No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

REPLY TO THE BRIEFS IN OPPOSITION OF THE STATES OF TEXAS, NEW MEXICO, COLORADO AND THE UNITED STATES TO THE MOTION FOR LEAVE TO INTERVENE OF THE NATHAN BOYD ESTATE. ET AL.

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Statement

Pre-federal Claimants ("Claimants") meet the standards set for intervention by non-state entities and their intervention is necessary in resolving the issue in this case.

Argument

Pre-federal Claimants meet the standard for intervention in original actions by non-state entities as stated in *New Jersey v. New York*, 345 U.S. 369, 373 (1953. Texas on page 2 gives the three requirements for joining non-state interveners:

a. Claimants must have a "compelling interest",

b. that interest is different "than the class of all other citizens and creatures of the state",

c. that interest "is not properly represented by the state".

In addition, joining Claimants will resolve the main issues in this Case.

Claimants' responses to the above requirements for joinder follow:

a. Claimants' claim is unique, not, as Texas states at 2, an intramural claim by disgruntled New Mexico citizens with a different view of the facts or legal position than that presented by the State of New Mexico ("NM"). Claimants' claims pre-date the 1939 Compact and U.S. Project. See Movants' Apps. A-10, A-21, A-34a, A-35. The original dispute was over federal issues of navigation, which the U.S. lost.

The need to ensure water delivery to Mexico that led to the 1905 U.S. Treaty with Mexico, 34 Stat. 2953, was the excuse the U.S. used to enjoin Rio Grande Dam and Irrigation Company ("RGD&IC") from completing its dam at Elephant Butte ("EBD") in 1897. *Texas v. NM*, 138 S. Ct. 954, 957 (2018). The U.S.' concerns about water deliveries to Mexico were disingenuous because RGD&IC intended to deliver water to Mexico. Senate Report 229, *Equitable Division of the Waters of the Rio Grande*, 55th

Congress, 2d Sess. 1898, ("Senate Report"); RGD&IC's Prospectus 4-11.

After the U.S. decided it preferred Elephant Butte as the location for its dam, rather than the International Dam location, it seized RGD&IC's project for its U.S.' project in 1903. See Claimants' Memorandum in its Motion for Leave to Intervene ¶¶ 38-70. The U.S. has maintained control of the entire Rio Grande ever since the 1896 Rio Grande Embargo

No one can defend a water right without a priority date decree. A water decree does not confer a water right. Instead it "confirms a pre-existing water right, or in the case of conditional applications, gives the applicant the opportunity to develop the right and obtain a priority date that relates back to the date of the first appropriation." *Dill v. Yamasaki Ring, LLC*, 2019 Colo. 14, at 18 (citing *Shirola v. Turkey Cañon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748 (Colo. 1997)).

The U.S. knew Boyd owned the project rights to EBD after 1900. *Rio Grande Irrigation & Land Co., Ltd. (G.B.) v. U.S.,* R.I.A.A. Vol. VI, at 131-38, Nov. 28, 1923 (United Nations 2006) ("*World Court Decision*"), See Movant's App. A-1. The U.S.' claim in this Case is another attempt to validate its seizure of Claimants' project and continue to control the RG without legally acquiring the necessary water and project rights for its project. The U.S. gained no title to water or project rights by a purported NM Territorial Third Judicial District Court default judgment of forfeiture in 1903 ("1903 Proceeding"). A seizure cannot extinguish or vest water rights. *Keeney v. Carillo,* 2 N.M. 480 *4 (1883).

Claimants were not in privity with RGD&IC in the 1903 Proceeding because RGD&IC was defunct, without assets, so could not and did not represent Claimants. *U.S. v. Truckee-Carson Irrig. Dist.*, 649 F.2d 1286, 1302-04 (1981). Therefore, Boyd's project rights and the farmers' water rights survived the 1903 Proceeding. See App A-37 and this Court's decision in *Rio Grande Dam & Irrigation Co. v. U.S.*, 215 U.S. 266 (1909).

