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

MOTION OF THE NATHAN BOYD ESTATE AND JAMES BOYD, INDIVIDUALLY, OSCAR V. BUTLER, ROSE MARIE ARISPE BUTLER, MARGIE GARCIA, SAMMIE SINGH, AND SAMMIE HOLGUIN SINGH JR., (COLLECTIVELY PRE-FEDERAL CLAIMANTS) FOR LEAVE TO INTERVENE AS PLAINTIFFS IN THIS ORIGINAL JURISDICTION CASE, COMPLAINT IN INTERVENTION AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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MOTION OF PRE-FEDERAL CLAIMANTS FOR LEAVE TO INTERVENE AS PLAINTIFFS

On January 27, 2014, this Court granted Texas' Motion for Leave to File a Bill of Complaint against New Mexico and Colorado regarding claimed shortages in delivery based upon the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"). This Court allowed New Mexico ("NM") and Colorado to file motions to dismiss the Texas complaint. Shortly after, the United States ("U.S.") filed a Motion for Leave to Intervene as a Plaintiff in this case to enforce its own Reclamation obligations relating to its Rio Grande Project ("Project") and treaty obligations with Mexico, which was granted by this Court.

James Scott Boyd, as representative of the Estate of Nathan E. Boyd, who was receiver of all interests and assets created by the Rio Grande Dam & Irrigation Co. ("RGD&IC"), and the other named Claimants, who were designated by the District Court in NM's Lower Rio Grande Adjudication ("LRGA") as representatives for all pre-federal territorial water rights claims derived from their 1893 Rio Grande Elephant Butte project and local community ditches that joined their diversions to RGD&IC (collectively "Claimants"), move for leave to be joined pursuant to Rules 19(a) and 24(a)(2) of the Federal Rules of Civil Procedure.

Movants are indispensable parties because Movants claim an interest relating to the property or transaction that is the subject of the action and are so situated that disposing of the action may as a practical matter impair or impede the Movants' ability to protect their interest. Further, no existing party adequately represents their interest, since they have a senior interest in the Project. Their joinder will avoid a judicial taking by the NM courts in the LRGA, and possibly by this Court, and will aid this Court in determining who owns the project and water rights and who has standing to protect those rights. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 130 S. Ct. 2592 (2010).

Movants/Claimants believe intervention in this case is the only way to protect their pre-federal project and water rights (collectively "Rights"), because NM misrepresents facts before this Court and Claimants' intervention will provide proven facts, including the factual background that led to

the Compact, that will aid this Court in a more thorough decision on the merits in this case.

The factual background evidence Claimants bring to this Court includes how the Department of War declared the December 6, 1896, Rio Grande Embargo ("Embargo") to suspend all pending applications for federal easements for reservoir sites pursuant to the Act of March 3, 1891, 43 U.S.C. §§ 946-948, 26 Stat. 1102. The Embargo remained in force until 1925, during Compact negotiations.

Other important facts Claimants will provide show how the U.S. took control of the Rio Grande by seizing Claimants' predecessors' project and water rights through a sham proceeding and Decree in 1903 in NM's Territorial District Court that was affirmed by this Court in 1909. *Rio Grande and Dam Company v. U.S.*, 215 U.S. 266 (1909). The 1903 Decree is being used by the U.S. and NM to preclude Claimants from establishing their pre-federal Rights in the LRGA. As the LRGA delays in adjudicating pre-federal claims, it has allowed the appearance that the U.S. legally appropriated its project and water rights, which are the subject matter before this Court.

Claimants' historical documents provide evidence of malfeasance by agents of the U.S. in the creation of the U.S.' Rio Grande Project ("Project") and the Compact. The 1896 Embargo and improper litigation in 1897 to stop RGD&IC's dam construction were the first steps taken by the U.S. to nationalize the Rio Grande by which the U.S. gained control over the Claimants' predecessors' prior appropriated Rights without a due process trial or just compensation.

The U.S.' 1896 Embargo coerced the farmers into signing up for the federal project and likewise was used as leverage by the Department of Justice, the Secretary of Interior (Bureau of Reclamation) and the Rio Grande Commission to induce acceptance of the Compact legislation by Texas, New Mexico and Colorado. See Letter from Delph Carpenter, State of Colorado, to Herbert Hoover, U.S. Secretary of Commerce (Oct. 9, 1924). **App. A-46**.

NM Attorney General Balderas admits, as reported in the Albuquerque Journal (Feb. 16, 2019), "I do not want to pre-settle or litigate in a way that short changes or pits one New Mexican against another." Balderas' statement is inappropriate because in this case litigation that pits one claimant versus another is exactly what needs to happen to determine who holds prior rights to the U.S. claims of 1903-1906. In essence, Balderas has abandoned his obligation to enforce NM's Prior Appropriation Doctrine ("PAD") by taking the position before this Court that the U.S. legally appropriated project and water rights. One cannot serve two masters.

Claimants will show that in 1905 the U.S. used its unconstitutional seizure of the Rio Grande and threatening non-delivery of the farmers' prior appropriated water to coerce the farmers in NM's Lower Rio Grande ("LRG") to assign control of their water to the U.S. and force them to pay for the construction of the U.S. Project. Claimants allege that the actions taken by the U.S. in creating its Project were in violation of Sections 7 and 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. § 383 ("Reclamation Act"), the 14th Amendment and Article 5 of the U.S. Constitution.

U.S. v. City of Las Cruces ("*CLC*"), 289 F.3d 1070, 1184-86 (10th Cir. 2002), held that the Compact, the Reclamation Act, and the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953 (1906) ("Mexico Treaty"), do not provide a basis for the U.S. to quiet title for its Project or provide the U.S. a basis to claim a water right. *U.S. v. CLC*, 289 F.3d at 1192, also held that federal abstention was appropriate because NM courts offered the better mechanism for resolving the complex legal issues regarding water rights and the ability to join the U.S. along with multiple parties into a comprehensive adjudication pursuant to NMSA 1978 § 72-4-17 (1907) and the McCarran Amendment, 43 U.S.C. 666 (1952).

On remand, the U.S. District Court for the District of New Mexico ("USDC") on August 15, 2002, stayed the federal case to allow litigants in the LRGA to return to the USDC if there was a federal issue (**App. A-45**), but when Claimants sought to reopen the federal case to question the NM's courts' preclusion of their pre-federal claims, the USDC denied their motion.

The issue of pre-federal water rights is yet to be litigated in the LRGA. For the last one and a half years, the LRGA Court has stayed the U.S.' project claims in Stream System Issue ("SSI")-104 along with Claimants' pre-federal claims in SSI-107, in an attempt to settle the case. Claimants, however, have not been included in any settlement discussions, and the LRGA Court has refused to grant a trial to determine their pre-federal rights in SSI-107.

Movants/Claimants believe the best way for this Court to resolve the controversy relating to the Compact is to allow Claimants to intervene and to present evidence supporting their rights derived from the RGD&IC and earlier Federal, Territorial, and Spanish/Mexican land grant/acequia rights. Claimants' pre-federal Rights were affirmed by the New Mexico Supreme Court in *U.S v. RGD&IC*, 9 N.M. 292, 51 P. 674 (1898), *reversed to determine if dam construction would affect navigation within areas now navigable*, 174 U.S. 690 (1899). *Candelaria v. Vallejos*, 13 N.M. 146, 81 P. 589 (1905); *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914); *Rio Grande Irrigation & Land Co., Ltd. v. U.S. (G.B.)*, R.I.A.A., Vol. VI, pp. 131-38, Nov. 28, 1923 (U.N. 2006).

As signatory and supporter of the Compact, NM has prevented Claimants from adjudicating their pre-federal claims in the LRGA and has not and will not assert or defend Movants' pre-federal claims before this Court.

It is necessary, therefore, for Claimants to intervene in this case to establish and protect their property rights. Intervention is appropriate because Claimants have a "compelling interest in their own right, apart from their interest in a class with all other citizens of the State of New Mexico, which interest is not properly represented by the State." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (citing *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930)); *see also South Carolina v. North Carolina*, 558 U.S. 256, 256 (2010).

The NM courts have condoned the U.S. and NM's procedural fencing to prevent the adjudication of

Claimants' rights. This Court may be the only jurisdiction left in which Claimants can establish and protect their pre-federal claims. Claimants' facts will demonstrate that the Compact was adopted to avoid recognition of pre-federal Rights in NM's LRG, as required by the Prior Appropriation Doctrine. See **App. A-46.**

Conclusion

Determination of Claimants' rights will help resolve Texas' Complaint allegation that New Mexico farmers' pumping underground water below Elephant Butte Dam is interfering with the surface delivery of water to Texas under the Compact. Compl. 15-16.

