No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants,

UNITED STATES OF AMERICA,

Intervenor.

On Motion Of Pre-Federal Claimants To Intervene

SECOND INTERIM REPORT OF THE SPECIAL MASTER

HON. MICHAEL J. MELLOY
United States Circuit Judge
Special Master
111 Seventh Avenue, S.E.
Box 22
Cedar Rapids, IA 52401
Telephone: 319-423-6080

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I. Summary

Before the Court is a motion to intervene by an estate and a group of individuals who refer to themselves collectively as the Pre-Federal Claimants and who assert contested rights to water and physical infrastructure alleged to be material to this original jurisdiction action. I recommend the Court deny the motion to intervene.

I note at the outset that the proposed intervenors acknowledge they cannot succeed on their claims unless they can convince the Court that the Court itself was the victim of fraud when it decided a case involving their predecessors 110 years ago. *See Rio Grande Dam & Irrigation Co. v. United States*, 215 U.S. 266 (1909). For the reasons discussed herein, I conclude the proposed intervenors will be unable to make the substantial showing necessary to set aside a 110-year-old Supreme Court decision.

In 1938, the Rio Grande Compact effected an equitable apportionment of the waters of the Rio Grande as between Colorado, New Mexico, and Texas, with 60,000 acre-feet per year reserved for delivery to Mexico as required by a 1906 treaty between the United States and Mexico. The Compact requires Colorado to deliver water at the New Mexico-Colorado state line. The Compact requires New Mexico to deliver water into the Elephant Butte Reservoir (the "Reservoir"), a reservoir within New Mexico approximately 105 miles north of El Paso, Texas. The Elephant Butte Reservoir is part of a larger reclamation project, the Rio Grande

Reclamation Project (the "Project"), operated by the United States Department of the Interior. Currently, many southern New Mexico recipients of Project water receive their water through the Elephant Butte Irrigation District ("EBID"). Many Texas recipients of Project water receive their water through the El Paso County Water Improvement District No. 1 ("EPCWID").

In 2013, Texas filed to commence this original jurisdiction action, naming Colorado and New Mexico as defendants. Texas alleged New Mexico was allowing water users to capture Project irrigation return flows, Rio Grande surface water, and hydrologically connected groundwater downstream of the Reservoir, all in violation of the Compact. The Court allowed the United States to intervene, and later, EBID and EPCWID moved to intervene. A special master recommended denying the districts' motions to intervene and recommended granting in part a motion to dismiss the United States' complaint. The Court adopted the special master's recommendation as to the districts, *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (Mem.), but reversed as to the United States, allowing the United States to assert Compact claims as an intervenor, *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

At present, there are several ongoing or stayed actions in state and federal courts concerning many of these same parties. These lower-court actions include a large state court water adjudication in New Mexico that has been ongoing for several decades, the *Lower Rio Grande Adjudication*. In that adjudication, a large number of individual water users, along with the

United States and EBID, are attempting to establish their relative rights to New Mexico's share of the Rio Grande. Individual water-rights claimants have individual subfiles under the larger umbrella of the *Lower Rio Grande Adjudication*, and certain interests have been aggregated for the state court to address collectively.

The Pre-Federal Claimants, who have been and are presently involved in several underlying lower-court proceedings, argue that their rights are different from those of other state-water-right claimants in New Mexico such that they should be allowed to intervene in this original jurisdiction action. In particular, the Pre-Federal Claimants argue that they hold rights not merely to water, but to storage and delivery privileges and also to actual Project and pre-Project infrastructure. They also allege their rights predate the United States' claimed rights to Project water and infrastructure. According to the Pre-Federal Claimants, the United States, in developing the Project, committed fraud upon their predecessors and upon the courts to obtain a forfeiture of their predecessors' rights in the late nineteenth and early twentieth centuries, culminating in a 1909 United States Supreme Court judgment affirming the forfeiture. *See Rio Grande Dam & Irrigation Co.*, 215 U.S. at 277–78. Finally, they argue that because their rights were wrongfully taken prior to Compact negotiations between Texas, New Mexico, and Colorado, their rights were not adequately considered during Compact negotiations such that the Compact itself is infirm.

Against this general backdrop, I recommend denial of the motion to intervene for several reasons. First, nothing the Pre-Federal Claimants allege in their proposed complaint rises to a level even arguably capable of calling into doubt the validity of the 1938 Compact itself. In fact, the Pre-Federal Claimants have identified no governing standards for addressing such a question. Second, the Pre-Federal Claimants cannot satisfy the high burden for a non-sovereign to intervene in an original jurisdiction Compact action. Their claims amount to intrastate claims, and New Mexico adequately represents the interests of persons and entities asserting such claims. Third, several judgments preclude the proposed complaint in intervention as res judicata, and no tolling theory applies to allow a much belated challenge to such judgments. And finally, the motion to intervene is simply untimely in an immediate sense in that the Pre-Federal Claimants filed the motion approximately six years after initiation of this original jurisdiction action and years after they demonstrated actual knowledge of this lawsuit. They base their complaint upon factual allegations and theories that were available and known prior to the filing of this action, and they offer no explanation for their delay.

II. Background

A. The Movants and a Summary of Their Assertions

The seven Pre-Federal Claimants include: the Nathan Boyd Estate, James Boyd in his individual capacity and as administrator of the Nathan Boyd Estate, Oscar V. Butler, Rose Marie Arispe Butler, Margie Garcia, Sammie Singh, and Sammie Holguin Singh, Jr. A brief discussion of the Pre-Federal Claimants' theory of the case is necessary to understand the Motion to Intervene.

Prior to the late nineteenth century, individual landowners had developed irrigation infrastructure such as community ditches to divert Rio Grande water. In the late nineteenth century, private parties sought to develop water resources in the lower Rio Grande in New Mexico on a larger scale. Investors, including Dr. Nathan Boyd, formed a corporation, the Rio Grande Ditch and Irrigation Company ("RGD&IC" or the "Company"), and put into motion the financing and building of dams, canals, and water distribution infrastructure. Part of the financing was obtained through creation of an English corporation, the Rio Grande Irrigation and Land Company (the "Financing Company"). During the development of these resources, the United States was negotiating international water rights as to the Rio Grande with Mexico. In addition, Congress passed successive iterations of applicable reclamation laws setting forth a framework for developers to secure federal rights of way for irrigation projects and imposing

deadlines for the completion of projects following acquisition of rights.

Meanwhile, other interested developmental and political groups sought the establishment of a federal reclamation project on the Rio Grande. Through various means including an embargo ordered by the Secretary of War and a court-ordered stay, the Company's efforts were delayed. Eventually, the United States obtained a default judgment against the Company and the Financing Company on a complaint in New Mexico territorial court. That complaint alleged the Company failed to complete its infrastructure projects in the time permitted by the authorizing statute such that the infrastructure was forfeited to the United States. The Supreme Court of the United States affirmed the territorial court's default judgment, rejecting an argument that the Company should be relieved from the default judgment due to the Company's lawyers' negligence in permitting the default judgment to occur. *See Rio Grande Dam & Irrigation Co.*, 215 U.S. at 277.

Fast forward to modern times. The Pre-Federal Claimants argue the default judgment was not the result of attorney negligence, but rather, it was the result of fraud, including fraud upon the Company and the courts. They also allege certain infrastructure was, in fact, completed within the required time, such that rights to that infrastructure had vested with their predecessors. According to the Claimants, however, they and their predecessors have been denied the opportunity to prove that fact. Against this backdrop, I

describe the asserted identities and claimed rights of the current movants.

The Nathan Boyd Estate purports to have obtained all rights and assets of the Company. James Boyd asserts that he is the administrator of the estate, and he seeks to intervene in his representative and individual capacities. James Boyd does not explain the nature of his individual-capacity interest.

