THIRD JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF DOÑA ANA

STATE OF NEW MEXICO *ex rel.*, NEW MEXICO STATE ENGINEER,	)	
Plaintiff,	)	No. CV-96-888 Lower Rio Grande Adjudication Honorable James J. Wechsler
vs.	)	
ELEPHANT BUTTE IRRIGATION DISTRICT, *et al.*,	)	Stream System Issue SS-97-106 United States Interests
Defendants.	)	

PRE-1906 CLAIMANTS' MOTION TO SET STREAM SYSTEM ISSUE 106

Defendants Sammie Singh, Sr., Sammie Singh, Jr., Ed Provencio, Lupe Garcia, John Fleming and Jonny Diaz (collectively referred to as the Pre-1906 Claimants) through their counsel of record, Robert Simon, file this Motion to Set a Stream System Issue to adjudicate all Pre-1906 Claimants' water, storage and diversion rights. We ask this court to set as Stream Issue 106: "What water, diversions, and storage rights were appropriated in the Lower Rio Grande in New Mexico prior to the January 1906 Application filed by the U.S. with the Office of the Territorial Engineer".

The McCarran Amendment 43 U.S.C. § 666 (1952) gives to the Third District Court, for the first time, jurisdiction to adjudicate state, local community and private claims, along with Federal water right claims. 43 U.S.C. § 666 (1952) and U.S. V. City of Las Cruces, 2289 F. 3d 1170 (10th Cir. 2002)

The Pre-1906 Claimants request the Court to designate a stream system issue to adjudicate all Pre-1906 water right claims pursuant to Rule 1-071.2 (A) and (B) NMRA, Section A., Designating a Stream System Issue of the Second Amended Case Management Order Authorizing Limited Notice by a Quarterly Report and Setting Procedures for Stream System Issue Proceedings filed August 16, 2010, and this Court's Order filed January 15th, 2013 denying the Pre-1906 Claimants Motion for Summary Judgment.

The designation and adjudication of all Pre 1906 rights as a stream system issue will bring about judicial efficiency, and;

A. affects the interests of most if not all water right claimants in the Lower Rio Grande Valley of New Mexico, including but not limited to the U.S., State of New Mexico, EBID, and,

B. the failure to resolve this issue in a manner that does not bind all parties would create a risk of:

   1) Inconsistent or varying decisions with respect to various claimants and,

   2) a decision that would be dispositive of the interests of other claimants and,

   3) a decision that would substantially impair and impede the ability of claimants or the State to protect their interests; and

C. a timely decision on this issue prior to the completion of Stream Issue 104, binding on all parties of this adjudication, will promote judicial efficiency and expedite the adjudication of SSI-104.

In summary, the review of pre-1906 priority diversion dates and amounts of water appropriated will facilitate this Court's ability to determine what existing water, storage and diversion right claims that pre-dated the U.S.' reservation of up to 2,000,000 miners' inches of water in Elephant Butte Dam and 730,000 acre feet per annum of water for the Rio Grande Project filed in January 1906, and its reservation of all un-appropriated water in the Rio Grande River in April, 1908.

The Movants' request the court to examine the factual basis and evidence supporting competing water right claims to any competing claims and apply the Priority Doctrine and the Relation Back Doctrine as defined under the case and statutory law of the Territory and State of New Mexico, including but not limited to all documentary evidence filed under Territorial Laws to meet statutory requirements at the time of the appropriation of water, such as filings of affidavits of place of use and points of diversion, along with the necessary applications for water rights and right of way affidavits filed with county probate clerks if appropriated before 1906 and for water right claims appropriated after 1906, such as the U.S.' claims, which was filed after the adoption of the 1905 Water Code, applications to appropriate water filed with the Territorial Engineer's Office for a water right.

Such an examination of historical evidence under statutory rules and procedures should allow the court to determine what amount of un-appropriated water if any was available to be appropriated by the U. S. in SSI-104. Keeney v. Carillo, 2 N.M. 480. Also, see Millheiser v. Long, 10 N.M. 99, 61 P. 111 (N.M. 1900) and Farmer's Dev. Co. v. Rayado Land and Irrigation Co., 28 N.M. 357, 213 P. 202 (1923).

Pre 1906 claims

The Pre-1906 Claimants' claim that most of the Lower Rio Grande hydrological surface and groundwater system was fully appropriated before 1906 and that the source of water claimed by the Pre-1906 Claimants is the same source as the U.S. claims in SSI-104. As indicated in this Court's January 15th, 2013 Order, a dispute between these two competing ownership interests in the same diversion and storage system is the issue that must be adjudicated.

The Pre-1906 Claimants believe that many surface claims to the Rio Grande were vested before 1848 under Spanish and Mexican law; the majority being appurtenant to Spanish and Mexican land grants, which were approved by the Court of Private Land Claims and that by 1894 or 1896 all future unappropriated surface and flood water for the Lower Rio Grande was appropriated through the contractual relationships created between the landowners and community ditches and RGD&IC (that provided private capital to construct an irrigation system in the LRG Valley that included the Elephant Butte Dam and its supporting diversion and irrigation works sufficient to capture and store and distribute as needed the entire appropriated and un-appropriated Lower Rio Grande at that time for the use and benefit of all existing landowners and future developers of water rights, thus raising a Mendenhall claim to the Lower Rio Grande.