Claimants allege they hold senior rights to pump the water pursuant to the PAD. *U.S. v. CLC*, 289 F.3d at 1176, states: "In New Mexico, state law provides for a hierarchy of water users along a river such as the Rio Grande. Those who first appropriate water for beneficial use have rights superior to those who appropriate water later." *See* N.M. Const., art. XVI, § 2; *Snow v. Abalos,* 18 N.M. 681, 140 P. 1044, 1048 (1914) (affirming that N.M. follows the PAD).

Claimants' senior Rights should not be curtailed in order to meet NM's and the U.S.' delivery obligations to Texas under the Compact.

Movants/Claimants append to this Motion their proposed Complaint in Intervention accompanied by a supporting Memorandum that explains more fully Claimants' facts and legal position.

Respectfully submitted,

ROBERT SIMON
Counsel for Pre-Federal Claimants

MARCH 2019

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COMPLAINT IN INTERVENTION

1. Plaintiff in Intervention James Scott Boyd, individually, and as administrator of the Nathan Boyd Estate ("Boyd"), joins Oscar V. Butler, Rose Marie Arispe Butler, Margie Garcia, Sammie Singh, and Sammie Holguin Singh, Jr., the persons designated by the N.M. District Court for the Third Judicial District ("NMDC") to represent all pre-1906 Claimants in the Lower Rio Grande Adjudication ("LRGA") (collectively "Claimants"), to establish and protect their pre-federal storage, project, diversion and water rights ("Rights") derived from both the Rio Grande Dam and Irrigation Company ("RGD&IC") and their construction of pre-federal community ditches.

2. Prior to 1893, farmers legally appropriated surface water and diversion rights by common law.

Candelaria v. Vallejos, 13 N.M. 146, 81 P. 589, 598 (1895); *Snow v. Abalos*, 18 N.M. 681, 699, 140 P. 1044, 1062 (1914). On January 12, 1893, RGD&IC, a New Mexico irrigation company, was organized pursuant to the Territorial Act of Feb. 14, 1887, to capture and legally appropriate the floodwater of the Rio Grande ("RG") for Claimants' benefit.

3. The Nathan E. Boyd Estate derives its claim from Dr. Nathan Boyd, to whom was conveyed the assets of RGD&IC and Rio Grande Irrigation & Land Co., Ltd. (G.B.) ("RGI&LC") ("Collectively "Companies") in 1900 as receiver, major investor and remaining debenture holder upon the Companies' forced liquidation by U.S. litigation over rights-of-way. *RGI&LC v. U.S.*, R.I.A.A., Vol VI, 131, 135, Nov. 28, 1923 (U.N. 2006) (**App. A-1**).

4. The U.S. claims it initiated the Rio Grande Project ("USRGP") in 1903 to serve the Lower Rio Grande ("LRG"), the El Paso Valley in Texas, and Mexico. But long before the U.S. initiated its project, farmers in the LRG constructed an irrigation system by connecting the existing community ditches. By 1893 local private interests aligned and organized RGD&IC and sought out Dr. Boyd to finance the construction of a modern irrigation project to capture Rio Grande floodwater and deliver water to the same area as the USRGP. *U.S. v. RGD&IC,* 174 U.S. 690, 691 (1899).

5. For the last 115 years, including the 29 years of the LRGA, this Court, the NM courts and the U.S. District Court for the District of New Mexico (USDC) have denied Claimants the opportunity to establish their pre-federal claims.

Claimants intervene in this case to establish and protect their senior Rights.

Jurisdiction

6. Jurisdiction of this Court is invoked under Article iii, Section 2, Clause 2 of the U.S. Constitution, 28 U.S.C. 1251(A), and the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact").

7. This Court granted the U.S.' Motion to Intervene based upon the United States' ("U.S.") alleged federal interest in its USRGP pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. § 383 ("Reclamation Act") and the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953 (1906) (("Mexico Treaty").

8. Claimants allege ownership of Rights senior to both the U.S. and N.M. pursuant to the Common Law and Prior Appropriation Doctrine ("PAD"), the Treaty of Guadalupe-Hidalgo (Act of Feb. 2, 1848), NMSA 1978 § 73-2-7 (1882), NMSA 1978 § 72-1-2, 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).

9. Joinder of Claimants is permitted pursuant to Fed. R. Civ. P. 19(a) and 24(a)(2), because Claimants claim an interest relating to the property or transaction that is the subject of the action and are so situated that disposing of the action may as a practical matter impair or impede Claimants' ability

to protect their interest and because no existing parties adequately represent their interest.

Federal Questions Resolved by Granting Claimants' Motion to Intervene

10. The historic facts stated below raise several federal questions and issues, including:

a. Did the U.S. comply with Reclamation Act §§ 7-8, in creating its USRGP? *U.S. v. City of Las Cruces ("CLC")*, 289 F.3d 1070, 1184 (10th Cir. 2002).

b. Did the NMDC err by refusing to consider Claimants' collateral attack on the 1903 Decree ("Decree") because the Decree was rendered by a Federal Territorial District Court ("NMTDC")? Does the NMDC lack jurisdiction to consider Claimants' collateral attack on the Decree. See Oct. 19, 2016, Memo Order at 19-20, ¶¶ 32-33, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx, and Ex. 20-1 to 20-3, Boyd Response to Motion to Dismiss, filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

c. Did the U.S. engage in improper litigation and fraud upon the judicial system, and seize Claimants' Rights without just compensation, due process or a constitutional condemnation? *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *abrogated on other grounds, Standard Oil Co. v. United States*, 429 U.S. 17 (1976); *Potter v. Pierce*, 2015-NMSC-002, ¶ 15 (2015); U.S. Const. art. V, § 2; *Sweet v. Rechel*, 159 U.S. 380 (1895),

Reclamation Act §§ 7-8; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 164-65 (1979).

d. Will Claimants' intervention provide additional historical facts that will clarify ownership of USRGP and LRG Rights and what rights were available for U.S. appropriation under the 1907 Water Code of NM?

e. Will the current dispute regarding control of surface and subsurface water between the U.S., Texas and New Mexico best be resolved by applying the PAD to determine ownership of pre-federal Rights?

f. Will applying the PAD to determine ownership of Rights answer whether N.M. farmers are interfering with delivery of water to which Texas claims it is entitled under the Compact, or are N.M. farmers pumping their water to supplement their pre-federal surface rights? *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 332 P.2d 165 (N.M. 1958).

g. Will applying the PAD assist this Court in determining whether the U.S. and N.M. have standing in this case?

Early Procedural History

11. In 1897, courts began considering whether RGD&IC legally commenced its irrigation project. *U.S. v. RGD&IC*, 9 N.M. 292, 51 P. 674 (1898).

12. The Court in *U.S. v. CLC,* 289 F.3d at 1184-86, held that the Compact, the Reclamation Act, and the Mexico Treaty provided no basis for quieting the U.S.' title to its USRGP, and, *id.* at 1192, that federal abstention was appropriate because the NM state court adjudication offered the better

mechanism for resolving the complex legal issues regarding water rights and joining multiple parties into a comprehensive adjudication pursuant to NMSA 1978 § 72-4-17 (1907), including federal claims pursuant to the McCarran Amendment, 43 U.S.C. 666 (1952), against any federal claim of sovereign immunity. *U.S. v. CLC,* 289 F.3d *at* 1193. The federal courts remanded the case to the state LRGA in 2002, wherein the U.S.' project claims are currently pending in Stream System Issue ("SSI")-104, and Claimants' pre-federal claims are pending in SSI-107.

Recent Procedural History of the LRGA

13. On April 17, 2017, after a lengthy trial in 2016, the NMDC entered its Findings of Facts and Conclusions of Law regarding SSI-104, finding the USRGP's project priority date was March 1, 1903. https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

14. The March 1, 1903, USRGP priority date conflicts with two other priority claims. First, NM claims the USRGP priority date is 1906/1908. See Brief in Support of NM's Exceptions to the First Interim Report of the Special Master 2, filed Mar. 20, 2017. Second, Claimants claim January 12, 1893, as their project priority date.