The motion to intervene, proposed complaint, and accompanying brief do not substantially describe the identity or interests of the other Pre-Federal Claimants. In general, however, based on the arguments advanced therein, these filings indicate that the other Pre-Federal Claimants are successors in interest to individual landowners who had acquired water rights through prior appropriation and community-irrigation-ditch development before the Company's development of infrastructure. These claimants appear to allege that, in the 1890s, their predecessors agreed to receive water from the Company and expended resources or entered into agreements to aid in the Company's infrastructure development, including moving their own irrigation canal headgates to tie into the Company's canals.[1]

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[1] The pending Motion for Leave to Intervene describes the non-Boyd movants as persons "designated by the District Court in [New Mexico]'s Lower Rio Grande Adjudication . . . 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 [the Company]." Unfortunately, there are multiple proceedings taking place under

Although the precise nature of each Pre-Federal Claimant's interest is unclear, filings in several lower court cases discussed throughout this opinion appear to describe claims under the doctrine of prior appropriation dating as far back as 1841 based upon surface water uses, including rights in community ditches or canals that predate the Company's late nineteenth century development. The non-Boyd Pre-Federal Claimants clearly assert arguments that align some of their rights with those of the Company. It remains unclear the extent to which asserted rights with priority dates earlier than the 1890s are distinct from those of the Company and to what extent the claimed rights with earlier priority dates were merged into the Company's claims. In fact, in a New Mexico state district court case under the umbrella of the *Lower Rio Grande Adjudication*, counsel indicated:

> As the lender and holder of the collateral/ assets of RGD&IC, the Boyd family is willing to convey those project, storage, and diversion rights either back to the farmers or to the district and or the U.S. in exchange for reimbursement of his investment in RGD&IC and assurance that the farmers' historic rights

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the umbrella of the *Lower Rio Grande Adjudication*. In one such proceeding, counsel provides a limited description of some of the non-Boyd Pre-Federal Claimants' interests. *See* Statement of Rights of Pre-1906 Representative Claimants Pursuant to the Court's June 1, 2015 Order (Stream System Issue No. 97-104), *New Mexico ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist.* (*Lower Rio Grande Adjudication*), No. CV-96-888 (N.M. 3d Dist. June 30, 2015), https://lrgadjudication.nmcourts.gov (see filings for "SS-97-104; US Interest").

> and priority dates will be recognized and protected and forever held in trust and their historic allotment of water delivered without undue burden for said storage and delivery.

Stream System Issue 97-104, *supra* note 1, at 6.

The movants now argue that adjudication of their rights in the present case is appropriate because they, rather than the United States, hold a superior claim to certain water rights and to at least a portion of the Rio Grande Project infrastructure integral to carrying out the interstate apportionment of water pursuant to the Compact.

Because several of the parties' arguments on the current motion relate to concepts of res judicata, tolling, and allegations of concealed fraud, it is necessary to describe generally the development of the Project and a selection of the related litigation in other fora.

B. Nineteenth Century and Early Twentieth Century Infrastructure Development and Non-Litigation Events

According to the proposed complaint in intervention, the movants' predecessors in interest appropriated water prior to 1893 and, in 1893, formed the Company. Compl. Intervention ¶ 2. The United States initiated the Rio Grande Project in 1903, but "long before the U.S. initiated its project, farmers in the [lower Rio Grande] constructed an irrigation system by connecting the existing community ditches. *Id.* ¶¶ 3, 4. The Company purportedly obtained necessary easements

to construct infrastructure in 1895 and was required to complete such infrastructure within 5 years or forfeit that infrastructure to the United States. Mem. Supp. Intervention ¶¶ 20, 21; *see also* Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1102, ch. 561 §§ 20, 21 ("1891 Federal Act"). Also according to the movants, through funding acquired by Dr. Boyd and the Financing Company, "[the Company] completed its Leasburg Canal and Fort Selden Diversion Dam within five years of commencement of construction." Mem. Supp. Intervention ¶ 33. Movants point to this alleged completion of construction as an event that vested Project rights in the Company.

Meanwhile, according to the movants, a competing group of investors affiliated with the United States/Mexico Boundary Commission sought to appropriate the same waters. Mem. Supp. Intervention ¶ 38. Purportedly at the behest of this separate group, the Secretary of the Interior requested and obtained assistance from the Secretary of War in the form of an "administrative embargo to reject . . . several RGD&IC dam-site applications" and otherwise "prevent construction of any large reservoirs on the Rio Grande in the Territory of New Mexico." *Id.* Movants do not assert when the Secretary of War's embargo was lifted. Nevertheless, movants assert the Company had obtained the necessary approval for two dam sites by 1897.

In subsequent years, the United States and Mexico entered into a treaty, the Rio Grande Project proceeded to completion, and New Mexico, Texas, and Colorado entered into the Compact.

According to the current movants, however, various litigation events caused the insolvency of the Company and Financing Company and prevented the movants' predecessors and the companies from proving to a court that they had completed their construction or caused their own rights in Project infrastructure to vest. I explain these litigation events below.

C. The Late Nineteenth Century and Early Twentieth Century Litigation

The first round of litigation cited by the parties took place in New Mexico territorial court based on a bill of complaint filed in May 1897. In that litigation, the United States sought to enjoin the Company from building a dam at Elephant Butte, arguing that the Rio Grande was a navigable river and that the construction of a dam would interfere with navigation. Eventually, the United States also named the Financing Company as a defendant. The territorial court granted a preliminary injunction, but then quickly dissolved the injunction and dismissed the bill on July 31, 1897, taking judicial notice of the fact that the Rio Grande was not a navigable river within the Territory of New Mexico.

The Supreme Court of the Territory of New Mexico affirmed, but the United States Supreme Court reversed, holding that a factual finding was required as to the question of navigability. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709–10 (1899), *rev'g*, 51 P. 674 (N.M. 1898). In its opinion,

the Supreme Court addressed the concept of the navigability of a river as a whole and indicated analysis of upstream development was required even where upstream navigation was not possible because such development could affect navigability far downstream. On remand, the territorial court again dismissed the United States' bill of complaint. The Supreme Court of the Territory of New Mexico again affirmed, and the United States Supreme Court again reversed. *See United States v. Rio Grande Dam & Irrigation Co.*, 184 U.S. 416, 424 (1902), *rev'g*, 65 P. 276 (N.M. 1900). In this second opinion the Supreme Court determined the trial court had failed to provide adequate process for the government to present evidence.

After the second Supreme Court decision, the United States filed and served upon counsel for the Company and the Financing Company an amended complaint dated April 7, 1903, adding a theory of relief different than the navigation arguments advanced prior to the Court's second remand. The amended complaint alleged that the defendants had failed to complete construction of the dam within five years of acquiring rights under the 1891 Federal Act, and as such, the rights and infrastructure were forfeited to the United States. *See* 1891 Federal Act §§ 20, 21. The Company failed to answer the amended complaint, and the territorial trial court entered a default judgment.

The Supreme Court of the Territory of New Mexico affirmed the default judgment, as did the United States Supreme Court. *See Rio Grande Dam & Irrigation Co.*, 215 U.S. at 277–78 (1909), *aff'g*, 85 P. 393

(N.M. 1906). In the Territorial Supreme Court, Dr. Boyd, on behalf of the Company, tendered an affidavit and sought unsuccessfully to be relieved from the default judgment by characterizing his attorney's failure to file an answer as attorney negligence. 85 P. at 399. At the Supreme Court, the Company again sought relief based on the alleged negligence of its own attorneys. 215 U.S. at 277. The Company also argued the default judgment was substantively inappropriate in that the United States had obtained an injunction to prevent construction of the dam, thus interfering with the five-year window for completion.

The Supreme Court rejected both arguments. *Id.* at 277–78. As to attorney negligence, the Court stated notice had been served upon counsel of record such that default judgment was proper. *Id.* at 277. As to the impact of the injunction, the Court stated:

> The preliminary injunction referred to was dissolved July 31, 1897, and was never reinstated. The supplemental bill was taken as confessed on May 21st, 1903, and a perpetual injunction was then awarded against the defendants. So that, between the dissolution of the preliminary injunction and the granting of the perpetual injunction, more than five years elapsed, during which the defendants were not impeded or hindered by any injunction against them. This is sufficient to show that the point just described is without merit. We need not, therefore, consider the larger question, whether the five-years' limitation prescribed by Congress in the above Act of

> March 3d, 1891, could have been disregarded or enlarged, either by the action or nonaction of the parties, or by any order of injunction made by the court in the progress of the cause.

