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

STATE OF NEW MEXICO *ex rel.* OFFICE
OF THE STATE ENGINEER,

Plaintiff,

vs.

ELEPHANT BUTTE IRRIGATION
DISTRICT, *et al.*,

Defendants.

)
) No. CV-96-888
) Lower Rio Grande Adjudication
) James J. Wechsler
) Presiding Judge
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**RESPONSE OF THE STATE OF NEW MEXICO TO PRE-1906 CLAIMANTS'
MOTIONS TO DESIGNATE STREAM SYSTEM ISSUES**

COMES NOW the State of New Mexico ("State") and submits this Response to the six motions to designate stream system issues filed on March 31, 2016,¹ by a group of individuals identified in the motions as "defendants" and described collectively as "the Pre-1906 Claimants." The individuals are Sammie Singh, Sr., Sammie Singh, Jr., Ed Provencio, John Fleming and Jonny Diaz. The State first notes that it has no record of two of the five individuals as defendants in this adjudication. John Fleming appears in the State's records only as holding the power of attorney for his mother, Jane Fleming, a claimant on subfile LRS 28-011-0060. The State has no record whatsoever of Jonny Diaz. The sole similarly named defendant of record in this adjudication is John F. Diaz, whose water right—a domestic groundwater right in subfile LRN

¹ At the request of counsel for the movants, these six motions were filed under Stream System Issue 104 in SS-97-104, and they appear on the Court's website in that location.

28-010-1128—was adjudicated in 2002. The State requests that the Court require counsel for the movants, Robert Simon, to establish their standing as parties to the adjudication.

The State opposes the Pre-1906 Claimants' six motions to designate stream system issues, on the grounds that none of the issues directly relates to the question on which the Court invited motions: the fate, or status, of surface water rights developed in the Lower Rio Grande before the Rio Grande Project. One of the motions requests a stream system issue on the applicability of state law to water rights on rented state lands, an issue that appears entirely unrelated to the subject of pre-Project rights. Another asks the Court to designate a claim to earlier priority dates for groundwater diversions under the Templeton Doctrine. While this issue could affect some pre-Project surface water rights, it is unrelated to the question at hand: whether those pre-Project surface water rights continue to exist today, and if so, in what manner. The other four motions conflate the status of pre-Project surface water rights with issues regarding storage and diversion rights derivative of the Rio Grande Dam and Irrigation Company—issues already being litigated in the Expedited *Inter Se* on the rights of a different group of pre-1906 claimants represented by Mr. Simon. Specifically, the objections of the State to the Pre-1906 Claimants' six motions are as follows:

I. The Four Motions on Rights Derivative of the Rio Grande Dam and Irrigation Company

A. Pre-1906 Claimants' Motion to Set Stream System Issue Regarding U.S. Claims to Pre-1906 Claimants' Property Rights

The Pre-1906 Claimants ask the Court to designate a stream system issue on the question: "Whether the U.S. gained any farmers' pre federal private project rights by any action, including

trespass, duress, coercion, improper litigation, collateral fraud and fraud on the court and fraud on the judicial system, or through any purported assignment to EBWUA in 1905?" [MOT 1]

In asking to Court to determine whether the United States acquired the farmers' "project rights" by tactics such as trespass, duress and improper litigation, the movants through their attorney are raising the same allegations Mr. Simon has raised on behalf of the pre-1906 claimants in the Expedited *Inter Se* on Claims to Rights Derivative of the Rio Grande Dam and Irrigation Company. See Statement of Pre-1906 Claimants' Water Right Claims and Appurtenant Project Rights Appropriated Commencing in 1893 Derived From the RGD&IC and Prior Established Diversion Rights 2, 5, 9, 13, 15-16, 20, 22, filed Nov. 9, 2015.

The motion goes on to propose that if it is determined that the farmers established ownership of project rights through their ditches or by merging their diversion rights with the RGD&IC, the Court must determine as a global threshold issue whether those project rights can be "administered under the EBID pro rata system of delivery." Again, in characterizing the rights at issue as "project rights" and describing diversion rights that merged with RGD&IC, the movants are mixing the question at issue here, the fate of the pre-Project surface water rights, with issues already in litigation in the Expedited *Inter Se*.

B. Pre-1906 Claimants' Motion to Set Stream System Issue Regarding Whether Pre-1906 Claimants' Rights Are Separate From Any U.S. Claim

The Pre-1906 Claimants ask the Court to designate the question: "Were the Pre-1906 Claimants' project rights that were conveyed to Dr. Nathan Boyd as receiver pursuant to the liquidation of RGI&LC., Ltd. in 1900 held by Boyd, as the creditor and for the benefit of the

farmers since then, if so, then are the pre-federal project rights now still private property, which should be a right from any later federal claims or control?" [MOT 1] The motion offers a sub-question: "If these pre project rights were never acquired by the U.S., can any federal laws, such as environmental laws, impose any restrictions or taking of the Pre-1906 Claimants' project rights without just compensation and due process?" [MOT 2]

These questions once again speak of "project rights" and are another example of the movants proposing issues already being argued in the Expedited *Inter Se*. In that proceeding, the pre-1906 claimants assert a right to "eject" the United States, and demand that the United States government "compensate the claimants for their property rights." [STATEMENT 16] These questions have no connection to the status of the early surface water rights in the Lower Rio Grande.