15. Shortly after the NMDC entered its Findings, the U.S., Elephant Butte Irrigation District ("EBID"), the CLC and NM's State Engineer ("U.S. Parties") filed a Motion to Stay further action in SSI-104 and SSI-107 to discuss settlement. Even though no U.S. Party claims any pre-federal right and Claimants have not been invited to join

settlement discussions, the NMDC has repeatedly extended the stay for one and a half years until May 8, 2019. See Order Extending Stay of Proceedings in "Stream System 107", filed October 29, 2018 ("Stay"), https://lrgadjudication.nmcourts.gov/ss-97-107-pre-project-interests.aspx.

16. Claimants allege that the Stay is the latest chapter in a 29-year procedural battle by the U.S. Parties to prevent Claimants from establishing their pre-federal rights. For example, the NMDC has yet to allow Claimants discovery or a due process trial. See Transcript of the May 21, 2015, NMDC hearing in SSI-104, pp. 46-49, TR-69 ln. 4 to TR-72 ln. 4 (**App. A-28**).

17. In *U.S. v. CLC*, 289 F.3d at 1189-90, the court observed: "The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction. Other parties have made motions to dismiss. The State Engineer himself made several," and, at 1190, "Only the United States and Texas parties still resist the stream adjudication" and "This court agrees that the procedural fencing factor weighs against the exercise of jurisdiction."

18. This case considers the same issue considered in *U.S. v. CLC*: Does the U.S. own the USRGP and appurtenant water rights? On what legal basis does the U.S. claim ownership or administrative control of the project and water rights in the LRG? and What unappropriated water and project rights were available to appropriate in 1903/1906?

19. NM asserts in the LRGA and in its Exceptions to Special Master's First Interim Report in this case that the U.S. appropriated project and

water rights in 1906/1908 by Application No. 8. At the same time NM refuses in the LRGA to meet its statutory obligation to adjudicate all claimants' claims and to apply the PAD. NMSA 1978 § 72-4-17 (1907) ("all other claimants ... shall be made parties"); *Id.* §§ 72-5-1, 72-5-2; NM Const. art. XVI, § 2.

20. The main argument the U.S. Parties advance to prevent Claimants from litigating their Rights in the LRGA is that a 1903 NMTDC Decree was a *res judicata* decision precluding Claimants from establishing their Claims in the LRGA. *U.S. v. RGD&IC*, 13 N.M. 386, 85 P. 393 (1906); *RGD&IC v. U.S.*, 215 U.S. 266 (1909) (**App A-37**).

21. Rather than meeting its statutory obligation to adjudicate all rights, as required by NMSA 1978 § 72-4-17 (1907), the NMDC in the LRGA forces each Claimant into separate individual sub-files, coercing each Claimant to defend its pre-federal claim or accept the State's 1906 priority date. Although the NMDC has held that it will revise priority dates if Claimants succeed in their pre-federal claim, it continues to force individuals into sub-files, which amounts to collateral fraud by preventing them from collectively establishing their pre-federal Rights. *Rutherford v. Buhler*, 89 N.M. 594, 598, 555 P.2d 715, 719 (Ct. App. 1976).

22. Further evidence of collateral fraud is found, in the 2016 SSI-104 trial regarding the U.S.' priority date. The NMDC, upon the U.S.' Motion in Limine, prevented consideration of Claimants' evidence of RGD&IC's 1897 completion of the Leasburg Diversion Dam/Canal to defeat the 1903 decision or the U.S. priority date claim. See Order Granting in

Part the U.S.' Motion in Limine to Exclude Trial Evidence, in SS-104. https://lrgadjudication.nmcourts.gov/stream-system-issues-includes-101-102-103-104-and-rn-97-2413.aspx.

23. Claimants believe the recent Stays confirm what the court in *U.S. v. CLC*, 289 F.3d at 1191, warned: "Unable to reach some claims, and needing to reach all in order to establish priority, the state adjudication could grind to a halt." While the U.S. Parties and Texas continue to stay adjudication of Claimants' Rights in the LRGA, they are seeking to confirm their Project rights in this Case.

24. Similarly, the NMDC, in its October 19, 2016, Order, denied Claimants' claim to an 1893 priority date for floodwater appropriated by RGD&IC, which is the issue stayed in SSI-107. See Memorandum Order Granting Joint Motion to Dismiss the Rights Derivative of RGD&IC, filed Oct. 19, 2016, located in Pre-1906 Claimant's Inter Se file, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

25. The NMDC denied Claimants' collateral attack on the 1903 Decree, holding circuitously that the Decree precludes Claimants from introducing evidence to attack the Decree. Claimants argue that the 1903 Decree did not bind Boyd and the farmers/landowners because they were not joined in the 1903 proceeding, that privity cannot exist with a non-existent company, and that the 1903 proceeding was not a trial on the merits. The LRGA is the first and only LRG adjudication in over 100 years.

Summary

26. Claimants allege that the federal questions and issues raised in this case can best be answered by applying the PAD, as in other prior multi-state water disputes. *Wyoming. v. Colorado*, 259 U.S. 419, 490, 495 (1922); *Arizona v. California*, 373 U.S. 546, 555-56 (1963).

27. In recent years, the EBID/U.S. has reduced LRG surface deliveries of water from approximately four acre-feet/year to less than one acre-foot/year, forcing farmers to rely upon wells to supplement their surface water rights. *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 332 P.2d 465 (N.M. 1958).

28. Claimants allege that they are entitled to their prior appropriated surface and subsurface water quantity and that quantity cannot be diminished to meet Compact deliveries to Texas.

29. In 1952 Congress waived sovereign immunity for the first time, subjecting U.S. claims to state adjudication. McCarran Amendment, 43 U.S.C. 666 (1952); *U.S. v. CLC*, 289 F.3d at 1191.

30. In the seventeen years since the decision in *CLC*, the N.M. courts still have not adjudicated Claimants' pre-federal claims. So long as Claimants' claims are not adjudicated, federal and state claims and standing before this Court cannot be determined.

31. Claimants allege that NM courts have disregarded the PAD and have participated in and condoned collateral fraud by procedural fencing by the U.S. and NM, including the current Stay, to prevent Claimants from establishing their Rights. *Rutherford v. Buhler*, 89 NM. 598, 719 (Ct. App. 1976).

32. No court has ever provided Claimants a due process trial to establish their pre-federal Rights. NMSA 1978 § 72-4-13 to 19 (1907).

33. Claimants intervene to protect their property Rights, because NM opposes and refuses to protect them. *New Jersey v. New York,* 345 U.S. 369, 373 (1953); *South Carolina v. North Carolina,* 558 U.S. 256, 257, 264-70 (2010) (granting intervention to a multi-state water project because its interests did not align with either state's interests).

34. Claimants pray that this Court re-examine its decision in *RGD&IC v. U.S.*, 215 U.S. 266 (1909), affirming the Decree **(App. A-37)**, by applying the holding in *RGI&LC, Ltd.* (1923) **(App. A-1)** that Boyd owned all project rights after 1900 to determine whether the Decree validly forfeited Claimants' pre-federal claims.

35. Once this Court determines whether Claimants own pre-federal project, diversion and water rights, the NMDC can quickly complete its adjudication and render water rights decrees pursuant to NMSA 1978 § 72-4-19 (1907). Until all claims to use of water are joined in the LRGA, the NMDC will lack the necessary subject-matter jurisdiction and evidence for a comprehensive adjudication and to determine what administrative control the U.S. and the OSE may exercise over Rio Grande Water. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 289 P.3d 1232 (N.M. 2012).

Prayer for Relief

WHEREFORE, Claimants pray that this Court:

a. Apply the PAD to determine all pre-federal claims and their priority in relation to the U.S. and NM claims;

b. Determine whether the 1903 Decree was a valid judgment that precludes Claimants from establishing their Rights in the LRGA,

c. Order a full due process trial, either in the LRGA or by this Court's Special Master, to determine all LRG pre-federal rights;

d. Order Colorado, New Mexico, Texas and the United States to apply the PAD and respect senior Rights in fulfillment of treaty and Compact delivery obligations; and

e. Consider reimbursement of legal costs incurred by Claimants due to the governments' preventing the adjudication of Claimants' Rights.