Id. at 277–78.

According to the Pre-Federal Claimants, all of the late nineteenth century and early twentieth century litigation was a scheme to bankrupt the Company through litigation and delay. Notwithstanding the Court's first opinion concerning the nature of the inquiry into navigability, the Pre-Federal Claimants assert that documents uncovered late in the twentieth century prove that United States Attorneys and officers knew at all times that the Rio Grande was not, in fact, navigable. Also, according to the Pre-Federal Claimants, the failure to answer the amended complaint was not mere negligence, but was actually the result of collusion between government attorneys and the Company's attorneys rising to the level of fraud on the Company and the courts.

Meanwhile, according to the Pre-Federal Claimants, several developments regarding the Company's actual construction of water impoundment and distribution infrastructure had occurred during the course of the first round of litigation. The Financing Company had "conveyed a right of redemption to an English Trustee for [the Company's] assets as collateral to secure issuance of [Financing Company] debentures in England." Mem. Supp. Intervention ¶ 28. The Company "used the debenture proceeds to construct the

Fort Selden diversion, Leasburg Canal and other facilities, including commencing construction of its [Elephant Butte Dam]." *Id.* ¶ 29. Finally, "[i]n 1897 the three main [Lower Rio Grande] community ditches (the 1846 Dona Ana, the 1848 Mesilla, and the 1849 Las Cruces) connected their ditch headings to [the Company's] completed Fort Selden Dam Leasburg Canal," thus demonstrating the Company's completion of "its Leasburg Canal and Fort Selden Diversion Dam within five years of commencement of construction." *Id.* ¶¶ 30, 33.

Also, according to the movants, the litigation between 1897 and 1900 succeeded at driving the Company and the Financing Company to insolvency, forcing liquidation of the Company and causing the English trustee to transfer to Nathan Boyd "the right of redemption for the [Company's and the Financing Company's] assets, rights, and interests." *Id.* ¶ 46.

Meanwhile, also according to the movants, other overlapping and inconsistent infrastructure development and litigation was occurring as to the same waters. In this regard, the movants point to actions litigated by a United States Attorney in New Mexico concerning alternative developments of the same water, in which that attorney took positions inconsistent with the claims of navigability raised in the litigation with the Company in the territorial courts and the United States Supreme Court. *See Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903). Also, the United States purported to obtain the necessary rights to construct infrastructure that eventually became the Rio Grande Project.

Neither Dr. Boyd nor the Company asked the Supreme Court or the courts of the New Mexico Territory to reconsider the 1903 default ruling or the related 1906 and 1909 appellate judgments. It is clear, however, that at least as early as 1903, Dr. Boyd was on notice of a need to investigate the circumstances surrounding his attorneys' purported negligence. He filed an affidavit cited in the Territorial Supreme Court's 1906 opinion. And, at least as early as 1909, he was aware of a final judgment affirming the forfeiture of the Company's Project rights. Moreover, at least as early as 1909, individual water users who had intended to conduct business with the Company were on notice of the Company's loss of rights and, therefore, on notice of the need to investigate the circumstances that led to the Company's ouster from the lower Rio Grande.

Then, in 1923, in an isolated opinion from the International Arbitration Tribunal, that tribunal addressed a claim by an English agent purporting to be acting on behalf of the Financing Company and seeking to set aside the default judgment and appellate rulings including and culminating in the 1909 Supreme Court judgment. *See Rio Grande Irrigation & Land Co. v. United States (U.K. v. U.S.)*, 6 R.I.A.A. 131 (Int'l Arb. Trib. 1923). In those proceedings, the tribunal ultimately determined that it lacked jurisdiction because an anti-alien statute enacted in the United States made a purported grant of interests to the Financing Company (an English company) invalid, thus depriving the Financing Company of an interest in the

matter. In describing the arguments asserted by the Financing Company concerning the New Mexico and Supreme Court litigation that had culminated in the default judgment, that tribunal stated:

> The complaint of His Britannic Majesty's Government, as put forward in the reply, is that these proceedings were oppressively and indirectly launched and prosecuted with other than their avowed object; and that: "The real purpose of the litigation appears to have been to defeat the Company's scheme and it is the initiation and relentless prosecution of the suit of which His Majesty's Government complain."

Id. at 134–35.

The English company had argued that the arbitration tribunal should not entertain arguments concerning the anti-alien statute because the United States itself had not raised any such arguments in the New Mexico Territorial or United State Supreme Court litigation. The tribunal rejected that argument due to the need to examine its own jurisdiction, concluding that the absence of earlier arguments concerning the anti-alien statute could be easily explained:

> Further, the course followed in this respect by the United States may well be explained by the fact that the main object of that litigation was not to crush the English company, but to get rid of the Elephant Butte concession which had been granted to the American company.

Id. at 137.

This arbitration ruling, of course, is not binding as to issues raised in the current motion. Moreover, although it discusses possible United States government litigation strategy against the Company, it in no manner suggests fraud. Still, the existence of this arbitration ruling demonstrates an attempt by the Financing Company, prior to 1923, to collaterally attack the New Mexico Territorial and United States Supreme Court proceedings under the theory that the true motivation of the early litigation was divorced from concerns with navigability and, instead, was designed to defeat the Company's development.

No party suggests any additional proceedings took place concerning the Company, the Financing Company, Dr. Boyd, or any of the Pre-Federal Claimants until the late twentieth century.

D. The Late Twentieth Century and Early Twenty-First Century Litigation

1. Court of Federal Claims

In 1989, James Boyd and the Boyd estate filed an action in the United States Court of Federal Claims asserting a claim under the Tucker Act and "seeking compensation for the water rights taken by the United States." *Boyd v. United States*, No. 96-476L, 1997 U.S. Claims LEXIS 345, at *7 (Fed. Cl. Apr. 21, 1997). Through procedural fits and starts, including an unsuccessful attempt to obtain a Congressional Reference waiving the statute of limitations, the case proceeded slowly. In 1996, Boyd filed an amended

complaint, and in 1997, the Court of Federal Claims dismissed the complaint based on the Tucker Act's six-year statute of limitations. Boyd had asserted "that the taking of the vested property rights of [p]laintiff[s] was accomplished through a series of concealed fraudulent affirmative acts" not discovered until 1996. *Id.* at *12 (alterations in original). The court rejected the fraud theory for tolling purposes and stated a fraud theory as a stand-alone cause of action was beyond the scope of the Court of Claims' limited jurisdiction. In rejecting the tolling theory, the court referenced the 1909 Supreme Court opinion and stated:

> In *Bailey* [*v. Glover*, 88 U.S. 342 (1874)], the United States Supreme Court held that, where due diligence would not have prompted discovery, as in cases where the wrong has been fraudulently or deliberately concealed or where the fact of injury is inherently unknowable, then equitable considerations dictate that the running of the statute of limitations be suspended. Importantly, this exception applies to "the fraud *which is the foundation of the suit*." Here, *the foundation of the suit is the taking of the Dam & Irr. Co.'s interest in the Elephant Butte Dam which ultimately culminated in three Supreme Court opinions. Plaintiffs do not, and cannot, argue that these decisions were fraudulently or deliberately concealed from them.* Rather, plaintiffs allege that certain actions on the part of defendant involving its conduct toward the Dam & Irr. Co. rose to the level of fraud. These alleged acts of fraud, however, did not conceal the

> foundation of this suit. Moreover, these allegations merely give rise to separate causes of action against defendant. Indeed, plaintiffs state that "fraud is an express cause of action in the present Complaint." These allegations of fraud are beyond the jurisdiction of this court.

Id. at *13–14 (citations omitted) (second emphasis added).