C. Pre-1906 Claimants' Motion to Set Stream System Issue Regarding Whether the U.S. Coerced Farmers Into Signing Assignments of Their Project, Storage and Diversion Works and Water Rights Against Their Free Will

The Pre-1906 Claimants request a stream system issue on the question: "Did the U.S. coerce the farmers into assigning their project rights to EBWUA in 1905, after it seized RGD&IC's and the farmers' project, storage, and diversion works and it put RGD&IC out of business and then forced the farmers to sign assignments of their rights under the threat of denying them delivery of their historically appropriated water from the newly built federal project if they did not sign assignments and agreements, and thus the 1905 contracts are unenforceable and conveyed no title?" [MOT 1-2]

Here movants propose another question laced with language about project storage and diversion rights and claims of improper conduct by the United States, claims that are being litigated in the Expedited *Inter Se*. Like the previous motions, they are irrelevant to the stream system issue to be designated here.

D. Pre-1906 Claimants' Motion to Set Stream System Issue Regarding Whether the Farmers Lacked Title in 1905 Sufficient to Assign Any Diversion or Storage Project Rights to the U.S.

The Pre-1906 Claimants ask the Court to designate as a stream system issue the question: "The farmers did not own any diversion and storage project rights in 1905 that could be conveyed to EBWUA due to the fact that the farmers previously agreed and did merge and align their ditches and rights into RGD&IC in exchange for reciprocal servitudes and joint ownership of the project as tenants-in-common with RGD&IC before 1900. The project storage and diversion rights were subsequently conveyed to Nathan Boyd in 1900, individually, as receiver for the debenture holders/creditors of RGI&LC, Ltd. Therefore in 1905, the farmers could not convey any project diversion and storage rights owned by Boyd, *Rio Grande Irrigation and Land Company, Ltd. v. U.S.*, Volume VI, 131,138 (1923), Reports of International Arbitral Awards, United Nations?" [MOT 1-2]

This motion, like the others in this vein, addresses the status of "storage and diversion project rights" that were conveyed to Nathan Boyd. And like the others, it relates to questions being addressed in the Expedited *Inter Se*.

II. The State Law Motion: Pre-1906 Claimants' Motion to Set Stream System Issue Regarding Whether Rented State Lands on which Water Is Used Should Be Administered Under State Laws

The Pre-1906 Claimants ask the Court to designate as a stream system issue the question:

"If there are legal claims by the N.M. land office to land which is rented to farmers who have historically developed these lands for farming, are the water rights developed by the farmers owned and administered as water rights under state law?" [MOT 1]

This proposed stream system issue appears to have no connection at all to the status of pre-Project surface water rights, and the movants offer no discussion suggesting any connection.

III. The Templeton Motion: Pre-1906 Claimants' Motion to Set Stream System Issue for Templeton Doctrine Ground Water Rights

The Pre-1906 Claimants ask the Court to designate as a stream system issue the question:

"Do the irrigators who drilled wells to supplement their surface rights have the same priority date for their supplemental well ground water claims appurtenant to their lands as their original surface right claims and should those supplemental ground water rights be included as part of their project claim?" [MOT 1] Claimants request that the Court "examine the factual basis and evidence supporting the application of the Templeton Doctrine" in determining this question. [MOT 3] They assert that "[i]t 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," citing to *Templeton v. Pecos Valley Artesian Conserv. Dist.*, 1958-NMSC-131, 65 N.M. 59, 332 P.2d 465. [MOT 4]

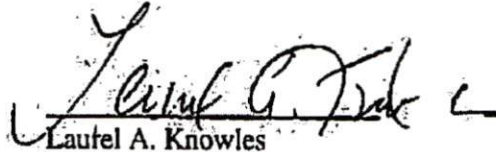
Claimants err in their characterization of the *Templeton* doctrine as granting every claimant with an historic surface water right the same priority for a diversion from a later-drilled well (a “combined right” in this adjudication). A *Templeton* groundwater diversion indeed does carry the same priority as the owner’s surface water diversion, but for distinct reasons. As summarized in *Herrington v. State*, 2006-NMSC-014, ¶11, 139 N.M. 368, 133 P.3d 258:

Templeton, 65 N.M. at 68, 332 P.2d at 471, defines a specific hydrologic circumstance where junior wells intercept groundwater that previously discharged to the surface, thereby depriving a senior appropriator of their water right. To address this circumstance, this Court in *Templeton* fashioned an equitable remedy to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well. *Id.* Through the well, the senior surface right owner can supplement existing surface supply, if any, by drawing upon groundwater that originally fed the surface water supply.

Because a *Templeton* analysis is fact-specific to each claim of interception by junior wells, the analysis must be done on a case-by-case basis to determine, among other things, whether the shortage of surface water is in fact due to a factor other than interception by juniors, such as drought. The subject of groundwater priority dates under the *Templeton* doctrine thus is inappropriate for a stream system issue. Of more importance here, however, is that the question of groundwater priority dates is in no way connected to the question of whether pre-Project surface water rights continue to exist today.

For the reasons stated above, the State opposes the six motions to designate stream system issues filed by the Pre-1906 Claimants on March 31, 2016.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Laurel A. Knowles", with a horizontal line drawn underneath it.

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