Respectfully submitted,

ROBERT SIMON
Counsel for Pre-Federal Claimants

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Intervention Is Necessary to Protect Claimants' Rights

1. The central unanswered questions in both the Lower Rio Grande Adjudication ("LRGA") and this case are, Who owns the senior project and water rights within the New Mexico ("NM") service area of the U.S. Rio Grande Project ("USRGP") and how should those water rights be administered? Claimants' claim they own senior rights and that NM and the United States ("U.S.") refuse to recognize and protect Claimants' property rights. Claimants seek joinder in this case as indispensable parties to establish and protect their senior rights pursuant to Fed. R. Civ. P. 19(a) and 24(a)(2).

2. Claimants' intervention in this case is the only currently available mechanism to determine whether there are senior claims to the water and project rights ("Rights") the U.S. claims for its USRGP. Claimants claim they appropriated their Rights pursuant to New Mexico's Prior Appropriation Doctrine ("PAD"), prior to the priority dates claimed by the U.S. and that Claimants' Rights were never forfeited. "All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed." *State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 618 P.2d 359 (1980); N.M. Const. Art. XVI, § 2.

3. To date, both the U.S. and NM oppose recognition and protection of Claimants' Rights. *New Jersey v. New York*, 345 U.S. 369 (1953); *South Carolina v. North Carolina*, 558 U.S. 256 (2010).

4. Claimants further allege:

a. Claimants' Rights predate the Convention Between the United States and Mexico

Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953 (1906) ("Mexico Treaty") and the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact");

b. The 1903 NM Territorial District Court ("NMTDC") Decree was an invalid judgment based upon a sham proceeding, and a fraud upon the judicial system;

c. This Court in *U.S. v. Rio Grande Dam & Irrigation Co. ("RGD&IC")*, 215 U.S. 266 (1909), failed to consider the validity of the 1903 Decree;

d. The Decree did not consider that Claimants vested Rights by completion of canals/works;

e. The U.S. failed to comply with Reclamation Act of 1902 §§ 7, 8, ch. 109, 32 Stat. 388, 43 U.S.C. § 383 ("Reclamation Act");

f. The U.S. seized Claimants' pre-federal Rights without just compensation or due process in violation of Reclamation Act § 7 (condemnation of private rights); and

g. Claimants' Rights are senior to the U.S.' claimed USRGP rights and entitled to equal protection under the law. *Arizona v. California*, 514 U.S. 1081 (2000); NMSA 1978 §§ 72-1-2, 72-4-17 (1907).

Application of the PAD to Resolve Disputes in This Case

5. Claimants are the only LRGA litigants who have claimed pre-federal project rights in the LRG during the last seventeen years. The U.S. admits

that it seized an existing private project in 1896. U.S. Findings of Fact 19-20, filed May 9, 2016, in SSI-104, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

6. This Court historically has applied the PAD to resolve multi-state water and project right disputes. *Arizona v. California*, 514 U.S. 1081 (2000); *Arizona v. California,* 373 U.S. 546, 555-56 (1963) (citing *Wyoming v. Colorado,* 259 U.S. 419, 490, 495 (1922) ("that the doctrine of prior appropriation could be given interstate effect")); *New Jersey v. New York*, 345 U.S. at 373; *South Carolina v. North Carolina,* 558 U.S. *at* 257, 264-70.

7. Application of the PAD will determine the extent of U.S. and NM Office of State Engineer ("OSE") administrative control of Lower Rio Grande ("LRG") waters and whether the U.S. legally acquired project rights and appropriated water for its USRGP pursuant to Territorial irrigation laws and the Reclamation Act. *U.S. v. City of Las Cruces ("CLC")*, 289 F.3d 1070, 1184 (10th Cir. 2002).

8. Most important, the application of the 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).

9. This Court affirmed application of the PAD in the arid western states in *U.S. v. RGD&IC,* 174 U.S. 690, 702-06 (1899).

10. This Court applies the PAD to resolve western multi-state water disputes. *Wyoming v. Colorado*, 259 U.S. 410, 470 (1922), states:

> We conclude that Colorado's objections to the doctrine of appropriation as a

> basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right.

11. *Arizona v. California*, 373 U.S. at 555-56, reconfirmed that "[u]nder that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. ... 'First in time, first in right' is the short-hand expression of this legal principle." *Colorado River Water Conservancy Dist. v. United States,* 424 U.S. 800, 805 (1976); *Arizona. v. California,* 460 U.S. at 659 cf. 12.

12. This Court, in *Arizona v. California, id.* at 555-56 (citing *Wyoming v. Colorado*, 259 US. at 490, 495), confirmed "that the doctrine of prior appropriation could be given interstate effect."

13. Claimants allege that NM and the U.S. continue to prevent adjudication of Claimants' Rights in the LGRA to continue control of their water rights.

Early History of Rio Grande Water Rights

14. For centuries, farmers in southern New Mexico diverted Rio Grande ("RG") water to irrigate their crops through diversion works, thereby appropriating water and diversion rights appurtenant to their ditches and land. *Candelaria v. Vallejos*, 13 N.M. 146, 81 P. 589, 598 (1895); *Snow v. Abalos*, 18 N.M. 681, 699, 140 P. 1044, 1062 (1914);

Nevada v. U.S., 463 U.S. 110, 122-23 (1983) (citing *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945)).

15. Farmer/landowners' appropriations of water rights are distinguished from irrigation project rights. *Nevada v. U.S.*, 463 U.S. at 122-23 (citing *Ickes v. Fox*; *Nebraska v. Wyoming*). Farmers can own beneficial rights to use water appropriated by an irrigation company without having to own the project. *Albuquerque Land & Irrigation Co. ("AL&IC") v. Gutierrez*, 10 N.M. 177, 186, 61 P. 357, 366 (1900), *affirmed*, *Gutierres v. AL&IC*, 188 U.S. 545, 557 (1903).

16. In 1879, LRG citizens began discussing building a reservoir to store RG floodwater. Douglas Littlefield, *Conflict on the Rio Grande: Water and the Law, 1879-1939* (2008), at 36, cf. 12 (citing "Artificial Lakes," *Thirty-four*, July 30, 1879; "Our Water Supply", Sept. 24, 1879, *Rio Grande Republican*, Oct. 22, 1887).

17. On January 12, 1893, a group of LRG citizens incorporated RGD&IC pursuant to Act of February 24, 1887, ch. 12, §§ 1-26, Acts of the Legislative Assembly of the Territory of New Mexico, 27th Sess., 1891 Compilation, *Corporations, Irrigation* §§ 468-492 (repealed 1907) ("1887 Territorial Act"). Section 2 of RGD&IC's Articles of Incorporation stated, "for the purpose of constructing and maintaining dams, reservoirs and canal and ditches and pipe lines for the purpose of supplying water for the purpose of irrigation, etc." See Ex. A to Statement of Pre-1906 Claimants filed November 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

18. RGD&IC planned to construct a modern irrigation system to distribute water on both sides of the RG from its Elephant Butte Dam ("EBD") 120 miles north of El Paso to Fort Quitman, Texas, south of El Paso. Littlefield, *supra* at 41 (map of RGD&IC's service area) (**App. A-16**); see also 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, Senate Report, Ex. S, Statement of Pre-1906 Claimants (filed Nov 9, 2015), https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

19. "All the concessions, rights and privileges necessary to the effective equipment of the undertaking as an irrigation enterprise were legally acquired by the Company." *Rio Grande Irrigation & Land Co., Ltd. ("RGI&LC, Ltd.") v. U.S.*, R.I.A.A. Vol. VI, pp. 131-38, at 132, Nov. 28, 1923 (U.N. 2006) (**App. A-1**).

20. On February 1, 1895, the U.S. Department of the Interior ("Interior") conveyed a federal easement to RGD&IC for dam sites 38 and 39 pursuant to section 1 of the Act of March 3, 1891, ch. 561, §§ 18-20 (*Application to Existing and Future Canals*), 43. U.S.C. §§ 946-948, 26 Stat. 1102 ("1891 Federal Act"), and *RGI&LC, Ltd. v. U.S.*, at 132.

21. The 1891 Federal Act, § 20 provides:

> Plats heretofore filed shall have the benefits of this act from the date of their filing, ... *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights

> herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir ....