The Court of Claims, therefore, rejected the argument that concealed fraud underlying the Supreme Court's 1909 judgment might toll a cause of action challenging the forfeiture of rights. Rather, the forfeiture of rights—the foundation of the suit—was complete and known no later than the Supreme Court's 1909 entry of final judgment. As such, a duty to investigate existed at that time, and later discovery of evidence of alleged fraud was not material to the question of tolling. Moreover, there is no indication that Boyd and the Estate appealed the Court of Claims' judgment dismissing their complaint to the Federal Circuit or asked the Supreme Court itself to revisit the 1909 judgment.

2. State Trial and Appellate Court Proceedings

In 1986, Elephant Butte Irrigation District (EBID, the entity primarily responsible for delivering Project water to southern New Mexico irrigators) filed suit in New Mexico state court against the New Mexico State

Engineer, the United States, and the City of El Paso to initiate a comprehensive adjudication of water rights within the lower Rio Grande. EBID sought comprehensive surveys by the state engineer and clarification from the United States as to its claimed rights. *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation Dist.* (*Lower Rio Grande Adjudication*), No. CV-96-888 (N.M. 3d Dist.). After unsuccessful motions to dismiss and substantial realignment of the parties, the case was captioned as shown and began to move forward with participation by large numbers of claimants asserting rights to lower Rio Grande waters. *See United States v. Elephant Butte Irrigation Dist.*, No. 97 CV 0803, 2014 WL 12783175, *3 (D.N.M. Oct. 20, 2014) (describing the genesis of the *Lower Rio Grande Adjudication*).

Material to the current action, Boyd, the Boyd Estate, and the other Pre-Federal Claimants filed individual claims in that comprehensive litigation. The state court addressed Boyd's claims in a proceeding separate from other claims. This proceeding culminated in a district court ruling that Boyd appealed to the New Mexico Court of Appeals. The other Pre-Federal Claimants' claims that were derivative of the Boyds or the Company were grouped together for a joint proceeding. That joint proceeding culminated in a district court ruling that is currently on appeal with the New Mexico Court of Appeals.

"The district court dismissed Boyd's claims on the grounds that Boyd failed to assert a cognizable claim to water rights, and that Boyd's claims were barred by

the principles of res judicata." *Boyd Estate ex rel. Boyd v. United States*, 344 P.3d 1013, 1014–15 (N.M. Ct. App. 2014). The Court of Appeals affirmed, *id.* at 1019, and the New Mexico Supreme Court denied certiorari, 345 P.3d 341 (N.M. 2015). In affirming the trial court, the New Mexico Court of Appeals addressed several issues. First, the court held that any water rights the Boyds might previously have possessed were forfeited. 344 P.3d at 1017. Regarding claims of fraud and conspiracy, the court rejected Boyd's claims, stating:

> Boyd denies that his water rights were forfeited or abandoned. He asserts that the United States government and the Company's attorneys entered into a conspiracy to fraudulently "void" the Company's water rights. According to Boyd, the "U.S.'s Attorneys" conspired with the Company's attorneys to file a supplemental complaint in the initial navigation litigation, which the Company's attorneys purposely failed to answer. As a result, the district court entered the default judgment in favor of the United States and ordered the forfeiture of the Company's water rights. Boyd contends that because the forfeiture action was the direct result of conspiracy and fraud by the United States and the Company's attorneys, it is invalid. We are not persuaded.
>
> Our review of the record reveals that one of the Company's attorneys may have suggested a legal strategy to the U.S. Attorney for forfeiture of the Company's water rights. Subsequently, the Company's attorneys failed to

> answer the United States' supplemental complaint for forfeiture and as a result, the district court entered a decree declaring the Company's water rights to be forfeited. These facts—by themselves—do not establish a conspiracy between the United States and the Company's attorneys to commit fraud.
>
> If a fraud was indeed perpetrated, it was a fraud on the Company by its own attorneys, the remedy for which would not be for this Court to reverse the Third Judicial District's 1903 decree of forfeiture as Boyd suggests. Rather, the Company could have brought an action against its attorneys for malpractice. To the extent that Boyd alleges fraud against the United States, the Federal Tort Claims Act "provides the exclusive remedy for tort actions against the federal government[.]" Accordingly, Boyd does not have a cause of action for fraud against the United States in state court. We conclude that Boyd's claims of conspiracy and fraud are irrelevant and are unsupported by the record.

Id. at 1017–18 (alteration in original) (citations omitted).

The court also addressed the question of whether the Supreme Court's 1909 ruling was res judicata as to the Boyds. Focusing on the privity requirement for the application of res judicata, the court determined:

> In the present case, Boyd asserts that the Company transferred its interests in the irrigation project to the English Company, which

> in turn transferred the same interests to Dr. Boyd. Boyd's claims necessarily depend on his assertion that he is successor in interest to the water rights of the Company. This puts him in privity with the Company and accordingly, for the purposes of res judicata, he is considered the same party. Therefore, we conclude that all four elements of res judicata are met and that Boyd's claims are precluded as a result.

Id. at 1019. Notwithstanding the fact that the state courts rejected Boyd's claims based on the res judicata effect of the Supreme Court's 1909 judgment, Boyd, again, did not attempt to take his collateral attack upon that judgment to the United States Supreme Court itself.

The other Pre-Federal Claimants asserted in their own separate proceeding in the state court *Lower Rio Grande Adjudication* that they held interests in the Company's infrastructure and rights under various theories. The state trial court granted a motion to dismiss, finding that the Pre-Federal Claimants' asserted rights either did not exist as a matter of law, or were terminated along with the Company's rights and the Boyds' rights. Memorandum Order Granting the Joint Motion to Dismiss the Claims to Rights Derivative of the Rio Grande Dam and Irrigation Company (Expedited *Inter Se* Proceeding Claims to Rights Derivative of the Rio Grande Dam and Irrigation Company), *New Mexico ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist.* (*Lower Rio Grande Adjudication*), No. CV-96-888 (N.M. 3d Dist. Oct. 19, 2016),

https://lrgadjudication/nmcourts.gov (see filings for "Pre-1906 Claimants' Expedited Inter SE Proceeding"). In addition, the state trial court, again, rejected the fraud theory that the Pre-Federal Claimants asserted in an effort to avoid the res judicata effect of the 1909 Supreme Court ruling. *Id.* That ruling is presently on appeal with the New Mexico Court of Appeals, Case No. A-1-CA-36269, and it appears these other Pre-Federal Claimants still have individual, non-aggregated, claims pending in the *Lower Rio Grande Adjudication* as to claims not derivative of the Company.

3. Federal District and Circuit Court Proceedings

In addition, Boyd and the Boyd Estate moved to intervene in a federal district court action. The United States had filed the federal action after a third round of unsuccessful motions to dismiss in the state water adjudication. In the federal action, the United States sought to quiet title to water rights as related to the Rio Grande Project. The United States District Court for the District of New Mexico declined to exercise jurisdiction and dismissed the case, finding deference to the comprehensive, ongoing state law proceedings was appropriate under *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289–90 (1995) and *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494–95 (1942). Due to the dismissal, the court denied the Boyd motion to intervene as moot. *See United States v. Elephant Butte Irrigation Dist.*, No. 97 CV-803, 2000 WL 36739525, at *2 n.4 (D.N.M. Aug. 22, 2000).

The Tenth Circuit affirmed the abstention ruling but remanded for the district court to address the propriety of a stay rather than a dismissal. *United States v. City of Las Cruces*, 289 F.3d 1170, 1192–93 (10th Cir. 2002). In conducting its analysis, the court rejected an argument by Texas and the United States that the claimed water rights at issue needed to be addressed in a federal forum. In particular, those entities had cited *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 95–97 (1938), for the proposition that disputes over interstate waters raise federal questions. Texas and the United States cited the Compact, the 1906 Treaty with Mexico, and the "interstate and international nature of the Project" as factors favoring a federal forum. *City of Las Cruces*, 289 F.3d at 1187. The Tenth Circuit rejected that argument, stating: "The federal action is . . . a suit for declaratory relief seeking a determination of the relative rights of the United States and the named defendants. The question of whether and how Rio Grande water should be apportioned among states is not directly at issue." *Id.* at 1186.

