

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

Dr. Nathan E. Boyd Estate, by James
Scott Boyd, Personal Representative,
and James Scott Boyd, Individually

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DISTRICT COURT
DONA ANA COUNTY, NM

Wendy James

Plaintiff - Appellant,

vs.

No. 32119

United States, Elephant Butte Irr.
District and City of Las Cruces

Defendant - Appellee.

DOCKETING STATEMENT

Appeal from the Third Judicial District Court
CV-1996-888
The Hon. James Wechsler, District Judge

Lower Rio Grande Adjudication
Subfile No. LRR-28-099-1001
Case No. RN-0009702413
Expedited Inter se proceeding: The
Claims of the Estate of Nathan Boyd

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I. STATEMENT OF THE NATURE OF THE PROCEEDING

This appeal is from the Lower Rio Grande Adjudication in the Third District Court. Specifically, it involves the District Court's Order dated February 24, 2012 (hereinafter referred to as the "the Order") Granting (1) the United States' and EBID' and (2) the City of Las Cruces Motions to Dismiss the Claims of the Estate of Nathan Boyd. The Claims of the Estate of Nathan Boyd are identified as Stream Issue 105 in the proceeding below.

II. DATE OF JUDGMENT TO BE REVIEWED AND STATEMENT OF TIMELY FILING OF NOTICE OF APPEAL

This is an appeal of the District Court's Order Granting the U.S., EBID and Las Cruces' Motions to Dismiss in State of New Mexico ex rel. Office of State Engineer v. Elephant Butte Irrigation District, et al., CV 96-888 filed in the Third Judicial District Court of New Mexico on February 24, 2012, (hereinafter referred to as the "Lower Rio Grande Adjudication" or "LRGA"). On March 6, 2012, James Boyd filed a Motion to Reconsider the Order (hereinafter referred to as the "Motion to Reconsider"), which the Court did not consider. Boyd then filed this appeal of said Order on April 6, 2012.

III. STATEMENT OF FACTS IN THE BOYD ESTATE CLAIMS

Introduction to Boyd Claim

The Boyd Claims in the Lower Rio Grande Adjudication (LRGA) focus on over a century of litigation between Dr. Nathan Boyd, his Estate, and the U.S. Government. See United States vs Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898), and United States v. Rio Grand Dam & Irrigation Co., 184 U.S. 416 (1902).

The Dr. Boyd claims represent an ongoing battle between private property rights and local control versus Federal and State government claims of ownership and administrative control over the storage, diversion and water rights in the Lower Rio Grande Valley in New Mexico ("LRG").

The battle over the Rio Grande began when the Department of War through the 1896 Rio Grande Embargo, in effect nationalized the Rio Grande and New Mexico's control over non-navigable water ways. The basis of the federal claim is an Application Number 8 filed with the Territorial Engineer by the U.S in 1906 pursuant to the requirements of the 1905-07 Water Code. The Territorial Water Code was written by Morris Bein, an engineer who worked for

the Reclamation Service, that provided for reservation of all unappropriated water in the entire Rio Grande by the U.S. Reclamation Service in 1906.

The problem that occurred was that the rights of Dr. Boyd and his predecessor the Rio Grande Dam and Irrigation Co. ("RGD&IC") and the other existing pre-1906 water rights owners were never recognized or adjudicated. The refusal by the Engineer's Office to adjudicate the existing rights, some of which were historically appropriated before the beginning of the Territory of New Mexico and the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase in 1853 has led to a century of loss of control over their historic water rights.

Most of the in-stream flow of the Rio Grande had historically been appropriated under local private community ditches and acequias before 1896. (See 1896 Follett Report and French Survey of 1903)

The first acequia in southern New Mexico, Dona Ana Community Ditch, was constructed in 1842. There were approximately 12 ditches in the LRG in the 1890's when the RGD&IC was involved in developing its Elephant Butte Project. Dr. Boyd secured all the capital necessary to build the RGD&IC

irrigation system and by 1896 construction had begun, when the United States (U.S.) declared the December 1896 Rio Grande Embargo, by Department of War and State's administrative directives and filed suit to enjoin the further construction of the RGD&IC's irrigation system. For thirty years thereafter, Dr. Boyd defended his and the other pre-1906 owners' existing water rights in court after court.

While holding the Company up in court for almost a decade, first with navigation and treaty claims and in 1903 with an added claim of forfeiture of RGD&IC's rights, the U.S. government in 1902 ushered in a new age of national administrative control over the Rio Grande and Western State's water, thus forcing previous territory rights to be surrendered to the U.S. One of the main issues in the LRG adjudication is whether the U.S. reservation in 1906 was ever approved and legally appropriated any water and, if so, what control did the U.S. obtain over the existing water rights owners rights and RGD&IC's irrigation works for the storage, diversion and water rights of the Lower Rio Grande.

Furthermore, the State and the U.S. have collaborated for over 100 years

to prevent any adjudication of the historical pre-1906 users' rights or any challenge to any junior rights it has approved since 1906.

The District Court has delayed now for 10 years any attempt to challenge of the government's claim to public water by the pre-1906 claimants and has make decisions as to Boyd's water rights and other issues without a comprehensive investigation of the historic water rights in the LRG and giving the claimants an opportunity to present their claims in a full hearing.

Historical Claims of the Rio Grande Dam and Irrigation Company and the local community ditches pre 1896 to the Rio Grande

The U.S. Arid Lands Act of 1877 and its revision in the Act of 1891 (Fifty-First Congress Sess. II, Ch. 561, Sec 18 -21) and the 1887 New Mexico Territorial Corporation Statute (Ch. 12 Sec. 1-26 and specifically Sec 17 of the 1887 Corporation Act) and its 1891 revision, provided for the granting of easements, right-of-ways, storage rights and appurtenant water rights across and on public and private lands in New Mexico to irrigation companies that provided capital to construct irrigation works to assist the developing farming communities.

Dr. Nathan Boyd joined with the local citizens of Southern New Mexico and El Paso in 1895, to incorporate a New Mexico company named the Rio Grande Dam and Irrigation Co. (hereinafter referred to as the "RGD&IC" or "Company") in 1893 with the purpose of building an irrigation system to dam the Rio Grande just below Elephant Butte to store and deliver the vested in-stream flows and to appropriate future flood waters of the Rio Grande for storage and delivery to the farmers and local communities in the Lower Rio Grande Valley in New Mexico, El Paso, Texas and Juarez, Mexico on a more reliable basis.

Nathan Boyd was an American Doctor and an Editor of the British Medical Journal in London who was solicited as a result of Pat Garret's suggestion and a group of farmers and businessmen in the Las Cruces and El Paso area to assist in financing and building an irrigation system that would serve the agricultural and municipal needs of the Lower Rio Grande Valley in New Mexico, Juarez and El Paso. As Honorable Judge Wechsler states in his Order of Dismissal, Boyd's role was to *"serve the growing agricultural needs of the Rio Grande Valley in southern New Mexico"*.

Dr. Nathan Boyd's expertise included affiliation with financing sources in England and Australia and his involvement in building the Aswan Dam on the Nile River in Egypt and as consultant to the Imperial Project on the Ganges River in India.

To build the Elephant Butte project, Dr. Boyd formed an English company, "The Rio Grande Investment Company" in London, to sell debentures to finance the New Mexico Rio Grande Dam and Irrigation Company ("RGD&IC" or the "Company").

Boyd himself was the largest debenture holder of the English Company. RGD&IC issued stock and assigned its leases and right-of-ways to the English Company as collateral for the English Company furnishing capital to RGD&IC to build RGD&IC's irrigation system.

The Company filed the necessary affidavits required to vest title to diversion, storage and water rights under the Territorial laws of 1887 and the 1891 General Revision Act (26 Stat.1095) (hereinafter called "Irrigation Act"). Notices, applications and plans were filed by the Company in 1894, 1895, 1896, and 1897 with both the U.S. Land Office and the County Probate Clerk's Office

in Sierra and Dona Ana County. United States vs. Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898).

In 1895 the Company obtained approval from the Secretary of the Interior for federally reserved reservoir sites number 38 and 39 to construct Elephant Butte Dam and commenced construction of Elephant Butte Dam in or before 1896 and made contracts with existing ditches to deliver water from the diversions it constructed. Rio Grande Dam and Irrigation Co 174 U.S. 690 (1899)

Prior to the filing by the U.S. of an application for injunction in April 1897, the Company completed a diversion dam at Leasburg and approximately six miles of canals connecting the diversion at Leasburg to the Dona Ana, Mesilla and Las Cruces' community ditches. Boyd v. United States, No. 96-476L, slip op. (Fed. Claims Ct. April 21, 1997) (See Exhibits 6, 8 and 9 attached to Boyd's Response to Motion to Dismiss).

Upon information and belief, Boyd owns the title to water rights conveyed by the landowners who made contracts with the RGD&IC in exchange for delivery of previous appropriated and the unappropriated flood

waters for the local Mesilla communities on the LRG. Boyd presented some evidence of these contracts, including a local notification in the local paper in Las Cruces and believes that the U.S. Reclamation Bureau may have some or all of these contracts today. Further discovery is required to determine if documents still exist.