Claimants allege the U.S.' Rio Grande Project ("USRGP") violates §§ 7 and 8 of the Reclamation Act of 1902 ("Reclamation Act"), ch. 1093, 32 Stat. 388, 43 U.S.C. § 383, the 14th Amendment, and Article 5 of the U.S. Constitution. See Claimants' Motion to Intervene at 4.

U.S. v. Truckee–Carson, 649 F.2d at 1298 (citing *California v. United States,* 438 U.S. 645, 665 (1972) (quoting HR Rep. No. 794, 57th Cong., 1st Sess. 7-8 (1902)), states: "[T]he Secretary of the Interior could not take any action in appropriating the waters of the state streams 'which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands."

Reclamation Act § 8, 43 U.S.C. § 383, requires the Secretary of the Interior Act to follow State and Territorial acts in creating irrigation projects. *U.S. v. City of Las Cruces* ("CLC"), 289 F.3d 1170**,** 1190 (2002). The U.S. did not legally acquire Claimants' project and water rights for its USRGP. Since Claimants' rights were never forfeited, no surface, floodwaters, or project rights were available for the U.S. to reserve pursuant to NM law in 1908. NMSA 1978 § 72-5-33 (1907).

Claimants believe NM and the U.S.' diversions and delivery of water upstream after 1907 are responsible for any shortfall in delivery of water under the Compact to Texas, not the farmers' pumping their water in southern NM.

b. The interest Claimants seek to protect is "apart from their interest in a class with all other citizens and creatures of the state".

Claimants' January 12, 1893, priority date is apart from a class with all other citizens of Texas and NM who have accepted U.S. control of the RG and Project water. NM supports a 1908 priority date for the USRGP, see App. A-42, and refuses to accept citizens' declarations of pre-1907 water rights in the LRG pursuant to NMSA 1978 §§ 72-1-3 and -4 (1953). Because NM refuses to accept pre-1907 declarations, opposes all pre-federal water claims in the NM Lower Rio Grande Adjudication ("LRGA"), and supports (on behalf of all New Mexico citizens) U.S. control of RG water and the USRGP, Claimants' claim is adverse and apart from the class of all citizens of NM.

The U.S. claims a March 1, 1903, priority date for its USRGP. The Claimants' pre-federal 1893 priority date is not shared by any other class of citizens of NM. Claimants claim a private project that extends across the entire bi-state, and international Project service area. Therefore, Claimants satisfy the requirement that a non-state claimant have a compelling interest in his own right and not be in the same class as all other citizens of the state. *New Jersey v. New York*, 345 U.S. at 373.

NM's statement in its Response at 10 that Claimants claim their rights subject to NM "state

law" is not true. Some Claimants' vested rights began in 1843, before the U.S. exercised sovereignty over what is now the State of NM. Claimants' perfected their rights pursuant to many different laws, doctrines, and treaties, including the Common Law, the Prior Appropriation Doctrine ("PAD"), the Treaty of Guadalupe-Hidalgo (Act of Feb. 2, 1848), NMSA 1978 § 73-2-7 (1882), the Territorial Acts of Feb. 24, 1887, and Feb. 26, 1891, and the Federal Act of March 3, 1891 (43 U.S.C. §§ 946-948, 26 Stat. 1102).

The LRGA court created a federal issue when it held it lacked jurisdiction to overturn the 1903 territorial Decree because rendered by a federal court and therefore subject to federal jurisdiction. See Oct. 19, 2016, "Memorandum Order Granting Motion to Dismiss the Claims to Rights Derivative of RGD&IC" at 19-21, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

This Court considered uniqueness a factor for permitting Duke Energy to intervene. "There is, moreover, no other similarly situated entity on the Catawba River, setting Duke's interests apart from the class of all other citizens of the States. See *New Jersey v. New York, supra,* at 373, 73 S. Ct. 689." *South Carolina v. North Carolina*, 558 U.S. at 272. As acknowledged by Texas at 6, "The South Carolina case established a limited exception where a unique set of circumstances is present."