On remand, the district court entered a stay. Then, in 2014, James Boyd individually and as representative of the Nathan Boyd Estate renewed his motion to intervene and asked the district court to lift its stay. In addition, several of the current other Pre-Federal Claimants also moved to intervene: Sammie Singh, Sr., Sammie Singh, Jr., and Lupe Garcia (possibly a predecessor to Margie Garcia) joined the motions. These movants again asserted their theory of fraud underlying

the 1896–1909 litigation, this time as a purported reason for moving ahead in federal district court rather than state court. The federal district court rejected the argument, noting the reasons for the earlier abstention order and stating:

> After a long recitation of the state court's errors, Boyd asks this Court to "review the real historic facts that underlie the state court's February 24, 2012 Order finding that Boyd's claims are barred from adjudication . . . and determine . . . , based upon all the facts, whether the state Court's February 24, 2012 decision was in error and a deprivation of Boyd's due process rights to establish ownership of rights." This Court, however, stayed this proceeding under the *Brillhart* abstention doctrine precisely to avoid the inevitable outcome of Boyd's request: the danger of inconsistent decisions in this federal court proceeding and the state court water adjudication.

United States v. Elephant Butte Irrigation Dist., No. 97 CV 0803, 2014 WL 12783175, at *7 (D.N.M. Dist. Oct. 20, 2014). The Tenth Circuit affirmed, characterizing Boyd and the other participating Pre-Federal Claimants as "claimants of water rights in the Lower Rio Grande Basin who are dissatisfied with various rulings in the state court water rights adjudication." *United States v. Mexico ex rel. State Eng'r*, 624 F. App'x 671, 672 (10th Cir. 2015) (unpublished).

III. Discussion

A. Pre-Federal Claimants Assert Intrastate Water and Property Interests and They Cannot Attack the Validity of the Compact Itself

Texas, New Mexico, and the United States do not raise questions regarding the validity of the Rio Grande Compact in their complaints. Rather, these parties seek interpretation of the Compact. The Compact references the Rio Grande Project, and, in fact, "is inextricably intertwined with the Rio Grande Project." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). Regardless, the current parties do not challenge the rights of the United States in the physical infrastructure or real property comprising the Rio Grande Project nor do they attack the process by which the United States obtained water rights for the Project. Further, the United States professes a willingness to operate the Rio Grande Project in a manner consistent with the Compact as interpreted by the Court. In fact, the United States sought entry into this suit asserting the need to appear as a party so as to be bound by the Court's final judgment. The present action is, quite simply, an action to resolve disputes about the duties the Compact imposes upon New Mexico and Texas. The United States happens to be an important actor in the storage and movement of water necessary for the states to meet these duties.

The Pre-Federal Claimants assert that they, rather than the United States, hold superior rights in much of the Project and the water it controls. Such an

argument appears to be nothing more than an intrastate priority dispute as to water rights and an ownership dispute as to real property and improvements. In an attempt to elevate their claims to a status appropriate for inclusion in the present suit, however, the Pre-Federal Claimants characterize their claims as touching upon the question of Compact validity rather than merely addressing intramural or intrastate disputes concerning water and property ownership. I recommend the Court reject their attempts to challenge the validity of the Compact or characterize their rights as superior to the Compact.

1. The Asserted Rights

The Pre-Federal Claimants appear to assert claims based on state water rights, state property rights, and real property rights allegedly derived from the acquisition of rights of way upon federal land followed by the construction of canals and ditches upon that land. Boyd and Boyd Estate appear to assert rights derived from the Company and the Financing Company in the nature of rights to water and to possession and control of real property and water distribution infrastructure, including the right to store and deliver water. The other Pre-Federal Claimants assert rights derivative of the Company and the Financing Company as well as possible individual, older claims to water based on prior appropriation. Finally, these other Pre-Federal Claimants arguably assert rights to pre-Project infrastructure, such as community ditches, separate and

apart from rights derived from the Company or the Financing Company.

Rights based upon prior appropriation of water or possible rights in community ditches are simple to understand. The status of such rights as being governed by territorial or state law is unquestioned and is not materially different from similar rights asserted by countless claimants in the state court *Lower Rio Grande Adjudication*. Rights related to the Company are a little more complex, given the role of federal statutes in the development of irrigation projects. Pursuant to the governing reclamation statute in force at the time the Company embarked on its infrastructure development, federal license was required for rights of way through federal land for construction of dams and ditches. *See* 1891 Federal Act. But still, the Company was ultimately required to appropriate rights to water as a matter of territorial or state law. *See* Act of February 26, 1891, ch. 71, §§ 1–2, 1891 N.M. Laws 130–31 (repealed 1907). The Pre-Federal Claimants allege the Company filed necessary notices to secure water rights as a state matter and obtained necessary rights of way as a federal matter.

Pursuant to the 1891 Federal Act, upon receipt of rights to build in a federal right of way, the Company was required to complete construction within five years or forfeit project rights to the United States. *See* 1891 Federal Act § 20 ("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, to the extent that the same is not completed at the date of the forfeiture"). And this statutory section, of course, served as the basis of the complaint that culminated in the 1909 Supreme Court judgment affirming the default judgment as to forfeiture of the Company's Project rights. At the end of the day, however, any claims to actual water are state-law claims.

2. The Relationship Between the Asserted Rights and the Compact: *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)

Regardless of what water rights the Pre-Federal Claimants may have possessed prior to Compact formation, the Compact was binding on their predecessors and is binding on them in a manner that may restrict such rights. "Whether [an] apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 106. After all, the "control [of] water within their own boundaries" is a "core state prerogative," such that when a state enters a compact, the state itself is compromising the state's right to the waters of the interstate stream. *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013). As such, questions as to New Mexico's Compact apportionment

of Rio Grande water and New Mexico's duties under the Compact are sovereign matters to be determined separately from individuals' claims upon that apportionment.

The Pre-Federal Claimants make little reference to the Compact in their motion to intervene, proposed complaint, and supporting brief. Rather they assert arguments in the nature of state-law claims to priority of rights. In fact, they raise essentially the same arguments in their motion to intervene that they asserted in the *Lower Rio Grande Adjudication*. They do not argue in these three documents that the Compact is invalid or that the process for its negotiation and enactment was fatally flawed. In their prayer for relief, they reference the Compact, asking the Court to, "Order Colorado, New Mexico, Texas, and the United States to apply the [Prior Appropriation Doctrine] and respect senior Rights in fulfillment of treaty and Compact Delivery obligations." Compl. Intervention at 12. Arguably, in making this assertion, they are arguing that the states' Compact apportionments are inferior to individual rights holders' pre-Compact water rights. Such an assertion, however, is by no means clear, and in any event, it is wholly inconsistent with *Hinderlider*.

Then, in their reply brief they appear to assert that the Compact itself is invalid. *See* Reply Br. Supp. Intervention at 9 ("Claimants should be granted leave to intervene because their claims identify vitiating infirmities in the creation of the Compact."). At oral argument, the Pre-Federal Claimants expanded on this

statement asserting, in essence, that the Court is free to disregard a Compact apportionment if earlier private rights are shown to be inconsistent with a Compact and if the process of Compact negotiation did not adequately consider and respect those rights. According to the Pre-Federal Claimants, fraudulent acts led to the early twentieth century termination of their rights and prevented the parties who negotiated the Compact—the states themselves—from adequately considering their rights.