Boyd also presented affidavits in Stream Issue SS-105 evidencing that construction was started sometime in 1894 above Leasburg in the Rincon Valley on another diversion called the Percha Diversion, by constructing a heading to divert the Rio Grande through 21 miles of canals, which today still is used to deliver irrigation water to farmers in the Rincon and Hatch valleys.

Boyd also presented evidence such as a declaration made by Ted Horner, a farmer above the Leasburg diversion and former manger of maintenance for EBID, who is just one of many landowners who today claim in their Pre-1907 Declaration priority rights established by irrigation from a canal constructed by Company in 1894.

The District Court in its Order Granting the Motion to Dismiss Boyd's claims dated February 24, 2012 failed to mention or consider the above facts

and erred when it disregarded the fact that RGD&IC that vested ownership of storage, diversion and water rights and relationships with the landowners, such as Singh and Fleming's predecessors in title.

On December 5, 1896 the Department of War issued an administrative order against the RGD&IC called the Rio Grande Embargo and seized the RGD&IC works and prevented any further issuance of federal permits related to the Rio Grande other than those authorized by the Secretary of War. The U.S. Department of Interior prevented the Company from taking any further action to complete its irrigation system by denying approval of a permit in June of 1897.

It is an uncontroverted fact that the U.S.'s prevented completion of the private irrigation system by claiming the Rio Grande navigable and by physically seizing the Rio Grande and the irrigation works of the RGD&IC in December of 1896, and by court injunction in April 1897 and refusal to issue permits and, afterward engaging in lengthy litigation concerning the seizure and forfeiture issue continued until Boyd's death in 1926. The Reclamation Service took over the project on March 1st of 1903 just months before the forfeiture. Boyd fought for over 30 years both administratively and in court. The last case

was the Hague Tribunal in November 28th, 1923, styled Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbital Award, Vol. VI, pp 131-138.

Among the three decades of litigation from 1897 to 1926 there are at least four Court decisions that reached findings that RGD&IC completed or could have completed a portion of its irrigation system. U.S. District Court District of New Mexico (Albuquerque) #: 1:97-CV-00803-JAP-RLP, the original 1898 U.S. v. RGD&IC, 9 N.M. 292, 51 P. 674, the Hague Tribunal in November 28th, 1923, styled Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbital Award, Vol. VI, pp 131-138 and the U.S. Court of Claims No. 96-476L, filed April 21, 1997.

After three or four years of litigation with the U.S., as the injunction stayed in place and the U.S. lost on its arguments of navigation and treaty violation, in 1900 the RGD&IC ran out of funds and ceased operations and the assets of the Company were distributed to its shareholders and creditors.

Nathan Boyd was appointed the receiver for the debenture holders of the English Company when it went into liquidation in 1900 and the liquidator of the

English Company sold the equity of redemption in all of the company's undertaking, assets and rights to the receiver for the debenture holders (Nathan Boyd), whereupon the debenture holders became the owners of everything belonging to the English company. Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbitral Award, Vol. VI, pp 131, 135.

Since Boyd was the only person left to defend the rights and investments of the RGD&IC and a major debenture holder and receiver and shareholder of the RGD&IC, the assets and rights of the Company held by the English Company that had been transferred to Boyd as receiver were transferred to him, individually, in 1901. (See 1997 Court of Federal Claims decision attached to U.S.'s Motion for Dismissal, Boyd v. United States, No.96-476L, slip op. Fed. Court of Claims April 21, 1997). Dr. Boyd's last attempt to have his rights adjudicated in the Hague Tribunal in 1923 failed on procedural grounds (the English Company no longer owned assets so there was no international diversity because Dr. Boyd was a U.S. citizen suing the U.S., and he died in 1926.

More recent litigation by the Boyd Estate

Litigation was continued by a descendent of Dr. Nathan Boyd, James

Scott Boyd, to adjudicate the uncompensated taking of Nathan Boyd's ownership and control of the liquidated assets and water rights diversion rights and storage rights which were once owned by the RGD&IC. James Scott Boyd is the great grandson of Nathan Ellington Boyd, an intestate heir, the designated family representative of the family of Nathan Boyd, the administrator of the Estate of Nathan E. Boyd and the claimant to a majority of rights once held by Nathan Boyd ("Boyd").

James Scott Boyd in 1989, as administrator of the Nathan Boyd Estate in the Probate Court proceeding in the District of Columbia where Dr. Boyd lived at the time of his death, filed a "takings" claim seeking "damages" in the U.S. Court of Federal Claims.

After 9 years of litigation, in 1997 the Court of Claims dismissed the Boyd Estate's claims, holding that the claim was barred by the statute of limitations because the Court of Claims has no jurisdiction to hear a takings claim by fraud under the Tucker Act 28 USC § 1491 (1887) and because the six year statute of limitations began to run in 1909. Boyd v. United States, No.96-476L, slip op (Fed. Claims Ct. April 21, 1997)

The U.S. Court of Federal Claims decision did find a number of facts including that the Company had built Leasburg and six miles of canal before the Embargo was placed against the Company. The Claims court went so far as to stay the case to allow the Boyd Estate to seek a Congressional Reference which would have alleviated the limitation bar, however this was never accomplished. Having no jurisdiction the court was forced to recognize the 1903 forfeiture decision upheld by the third U.S. Supreme Court decision in 1909 as the date when the statute of limitations began to run for purposes of seeking a recovery under the Tucker Act 28 USC § 1491 for claims against the U.S. Government.

1903 forfeiture and fraud upon the court not a bar in federal court

Immediately after the 1997 Court of Claims dismissed Boyd's case for lack of jurisdiction, in order to preserve the Boyd claims, James Scott Boyd intervened in the Rio Grande Quiet Title action in January of 1998 in the U.S. District Court in Albuquerque N.M. Some of the same movant's in this case opposed Boyd's Motion to Intervene in the Rio Grande U.S. District Court quiet title case, arguing the same limitation arguments and *res judicata* claims as they made in this case in their Motion to Dismiss.

The lack of a sufficient basis for the statute of limitations and *res judicata* claims by the movant's was demonstrated in the quiet title action filed by the U.S. in 1997, U.S. District Court District of New Mexico (Albuquerque) #: 1:97-CV-00803-JAP-RLP, wherein in 1999 the federal court ordered a Settlement Conference between Boyd and the U.S. and thereafter ordered an evidentiary hearing over what rights were vested in RGD&IC and/or Boyd at the time of the 1903 forfeiture.

During the federal evidentiary hearing Boyd presented evidence that the Leasburg diversion and canal had been vested and that the Claims Court determined that Leasburg Diversion was completed and six miles of canal was a *res judicata* decision. Shortly after the Boyd claims were heard in the federal hearing, the U.S. appealed the federal case to the 10th Circuit in 1999.

The 10th Circuit Court of Appeals in 2002 in U.S. v. City of Las Cruces 289 F. 3d 1170 (10th Cir., 2002) decided that there is no other federal claims (Reclamation, Compact or Treaty) by the U.S. to the Lower Rio Grande other than under the purported Application No. 8, filed with the Territorial Engineer in 1906. U.S. V. City of Las Cruces, 2289 F. 3d 1170 (10th Cir. 2002). In 2002, it

was not brought forward by the U.S. or the OSE in the federal court that there was a fact issue whether Application No. 8 ever was approved. See Turner v. Bransford et al., D-307-CV-2010-00775- (2011).

The U.S. 10th Circuit Court of Appeals opinion affirmed the Federal District rulings, to remand the case to the Third District to adjudicate all claims to the Rio Grande in the Lower Rio Grande Adjudication.

Res judicata or statute of limitations claims as a bar to Boyd's claims

The Claims Court decision should was not a *res Judicata* decision over the forfeiture and fraud issues because it did not hold a full hearing on any of those issues. (See the below issue for argument). Also, it is not clear from a reading of the 1903 forfeiture decision what rights were forfeited under the 1891 Irrigation Act and although the 1903 New Mexico District Court assumed that service of the 1903 amended complaint was proper and a basis for its forfeiture decision and the Territorial District Court's forfeiture decision was upheld by the New Mexico Supreme Court in 1906, U.S. v. RGD&IC. 13 N.M. 386, 85 P. 393 and the U.S. Supreme Court in 1909, U.S. v. RGD&IC 215 U.S. 266 that purported to forfeit RGD&IC's claims, the actual facts throw doubt on the

sufficiency of service of the amended complaint on Dr. Boyd, who was the real party in interest in 1903. Also, at issue in State v. Diamond, No. 4294 (N.M. Ct. App., filed February 7, 1980) is whether a Court holding a summary proceeding was proper where an attorney failed to appear in court at the time designated by the judge.

The 1906 decision by the N.M. Supreme Court described in detail how the default of RGD&IC's rights resulted from the five year forfeiture provision under the 1891 Act. A few excerpts from this opinion are as follows:

" The record shows that upon the same day the supplemental complaint was filed the same was served upon A. B. Fall, Esq., one of the attorneys of record of the appellants. On the 21st day of May, and 44 days after the supplemental complaint was filed and served upon appellants' counsel, no answer or other pleading being filed, the court rendered the following decree of forfeiture and injunction, in favor of the appellee: "

And continues: "the Rio Grande Dam & Irrigation Company(plans), were filed with the Secretary of the Interior prior to the 26th day of June, A. D. 1897, and were prior to said date approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir . . . {the} reservoir and ditch line of the defendants had long since lapsed prior to the filing of the said supplemental bill, and that the defendants had not compiled with the requirements of the act of Congress. . . under which the same were filed, but has failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same.