22. On January 20, 1894, RGD&IC filed Notice of Appropriation of its EBD reservoir site and appropriated 253,368 acre/feet of unappropriated floodwaters of the RG with the right to refill, with the Sierra County Clerk pursuant to section 1 of the Act of February 26, 1891, ch. 71, §§ 1-2, Acts of the Legislative Assembly of the Territory of New Mexico, 29th Sess., 1891 Compilation, *Corporations, Irrigation* §§ 493-94 (repealed 1907) ("1891 Territorial Act"). *See* Ex. B, Statement of Pre-1906 Claimants filed Nov. 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

23. On January 31, 1894, RGD&IC filed Notice of Commencement of Work and appropriation of additional RG floodwater through its West Side Diversion Dam and Canal with the Sierra County Clerk pursuant to the 1891 Territorial Act § 1, in which it averred that work commenced on the West Side Diversion and Canal on Nov. 1, 1893, and "work upon the reservoir (EBD) described in the Affidavit of Jan. 20, 1894, was begun on the 12th day of October, 1893." See Ex. C, Statement of Pre-1906 Claimants filed Nov. 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

24. On June 2, 1895, RGD&IC filed Notice in El Paso County, Texas, to appropriate 1000 miners' inches of unappropriated RG floodwaters pursuant to the 1891 Territorial Act § 1 (**App. A-10**).

25. The 1891 Territorial Act § 1 states, in relevant part: "[N]o priority of right for any purpose shall attach to any such construction, change, or enlargement until such record is made." (**App. A-33**)

26. The 1891 Territorial Act § 2 states: "A copy of such sworn statement duly certified by the county probate clerk ... shall be admitted as *prima facie* evidence of such appropriation of water in all courts of the Territory." § 494, 1897 Compilation, at 226 (**App. A-33**).

27. RGD&IC signed a Lease dated June 20, 1896, with RGI&LC, Ltd. (RGD&IC's English sister company), agreeing to convey its assets to RGI&LC, Ltd. See Ex. G, Statement of Pre-1906 Claimants filed Nov. 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

28. RGI&LC, Ltd., then conveyed a right of redemption to an English Trustee for RGD&IC's assets as collateral to secure issuance of RGI&LC, Ltd., debentures in England. *RGI&LC, Ltd. v. U.S.*, at 135 (**App A-1**).

29. RGD&IC used the debenture proceeds to construct the Fort Selden Diversion, Leasburg Canal and other facilities, including commencing construction of its EBD.

30. In 1897 the three main LRG community ditches (the 1846 Dona Ana, the 1848 Mesilla, and the 1849 Las Cruces) connected their ditch headings to RGD&IC's completed Fort Seldon Dam Leasburg Canal (**App. A-38**).

31. The 1896 Follett Report reported 27,100 acres irrigated in the Mesilla Valley. See W.W. Follett, "A Study of the Use of Water for Irrigation

on the Rio Grande del Norte" (Proceedings of the International Boundary Commission Nov. 1896), http://www.ose.state.nm.us/Pub/pub_reports.php#F.

32. By 1897 many Mesilla Valley ditches were connected, and water was diverted from one ditch into another to form a rudimentary irrigation system. Ex. L, Statement of Pre-1906 Claimants filed Nov. 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

33. RGD&IC completed its Leasburg Canal and Fort Selden Diversion Dam within five years of commencement of construction. Exs. E, H ("Meeting of the Ditch People", *Rio Grande Republican* (Dec 24, 1897)) (**App. A-34**); French Map of the Upper Mesilla Valley (1903) (**App. A-35**); Exs. I, M ("1898 Water Supply Report No. 10") (**App. A-21**); Ex. N (Aug. 7, 1897), Frank Burke Letter, at 195-96, Senate Report; Claimants' Statement in Expedited Inter Se Proceeding of Pre-1906 Claimants, filed Nov. 9, 2015, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceedin,g.aspx.

34. No trial ever considered the question, Did RGD&IC's completion of Fort Selden Diversion Dam and Leasburg Canal vest RGD&IC/Boyd with project rights pursuant to the 1891 Federal Act § 20 and the 1891 Territorial Act § 1?

35. There has never been a full trial to consider whether the farmers derived water rights from RGD&IC's appropriations and completion of diversions and canals pursuant to the 1887 and 1891 Territorial Acts and/or the 1891 Federal Act.

36. The *U.S. v. RGD&IC* cases from 1897 to 1900 involved the U.S.' navigation theory, which the U.S. repeatedly lost. *U.S. v. RGD&IC*, 9 N.M. 292, 295, 51 P. 674, 677 (1898); *U.S. v. RGD&IC*, 10 N.M. 617, 624, 65 P. 276, 283 (1900); *U.S. v. RGD&IC*, 174 U.S. 690, 692-93 (1899); *U.S. v. RGD&IC*, 184 U.S. 416 (1902) (remanded to gather more evidence).

37. The final two cases, *U.S. v. RGD&IC*, 13 N.M. 386, 85 P. 393 (1906), and *RGD&IC v. U.S.*, 215 U.S. 266 (1909), dealt only with the procedural issue regarding the sufficiency of the U.S.' 1903 Supplemental Complaint ("SC"). This Court's 1909 affirmance of the 1903 Decree was not a review of a merits trial. The 1903 NMTDC never held a trial and merely granted a default judgment forfeiting the right-of-way owned by two liquidated corporations, neither of which owned the federal right-of-way easement. The 1903 proceeding was a sham proceeding that did not bind the real parties in interest because they were not joined and did not consider whether works were completed or water rights vested. In fact, RGD&IC completed works in 1897. The 1923 Hague Tribunal decision confirmed that Boyd's ownership of project rights continued past 1903. *RGI&LC, Ltd. v. U.S.*, at 134-35 (**App. A-1**).

U.S. Actions Against RGD&IC from 1896 to 1903–A Conspiracy from the Beginning

38. An El Paso group that controlled the U.S./Mexico Boundary Commission through Col. Anson Mills sought to capture the same floodwater previously appropriated by RGD&IC and convinced the Secretary of State to stop RGD&IC from

completing its dam. On December 6, 1896, the Secretary of War, at the request of the Secretary of State, declared an administrative embargo to reject several RGD&IC dam-site applications. Littlefield, *supra* at 52; Senate Report, *supra* at 41 (Recommendation No.5: "[I]n some way prevent the construction of any large reservoirs on the Rio Grande in the Territory of New Mexico"); *id.* at 184, letter from Secretary of War to President McKinley.

39. Anson Mills sought personal gain from the competing El Paso dam. See Anson Mills' letters, Apr. 29, 1898, Senate Report 229; Ex. 23-1, 23-3, Boyd Response to Motion to Dismiss filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

40. On April 27, 1897, the U.S. commenced a lawsuit to enjoin RGD&IC from constructing EBD. See Letter, Dept. of Justice to Dept. of War, Senate Report, *supra* at 187-90; Littlefield, *supra* at 58.

41. The U.S.' 1897 Complaint alleged RGD&IC's dam would hinder RG navigation ("Creation or continuance of obstruction of navigable waters") in violation of The Rivers and Harbors Act, 33 U.S.C. §403a (1890, 1892).

42. The U.S. knew or reasonably should have known that its 1897 Complaint constituted improper litigation for six reasons:

(1) The U.S. knew the RG was not navigable above the Rio Conchos. *U.S. v. RGD&IC,* 9 N.M. 292, 293, 51 P. 674, 675 (1898); see Corp of Engineers' Reports, Feb. 5, 1897, at 29-30, Feb. 1, 1897, at 185-86; Senate Report, *supra.*

(2) The U.S.' true intent was not to protect navigability but to utilize RGD&IC's appropriated RG floodwater to fill its proposed El Paso reservoir. *U.S. v. RGD&IC*, 9 N.M. at 295, 51 P. at 677.

(3) The U.S. knew RGD&IC had vested title to its project and RG floodwater by completing the Leasburg Canal pursuant to the 1891 Federal Act. See Col. Anson Mills letter at 191-92; Frank Burke letter at 195-96, Senate Report; 1898 Water Supply Report No. 10 (**App. A-21**), http://www.ose.state.nm.us/Pub/HistoricalReports/JA-FrenchMaps.pdf.

(4) The U.S. had public notice pursuant to 1891 Territorial Act § 1 of RGD&IC's filed affidavits of appropriations and construction of works.

(5) RGD&IC's prospectus informed the U.S. that RGD&IC planned an irrigation system to distribute water in El Paso Valley and Mexico, so the U.S.' proposed El Paso dam served no public purpose. Senate Report at 4-11, 185-93.

(6) The U.S. had concluded that litigation was the only means to stop RGD&IC's construction because no federal statute existed to terminate or condemn RGD&IC's federal right-of-way easement. Senate Report at 185-93; *Sweet v. Rechel,* 159 U.S. 380 (1895).