The facts demonstrate that Claimants meet the three-pronged standard for intervention enumerated in *New Jersey v. New York,* 345 U.S. at 373, and are in the same category of interveners as Duke Energy

Carolinas, LLC (Duke Energy), and the Catawba River Water Supply Project (CRWSP) in *South Carolina v. North Carolina*.

No other LRGA participant has made a claim to pre-federal project rights for over one hundred years or directly attacks the legality of the USRGP and the Compact.

c. Claimants' interest is "not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. NM has supported the U.S. project claim and opposed Claimants' claims in the LRGA for decades. For examples of NM opposition to Claimants' claims, see "Joint Motion of the State of New Mexico EBID to Dismiss Claims to Rights Derivative of the RGD&IC", filed January 11, 2016, and "Response of the State of New Mexico to Pre-1906's Claimants' Motion to Set Aside 1903 Decree", filed 8-24-16, at https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

NM is the sole appellee opposing Claimants' appeal of the LRGA district court's order dismissing Claimants' claim of Rights Derivative of the RGD&IC entered October 19, 2016, in the NM Court of Appeals, No. 36,269. The U.S. and NM have relied upon procedural fencing to create procedural hurdles for over a century to prevent Claimants the opportunity to establish their project water and right claims. *U.S. v. CLC*, 289 F.3d at 1189-90.

NM has also supported staying the adjudication of Claimants pre-federal rights in the LRGA for two years. When the LRGA district court suggested joining Claimants in ongoing settlement negotiations, NM refused. NM's actions during the last seven

years clearly evidence that it will not represent Claimants' claims in the LRGA or this Case.

The evidence proves that Claimants' interest "is not fairly represented by the State". NM's constant opposition and procedural actions prove NM intends to destroy Claimants' pre-federal claims.

Texas' Response at 6 that there has only been one non-state or Indian tribe granted intervention in an original jurisdiction case is incorrect. As stated in *South Carolina v. North Carolina*, 558 U.S. at 264, "[t]his Court likewise has granted leave, under appropriate circumstances, for non-state entities to intervene as parties in original actions between States. See *Maryland v. Louisiana,* 451 U.S. 725, 745, n. 21, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981)."

Claimants' interests are compelling because Claimants claim the same interest as the U.S.: the project rights and water. Claimants meet the high standard requirement adopted by Justices Roberts, Thomas, Sotomayor, and Ginsburg in their dissent in *South Carolina v. North Carolina*, *id.* at 289, "A private party (or perhaps a Compact Clause entity) with a federal statutory right to a certain quantity of water might have a compelling interest in an equitable apportionment action that is not fairly represented by the States."

d. Resolution of Issues: Granting intervention to Pre-Federal Claimants will resolve several issues involving the Compact, such as: Is all the water stored in EBR subject to Compact delivery obligations and what water is subject to USRGP control?

(1) Claimants should be granted leave to intervene because their claims identify vitiating infirmities in the creation of the Compact.

The procedures followed in adopting the Compact failed to address Claimants' vested water right claims and project claims. There is evidence that the Compact was created to avoid and diminish Claimants' vested rights by depriving Claimants of their pre-federal priority date. See Movants' App. A-46.

Claimants allege that application of the Compact as requested by Texas and the U.S. (apportioning all water reaching EB reservoir to Texas, see Texas' Complaint ¶ 11) will diminish Claimants' vested surface water rights. The U.S., through EBID, is not delivering Claimants' vested amount of water to LRG farmers, thus requiring LRG farmers to pump water to secure their vested rights. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938).

Granting Texas' requested remedy (to stop pumping by LRG farmers) will have a devastating effect on agriculture and the economy in NM's LRG.

As stated in Claimant's Memorandum in Support of their Motion for Leave to Intervene at 3, "The application of NM's PAD will determine whether NM farmers hold senior subsurface rights to supplement their surface rights. *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1958)."