Whereof, it is ordered, adjudged, and decreed by the court that the rights of the said defendants, or either of them, to construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said act of Congress of March 3, 1901(1891), be and the same are hereby declared to be forfeited. It is further ordered, adjudged, and decreed by the court by reason of the premises that an injunction be, and the same is hereby granted, against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual.”

An examination of the 1906 decision’s description of the 1903 Forfeiture Decision proceedings demonstrates that the 1903 decision did not render a final determination of the following issues: 1.) Whether the building of Elephant Butte Dam hindered the navigable capacity of the Rio Grande downstream in Texas as the bases of the U.S. injunction under the 1890 Rivers and Harbors Act required persons who intended to obstruct navigable waterways to obtain approval from the Secretary of War, 2.) What if any storage, diversion and water rights were vested in RGD&IC under the existing U.S. and Territorial statutes by the completion of Leasburg and other diversions prior to the injunction in 1897, 3.) Whether the decision in Sierra County relating to the Elephant Butte Dam reached any works in any other county and 4.) Whether the U.S. should have been collaterally estopped from seeking the forfeiture of all of RGD&IC’s

works by its fraudulent behavior in interfering with RGD&IC's completion of its works and conspiracy to defraud Boyd.

With historic hindsight it now appears that the U.S.' claims that RGD&IC's dam at Elephant Butte created an impediment to downstream navigation was a ruse to gain control over Boyd's approved and vested works, because as a permanent trespasser, the U.S. dammed the Rio Grande 20 years later at the same spot by building a dam twice the size as the RGD&IC dam costing the landowners 20 times as much and a diversion dam already existed at Juarez, Mexico in 1896.

Newly discovered evidence of fraud upon the court

After the 1997 decision in the Court of Federal Claims, Scott Boyd while researching the National Archives found evidence that the forfeiture decision in 1903 was orchestrated by the attorneys for the RGD&IC, A.B. Fall and Hawkins, in concert with U.S. attorney for New Mexico, W. B. Childers, and possibly with the cooperation of the Third Judicial District Court Judge Frank Parker, by the filing of an Amended Complaint in the Fifth District in Sierra County and serving it on RGD&IC's attorney, A.B. Fall, in open court (possibly

a lie by Parker) and then by A.B. Fall letting the thirty day answer period run without filing an answer, which triggered the entry of a default judgment against RGD&IC that ordered the forfeiture of its rights and works in Elephant Butte Dam. Judge Parker's then prevented RGD&IC's from re-opening the case to take evidence in October of 1903. There never has been a hearing on what was vested or forfeited by the 1903 default forfeiture.

The newly discovered evidence proves that the RGD&IC's attorneys conspired with the U.S.' attorney (See Exhibit 10 attached to Boyd's Response to the Motion to Dismiss) to forfeit the Company's rights by preventing RGD&IC from answering the Amended Complaint filed by the U.S. in 1903. It is apparent that District Court Judge Parker was also part of the scheme to default Boyd's rights.

This issue of collateral fraud was discovered after 1997 which raises another newly discovered fact of whether the 1903 Forfeiture Decision should be overturned based on collateral fraud and thus whether it should have been a res judicata decision. (See Issue Six below).

No court has ever reached a final judgment on the issue of whether the

obstruction at Elephant butte would diminish navigation at the mouth of the Rio Grande in Texas, or whether the RGD&IC already owned right-of-ways and water rights by compliance with the General Revision Act (26 Stat.1095) "Irrigation Act" and other statutes or whether the forfeiture of rights-of-way for construction just below Elephant Butte forfeited the already vested rights at Leasburg or whether the 1903 Forfeiture Decision was obtained by collateral fraud or whether the U.S. by its seizure created a constructive trust to avoid its unjust enrichment, which is inherent in its seizure that made the U.S. a fiduciary responsible for RGD&IC's rights.

Conversely, there was a determination sufficient for treatment as res judicata or collateral estoppel reached after a full trial on the merits and confirmed by New Mexico's Supreme Court that found that the Rio Grande was not navigable and the navigation claim of the U.S. was without merit and the RGD&IC had a rightful claim to its Elephant Butte rights of way. United States vs Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674, 676 (1898)

Neither the 1903 decision, the Claims Court decision in 1997, or the District Court in its February 24th dismissal of Boyd's Claims considered

whether the U.S preventing the Company from completing the irrigation system that the Company commenced in 1894 was collateral fraud or whether RGD&IC had the right under the Mendenhall doctrine, referring to State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (1961) to complete its works because the U.S. prevented RGD&IC from completing its works when the U.S. seized the RGD&IC's works or whether the U.S. should be burdened by a constructive trust in favor of the pre-1906 appropriators or barred by collateral and judicial estoppel from filing a Motion to Dismiss in this adjudication.

It is evident that the U.S. seized the RGD&IC's works by fraud and did not obtain a legal permit under New Mexico law to appropriate water and does not hold historic beneficial uses to appropriate water in the LRG, so does not have the necessary standing to file a Motion to Dismiss in this case.

The Application No. 8 claimed in 1906 by the U.S. as the basis for its claim to the project was never approved. (See S.E. Herbert Yeo's letter dated March 23, 1927 to Bureau of Reclamation, Exhibit 12 to Boyd's Response to Motion for Dismissal) and today there is no permit in file No. 8. (See Turner v. Bransford et al. Case no. D-307-CV-201000775- (2011)).

The RGD&IC's rights were first adjudicated by the N.M. Supreme Court in its 1898 decision in United States v. Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898) which held that the Rio Grande is not navigable above El Paso and that the injunction by the U.S. was not valid, which is a *res judicata* decision that confirmed the RGC&IC's rights of way at Elephant Butte, but the U.S. Supreme Courts reversed two decisions in RGD&IC's favor to provide the U.S. additional time to gather additional evidence until the forfeiture scheme was sprung in 1903. If the court system ever lets the history of the U.S.'s actions regarding the LRG to ever be examine it will show that the U.S. has unclean hands in its claims to the Rio Grande and no legally vested rights.

IV. STATEMENT OF THE ISSUES

Issue One – The Court erred when it found on page 9 of its Order that “Boyd Estate’s claims specifically reference existing works that it does not own.”

Argument – The Court’s failure to accept as true and find that Boyd held title to the property rights in the works and the storage, diversion and water rights associated with the RGD&IC’s Rio Grande Project, is the main issue in the case.

The Hague Tribunal settled the issue of Boyd's claim to the RGD&IC when the U.S. relied as their defense against Boyd's claim on the fact that the English Company transferred all ownership rights to the assets of the RGD&IC to Dr. Boyd when the English Company was liquidated in 1900. Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbitral Award, Vol. VI, pp 131-138, November 28, 1923. In 1901, when RGD&IC was liquidated, all the shares of RGD&IC were transferred to Boyd, who then, as sole shareholder of the defunct RGD&IC, owned all the property rights of the RGD&IC.

So the remaining underlying question is did Nathan Boyd, individually, own any vested property or water rights at the time of the illegal seizure by the U.S. in 1903 because those rights are now own by James Boyd.

If the RGD&IC was vested with the rights to the storage, diversion and water rights associated with the irrigation system that it commenced under existing law then Nathan Boyd owned those rights, individually beginning in 1901. Boyd was not served, personally in 1903, when the U.S. through litigation and conspiracy with the Company's attorneys and collateral fraud took those works and water rights without due process of law or just compensation to

Boyd and contrary to Sections 7 and 8 of the National Reclamation Act, chap. 1093, 32 Stat. 388 (June 17, 1902), then the Boyd Estate and James Boyd individually, still own those rights. Farmers' Development Co. V. Rayado Land and Irrigation Co 28 N.M. 357, 213 P. 202, 206 (N.M. 1923)

Water rights in New Mexico can not be appropriated through adverse possession or fraudulent alteration of deeds of title. Turner v. Bassett, 2003-NMCA-136, 134 N.M. 621 (2005) and Mosely v. Magnolia Petroleum Co. 45 N.M. 230, 114 p. 2d. 740 (1941). Water rights must be appropriated in accordance with state law, U.S. V. City of Las Cruces, 2289 F. 3d 1170 (10th Cir., 2002), and all property rights must be acquired by the U.S. through due process of law and just compensation under the 5th and 14th Amendments of the U.S Constitution and Article II, Section 20 of the New Mexico Constitution.

The underlying question to the Boyd's historical claim was asked by the Court of Robert Simon in the first hearing on the Motion for Dismissal on August 8, 2011; "Is your client making a claim to the works?" Robert Simon did not answer in open Court but Boyd filed its Motion for Leave to Clarify and Correct the Record on October 26, 2011, that pled facts in great detail about

how the RGD&IC established its ownership and how the U.S. seized and dispossessed Boyd from the works, and that the answer to the Court's question was, "Yes" that demonstrated that Boyd has a relationship of interests in the LRG, including right-of-ways at Elephant Butte that may or may not have been forfeited, which is still an issue before the court that has never been answered.