The landowners have always had the beneficial use claim of water from their work and investments in the development of their local project rights, even before 1894-96. see United States v. Rio Grande Dam & Irrigation Co., 9 N.M. 292, 295, 51 P. 674, 676. (1898) and Snow vs. Abalos 18 N.M.. 681, 140 P. 1044 (1914).

Also, the landowners in the Lower Rio Grande Valley in New Mexico by drilling wells and pumping water to their lands prior to the 1980's appropriated supplemental sub-surface groundwater before permits were required beginning in the 1980's, when the OSE declared the underground basin in the Lower Rio Grande Valley in New Mexico a closed basin. See NMSA 72-12-20. When appropriation without permit allowed;

"No permit and license to appropriate underground waters for in-state use shall be required except in basins declared by the state engineer to have reasonably ascertainable boundaries".

It is generally accepted that there is a legal and hydrological connection between supplemental groundwater claims and the historic surface water rights in N.M.'s Rio Grande Valley, and the priority date of a supplemental well is the date of the surface right. Templeton v. Pecos Val. Artesian Conservancy Dist., 332 P.2d 465, 65 N.M. 59 (N.M., 1958)

As a result of the decisions in United States v. Rio Grande Dam & Irrigation Co., 9 N.M. 292, 295, 51 P. 674, 676. (1898), Snow vs. Abalos, 18 N.M. 681, 140 P. 1044 (1914), State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998, 1001 (N.M. 1961) and Templeton v. Pecos Val. Artesian Conservancy Dist., 332 P.2d 465, 65 N.M. 59 (N.M., 1958), the farmers, landowners, local communities ditches, and acequias and the RGD&IC by their applications and actions appropriated most, if not all, of the surface and annual flood water and the appurtenant diversion and storage rights along with the supporting supplemental ground water rights in the Lower Rio Grande.

Also, the City of Las Cruces' Response to the Pre-1906 Claimants' Motion for Summary Judgment in SSI-104 provided evidence that there were contractual relationships created in 1905 between some pre-1906 claimants and the Elephant Butte Water Users

Association. The Pre-1906 claimants have also alleged and produced evidence that there were contractual relationships between landowners and community ditches and the RGD&IC in the early 1890's to store and deliver claimants' water to them. The proposed Stream Issue 106 provides the mechanism for examining these and other claims and allegations to determine what pre-1906 rights existed and thereafter what rights were transferred if any to the Federal Rio Grand Project.

In further support of setting SSI-106, a spokeswoman speaking for the New Mexico Attorney's General's Office in a response regarding the recent suit filed by Texas against New Mexico in the U.S. Supreme Court was quoted in a January 25th, 2013 article in the L.A. Times acknowledged the existence of historical "pre federal rights" on the Rio Grande.

The importance of setting SSI-106 to determine what rights existed before 1906 is that the U.S. could only appropriate water and property rights that were not previously appropriated. Reclamation Act 1902, Section 20 in the federal Act of March 8, 1891 (26 Stat. 1095), and Sections 72-1-2 and NMSA 73-2-I (N.M.S.A. 1978).

This court has been given exclusive jurisdiction by the Federal Appeals Court in U.S. V. City of Las Cruces, 2289 F. 3d 1170 (10th Cir.2002) and by the McCarran Amendment [43 U.S.C.§ 666 (1952)], to hear evidence and adjudicate all historic rights. To accomplish the goal of a full adjudication the Pre-1906 Claimants contend that it is important to consider all evidence regarding the historic surface diversions along with all known and unknown users of water, including the community and private ditches under the prior laws of the Territory of New Mexico, Mexico and Spain and the completion of all irrigation works, such as Leasburg Diversion Dam and canal completed by the RGD&IC for the benefit of and pursuant to agreements with the community ditches/landowners.

The people of New Mexico's property rights and businesses will be further damaged and they will experience irreparable harm to their water rights if their legal due process rights to present and prove their historical priority claims to the Rio Grande are denied.

All potential claimants should have an opportunity to present evidence and to challenge competing claims in support of their claims.

WHEREFORE, the Pre-1906 Claimants pray that this Court grant the Pre-1906 Claimants' Motion to Designate Stream System Issue 106 as follows:

1. Post this Motion in the New Mexico Court's Monthly Report.
2. Schedule briefing and a hearing to determine whether to designate the above proposed Stream System Issue, to determine what water, diversion, storage and project rights existed before January 1906 as a stream system issue.
3. Grant this motion to designate the Issue proposed in this Motion as a stream system issue and assign to it a number (we suggest and have used herein above #106).
4. Publish a Notice of Stream System Issue for this issue in a Monthly Report in the New Mexico Judiciary's website for the Lower Rio Grande Adjudication.

Robert S. Simon

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CERTIFICATE OF SERVICE

I, Robert Simon, do hereby certify that on this 31th day of January, 2013, I mailed the original and one copy of the Pre-1906 Claimants' Motion to Designate Stream System Issue 106 to the State of New Mexico and mailed a true and correct copy of this Certificate of Service to the counsel of the record and participating parties, properly addressed to the parties provided on the Court's website at https://lrgadjudication.nmcourts.gov/index.php/mailing-lists for Stream System Issue SS-97-104.

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