W.2d 801, 806 (Tex. 1956)). Here, the executors of the estates which are claimants in this arbitration have been named and are bringing suit to recover property belonging to the estate.

Question:

We further ask that you explain to us: (4) The compliance of the investment described in the request for arbitration with Article 1101(1) of the NAFTA.

Answer:

Claimants' investment complies with Article 1101(1) of NAFTA. NAFTA Article 1101(1) "applies to measures adopted or maintained by a Party relating to . . . (b) investments of investors of another Party in the territory of the Party." A "measure" is "any law, regulation, procedure, requirement or practice." NAFTA art. 201. An "investment" is "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." NAFTA art. 1139(g). An "investor" is "a Party or a state enterprise thereof, or a national

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This water is in the territory of Mexico, a NAFTA Party. Mexico has captured, seized and diverted this water and kept this water in its territory. This is a "measure" under Article 201 of NAFTA. Thus, the water, an investment that is owned by the Claimants, has been subject to a measure by Mexico, in the territory of Mexico.

Question:


Finally, we ask that you comply with the requirements set forth in Article 4(1) of the Additional Facility Rules, pursuant to which any agreement providing for arbitration proceedings requires the approval of the Secretary General.

Answer:

According to Barbara Wally of our office, you have now concluded that Claimants have complied with this requirement in ¶ 79 of the Request for Arbitration.

If you have any further questions, please let me know.

Yours truly,



Nancie G. Marzulla

cc: Executive Committee

**International Centre for Settlement
of Investment Disputes**
1818 H Street, N.W., MSN MC6-611, Washington, D.C. 20433 U.S.A.
Tel: (202) 458-1534 • Fax: (202) 522-2615/2027

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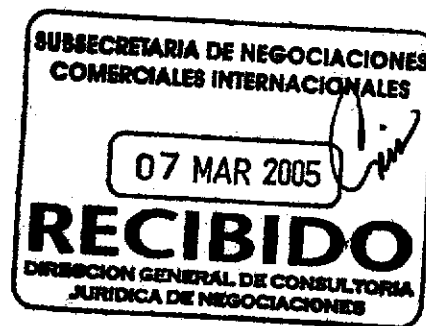
TO: Sr. Hugo Perezcano Díaz **FAX NO.:** (52 55) 5729 9310/09
Title: Consultor Jurídico
Organization: Secretaría de Economía
City/Country: México, D.F., México

FROM: Gabriela Alvarez-Avila **FAX NO.:** (202) 522-2615/2027
Title: Consejero Jurídico Principal *GA* **Telephone:** (202) 473-4925
Dept./Div.: ICSID **Dept./Div. No.:** 168
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SUBJECT:

MESSAGE:

Please see attached.



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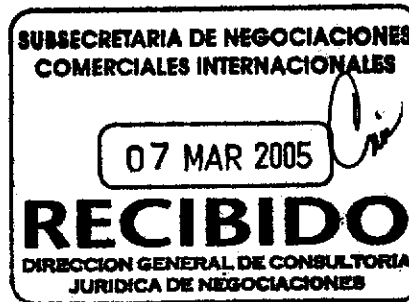
International Centre for Settlement of Investment Disputes

1818 H Street, N.W., Washington, D.C. 20433 U.S.A.
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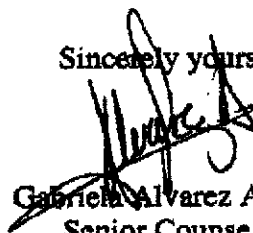
Bayview Irrigation District et al.,
c/o Ms. Nancie G. Marzulla
Marzulla & Marzulla
1350 Connecticut Avenue, N.W.
Suite 410
Washington D.C. 20036
c/o Professor Don Wallace Jr.
Chair of International Law Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001



Dear Sir and Madam,

This will acknowledge receipt of your letter of today's date regarding your request for arbitration of January 19, 2005.

Sincerely yours,


Gabriela Alvarez Avila
Senior Counsel

cc (with incoming correspondence):

United Mexican States
c/o Mr. Hugo Perezcano Díaz
Consultor Jurídico
Subsecretaría de Negociaciones
Comerciales Internacionales
Dirección General de Consultoría Jurídica
de Negociaciones

H.E. Ambassador Carlos de Icaza
Embassy of the United Mexican States
1911 Pennsylvania Av., N.W.
Washington D.C. 20006