Boyd's Claims today rest upon that the fact that the historical water and property and right-of-ways are held by the U.S. in a constructive trust, in the absence of Boyd's possession, due to the seizure of the Company's works by the U.S. and possession by the U.S.' continuing trespass without compensation for over 100 years beginning with the War Department's Embargo in 1896 and the Department of Justice injunction in 1897, and the U.S. Reclamation Service's claim beginning in March 1, 1903, and the Territorial Engineer's administrative control based upon the U.S.' application for all public water in 1906.

A delay caused by litigation and efforts by an irrigation company to obtain a right-of-way for irrigation ditches and reservoirs is not a ground for forfeiture of water rights. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (N.M. 1961) In such proceedings, instead of showing an

abandonment or forfeiture, the company's defense in litigation indicates that the company was fighting to complete the project. (In. Re. Willow Creek, 74 Ore. 592; 144 P. 505; 1914).

Secondary Argument --The second argument in this case is whether there has been any court decisions sufficient to satisfy *res judicata* or the statute of limitations in the last 100 years that determined that the RGD&IC and or Boyd did not own the property and water rights to which he became vested in 1900.

The Boyd Estate demonstrates in its pleadings, exhibits and reference to court cases below that there has never been a determination by any court that the taking by seizure by the U.S. of the project rights of the RGD&IC and/or Boyd was free of fraud. See United States vs Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898), Rio Grande Dam and Irrigation Co 174 U.S. 690 (1899), Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbitral Award, Vol. VI, pp 131-138, November 28, 1923, United Nations; James Scott Boyd v. U.S., No. 96-476L, April 21, 1997, Fed.Cl.Ct. Likewise, there are no decisions that upheld a taking by the U.S. in which Boyd had the opportunity to present his defense of his rights in a due process hearing

on its merits holding that the U.S. divested or forfeited the RGD&IC's property rights and/or right-of-ways to the Rio Grande.

The first case after the Hague Tribunal and Nathan Boyd's untimely death in 1926, was the Federal Claims Court, which in Boyd v. United States, No.96-476L, slip op (Fed. Claims Ct. April 21, 1997), denied Boyd's claim on the grounds that the six year statute of limitations had run commencing in 1909 and that the forfeiture decision was affirmed in 1909 by the U.S. Supreme court in U.S. vs. RGD&IC 215 U.S.26 but without considering whether the U.S. was guilty of collateral fraud.

The disputed issue now before this court is did the Territorial district court, the Federal Claims Court or the U.S. Supreme Court in 1909 ever make a final decision regarding water rights or forfeiture of water rights other than on procedural grounds that provided Boyd the opportunity to present a defense of his property rights. For there to be a *res judicata* decision it must be upon the merits and be based upon a due process of law hearing. Rosette v. U.S. et al., 2007-NMCA-136, ¶39,142 N.M. 717, 169 P.3d 704. Because the U.S. Court of Federal Claims' decision granted the U.S.' Motion to Dismiss Boyd's Complaint

for lack of subject matter jurisdiction, it never gave Boyd the opportunity to present its evidence of the collateral fraud by the U.S. and its decision did not make a finding over water rights and whether the forfeiture could reach any vested rights-of-way such as Leasburg. Since the U.S. Court of Federal Claims' decision never determined the issues of ownership, its decision did not stat any statute of limitations running or settle the issue of ownership sufficient to be a res judicata decision and the issue of ownership still must be considered.

U.S Attorney Lee Lieninger conceded in 1999 before Chief Magistrate Judge William Deaton in the U.S. quiet title case in a hearing over the Leasburg diversion, that the 1903 forfeiture decision could not reached to water rights that were vested, as there was never any decision in any court to that issue. The 1903 forfeiture decision could never have reached to the issue of what property rights were vested, as there was never any decision in any court over the water rights under the existing territorial water law in 1896, which issue is still in dispute and needs to be adjudicated, as well a the issues of whether the actions of the U.S. between 1897 and 1909 constituted collateral fraud and whether there was fraud upon the court in the 1903 Forfeiture Decision.

Boyd's claim of title and interest in the storage, diversion, and water rights is not necessarily tied to actual physical possession or current beneficial use of the works as stated by the District Court as a reason for dismissing Boyd's claims of title and ownership to water under 72-1-2 NMSA. In 1896 diversion itself was beneficial use and by having the approved plans and permits and having filed the appropriate affidavits under Chapter 12, Corporations, of the Territorial Acts of 1887, the RGD&IC had legal title to the works and right-of-ways and under the Mendenhall Doctrine the right to complete its works when the U.S. interfered with their completion by collateral fraud. If someone steals your car and you are deprived of the use of it, that doesn't mean that they have obtained legal title to it.

If Boyd's ownership has been subjected to a continuing trespass by the U.S., as Boyd argues, then Boyd owns the property rights that were vested in RGD&IC, even though the U.S. dispossessed Boyd by trespass, accompanied by collateral fraud, as a result of litigation since 1897 and entry by force, by a never proven claim of navigation and declaring the Rio Grande Embargo in 1896 and never complying with the laws of New Mexico or the Reclamation Act of 1902.

Boyd pleaded that the ability of private citizens to vest ownership of storage and diversion rights under the Act of Congress of March 3, 1891 was confirmed by Secretary of Interior Work in his letter to the Commissioner of the General Land Office dated May 20, 1925 (See Exhibit 24 attached to Boyd's Response to the Motion to Dismiss), wherein he stated,

"The approval of rights of way over public lands for dams and canals is pursuant to the Act of Congress of March 3, 1891, which the Secretary of the Interior has no legal right to suspend or defeat. Grants under that act are not grants of water, but simply rights of way to use and occupy public lands. Water must be appropriated under State laws, and under those laws priority in appropriation and use controls."

Thus Boyd pleaded facts that show that there is an issue of fact whether Boyd owns property rights and the District Court erred when it stated "Boyd Estate's claims specifically reference existing works that it does not own."

Issue Two:

The District Court's February 24, 2012 Order erred by not accepting as true the well pled facts by Boyd.

This issue was raised in many of the pleadings filed by Boyd, including pages 12 through 24 and pages 33 through 35 of Boyd's Response to the Motion

to Dismiss and Exhibits 6, 8, 9 and 16 attached to Boyd's Response to the Motion to Dismiss and pages 1 through 20 of Boyd's Motion to Re-consider.

Argument-- The Boyd Estate showed that the RGD&IC appropriated water, storage and/or diversion rights under the Territorial Laws of 1887 Chapter XII, Corporations and the U.S. Act of March 3, 1891 and that the U.S. was guilty of collateral fraud by its actions to prevent RGD&IC from controlling and completing its works within the five year period provided in Section 20 of the Act of March 3, 1891 and defaulting RGD&IC's vested rights by preventing it from filing a timely defense against the U.S.' Amended Complaint in the 1903 forfeiture case.

Among the facts pleaded by Boyd were that:

On October 19, 2001, the State Court of New Mexico entered a decision (see N.M. Court of Appeals Nos. 20294 and 22600 State of N.M. vs. LT Lewis and U.S.) concerning priority of water rights claims of members of the Carlsbad Irrigation District in the Pecos Adjudication, on pages seven and eight of which it states;

"Under the Authority of the Reclamation Act 1902,....the United States

purchased water rights and appropriated the waters of the Pecos River for the CID... In Dec. 18, 1905 a Warranty Deed, the Pecos Irrigation Company conveyed to the United States fee simple title to certain land, and, real estate, the irrigation system together with all water rights owned or claimed by Company...see Statement of Claims(by U.S.)....Thus all the water rights owned or claimed by the Pecos Irrigation Company were conveyed to the U.S."

That a threshold issue in the LRGA is how did the U.S. gain its alleged project water rights. Boyd pled that, unlike in the Pecos Adjudication above where the farmers were always under a legal federal project beginning in 1906, the U.S. seized the irrigation rights on the Rio Grande vested in the Rio Grande Dam and Irrigation Company, by a never proven navigation treaty claim and not through purchase.

The District Court arbitrarily and capriciously made its ruling by avoiding the facts pleaded by Boyd regarding the completion by the RGD&IC of works and water and project rights and the evidence demonstrating that the U.S. was guilty of collateral fraud designed to forfeit Boyd's rights and that there was a conspiracy to forfeit Boyd's rights in the 1903 judgment by default that included fraud by the RGD&IC's attorneys and the court.

The test to be applied in determining whether to grant a motion to dismiss

a complaint is to accept as true for the purposes of the motion, all facts well pleaded and question only whether plaintiffs might prevail under any state of facts provable under the claim. Groendyke Transp. Inc. New Mexico St. Corp. Com'n 85 NM 718, 516 P.2d. 689 (1973).

The main reason given by the District Court for granting the Motion to Dismiss Boyd's claims to water in the case below was that Boyd did not own any works and had not exercised any control of any works in over 100 years. (Page 8, line 16). We disputed this finding by the court in Boyd's Motion to Reconsider, as control over works is not a requirement for ownership under the law for owners of storage and diversion rights. As 72-1-2 NMSA states:

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water. . . , except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water. . . In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use".