Claimants' Motion presents only a fraction of the evidence of over 120 years of litigation by the U.S. and NM to deprive Claimants of the opportunity to establish their vested project and water rights.

If history is an indicator of the future, litigation will continue until Claimants are provided a due process trial to adjudicate their rights. Claimants intend to appeal any LRGA district court decision in SSI-104 granting the U.S. a priority date of March 1, 1903, and any decision in SSI-107 that Claimants' rights did not survive the Project.

To avoid more years of litigation, this Court might consider Justices Jackson and Black's suggestion in their dissent in *New Jersey v. New York,* 345 U.S. at 375:

> We would allow Philadelphia's motion to present any proper evidence that it deems protective of its interest. This would not be merely a favor to that city. It would also protect the position of this Court if the master should report in favor of New York, and Philadelphia, with the wisdom that comes from hindsight, should ask to oppose confirmation upon the ground that its interests had not had full consideration.

To fulfill the intention of the Preamble of the Compact, "to remove all causes of present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande," Claimants should be granted leave to intervene.

(2) Texas' opposition to Claimants' intervention is flawed when Texas mischaracterizes Boyd's claim to prior project rights as "water rights" and states that Claimants "assert claims to a specific water allocation." See Texas Response at 12-14. An

allocation of water rights would not recognize that Boyd's project claims are unique and not within the class of all other intrastate litigants. Boyd claims senior vested rights to store, convey and deliver water throughout the entire geographic area of the USRGP. Compact procedures for control and delivery of water by the U.S. vitiate and diminish Claimants' project and water rights. *Hinderlider,* 304 U.S. at 108.

The Compact's creation was also flawed by not considering the vested priority dates of irrigated lands and ownership of project rights in its equitable apportionment of the Rio Grande or administer water rights. The Compact's equitable apportionment was based upon irrigated lands in the project, not priority of water rights. It is a vitiating infirmity that Compact procedures for Compact administration do not mandate delivery of all senior water rights before water deliveries to junior federal water users.

(3) Texas' Response at 12 states, "The State of New Mexico in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact." Determining the senior project right will not only determine ownership, it will also determine standing, and who has been damaged and whether the Compact diminished Claimants' project and water rights. *Hinderlider,* 304 U.S. at 108.

Because this Court allowed the U.S. to intervene to protect its purported Project interest, it should allow the Claimants to intervene to protect their

senior project rights. Claimants' allege their vested rights were not considered in the creation of the Compact and have been diminished.

"All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed." NM Const. art. XVI, § 1 (1911); *State ex rel. Reynolds v. Holguin,* 95 N.M. 15, 618 P.2d 359 (1980).

The Pre-federal Claimants' Motion to Intervene is both timely and necessary. As soon as this Court granted the U.S. leave to intervene in this case, Claimants had little choice but to intervene.

Summary

Claimants seek to intervene in this case to assert their senior vested rights to the Project and waters of the RG and to prove that the U.S. never legally appropriated the project and water rights it claims in this case for its Project. Because the invalidity of the 1903 Territorial Proceeding and the vesting of pre-federal project and water rights pursuant to federal law are the central issues in this case and since NM is not representing Claimants' property rights, it is appropriate to grant Claimants' Motion for Leave to Intervene to resolve these issues and protect their rights.

NM has demonstrated an unwillingness to adjudicate Claimants' project and water rights during the last 17 years since remand. *U.S. v. CLC*, 289 F.3d at 1187 (citing *Brillhart v. Excess Ins. Co. of America***,** 316 U.S. 491 (1942)), provides:

> A district court should evaluate the scope of the state proceeding, whether the claims of all parties can be adjudi-

> cated in that proceeding, whether necessary parties have been joined, whether they are amenable to process, and any other factor bearing on the central question of which forum can better resolve the controversy.

Claimants request that this Court grant Movants' Motion for Leave to Intervene to evaluate whether the LRGA or this court is better able to review and protect Claimants' rights and whether there was a legal basis for the Compact and the USRGP.

Respectfully submitted,

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