Their reason for suggesting this theory in their reply brief and in oral arguments seems clear. The parties resisting intervention rely heavily on *Hinderlider* for the proposition that the states, as sovereigns, negotiate (or litigate) their overall, statewide equitable apportionment of interstate waters. These parties argue that all competing intrastate claims, including preexisting claims, are subject to restrictions arising from the apportionment. To rebut this assertion, the Pre-Federal Claimants cite language from *Hinderlider* that they characterize as providing a path for the vindication of individual water rights over otherwise applicable Compact restrictions:

> As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898, in the Colorado water proceeding did not award to the Ditch Company any right greater than the equitable share. Hence the apportionment made by the Compact can not have taken from the Ditch Company any vested right, *unless there was*

> *in the proceedings leading up to the Compact or in its application, some vitiating infirmity.*

304 U.S. at 108 (emphasis added). The Pre-Federal Claimants allege that the disregard for their rights prior to and during Compact negotiation serves as a "vitiating infirmity."

Whatever might qualify as a "vitiating infirmity" with a Compact, I assume it is something that speaks to the rights and processes afforded the negotiating parties themselves—the sovereign states—and not the legions of individuals whose property and water rights flow from and are governed by the laws of those states. The Pre-Federal Claimants argue essentially that *Hinderlider* contains an escape hatch that permits individual water-rights claimants to attack the validity of a compact based upon their dissatisfaction with how compact negotiators considered their individual rights.

Such a theory undercuts entirely the larger holding of *Hinderlider*. It also ignores the simple truth that, when negotiating a compact on behalf of all its citizens, every state necessarily engages in the process of compromising the rights of its citizens with unequal effects upon different rights holders. As with any act of lawmaking or contract negotiating, the rough and tumble politics of the process will create relative winners and losers. Therefore, it would make little sense to allow individuals aggrieved by a compact negotiation process to challenge on an individual basis the resulting compact after it has been approved by their state and Congress. Rather, to the extent persons asserting

rights under the laws of a state believe the state itself has acted to diminish or damage their rights through compact negotiation, it would seem such persons should direct their complaint against the negotiating state.

Whether this assumption is correct, however, is of little consequence. Because the Pre-Federal Claimants failed to raise this issue in their opening brief, failed to articulate a governing standard, and failed to flesh out their skeletal argument, it is not properly before the Court. If this were a normal lower-court case, a federal district or appellate court likely would refuse to address a legal argument raised for the first time in responsive briefing or at oral argument. *See, e.g.*, *Cone v. Bell*, 556 U.S. 449, 482 (2009) (Alito, J., concurring in part and dissenting in part) ("Appellate courts generally do not reach out to decide issues not raised by the appellant. Nor do they generally consider issues first mentioned in a reply brief." (citations omitted)); *Food Market Merch., Inc. v. Scottsdale Indem. Co.*, 857 F.3d 783, 789 (8th Cir. 2017) ("As a general rule, [this court] will not consider arguments raised for the first time in a reply brief, and declines to do so here." (alteration in original) (citation omitted)). Of course, the Court itself enjoys substantial discretion as to arguments and issues it will entertain. Still, the prudence of requiring clear and timely assertion of issues and theories remains. Without timely assertion, arguments are not fully developed and they are not subjected to the rigors of the adversarial process, with interested parties zealously advancing their interests and guiding the court to controlling law and facts. This concern holds true in

the present case. To the extent the Pre-Federal Claimants assert a theory of Compact invalidity (which is by no means clear), such a theory is not sufficiently developed.

I therefore recommend the Court reject any such argument.

B. The Pre-Federal Claimants Fail to Satisfy the High Burden for Intervention in an Original Jurisdiction Action

Because the Pre-Federal Claimants cannot attack the validity of the Compact, and because their claims amount to intrastate or intermural claims challenging the relative priority of rights as between their predecessors and the United States, they fail to satisfy the high burden for intervention.

In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court articulated a high threshold for granting intervention to a non-sovereign in an original jurisdiction action. There, New York, New Jersey, and Pennsylvania were parties to the action concerning the Delaware River. New York City had been forcibly joined as a defendant because New York City was the political subdivision of the state acting as authorized agent as to the sovereign's challenged actions. The City of Philadelphia moved to intervene, but the Court denied the motion. In doing so, the Court emphasized "that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey*, 345 U.S. at 372 (quoting *Kentucky*

v. Indiana, 281 U.S. 163, 173 (1930)). The Court described this principle as "a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373. The Court then turned to the facts at hand and explained the "wisdom of the rule" in application:

> If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.
>
> Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. *An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which*

> *interest is not properly represented by the state.*

Id. (emphasis added).

More recently, in *South Carolina v. North Carolina*, 558 U.S. 256 (2010), the Court reiterated these principles but permitted intervention by two non-sovereigns over a four-Justice dissent. There, the Court permitted intervention by a water project described as a "bistate entity" that was jointly owned and operated by two counties—one in North Carolina and one in South Carolina. *Id.* at 269. The Court emphasized that this entity was "an unusual municipal entity, established as a joint venture with the encouragement of regulatory authorities in both States" that delivered water to persons in both States. *Id.* The Court also permitted the power company Duke Energy to intervene based on the fact that "Duke Energy operate[d] 11 dams and reservoirs in both States that generate electricity for the region and control the flow the river," and on the fact that there was "no other similarly situated entity on the . . . River." *Id.* at 272. The Court also emphasized that Duke Energy's superior access to information and experience with the river at issue would aid the Court in "the exercise of an informed judgment." *Id.* (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)).

Notwithstanding the strong and obviously interstate interests and unique access to information offered by the non-sovereign proposed intervenors, the dissent in *South Carolina* still would have denied

intervention. The dissent emphasized that "[t]he result [was] literally unprecedented: . . . [The] Court ha[d] never before granted intervention in . . . [an equitable apportionment] case to an entity other than a State, the United States, or an Indian tribe." *South Carolina*, 558 U.S. at 277 (Roberts, C.J., dissenting). *South Carolina*, therefore, not only provides an example of the strength and unusual nature of non-sovereign interests that are required to justify intervention, it demonstrates a strong likelihood that the *New Jersey* test will continue to result in only the most sparing grants of intervention for non-sovereigns.

Turning to the present case, there appears to be little that would justify intervention by the Pre-Federal Claimants. Unlike the bistate municipal entity in *South Carolina*, the Pre-Federal Claimants are an assortment of New Mexico individuals and an estate asserting rights to water and property in New Mexico. Whether or not they are satisfied with New Mexico's representation in this Compact dispute, New Mexico represents their interests in this "matter of sovereign interest." *New Jersey*, 345 U.S. at 372 ("the state . . . must be deemed to represent all its citizens"). The Pre-Federal Claimants argue their "interest is not properly represented by the state [because] NM has supported the U.S. project claim and opposed Claimants' claims in the LRGA for decades." Reply Br. at 7. Again, however, the Pre-Federal Claimants' disagreement with New Mexico's position and dissatisfaction with New Mexico's representation of their interests does not convert their own claims into Compact claims. Rather, it

explains why they have been repeatedly raising these same arguments in other state and federal courts.

Unlike Duke Energy in *South Carolina*, the Pre-Federal Claimants have not, in fact, been operating key facilities controlling the flow of the river in multiple states in the Compact area. As such, unlike Duke Energy, they do not possess the information and experience necessary for the Court to make an "informed judgment" as to New Mexico's and Texas's rights under the Compact. *South Carolina*, 558 U.S. at 272. Rather, the United States has been operating the Project since prior to Compact formation. In fact, agencies of the United States possess vast amounts of information currently being produced in discovery. Moreover, the Pre-Federal Claimants enjoy no sovereign status like the United States or like the Indian Tribes the Court has allowed to intervene in several actions. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 613–14 (1983).

In attempting to characterize their interest as unique and different from the many other individual intrastate water-rights claimants within New Mexico, the Pre-Federal Claimants emphasize their allegation that their predecessors had intended to serve in the role that the United States currently serves and to distribute water not only to New Mexico, but also to Mexico and Texas. I have little doubt that such a claim is unique among the many possible individual New Mexican water-right claimants participating in the state court *Lower Rio Grande Adjudication*. And yet, this ancient and unrealized intention provides no basis for present intervention. Rather, it describes the

complicated nature of the Pre-Federal Claimants' dispute with the United States.