43. RGD&IC responded to the U.S.' 1897 Complaint, stating it had appropriated RG unappropriated floodwater for irrigation of "others' lands" under Territorial law, the U.S. had conveyed dam sites 38 and 39 for EBD, and it was constructing its irrigation project to capture and deliver water to N.M., Texas and Mexico. *U.S. v. RGD&IC*, 174 U.S. at 692-94.

44. The U.S. never demurred to RGD&IC's responses, thus they were deemed admitted. *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 257 (1895).

45. Between 1894 and 1900, W.A. Hawkins and A.B. Fall ("Attorneys") represented the Companies, including structuring their financial arrangements with English investors. *RGI&LC, Ltd. v. U.S.*, at 133 (**App. A-1**).

46. Three years of continuous litigation by the U.S. bankrupted the Companies, forcing liquidation of their assets. In May 1900, the right of redemption for the Companies' assets, rights, and interests was conveyed by the debenture trustee to Nathan Boyd. *Id.* at 132-35.

47. The U.S. knew Dr. Nathan Boyd owned the former Companies' assets after 1900 because the U.S. defeated diversity jurisdiction in the World Court in 1923 by presenting evidence that Dr. Boyd, an American, owned the Companies' liquidated assets. *Id. at* 138. The U.S. stated in open court: "There is no showing of any British interest in it. I mentioned one individual whom we have always regarded as the real claimant". *Id.* at 135.

48. Another attempt to obtain RGD&IC's appropriated water was initiated by U.S. Attorney for NM, William Childers. While litigating against RGD&IC in 1897, Childers organized Albuquerque Land and Irrigation Corporation ("AL&IC") to capture and appropriate the same RG floodwater previously appropriated by RGD&IC in 1893. *AL&IC v. Gutierrez*, 10 NM. 177, 186, 61 P. 357, 366 (1900), *affirmed, Gutierres v. AL&IC,* 188 U.S. 545 (1903). Childers testified that "it is the intention of the company to construct reservoirs."

49. The NM Supreme Court ("NMSC") in *AL&IC*, 10 N.M. at 186, 61 P. at 366, approved AL&IC's appropriation of RG floodwaters pursuant to the same Territorial Laws relied upon by RGD&IC, stating that "(T)he complainant company (AL&IC) had a legal right to construct the proposed canal at the time it attempted to do so".

50. In *Gutierres,* 188 U.S at 549, this Court approved the following finding in *AL&IC*, 10 N.M. *at* 177:

> That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico, and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs to divert ... unappropriated waters ...

51. Childers did not disclose in *AL&IC v. Gutierrez* that the U.S.' navigation theory he argued to enjoin RGD&IC's construction in *U.S. v. RGD&IC*, 9 N.M. 292, 51 P. 674 (1898), applied equally to AL&IC, or that RGD&IC had relied on the same territorial laws for its prior appropriations as AL&IC, or that AL&IC intended to divert the same RG floodwater as RGD&IC.

52. The NMTDC and the NMSC in *AL&IC* failed to take judicial notice that similar to RGD&IC, AL&IC also intended to hinder navigation, or that RGD&IC's public notices filed pursuant to 1891 Territorial Act § 2 constituted *prima facie* evidence of RGD&IC's prior water appropriations and facility construction (**App. A-33**).

The 1903 sham proceeding

53. In 1903, after this Court confirmed in *Gutierres v. AL&IC*, 188 U.S. 545 (1903), the validity of AL&IC's appropriation of the RG floodwater pursuant to the same statutes that RGD&IC relied upon, it surely became clear to the U.S. and attorneys that the U.S.' navigation theory in *RGD&IC* would fail. The Attorneys then switched their allegiance and conspired with the U.S. to create a sham proceeding to forfeit Claimants' predecessors' rights. See **App. A-17**; U.S. Proposed Findings filed May 9, 2016 in SSI-104, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx, at 11, Finding 45; Memorandum filed 3-18-16 in Pre-1906 Claimants' Expedited Inter Se Proceeding Ex. 10, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx, and Ex. 10, and 18-4, Boyd Response to Motion to Dismiss filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

54. The U.S., the Attorneys, and the NMTDC ("Conspirators") created a sham forfeiture of the Companies' liquidated rights by a staged default judgment so the U.S. could commence its USRGP by seizing Claimants' predecessors' Rights without condemnation or just compensation in violation of Reclamation Act § 7.

55. The conspirators initiated their sham proceeding by the U.S. filing a Supplemental Complaint ("SC") alleging the Companies' right-of-way was forfeited for failure to complete any works

within five years pursuant to the 1891 Federal Act. When the U.S. filed its SC, the Conspirators knew that RGD&IC had completed diversion works the SC sought to forfeit and the Companies did not own the right-of-way in 1903, because Boyd (as receiver of the Companies' liquidated assets in 1900) owned all their former assets. *RGI&LC, Ltd. v. U.S.* at 132-35 (**App. A-1**).

56. "An adjudication to which a receiver is not a party will not bind him or any other party of interest." *New York Municipal Rwy. v. Holliday*, 189 A.D 814, 819, 179 N.Y.S. 238 (N.Y. App. Div. 1919); *Seattle R&S Ry. Co. v. City of Seattle*, 93 Wash. 94, 95, 145 P. 54, 55, 1914 (1914) ("In proceedings by a city to condemn property of a railroad company, which was in the hands of receivers, the receivers are necessary parties defendant").

57. The U.S. served its SC in open court in Socorro (sixty miles north of the Third Judicial District Court) by hand-delivery to the Attorneys, so that neither the Las Cruces citizens nor Dr. Boyd would become aware of the service.

58. When the Attorneys failed to respond to the SC within 30 days, the U.S. obtained a default Decree on May 21, 1903. See Ex. 20-1 to 20-3, Boyd Response to Motion to Dismiss filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

59. The NMTDC also participated in the Conspiracy by denying the N.M. Territory's Petition to Intervene to protect the farmers' predecessors' interests several months before the U.S. initiated its sham forfeiture scheme and condoned the U.S.' and

the Attorneys' scheme to avoid notice of the SC on Boyd and the farmers, who it knew owned the federal right-of-way and project water rights. See Senate Doc. 154, 57th Cong., 2d Sess. (1903), Ex. K., at 131-133, Petition for Intervention; Ex. 10, Boyd Response to Motion to Dismiss filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

60. The Conspirators knew the Companies had been liquidated and did not own the right-of-way or project rights as alleged in the U.S.' SC. *RGI&LC, Ltd. v. U.S.* at 135-38 (**App. A-1**).

61. The Conspirators knew that the SC allegation that RGD&IC had completed no works within five years was false. *Id.* at 138.

62. The U.S.' 1896-1903 actions evidence unclean hands. The U.S. used improper litigation based upon a navigation theory it knew to be meritless and adopted its embargo to prevent RGD&IC from completing EBD. Then, after five years of litigation that bankrupted the Companies, the U.S. created a sham proceeding based upon false allegations to forfeit assets it knew the liquidated Companies did not own.

63. The 1903 NMTDC aided and abetted the conspiracy by failing to take judicial notice that RGD&IC's public notices filed pursuant to the 1891 Territorial Act § 2 were *prima facie* evidence of Claimant's predecessors' appropriations of Rights.

64. The NMTDC's failure to join Claimants' predecessors, the real parties in interest, in the 1903 proceeding deprived it of in personam and subject-

matter jurisdiction necessary to forfeit Claimants' Rights.

65. Lack of jurisdiction can be raised at any time to nullify a judgment. "Failure to state a cause of action is jurisdictional and may be raised for the first time on appeal." *Sundance Mechanical & Utility Corp. v. Atlas*, 109 N.M. 683, 688, 789 P.2d 1250, 1255 (1990), (citing *Campbell v. Smith*, 68 N.M. 373, 375-376, 362 P.2d 523, 524 (1961) (citing *Phillips v. Allingham*, 38 N.M. 361, 363, 33 P.2d 910, 911 (1934) (recognizing the "well-established rule ... that the failure of a complaint to state a cause of action is jurisdictional")."

66. Similarly, because the Companies did not own the assets in 1903, the U.S.' SC failed to state a claim. *Sundance Mechanical & Utility Corp. v. Atlas*, 109 N.M. 683, 688, 789 P.2d 1250, 1255 (1990) (citing *Heckathorn v. Heckathorn*, 77 N.M 369, 372, 423 P.2d. 410, 412 (1967); *In re Field's Estate*, 40 N.M. 423, 427, 60 P.2d 945, 947 (1936)).