Boyd pleaded and proved by exhibits that RGD&IC owned approved right-of-ways for Elephant Butte and had filed the appropriate affidavits to vest title to easements for right-of-ways and had completion works at Leasburg and

had commenced construction at Elephant Butte Dam, and pursuant 72-1-2 NMSA, the RGD&IC had contracts for delivery of existing and newly appropriated water to the community ditches of Dona Ana, Las Cruces, Mesilla for beneficial use was constructing the Percha diversion in the Rincon-Hatch Valleys and the Santo Tomas diversion where today's Mesilla dam is located and had completed Leasburg connecting to the three main acequias in Mesilla. United States vs Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898), Boyd v. United States, No.96-476L, slip op (Fed. Claims Ct. April 21, 1997) and Exhibits 6, 8, 9, and 16 attached to Boyd's Response to the Motion to Dismiss.

The Boyd claims state that the RGD&IC did own vested water rights under Chapter XII, Ch. 12, Corporations, New Mexico Territorial Laws of 1887 and Corporations, Irrigation, Sections 467 – 494, New Mexico Territorial Laws of 1891 and did own approved rights-of-ways under the 1891 General Revision Act (26 Stat.1095) and had received approval for the construction of Elephant Butte Dam and Reservoir from the Secretary of Interior when the U.S. seized the works.

If these facts are accepted as true, then Boyd presented enough facts to overcome the Motion to Dismiss by raising many issues of fact, not the least of which is whether or not the 1903 forfeiture of Boyd's right was accomplished by the U.S by collateral fraud and unclean hands, and whether judicial estoppel and *res judicata* should have barred the Motion to Dismiss.

When facts are well pleaded, the court has a duty to allow the claimant to develop its facts. In U.S. v. Rio Grande Dam and Irrig. Co., 184 U.S. 416, 423 Judge Harlan stated, "*If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have the power to forebear a determination of the merits and remand the cause for further preparation.*"

Justice Harlan's supports his decision on this point with the well established legal rule that when the record is not fully prepared that the court should **forebear until the facts are fully prepared**, citing Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

The District Court erred when it did not allow Boyd to develop the facts to prove that the U.S.' use of navigation and treaty claims and the 1903 Forfeiture Decision were all part of a scheme of collateral fraud and equitable grounds exist to this day to overturn the 1903 Forfeiture Decision, especially since the newly discovered facts of the U.S.' after 1997 that show a conspiracy.

Likewise, there was a genuine issue of fact whether the Territorial District Court in the Forfeiture Decision in 1903 erred in its reading of Section 20 of the of the federal 1891 Act (the General Revision Act; 26 Stat.1095) or intended to forfeit only the RGD&IC works in Sierra County an not those completed sections in Dona Ana County such as Leasburg. Section 20 of the federal 1891 Act (the General Revision Act; 26 Stat.1095 states:

"Provided, that if any section of said canal or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any "uncompleted" (emphasis added) section of said canal, ditch or reservoir to the extent that the same is not completed at the date of the forfeiture."

The District Court should have addressed the issue whether the U.S. simply used the 1903 decision as a pretext to seize all of Boyd's works including its vested water rights and is now attempting to gain a water right

decision in this adjudication by avoiding consideration of all the facts regarding the U.S. interference with RGD&IC completing its works.

Lack of possession and use by Boyd for over one hundred years is not a valid basis to bar its ownership claim in the Lower Rio Grande adjudication when he has not been allowed a legal remedy in the past. In New Mexico water law "*Our statutes recognize the unfairness in loss of water right through nonuse where conditions beyond the control of the owner of such right prevent use*". (Chavez v. Gutierrez, 54 N. Mex. 76, 82, 213 Pac. 2d 597, 1950).

The Supreme Court of New Mexico in State of New Mexico v. South Springs Co., et.al, 80 N.M. 144; 452 P.2d 478 (1969), held that "*because when the "State Engineer claims abandonment or forfeiture of water rights, it [bears] the burden of proof as to that issue*".

A delay caused by litigation and efforts by an irrigation company to obtain a right-of-way for irrigation ditches and reservoirs is not a ground for forfeiture of water rights: Such legal proceedings, instead of showing an abandonment, indicate that the company is fighting for the purpose of carrying forward the project. Farmers' Dev. Co., v. Rayado Land & Irrign Co., 28 N.M.

357, 213 P. 202 (N.M. 1923), In Re Willow Creek, 74 Ore. 592; 144 P. 505; 1914.

In Montgomery v. Lomos Altos, Inc., 141 N.M. 21, 2007 NMSC 2; 150 P.3d 971; 2006, the Supreme Court of New Mexico stated that “*Our water law statutes recognize that a surface water right will not be forfeited when the reason for nonuse is beyond the water right owner's control*”.

With so many disputed facts still unresolved on the merits, it was appropriate for the District Court to deny the Motion to Dismiss. Gardner-Zemke Co. v. State, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990), states to that end, “[a] motion to dismiss is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists”.

Issue Three:

The District Court erred to consider that the U.S.’s interference with RGD&IC’s completion of its private irrigation system by filing an injunction and the administrative Rio Grande Embargo filed under a false navigation and treaty theory and taking possession of RGD&IC’s works by continuing trespass and collateral fraud upon the court were sufficient actions to trigger the

Mendenhall Doctrine. Referring to Reynolds V. Mendenhall, 68 N.M. 467, 362 P.2d 990 (N.M. 1961).

This issue was raised in many of the pleadings filed by Boyd, including pages 12 through 17 of Boyd's Response to the Motion to Dismiss Submitted by the U.S., EBID, Las Cruces and the Responses of the State of New Mexico and NMSU in Support of the Motions to Dismiss and Exhibits 5, 10, 17, 18, 19, 21, 22, 23, 24, 25 and 26 attached to Boyd's Response to the Motion to Dismiss and pages 8 through 43 of Boyd's Motion to Re-consider and Exhibits 31, 32, 33, 34, 36, 37 attached thereto.

Argument--The treaty obligations to Mexico and compact obligations to Texas claimed by the U.S. in 1897, and the treaty obligations claimed by the U.S. in 1906 and by the Reclamation Bureau were discredited in United States v. Rio Grande Dam and Irrigation Co. et al., 9 N.M. 292, 51 P. 674 (1898) and the 10th Circuit Court of Appeals decision, U.S. v. City of Las Cruces, 289 F.3d 1179, 1185, as not a basis on which the U.S. can claim water rights..

The Territorial District Court in the 1903 Forfeiture Decision and the District Court's decision in the present case should have provided equitable

relief to RGD&IC and/or Boyd based upon the known facts that the U.S.' actions preventing RGD&IC from completing its works for more than five years, and then raising the five year completion prohibition in Section 20 of the Act of March 3, 1891 constituted collateral fraud. Especially since it now appears from the U.S.'s claim of rights filed in this adjudication to the State of New Mexico's Offer of Judgment that the U.S. today claims that its storage dates from 1890. So apparently as early as 1890 the U.S intended to build the Rio Grande Project and thus all of its actions and allegations since 1890, including its 1897 complaint for injunction against RGD&IC for obstruction of navigation, are evidence of long term scheme of collateral fraud and interference with RGD&IC's efforts to complete its irrigation works.

The only final adjudication on the issue of navigation ever rendered after a full hearing on the merits was entered in the original Third District Court, which denied the U.S.' application for an injunction that found that the Rio Grande throughout its length in New Mexico is not navigable. The Third Judicial District Court finding was confirmed on appeal by the New Mexico Supreme Court. U.S. v. RGD&IC, 9 N.M. 292, 51 P. 674 (1898).

The 1898 N.M. Supreme Court decision was reversed by the U.S. Supreme Court. U.S. v. RGD&IC, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1898) and remanded for further findings on the issue of whether the navigable capacity of the Rio Grande would be diminished downstream by construction of the Elephant Butte Dam.

After another trial on the issue of navigability of the Rio Grande that the U.S. also lost in the New Mexico's court, the merits decisions were reversed again by the U.S. Supreme Court, U.S. v. RGD&IC 184 U.S. 416 (1902) and remanded to grant the U.S. another trial. There never was another trial. Instead in 1903 the U.S. attorney for New Mexico and the corrupted members of the New Mexico Irrigation Commission and RGD&IC's attorneys (See Exhibits No. 10 and 18 attached to Boyd's Response to the Motion to Dismiss) colluded to forfeit the RGD&IC's rights, first through an attempt through legislation, and then by a conspiracy in a court proceeding whereby the U.S. filing an Amended Complaint and then having the Company's attorneys default by not answering the amended complaint U.S. alleging the failure to complete its works within five years as required by Section 20 of the Act of Congress of March 3, 1891,

rather than proceeding to litigate a third time its previously unsuccessful obstruction to navigation theory.

The District Court below chose not to explore the facts that established collateral fraud by the U.S.'s actions from 1897 through 1909. Rutherford v. Buhler, 555 P2d. 715, 89 N.M. 594 (N.M. App., 1976), Gonzales v. Surgidve Corp., 120 N.M. 151, 899 P2d. 594 (N.M. 1995). The Court erred when it chose to look for simple fraud, rather than collateral fraud, in the statements contained in the Exhibits produced by Boyd and found none. The Court on Page 16 stated, *"The facts as presented by the Boyd Estate, however do not establish even a single element of fraud. The Boyd Estate has not demonstrated that Hawkins' communication with Childers included a misrepresentation or that Hawkins subsequent communications with Boyd included a material misrepresentation that induced Dr. Boyd's reliance."* See Order Granting Motion to Dismiss, page 16, lines 18-21. The Court chose not to recognize the actions when RGD&IC's attorneys sold him out by not answering the amended complaint and offering his defense and went along with the forfeiture of Boyd's rights constituted collateral fraud.