At the end of the day, the Pre-Federal Claimants assert state rights that either can be or have been subject to jurisdiction in other fora. The Court "seeks[s] to exercise [its] original jurisdiction sparingly and [is] particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada & California*, 412 U.S. 534, 538 (1973) (per curiam). This is particularly true where parties seek "original jurisdiction to settle competing claims to water within a single State." *Id.* And denial of intervention is even more compelling where those parties have already taken advantage of opportunities in the other fora without success.

C. The Supreme Court's 1909 Judgment Affirming the Default Judgment as to Forfeiture is Res Judicata

1. Res Judicata, Generally

Even if the Pre-Federal Claimants could otherwise satisfy the high burden for intervention, their claimed rights are foreclosed as res judicata by the Supreme Court's 1909 judgment affirming the territorial court's grant of a default judgment. As has already been repeatedly determined, the Supreme Court's 1909 judgment finalized the forfeiture of the Company's rights in the Project. The New Mexico Court of Appeals decided the res judicata effect of the 1909 judgment

adversely to the Boyd interests and rejected the fraud-based collateral attack upon the 1909 judgment (as did the Court of Claims). The New Mexico state district court decided the same issues adversely to the other Pre-Federal Claimants in the ruling currently on appeal with the New Mexico Court of Appeals. Moreover, Boyd did not attempt to place his collateral attack upon the 1909 judgment before the source of that judgment, the United States Supreme Court itself, by appealing from either the New Mexico Court of Appeals or the Court of Claims judgments to the Supreme Court.

Without belaboring the point, I agree completely that res judicata applies. "Res judicata applies if four elements are met: (1) the parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits." *Boyd Estate ex rel. Boyd*, 344 P.3d at 1019 (citation omitted). As the New Mexico Court of Appeals determined in addressing the res judicata effect of the 1909 judgment upon the Boyd claims, the first element is easily satisfied as to the Boyd claims:

> Boyd asserts that the Company transferred its interests in the irrigation project to the English Company, which in turn transferred the same interests to Dr. Boyd. Boyd's claims necessarily depend on his assertion that he is successor in interest to the water rights of the Company. This puts him in privity with the

> Company and accordingly, for the purposes of res judicata, he is considered the same party.

Id.[2]

The other elements, too, are met. The default judgment as to forfeiture was a final judgment on the merits, and the claims asserted are the same. *See First State Bank v. Muzio*, 666 P.2d 777, 781 (N.M. 1983) (for res judicata purposes, a default judgment is a final judgment on the merits as to issues that could have been raised), *overruled on other grounds by Huntington Nat'l Bank v. Sproul*, 861 P.2d 935 (N.M. 1993). To the extent the Pre-Federal Claimants argue their present claims differ from those in the 1909 case due to their current allegations of fraud, I recommend the Court reject their arguments. The allegations of fraud speak not to the question of res judicata, but to the question of whether some theory of tolling might permit a much belated collateral attack upon the Court's 1909 judgment.

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[2] To the extent the non-Boyd Pre-Federal Claimants assert claims derivative of the Company's rights and the Boyds' rights, they also are in privity with the Company for res judicata purposes. To the extent they assert stand-alone claims independent of the Company or the Boyds, their claims are even more clearly pure matters of state or territorial law and even more clearly inappropriate for intervention in this original jurisdiction matter and need not be addressed for res judicata purposes.

2. A Collateral Attack Upon the 1909 Judgment is Time Barred, is not Tolled, and is Precluded by Res Judicata based on the Recent Judgments from the Court of Claims and New Mexico State Court

The Pre-Federal Claimants direct their motion to intervene towards attacking the 1909 judgment. They argue they should be allowed to attack the judgment due to fraud underlying that judgment and due to the long-term suppression of evidence of that fraud. It is difficult to conceive of any tolling theory that might excuse a century-long delay. Even assuming the Pre-Federal Claimants could rely upon some form of tolling, however, it is clear that various combinations of Pre-Federal Claimants raised this exact argument in the New Mexico state court proceedings and in the Court of Claims, as described at length above. Those recent opinions stand as res judicata for purposes of collaterally attacking the 1909 judgment under a theory of fraud.

In those opinions, the courts determined that the critical discovery for triggering the duty to investigate and assert collateral attacks under a theory of fraud was the discovery of the loss of rights rather than the discovery of evidence of fraud. *See Boyd v. United States*, No. 96-476L, 1997 U.S. Claims LEXIS 345, at *13 (Fed. Cl. Apr. 21, 1997) (noting that fraud-based tolling applies to fraud that conceals the "foundation of the suit" and "[h]ere, the foundation of the suit is the taking of the Dam & Irr. Co.'s interest in the Elephant

Butte Dam which ultimately culminated in three Supreme Court opinions" that were not "fraudulently or deliberately concealed"). This, of course, makes sense, because the loss of rights is the event that puts interested parties on notice of the need to investigate and determine the cause for their loss of rights. Because the loss of rights was final in 1909 and neither the 1909 judgment nor any prior judgments were concealed, the duty to timely challenge the Court's judgment was not tolled.

In addition, there is another timeliness issue at play in this matter. Even if the Pre-Federal Claimants otherwise were correct as to their theory of tolling, and even if they otherwise could avoid the res judicata effects of the Court of Claims or New Mexico state court judgments rejecting their theory, they have not adequately pleaded the necessary details of their fraud theory.

The Federal Rules of Civil Procedure provide guidance in this regard. Rule 9 requires specificity in allegations of fraud, and most courts extend that requirement of specificity to include the details surrounding the discovery of an alleged fraud. *See, e.g.*, *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 881 (8th Cir. 2011) ("By failing to allege when and how he discovered [the] alleged fraud, Summerhill has failed to meet his burden of sufficiently pleading that the doctrine of fraudulent concealment saves his otherwise time-barred claims."); *Wood v. Carpenter*, 101 U.S. 135, 140–41, 143 (1879) ("If the plaintiff made any particular discovery, it should be stated when it was made,

what it was, how it was made, and why it was not made sooner. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."). Moreover, Rule 60(c) requires that collateral attacks upon a judgment be asserted within one year if based on fraud and within a "reasonable time" if alleging a judgment is void. The Court, no doubt, would endorse a "reasonable time" restriction on collateral attacks or requests for reconsideration. Any such timeliness requirement would need to be coupled with a requirement to plead specifically the details of discovery. Without such a requirement, the Court could not assess the parties' diligence in discovering the alleged fraud or their diligence in filing for relief after discovering such fraud.

Here, the Pre-Federal Claimants make oblique reference to the Freedom of Information Act and the alleged revelation of fraud based upon information obtained through that Act. They do not do so, however, with the specificity courts typically require for tolling a limitations period based on allegations of fraud. Therefore, even if it were appropriate to focus upon the alleged discovery of fraud as a date triggering the duty to attack the 1909 judgment (rather than the date of the judgment itself) the Pre-Federal Claimants' pleadings are insufficient.

Any purportedly new evidence supporting allegations of fraud was known by the mid-1990s as the Boyds asserted their theory in the Court of Claims. The judgment under attack, however, was not a judgment

from the Court of Claims. Rather, it was a judgment from the Supreme Court itself. In no event is waiting more than 20 years after discovering purported evidence of fraud a reasonable time to wait before approaching the Court itself to ask that the Court void an earlier judgment.

D. The Motion to Intervene is Untimely Because it was Filed Six Years into the Current Action

In the final alternative, Texas and the United States argue the current motion to intervene is untimely in the simple and narrow context of the present case. I agree and recommend the Court deny the motion as untimely.

Texas filed its Motion for Leave to File a Bill of Complaint with the Supreme Court in January 2013. The Court granted leave in January 2014, and one month later, the United States moved to intervene. In March 2014, the Court granted leave to the United States. Throughout 2014, New Mexico moved to dismiss Texas's and the United States' complaints, and the parties and several amici filed briefs. In November 2014, the Court appointed a first special master. In December 2014, EBID moved to intervene, and in April 2015, EPCWID moved to intervene.