67. Because the Conspirators failed to join Claimants' predecessors, Claimants are not bound by the Decree. *Nevada v. U.S.*, 463 U.S. at 130; *Rio Puerco Irrig. Co. v. Jastro,* 19 N.M. 149, 151-152, 141 P. 874, 876-877 (1914).

68. Further evidence that the U.S. intended to divest Claimants' predecessors' Rights by denying them due process is the November 8, 1903, letter from U.S. Attorney for NM Childers to the U.S. Attorney acknowledging instructions to "Take all possible means prevent reopening and prolongation Rio Grande case." (**App A-12**)

69. It appears that the sham proceeding was created to enable the U.S. to seize Claimants'

predecessors' Rights without a trial on the merits and without notice and joinder, to avoid introduction of evidence and a record for an appeal.

70. The U.S., rather than condemning Claimants' Rights pursuant to Reclamation Act § 7, created a sham proceeding that denied Claimants their right of due process to ascertain and be paid just compensation for their vested property Rights. The U.S.' claims to the RG in this case are based on its 1903 fraud on the judicial system and seizure by trespass of Claimants' Rights without just compensation or due process.

Res Judicata

71. Until this Court reconsiders its prior decision in *RGD&IC v. U.S.*, 215 U.S. 266 (1909), the U.S., NM, and the NM courts will continue to rely on the 1903 fraudulent forfeiture Decree to preclude Claimants from establishing their Rights or attacking the Decree in the LRGA.

72. For a prior judgment to be preclusive three questions are pertinent:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

See *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 810, 122 P.2d 892, 895 (1942); *Blonder-Tongue Labs, Inc. v. University of*

Illinois Foundation, 402 U.S. 313, 323-24 (1971); Restatement of Judgments, "Persons not Parties or Privies" § 93 (1942).

73. The 1903 Decree met none of these three *res judicata* requirements and thus should not preclude Claimants' claims.

74. First, the issues are not the same in both proceedings. The issue in the LRGA is whether Claimants own Rights derived from pre-federal appropriations and completion of irrigation works. The Decree never addressed ownership, because the 1903 proceeding was a sham default proceeding. *Nevada v. U.S.*, 463 U.S. at 130.

75. "Cases are not authority for propositions not considered". *Potter v. Pierce*, 2015-NMSC-002, 342 P.3d 54 at ¶ 17 (citing *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993–NMSC–035, ¶ 15, 115 N.M. 622, 857 P.2d 22).

76. There still exists a genuine issue of fact regarding completion: the U.S.' expert testified in 2015 that RGD&IC completed irrigation works in 1897, while the Decree stated no works were completed (**App. A-37**); Deposition of Andrew Gahan, Ph.D., Mar. 3, 2015, ln. 19, p.300 to ln. 24 p. 302 (**App. A-13**).

77. Second, the 1903 proceeding was not a trial on the merits. "Summary proceedings without full due process and joinder of all indispensable parties do not meet the standard for a due process trial on the merits." *Potter v. Pierce* at ¶ 15; Restatement (Second) of Judgments § 27 at 250 (1982).

78. The 1903 proceeding deprived Claimants' predecessors a trial on the merits to establish their ownership of Rights. "[I]ssue preclusion requires the

issue of fact or law to actually have been litigated and determined in a valid and final judgment between the parties". *Id.*

79. "[A] party's full and fair opportunity to litigate is the essence of res judicata." *Brooks Trucking Co. v. Bull Rogers, Inc.,* 2006-NMCA-025, ¶11, 139 N.M. 99, 103, 128 P.3d 1076, 1079; Restatement (Second) of Judgments § 2, at 33-34 (1982); *Potter v. Pierce,* ¶ 15-16, 54 ("Res judicata will only preclude a ... claim if the facts demonstrate that it could and should have been brought during the earlier proceeding."); Restatement (Second) of Judgments § 27, at 250 (1982).

80. Summary dismissal without full due process does not meet the standard for a due process trial on the merits. *Potter v. Pierce,* at ¶ 15; Restatement (Second) of Judgments § 27, at 250 (1982).

81. Because the Conspirators in 1903 intentionally deprived Claimants notice of the U.S.' SC filing and proceeding, the 1903 Decree was not a valid judgment and therefore cannot be preclusive. Restatement (Second) of Judgments § 2 (1982).

82. To date, in the LRGA the NMDC has refused to grant Claimants a trial on the merits to establish their Rights or to collaterally attack the Decree, just as the 1903 NMTDC prevented Claimants' predecessors a merits trial.

83. Claimants' predecessors were not parties in the 1903 proceeding or in privity with any defendant.

84. *Mullane v. Central Hanover Bank and Trust,* 339 U.S. 306, 314 (1950), states:

> An elementary and fundamental requirement of due process in any proceeding, which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900).

85. *Cappeart v. U.S.*, 426 U.S. 128, 147 (1976) states:

> The requirement that a party be in the same or similar legal capacity in a suit relates to the fundamental precept that a person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and an opportunity to be heard in opposition to that claim.

Drickersen v. Drickersen, 546 P.2d 162, 170 (Alaska 1976); *accord, Blonder-Tongue v. University Foundation*, 402 U.S. 313 (1971); Restatement (Second) of Judgments, § 34, reporter's note (1980).

86. The Companies were liquidated corporations without assets in 1903, so could not represent or be in privity with Claimants' predecessors. *Cappeart v. U.S.,* 426 U.S. at 146 (citing *Blonder-Tongue Labs, Inc. v University Foundation*, 402 U.S. at 320-26).

87. The Conspirators intended that Claimants' predecessors not be joined as parties and knew there could be no privity with the two liquidated defendant Companies in 1903 **(App. A-17).**

88. Instead, the U.S. misrepresented in its SC that the liquidated Companies owned the project rights that it knew Boyd owned.

Other Reasons the 1903 Decree Was Invalid

89. The NMDC's October 19, 2016, Memorandum Order granting NM's Motion to Dismiss Representatives' Claims Derived from RGD&IC in the Pre-1906 Claimants' Expedited Inter Se Proceeding was in error because it did not treat as true Claimants' well-pleaded facts describing the 1903 Conspiracy or acknowledge the impossibility of Boyd's privity with the defunct Companies in 1903. *Reinhardt v. Rauscher Pierce Securities Corp.*, 83 N.M. 194, 490 P. 2d 240 (Ct. App. 1971); *State ex rel. Reynolds v. Holguin*, 95 N.M. 15, 618 P.2d 359 (1980). See Order at 24-27, ¶¶ 37-42, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

90. The NMDC erred by refusing to consider whether the Decree was an invalid judgment created by a sham proceeding to forfeit assets not owned by the liquidated defendant Companies. See Oct. 19, 2016, Memorandum Order at 17-19, ¶¶ 29-30, https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

91. The NMDC's decision that it is without jurisdiction to examine Claimants' well-pleaded material facts collaterally attacking the Decree,

while relying on the Decree to preclude Claimants from claiming their Rights, has derailed the LRGA.

92. This Court should re-examine its decision in *RGD&IC v. U.S.*, 215 U.S. 266 (1909), and the facts underlying the Decree to determine whether the Decree met the requirements for *res judicata* and a valid judgment.

Fraud on the Judicial System

93. The U.S.' depriving the real owners notice of its 1903 SC filing, its misrepresentation that the Companies owned the rights-of-way when it knew that Claimants' predecessors owned the rights-of-way the U.S. sought to forfeit, its intent to deprive Claimants' predecessors of a merits trial and its failure to proceed pursuant to Reclamation Act § 7 leads to the obvious conclusion that the U.S.' true intent was to create a fraud on the judicial system. See Ex. 18-1, Boyd Response to Motion to Dismiss, filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx.

94. Further evidence that Judge Parker was a co-conspirator to fraud on the judicial system in 1903 is his Decree that purportedly forfeited a right-of-way he knew the Companies did not own. Judge Parker's conspiracy is also proven by his denial of the real owners' (the farmers' predecessors') Petition to Intervene one month before the U.S. filed its SC and his denial of Boyd's Motion to Set Aside the Decree, when he knew that the NMSC had confirmed AL&IC's right to construct reservoirs pursuant to the same Territorial Acts RGD&IC had

relied upon in *AL&IC v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900).