Thus, the District Court applied the wrong fraud theory to the wrong facts by looking at the statements made by the Company's counsel to a co-conspirator engaged in the fraud in 1903, the Court should have analyzed whether the actions taken by all the conspirators, Childers, Hawkins and Fall and possibly Judge Parker identified in U.S. v. Rio Grande Dam and Irrig. Co. cases 1906, U.S. v. RGD&IC. 13 N.M. 386, 85 P. 393 and the U.S. Supreme Court in 1909, U.S. v. RGD&IC 215 U.S. 266 in 1903, were a conspiracy to prevent the Company from answering the complaint to effect a default and forfeiture of the RGD&IC's rights.

The documents James Boyd discovered in the National Archives after the Claims Court decision in 1997 proved that the two lawyers were upset that they had not been paid for past work.

It appears from the documents that the RDG&IC and U.S. attorneys entered into a conspiracy to defraud Boyd of his property rights by forfeiture.

C & H Const. & Paving Co., Inc. v. Citizens Bank, 597 P.2d 1190, 1199, 93 N.M. 150, 159 (N.M. App., 1979) stated:

“Those principles for establishing a conspiracy were stated by this Court in Morris v. Dodge Country, Inc., 85 N.M. 491, 513 P.2d 1273 (Ct.App.), Cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973):

“For a conspiracy to exist there must be a common design or a mutually implied understanding; an agreement.

“A conspiracy may be established by circumstantial evidence; generally, the agreement is a matter of inference from the facts and circumstances, including the acts of the persons alleged to be conspirators. (Cite omitted.) The question is whether the circumstances, considered as a whole, show that the parties united to accomplish the fraudulent scheme. Id. at 492, 513 P.2d at 1274.”

Those who conspired benefited by cooperating with the U.S.. A. B. Fall became one of New Mexico's first U.S. senators. Parker was elevated to the N.M. Supreme Court and Justice McKenna was appointed a Justice on the U.S. Supreme Court where he would author the Winters decision asserting a reserve right in favor of the U.S. in 1908, one year before the final US RGD&IC case was decided by the U.S. Supreme Court in 1909 and the U.S. got control of the Rio Grande without having to pay just compensation. Senator A.B. Fall in 1924 was appointed Secretary of Interior until he became the first serving U.S. Cabinet Secretary to be found guilty of bribery and sentenced to prison for his actions in the “Teapot Dome Scandal”.

Judge Hernandez in his concurring opinion in Rutherford v. Buhler, 555 P.2d 715, 719-720, 89 N.M. 594 (N.M. App., 1976), citing the case of Chisholm v. House, 160 F 2d. 632 (10th Cir. 1947), stated the following:

'Equitable relief from a judgment may be obtained on the ground of extrinsic or collateral fraud. Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdrawn a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Where, however, the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts [89 N.M. 599] pertained to an issue involved in the original action and litigated therein, the fraud is regarded as extrinsic.'

The actions taken by the U.S. and Boyd's attorneys, Hawkins and Fall, and the court itself, to prevent RGD&IC from filing an answer to the U.S.' Amended Complaint in the 1903 Forfeiture case prevented RGD&IC "from presenting its defense". Such action fits squarely within the definition of collateral fraud. Rutherford v. Buhler, Ibid at p. 719. The Court's 1903 ruling several months before the forfeiture was filed that no other interests could intervene appears to have been part of the forfeiture scheme, also (See Exhibit 11, Boyd's Response to Motion to Dismiss).

As Judge Hernandez noted in Rutherford v. Buhler, Ibid. 719, the co-conspirators' actions relating to the manner in which the default and forfeiture were procured constituted the collateral fraud and not any representations between co-conspirators, as the District Court finds in its analysis at page 16.

The facts surrounding the 1903 forfeiture are the most significant facts in this appeal because they are the facts on which the forfeiture of RGD&IC's rights rests. If this Court's examination of the facts and the record leads it to conclude that the facts as alleged by Boyd fit the definition of collateral fraud, then this Court should reverse of the District Court's Order Granting the Motion to Dismiss.

Issue Four:

The Court failed to recognize that the RGD&IC, as owner of the storage and delivery rights by which water is conveyed shares a common relationship through contracts with the farmers and community ditches and towns that are the beneficial users of the water delivered to them and all share in the project rights and hold a common interest in the administration and control of their

shared water rights, storage, delivery and other beneficial use rights under the prior appropriation doctrine, which rights could not be subjected to *res judicata* without all claims being heard in one proceeding. (See State Engineer's legal position on *res judicata* water rights in the San Juan adjudication)

Second Reason - No comprehensive investigation of all water uses, including pre-1907 water uses has been done in this case as required by New Mexico law.

This issue was raised in Boyd's Motion to Reconsider, pp. 37-42.

Argument: Water rights adjudications are governed by New Mexico law and the Court should have ordered the New Mexico State Engineer to perform a comprehensive investigation of historic water uses and existing rights having a priority date before the U.S' purported 1906 application No. 8 and allow them to prove their claims before dismissing Boyd's claims. U.S. v. City of Las Cruces, 289 R.3d 1170, 1191 (10th Cir. 2002). Sections 72-4-13 et seq. (NMSA 1978).

Instead of inventorying the pre-1906 rights to determine the priority dates of each water use as is required by New Mexico law Sections 72-4-13 et seq. (NMSA 1978), the State Engineer has made an offer of Judgment to the U.S., the Row Croppers and Pecan farm groups that grants to the U.S. all the priority

rights to the Rio Grande Project without regard to the fact that historically a majority of the rights covered by this adjudication vested before the U.S. ever filed its application No. 8 in 1906. See U.S. v. Rio Grande Dam and Irrig. Co, 9 N.M. 292, 51 P. 674. Section 72-4-13 NMSA 1978, which requires the State Engineer to make a comprehensive investigation of all water uses and Section 72-4-29 NMSA 1978, which requires the Court to include in every decree the priority date of each right.

Tri-State Generation vs. John D'Antonio Jr., 2011-NMCA-014 August 31, 2007 this court recognized that only after an adjudication can the OSE exercise administration over priority rights. Tri-State, Ibid held that the court's role is to enforce the priority rights to even the State Engineer's permits, and determine if there is water available to appropriate under a permit. Tri-State, Ibid. states at ¶12:

{12} Additionally, permits and licenses by necessity identify usage elements. . . . They also incorporate a priority date. See NMSA 1978, § 72-5-3 (1941). The licensing, permitting, transfer, and forfeiture statutes also, as we have stated, require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights”.

Singh and Fleming are the successors to farm lands with historic

beneficial uses of water predating 1906 and the priority of and availability of their water rights are important to their farming operation. The Court and the State Engineer should be ordered to follow the law and recognize that the Prior Appropriation Doctrine applies to this adjudication. Farmers' Dev. Co. v. Rayado Land and Irrig Co, 28 N.M. 367, 213 P. 202 (1928)

In U.S. v. City of Las Cruces, 289 F.3d 1170, 1191 (10th Cir. 2002) the court held that,

"...[T]he United States and Texas parties fail to acknowledge the reality of water rights disputes in the West. Thousands of individuals claim water rights that depend on the resolution of the claims of others. The situation has long been recognized as demanding a comprehensive adjudication of all users' claims." Citing El Paso and R.I Ry. Co. v. District Court 36 N.M. 94, 8 P.2d 1064, 1067 (1931).

There is a long history of U.S. efforts to take control of the Rio Grande away from the local beneficial users and owners of the rights to divert the Rio Grande. Approximately one month before the U.S. filed its Amended Complaint, the Territory of New Mexico filed its Motion to Intervene on behalf of the people of New Mexico in the pending U.S. vs RGD&IC case in the Territorial Third District Court in 1903 (See Exhibit 11, Boyd's Response to

Motion to Dismiss).

Then District Court Judge Parker, who denied the Territory's motion to intervene, had been appointed by President Theodore Roosevelt, whose administration and cabinet were already firmly embarked on taking control of the Rio Grande for the benefit of a few political insiders from Texas, one being Max Weber.

This Court should order the District Court to follow New Mexico law and to examine whether the U.S. obtained its claimed project rights in accordance with New Mexico and federal laws and in accordance with New Mexico's Prior Appropriation Doctrine, Farmers Dev Co, v. Rayado Land and Irrig. Co. , 28 N.M. 357, 213 P. 202 (N.M. 1923), Snow v. Abalos et al., 18 N.M. 681, 140 P. 1044, No. 1626 (N.M 1914)

If this Court does not correct the history of property rights in this adjudication, Dr. Boyd will have lost his investment and the farmers will have lost their historically appropriated water rights and control over their property and irrigation works, but New Mexico will have lost its control over the Rio Grande to Washington.

The U.S., OSE and EBID have attempted to separate the Boyd/RGD&IC claims in SS-105 from all others pre-1906 claims in SS-104 in this case, and by this court granting the U.S. and EBID's motion to set as a Stream Issue 105, "what rights does the Boyd Estate and James Scott Boyd have to the Rio Grande" we shall never know if the U.S. acquired any rights legally. It is from stream issue SS-105 that we take appeal.