Briefing as to pending issues continued, and, in February 2017, the first special master issued a first interim report recommending the Court deny New Mexico's motion to dismiss Texas's complaint, grant

in part and deny in part a motion to dismiss the United States' complaint in intervention, and deny intervention as to EBID and EPCWID.

The parties and several amici filed exceptions and briefs with the Court throughout 2017. The Court held arguments as to limited issues and, in March 2018, issued an opinion in this matter allowing the United States' original jurisdiction claims to proceed. In so holding, the Court emphasized that the United States' claims did not change the scope of the action because the United States sought "substantially the same" relief as Texas. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

Since that time, the Court has appointed the undersigned as special master, and the parties and the special master have adopted a case management plan to govern the conduct of this litigation. Discovery, including depositions and voluminous document production, has commenced and is ongoing. Although denied the right to intervene, EBID and EPCWID are actively participating in discovery as amici with an enhanced status due to their role in the operation of the Project and their access to information material to this matter. Some of the parties have disclosed expert witnesses and reports, and the special master has entered an order concerning the parties' and the amici's division of costs for certain electronic discovery services. New Mexico filed its answer and counterclaims, and the other parties have filed their answers to the counterclaims. In addition, there are currently pending several motions to dismiss and motions seeking from the

special master clarification of issues that have already been decided in the case. Finally, the special master has conducted several telephone and in-person hearings as to these various matters.

Meanwhile, the other litigation as described above had occurred or was ongoing in which the Pre-Federal Claimants asserted the Project and water rights, legal theories, and allegations of fraud they now seek to assert in the present case. And, in November 2016, in one of those proceedings, the non-Boyd Pre-Federal Claimants referenced the current original jurisdiction action expressly. *See* Pre-1906 Claimants' Motion for Reconsideration of the October 19, 2016 Memorandum Order Granting the Joint Motion to Dismiss Claims Derivative of the Rio Grande Dam and Irrigation Company (Expedited *Inter Se* Proceeding Claims to Rights Derivative of the Rio Grande Dam and Irrigation Company), *New Mexico ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist.* (*Lower Rio Grande Adjudication*), No. CV-96-888 (N.M. 3d Dist. Nov. 18, 2016), https://lrgadjudication.nmcourts.gov (see filings for "Pre-1906 Claimants' Expedited Inter SE Proceeding").

The Pre-Federal Claimants filed their Motion to Intervene in this action in March 2019, many years, if not decades, after first asserting their theories in other fora and more than two years after demonstrating actual knowledge of this action in their own public filings.

Against this backdrop, Texas and the United States argue the current motion to intervene is untimely. In response, the Pre-Federal Claimants assert:

> Because this Court allowed the U.S. to intervene to protect its purported Project interest, it should allow the [Pre-Federal] Claimants to intervene to protect their senior project rights. Claimants' [sic] allege their vested rights were not considered in the creation of the Compact and have been diminished. . . . The Pre-[F]ederal 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.

Reply Br. at 11–12.

By the Pre-Federal Claimants' own account, then, they viewed the grant of the United States' motion for leave to intervene as the trigger that left them "little choice but to intervene." But the Court granted that motion approximately five years before the Pre-Federal Claimants filed their own motion to intervene. And, even if the Pre-Federal Claimants intended instead to reference the first special master's or the Supreme Court's opinions addressing the motion to dismiss the United States' complaint, those later events still preceded the current motion to intervene by two years and one year respectively.

The Federal Rules of Civil Procedure are not technically controlling in this forum, but Rule 24 requires that motions to intervene be filed "timely," Fed. R. Civ.

P. 24(a)–(b), and the Court has acknowledged that timeliness is a consideration in allowing intervention in original jurisdiction actions, *see Arizona v. California*, 460 U.S. at 615 (permitting sovereign tribes to intervene in an original jurisdiction water case and characterizing their motions to intervene as "sufficiently timely with respect to this phase of the litigation"). It would therefore seem appropriate that analysis of timeliness in original jurisdiction actions employ considerations similar to the factors lower courts employ when exercising discretion to allow or disallow intervention. In other words, timeliness analysis should include not only an examination of timing and explanations for that timing, but a qualitative analysis of the nature and effect of the newly asserted claims in the context of the ongoing action as a whole. *See, e.g.*, *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011) (identifying relevant factors as "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties"). All the while, it is important to keep in mind the unique nature of original jurisdiction actions which, in any given case, may result in different treatment of timeliness concerns.

Here, I conclude these common-sense factors weigh against finding the current motion timely. First, the litigation has progressed substantially in relation to matters the Pre-Federal Claimants raise in their motion to

intervene. The case is well into discovery with the parties expending resources to marshal information and build their cases to address the currently pending claims. The parties have disclosed their experts' reports and have repeatedly briefed the issue of the United States' interest in this case. All the while, no party or amici challenged the United States' rights in the Project, and all parties appear to have understood the scope of the action as being one of Compact interpretation.

The Pre-Federal Claimants, in contrast, seek to inject wholly new issues into the case, namely, challenges to the United States' rights in the Project and an apparent claim as to the validity of the Compact itself (or, at a minimum, a question as to the priority of states' Compact apportionments vis-à-vis alleged individual water users' pre-Compact rights). It would seem the time to have addressed possible infirmities with the United States' Project rights in this case would have been throughout the earlier rounds of briefing in which the Court carefully considered those interests and ultimately determined the "United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959 (citations omitted).

Second, as just described, the prospective intervenors were well aware of the current litigation as shown by the fact that they expressly referenced this action in another proceeding years before filing for intervention. Moreover, the parties, amici, and attorneys

appearing in the present case are heavily involved in the several ongoing disputes concerning the lower Rio Grande. As such, it is nearly certain that the Pre-Federal Claimants and their attorneys possessed actual notice of this original jurisdiction action from a date preceding their cited reference (even assuming actual rather than constructive notice is required).

Third, they offer no reason for their delay in seeking intervention. The role of the United States in the Compact was clear long before Texas initiated the current action. The Compact identifies the United States as the obligee in the Treaty with Mexico and specifically identifies the Project as a federal reclamation project. Upon learning of the current action, any party asserting a cloud on the United States' Project rights was on notice of the need to act. And, as noted, the Pre-Federal Claimants' failure to move for intervention sooner effectively prevented the first special master and the Supreme Court from considering their allegations of infirmities with the United States' rights when considering the motion to dismiss the United States' claims.

Finally, allowing the current movants to intervene will substantially prejudice the existing parties. This case is already six years old, and the parties are entitled to move their case along without further expansion of issues due to the addition of new parties. Although the Pre-Federal Claimants argue their claims differ from those of other individual New Mexico water users, their claims ultimately boil down to intrastate claims as to water or property rights. As

such, it would seem that allowing the current movants to intervene would not only expand this action to the entirely new issues of the validity and limits of the United States' rights, but it would necessitate a review of the previous denial of intervention to EBID and EPCWID and the possible entertainment of additional motions to intervene by other non-sovereign entities. In this regard, I note that a recent status report in the *Lower Rio Grande Adjudication* indicates more than 18,000 claimants are pursuing claims through more than 23,000 case numbers, all under the umbrella of those comprehensive proceedings. It is simply inappropriate, six years into this original jurisdiction action, to begin addressing novel claims from any such litigants as they seek to advance their personal rights in this sovereign matter.

I recommend the Court deny the motion to intervene.

Respectfully submitted,

HON. MICHAEL J. MELLOY
United States Circuit Judge
Special Master
111 Seventh Avenue, S.E.
Box 22
Cedar Rapids, IA 52401
Telephone: 319-423-6080

APPENDIX

PROPOSED ORDER

STATE OF TEXAS V. STATE OF NEW MEXICO AND STATE OF COLORADO

No. 141, Original

ORDER

Having considered the briefs of the parties and proposed intervenors in support of, opposition to, or otherwise relating to the March 20, 2019 Motion of Nathan Boyd Estate, et al. for Leave to Intervene as Plaintiffs,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

The Motion for Leave to Intervene is DENIED.