95. The Conspirators' intentionally false statements of fact and actions to create the Decree by a sham proceeding constituted fraud on the judicial system. As stated in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), *abrogated on other grounds, Standard Oil Co. v. U.S.*, 429 U.S. 17 (1976):

> [T]tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

See also U.S. v. Throckmorton, 98 U.S. 61 (1878); *Clark v. Kreamer*, 405 P.3d 1123 (Ariz. Ct. App. 2017).

96. A decree obtained by a sham proceeding is a nullity. *Cook v. Cook*, 342 U.S. 126 (1951); *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 509-16 (1972); *Hydro-Tech v. Sundstrand Corp.*, 673 F.2d 1171, 1175 (10th Cir. 1982) (defining a sham proceeding as one without probable cause).

97. The U.S. Parties and the NM courts have damaged Claimants' property rights for over 100 years by depriving Claimants exclusive control and use of their Rights or, in the alternative, a constitutional condemnation pursuant to the Reclamation Act § 7; U.S. Const. art. V, § 2; *Sweet v.*

Rechel, 159 U.S. 380 (1895); *Kaiser-Aetna v. U.S.*, 444 US. 164, 164-65 (1979).

98. The NM courts have repeatedly disregarded and mischaracterized Claimants' claim of fraud on the judicial system.

99. The NM Court of Appeals in its October 15, 2014, Opinion in Case No. 32,119 at 11, lines 13-15 stated: "Accordingly, Boyd does not have a cause of action for fraud against the United States in state court."

100. Fifteen years earlier, the U.S. Court of Federal Claims ruled that it lacked jurisdiction to consider Boyd's allegation that the Decree was fraud on the judicial system. *James Scott Boyd v. U.S.*, No. 96-476L at 8 (Fed. Cl. Apr. 21, 1997).

101. Similarly, the NMDC in its LRGA October 19, 2016 Memorandum Order at 24-27, ¶¶ 37-42, misconstrued Claimants' facts regarding fraud on the judicial system.
https://lrgadjudication.nmcourts.gov/pre-1906-claimants-expedited-inter-se-proceeding.aspx.

Trespass

102. The U.S. claims a March 1, 1903, priority date for its USRGP, which the NMDC adopted as a Finding of Fact,
https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

103. March 1, 1903, cannot be the U.S.' priority date because March 1, 1903, pre-dates May 21, 1903, the date of the forfeiture Decree.

104. On March 1, 1903, the U.S.' survey team was trespassing on Nathan Boyd's dam easement/ reservoir site. See 1903 letter from U.S.G.S., U.S.'...

Proposed Findings of Fact..., filed May 9, 2016, at 12, Finding 50, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

105. The U.S. admitted "it actively sought to prevent a private dam and irrigation company... from diverting water from the river." Conclusion at 14, U.S. Post-Trial Brief, filed May 9, 2016, in SSI-104, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

106. The U.S. further admitted that RGD&IC proposed to build a large storage dam on the RG in the vicinity of Elephant Butte pursuant to federal laws, when it filed the necessary notice of its intent to build the dam and appropriate 253,368 a/f of water on January 11, 1894. See Finding of Fact No. 19-20, at 5-6, filed in SSI-104 May 9, 2016, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.

107. What the U.S. did not admit was that the RGD&IC's January 11, 1894, notice satisfied the requirements of §§ 1-2 of the 1891 Territorial Act by providing public notice of commencement of its dam construction and its RG floodwater appropriations, which constituted prima facie evidence of said appropriations.

108. The U.S. also refuses to admit that it used the Decree as its predicate to seize Claimants' predecessors' Rights by trespass. Long-established NM precedent holds that a party cannot gain title to water rights by trespass. *Keeney v. Carillo,* 2 N.M. 480, *4 (1883).

109. The U.S.' actions from 1903 through 2019 constitute a continuing trespass that is grounds for

abatement and injunction. *City of Shawnee v AT&T Corp.*, 910 F. Supp. 1546, 1563 (D. Kan.1995); *Hunter v. Mansell*, 240 P.3d 469, 477 (citing 75 Am. Jur. 2d Trespass § 26 (2002)).

Subsequent U.S. Actions to Control RG Water Rights

110. The U.S. has continued to perpetuate its trespass by preventing Claimants from establishing their Rights or seeking damages, which amounts to collateral fraud. *Rutherford v. Buhler*, 89 N.M. 594, 598, 719 (Ct. App. 1976).

111. In 1913, the U.S. refused to join the attempted adjudication of LRG water rights in *Snow v. Abalos*. See Oct. 1, 1913, and Dec. 11, 1913, Examiner Dent letters, Ex. 13&14, Boyd Response to Motion to Dismiss, filed July 14, 2011, Claims of Estate of Boyd. https://lrgadjudication.nmcourts.gov.

112. Twenty years after the 1903 Decree, the U.S. finally admitted it always knew that Boyd owned the project rights in order to defeat World Court jurisdiction. *RGI&LC, Ltd. v. U.S.*, at 131-33.

113. The U.S.' continuing trespass has deprived Claimants' predecessors' and Claimants' exclusive control of their property rights since 1903 and is a continuing damage to Claimants. *Kaiser-Aetna v. U.S.*, 444 U.S. at 164-65.

114. After seizing Claimants' irrigation project by trespass in 1903, the U.S. continued its wrongful actions in 1905 when it coerced the farmers/landowners into: (1) assigning administrative control of their diversion and water rights to the U.S., (2) pledging their land as collateral for U.S. construction of its USRGP, and (3) paying the U.S. to

build its USRGP, by threatening not to deliver the farmers/landowners' prior appropriated water unless they agreed to join the Elephant Butte Water Users Association ("EBWUA"). EBWUA membership mandated compliance with the three above-stated conditions in order to receive delivery of water by the U.S. See EBWUA brochure, Attachment "A" at 5, filed July 21, 2015, in Elephant Butte Irrigation District Response ... in SSI-104.
https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx.U.S.

115. The fact that the U.S. coerced the farmers/landowners into joining EBWUA in order to continue receiving delivery of their prior appropriated water is proven by ¶ 12 in the U.S.' Complaint in Intervention, filed in this case, which states, "Only persons having contracts with the Secretary may receive deliveries of water.... The only entity in NM that is permitted to receive water is EBID." EBID (1917) is the successor to EBWUA (1905).

116. Further evidence that the farmers/landowners had no choice in joining EBWUA in 1905 is the fact that the farmers connected their ditches voluntarily to RGD&IC's private project at no cost and without giving up control of their water rights in 1897, but were forced to have to pay for a dam that the U.S. seized. **App. A-34, App. A-35.**

The U.S. Did Not Form the USRGP Legally

117. Reclamation Act § 8 requires the U.S. to establish reclamation projects in conformity with Territorial and State law. The U.S. neither acquired the prior appropriated rights per Reclamation Act §

7, nor filed notice of commencement of its USRGP in 1903 as required by § 493 of the Compiled Laws of New Mexico of 1897 (1891 Territorial Act § 1).

118. The U.S. never obtained the required permit to appropriate water for its USRGP as NM alleges in this Court pursuant to N.M.'s Water Codes of 1905 and 1907. See Laws 1907, ch. 49, NMSA 1978 § 72-1-1 et seq., especially NMSA 1978 § 72-5-1 (1907); see Letter from Herbert Yeo, NM State Engineer, to Herbert Devries, Bureau of Reclamation (Mar. 23, 1927) (**App. A-42**); Ex. 12, Boyd response to Motion to Dismiss filed July 14, 2011, Claims of Estate of Boyd, https://lrgadjudication.nmcourts.gov.

119. When requested to produce its approved permit for the USRGP (NM Application No. 8) pursuant to NMSA 1978 § 72-2-7 (1907), the OSE could not produce any approval of Application No. 8. See **App. A-44**. Thus, the U.S.' and NM's statements in this case that the U.S. legally appropriated the RG is a misrepresentation of the facts.

120. Only when Claimants' pre-federal Rights are determined can this Court determine whether unappropriated water, diversion, and project rights were available in 1903 for the U.S. to reserve and whether the U.S. established its USRGP in conformity with then-existing law. *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976), states: "In a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."

Conclusion

For all the above reasons, Claimants respectfully request that their Motion for Leave to Intervene as

Plaintiffs be granted and that their project and water rights be adjudicated and protected.

Respectfully submitted,

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