Singh and Fleming, who also challenge the U.S. claims, support this appeal because their pre-1906 priority rights were damaged by both the 1903 Forfeiture Decision that also seized the irrigators' rights to control the diversions and beneficial use of their water, by the U.S. injunction beginning in 1896, which created a perpetual administrative trespass by the Department of War and State preventing RGD&IC and the farmers from controlling storage and delivery of water to the farmers' ditches and fields.

The court should require the U.S. to prove that it took actions that initiated a right under the statutes before it dismisses pre-1906 rights. Farmers' Dev. Co. v. Rayado Land and Irrig Co, 28 N.M. 367, 213 P. 202, 206 (1928).

Issue Five:

Because the 1903 Forfeiture Decision and the 1997 Federal Claims Court's decision were not final decisions on the merits, the District Court should not have been relied on them as res judicata or as commencing the running of the statute of limitations.

This issue was raised on pages 27 through 35 of Boyd's Motion to Reconsider and pages 9 through 12 and pages 17 through 24 of Boyd's Response to the Motion to Dismiss.

Argument - The 1903 Forfeiture Decision was a default judgment based upon procedural grounds (failure to answer) and not a trial on the merits and so was not a final decision on the issue of ownership of storage and diversion rights under the General Revision Act of 1891(26 Stat.1095) (hereinafter called "Irrigation Act") and those water rights appropriated under the Territorial 1887 and 1891 Corporation Irrigation Laws.

Also, since prior decisions relied upon by the District Court below as res judicata did not determine which water rights were vested and forfeited, these facts and issues were never adjudicated before this adjudication, and they have

not been adjudicated in a full trial on the merits in this case to this date, either.

The Court on Page 8, line states, "... adjudication of water rights confirm only currently existing right to use water." The court does not address the fact that once rights are vested that they are owned by the person in whom the rights are vested until the rights are legally transferred or divested. Because the Court has not ordered the State Engineer to perform a comprehensive investigation of water uses in the LRG, the Court has no way to determine if the claim of the U.S. has priority over that of the Boyd Estate.

When Boyd provided evidence of ownership of vested water rights it was an abuse of discretion for the Court below to enter an Order Dismissing Boyd's Claims that did not treat as true, the well pleaded facts by Boyd and investigating the claims of Boyd fully. Instead the Court seems to have accepted the claims of the U.S. and the State Engineer without investigation or challenge. The Court avoided treating the facts provided by Boyd as true by saying that the documents were illegible. The documents were not illegible. Boyd put the entire text of three of the documents into its Motion to Reconsider, but the Court did not consider Boyd's Motion to Reconsider. Groendyke Transp.

Inc. New Mexico St. Corp. Com'n 85 NM 718, 516 P.2d. 689 (1973).

After the Court's treating Boyd's evidence as fact in order to grant the U.S' Motion to Dismiss without first allowing full discovery and investigation of water uses and the right to due process to Boyd and the other pre-1906 claimants violates Sections 72-1-2, 72-4-13, 72-4-17, 72-4-19, and 72-5-33 (NMSA 1978) and the 14th Amendment to the U.S. Constitution.

B. The District Court erred when it relied on the 1997 Claims Court decision as a bar to Boyd's claims under the statute of limitations based upon the 1) the 1903 Forfeiture Decision, 2) the never determined U.S. navigation claim that was left unanswered or 3) the claims of collateral fraud upon the court by the use of navigation to prevent the Company from presenting its case and completing its works or b. the claim of fraud upon the court via a conspiracy to defraud Boyd and all claimants by improper service and lies by officers of the court and the Court itself, specifically Judge Parker, U.S. Atty. Childers and Boyd's attorneys, A.B. Fall and William Hawkins. These three legal claims have never been adjudicated on their merits and were never at issue or adjudicated in the Claims Court and thus its decision can not start the running of the statute of

limitation to bar Boyd's claims in this case.

Also, the seizing of the Company's works and water, storage and diversion rights has been a continuing trespass for over 100 years. Therefore, the general principle that the statute of limitations should not bar a recovery for a continuing trespass applies to this case and the Court erred when it found that the taking of the Company's rights was complete in 1909.

In determining whether recovery for a continuing trespass is barred by the running of the statute of limitations the court in McNeill v. Rice Engineering and Operating, 128 P.3d 476, 2006 NMCA 15, ¶29, 139 N.M. 48 (N.M. App., 2005), stated,

"{29} Under the circumstances in this case, we reject a theory or rule requiring a holding that Plaintiffs' cause of action for thirty-six years of continuing trespass or continuing wrong did not accrue until a disposal of salt water or a failure to compensate for a disposal occurred sometime after October 27, 1994. Although it appears, as Plaintiffs show, that some jurisdictions set the cause of action accrual date for a claim for damages for all injuries from the continuing trespass to be the date of the last injury, we think the better rule to apply in the present case is one that sets the accrual date as in *Hess*, *Valdez*, and *Haas*. The accrual date is the date of each particular injury which, for an intermittent injury, is the date of that discrete injury, or for a continuous injury, each new day."

This Court ruled that the statute of limitations is tolled in the case of a continuing trespass.

In a case such as this one the continuing trespass is the conversion of the water, storage and diversions rights of Boyd each new day. McNeill v. Rice Engineering and Operating, 128 P.3d 476, 479, 2006 NMCA 15, ¶12, 139 N.M. 48 (N.M. App., 2005, citing Valedez v. Mountain Bell Tel. Co. 107 N.M. 236, 239-40, 755 P.2d 80, 83-84 (Ct.App.1988) (holding causes of action for damage to home from water seepage caused by placement of utility pole in drainage ditch arose with each new, successive injury, with the statute of limitations beginning to run from the date of each injury); Breiggar Props., L.C. V. H.E. Davis Sins, In c., 52 P3d. 1133, 1135 (Utah 2002) (involving debris dumped on land, and stating "[i]n the case of a continuing trespass or nuisance, the person injured may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action".

Similarly, the Federal Court of Claims chose to not exercise its jurisdiction and refused to hear Boyd's fraudulent taking claim and it then dismissed the case upon the statute of limitations. Since the Federal Court of Claims is not a court of equity it could not consider equitable grounds for a recovery such as fraud, but New Mexico district court has equitable jurisdiction and should exercise it when a claim of fraud is raised. Hudson v. Herschbach Drilling Co. 46 N.M. 330, 332-33, 128 P.2d. 1044, 1045 (1942) stated,

"Unless the judgment was void, then it could only be opened or set aside upon grounds authorized by the common law, or by an action in equity, and by some recognized proceeding instituted for such purpose.

We held in Kerr v. Southwest Fleurite Co., 35 N.M. 232, 294 P. 324, that there was an inherent power in courts of general jurisdiction to vacate their final judgments upon the ground of fraud or collusion, extrinsic and collateral to the matter tried, and that the exercise of such inherent power was not limited to the term at which the judgment was rendered; or as in this jurisdiction, in which there are no terms of court for the trial of non jury cases, to the statutory time of thirty days during which the court has control of its judgments. The procedure, while instituted by motion, is in effect an action in equity. State ex rel. Brady v. Frenger, 44 N.M. 386, 103 P.2d 115."

New Mexico courts do not limit the time within which one can raise a

claim of fraud and the claim can be made well beyond the time of running of the statute of limitations. In Moya v. Catholic Archdiocese, the court vacated a 1978 judgment following a deposition taken eight years later in 1986. 107 N.M. 245, 247, 755 P.2d. 583, 585 (1988).

The Claims Court, as a narrowly circumscribed statutory court, did not have jurisdiction over fraudulent illegal War Department administrative navigation, forfeiture and fraud upon the court and the people of New Mexico's.

The 10th Circuit Federal Court of Appeals in this case determined there were no federal claims available to the U.S. other than under Application No. 8 in 1906, which Boyd has presented evidence to show was never approved (See Herbert Yeo letter dated March 23, 1927, Exhibit 12, Boyd's Response to U.S' et al.'s Motion to Dismiss) and thus the U.S. has no standing to bring the Motion to Dismiss. U.S. V. City of Las Cruces, 289 F. 3d 1170 (10th Cir., 2002).

Likewise, without the adoption of the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 (1952), it would be questionable if this court would have jurisdiction to quiet the federal claims of the Rio Grande or any way for the litigants to contest the State Engineer's having given the U.S. the project rights

in its Offer of Judgment to the U.S.

The decision in U.S. V. City of Las Cruces, 289 F. 3d 1170 (10th Cir., 2002) also set to rest any federal claim based upon a treaty or the navigation claim to the Rio Grande in New Mexico. Also, since this case deals with property rights in the nature of a quiet title action, it is an *in rem* proceeding to quiet title. The U.S. can not claim any water or other property rights by adverse possession of water rights. Turner v. Bassett 2005 NMSA 9,111 P.3d. 701, 137 N.M. 381. The U.S. should be ordered to prove its claim to any rights connected to the Rio Grande Project predate 1906. It appears that the U.S.' claims are not superior to those claimed by Boyd, Fleming and Singh whose vested property rights predate 1906.

The U.S. Court of Federal Claims refused to consider that collateral fraud applied in this case. Instead, it looked to the staying of a claim of fraud by the fraud exception, citing Bailey v. Glover, 88 U.S. 342 (1874). Finding that the forfeiture started the running of the statute of limitations and that Boyd knew about the forfeiture in 1909, it found that Boyd's claim for the taking had lapsed under the six year statute of limitation under the Tucker Act. The decision of

the Court of Federal Claims, No. 96-476L, April 21, 1997, was adopted by the Court below as the basis for its dismissal. But the District Court, unlike the Federal Court of Claims does have jurisdiction to consider equitable claims such as fraud and should have considered Boyd's claims of fraud as true and that they supported denial of a Motion to Dismiss as in this case.

Groendyke Transp., Inc. v. New Mexico St. Corp. Com'n., 85 N.M. 718, 516 P.2d 689 (1973), held,

“In my opinion the allegations made by plaintiffs in their complaint stated a probable claim of extrinsic or collateral fraud and the trial court erred in dismissing it.” citing the case of Chisholm v. House, 160 F.2d 632 (10th Cir. 1947).

Issue Six:

The District Court erred by not overturning the 1903 decision due to collateral fraud pursuant to Rule 1-060(b) NMRA based upon the newly discovered evidence presented by Boyd.

This issue was raised on pages 4 through 6 and 38 through 43 of Boyd's

Motion to Reconsider and pages 26 through 33 and pages 35 through 40 and Exhibits 5, 7, 10, 17, 21, 22, 23.24, 25 of Boyd's Response to the Motion to Dismiss

Argument --The District Court made a finding on page 1 of its February 24, 2012 Order that it was not persuaded as to the level of fraud.

Boyd presented many newly discovered facts to the Court below in response to the Movants' Motion to Dismiss sufficient if treated as true to support Boyd's two claims of collateral fraud by the U.S (preventing completion of works and forfeiture by conspiracy to cause default), including many internal letters and government documents and commission hearings that exposed for the first time in any court of law the fraudulent and malicious and illegal actions taken on behalf of the U.S. to gain control of the Rio Grande by forfeiting Boyd's rights (Exhibits 5, 7, 10, 17, 21, 22, 23.24, 25 Boyd's Response to the Motion to Dismiss).

The new evidence was discovered after entry by the Federal Court of Claims of its 1997 decision and demonstrated that the 1903 forfeiture decision was induced by fraud which reached to the court itself. These facts were first

raised by Boyd in the Federal quiet title action in 1998. U.S. v. Elephant Butte Irrig. Dist., et al., U.S. District Court for District of New Mexico, 97-CV-00803-JAP-RLP.

The first fraud was a never proven navigation claim. We now know from an examination of the US' claim of rights to the Rio Grande in SS-104 in the case below that the U.S. planned as early as 1890 to dam the Rio Grande, which proves that its injunction application in 1897 under the Rivers and Harbors Act (Fifty-First Cong., Sess. I, Ch. 907 (1890) page 454) to prevent Boyd from completing its works was a false claim by the U.S. to force forfeiture of the Company's rights under Section 20 of the Act of 1891 (Fifty-first Sess. II, Ch. 561 (1891) page 1101) and thus a collateral fraud.

The U.S.' navigation obstruction claim was also shown to be without merit by the 1898 New Mexico Supreme Court decision, which indicated that the citizens of Juarez had already created a dam across the river at Juarez to divert water. 9 N.M. 292, 51 P. 674.

Since the U.S. gave out rights to entice Boyd and others to privately finance irrigation systems through the Act of 1891 (Fifty-First Cong. Sess II,

Ch. 561), after those rights-of-ways were vested in RGD&IC, the only way the U.S. could cancel RGD&IC's rights-of-way, was to either purchase the rights or condemn them and pay a just compensation. Instead the U.S. litigated with the Company in court for over five years to prevent Boyd from presenting its defense to the U.S. claims and force a forfeiture and the ultimate bankruptcy of the Company and Dr. Boyd losing his rights and his investments, which constitutes collateral fraud. Rutherford v. Buhler, 555 P.2d 715, 719-720, 89 N.M. 594 (N.M. App., 1976), citing the case of Chisholm v. House, 160 F. 2d. 632 (10th Cir. 1947).

The second collateral fraud was a conspiracy to prevent Boyd from defending his rights. Judge Parker in his affidavit attested that A.B. Fall was served the amended complaint before his court. This was either a lie by Judge Parker, since the amended complaint was filed in a different venue, the Fifth District Court in Sierra County, over 60 miles away from Judge Parker's Court that had venue over the U.S. v. RGD&IC case in the Third District Court in Las Cruces in 1903 or a subterfuge to avoid Boyd's supporters in the Las Cruces from timely notifying Dr. Boyd of the filing of the amended complaint.

The Appellate Court of Illinois, Second Department, in Pinnacle Arabians, Inc v. William Schmidt, 274 Ill. App. 3d 504; 654 N.E.2d 262, held that "Extrinsic fraud occurs where "the unsuccessful party has been prevented from exhibiting fully his case as by keeping him away from court or where the defendant never had knowledge of the suit"

The actions of the U.S. in RGD&IC meet both of definitions of extrinsic fraud, yet the District Court below was not convince that there was any fraud perpetrated on Boyd and RGD&IC from 1897 to 1903.

Justice Pope, who was also appointed in 1903 to the Sierra District Court by Roosevelt, was later appointed to the Territorial Supreme Court and participated as a Justice in delivering its forfeiture opinion in U.S. v. RGD&IC, 13 N.M. 386, 85 P. 393 (NM 1906) which upheld Judge Parker's forfeiture decision, even though he should have recused himself, since the forfeiture scheme's supplemental complaint was filed in his court in 1903 in the Fifth District in Sierra County. Under Pope's supervision, the default was sent down to Las Cruces 40 days later for Judge Parker in Las Cruces to sign.

Both Parker and Pope sat on the bench in consideration of the appeal of

Parker's forfeiture and even though the decision reflects that Parker didn't participate in writing the opinion, his influence in the hearing process presents a further question as to the court's integrity.

It is hard to understand how this Court could not see the collateral fraud in the earlier cases in light of the newly discovered evidence of a conspiracy among the U.S. attorney, the Company's attorney and the Judge that has come to light since 1997 (See Exhibit 10, Boyd's Response to the Motion to Dismiss).

The collateral fraud was clearly evident in 1923 by the International Court in its decision in *Rio Grande Irrigation and Land Co, Ltd. (Great Britain) v. U.S.*, Reports of International Arbitral Awards, Vol. VI, pp. 131-138, 134-135, United Nations, November 28, 1923, where in it 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’”

This Court has jurisdiction to set aside an inappropriate judgment even without reaching a finding of fraud. See Rule 60 (b) (4)A.(NMRA). A void judgment is one that has been procured by extrinsic or collateral fraud or entered by a court that did not have jurisdiction over the subject matter or the parties. Rook v. Rook, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987) A void judgment is one which, from its inception, was a complete nullity and without legal effect, Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645, 14 A.L.R. Fed. 298 (C.A. 1 Mass. 1972).

It does not matter how long after the original fraudulent judgment is entered that the evidence that the judgment was induced by fraud is discovered. It is always subject to being set aside. Gonzales v. Surgidev Corp., 120 N.M. 151, 156, 899 P.2d 594, 600 (N.M., 1995), stating,

“[W]e have always held that the court has inherent power to vacate a final judgment under its powers of equity. See Hudson v. Herschbach Drilling Co., 46 N.M. 330, 332-33, 128 P.2d 1044, 1045 (1942). We have set no time limit on this power. In Moya v. Catholic Archdiocese, we vacated a 1978 judgment following a deposition taken eight years later in 1986. 107 N.M. 245, 247, 755 P.2d 583, 585 (1988). We vacated the judgment upon finding "not mere perjury but a deliberate scheme to defraud the court." Id.

The District Court should have set aside the 1903 Forfeiture Decision as

void or based on fraud because Boyd presented sufficient facts that if taken as true proved that RGD&IC was prevented from defending its rights in 1903.

In Rutherford v. Buhler, 555 P.2d 715, 719, 89 N.M. 594 (N.M. App., 1976) in reversing an order of dismissal for lack of jurisdiction involving a claim of fraudulent mismanagement of estate assets Judge Hernandez, in his concurring opinion, citing to Chrisholm v. House, 160F2d 632 (10th Cir. 1947) stated as follows:

“Equitable relief from a judgment may be obtained on the ground of extrinsic or collateral fraud. Fraud is regarded as extrinsic or collateral where it prevents a party from having a trial or from presenting his cause of action or his defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured. Where, however, the judgment was founded on a fraudulent instrument or perjured evidence, or the fraudulent acts [89 N.M. 599] pertained to an issue involved in the original action and litigated therein, the fraud is regarded as extrinsic.

The rationale for this rule is set forth in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1943):

'Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet

new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.”

Clearly in the events leading up to the forfeiture decision in 1903 the U.S. took many different actions to prevent RGD&IC right to due process in a trial on the merits and presenting his defense to the amended complaint. Therefore, the District Court below should have exercised its equitable jurisdiction to reverse the 1903 Forfeiture Judgment and found that the 1997 Federal Court of Claims Judgment was in error, when it did not consider whether the 1903 forfeiture was based upon a collateral fraud. Torres v. El Paso Electric Co., 987 P.2d 386, 127 N.M. 729, 1999 NMSC 29 (N.M., 1999)

Issue Seven:

The service on A. B. Fall in the 1903 forfeiture case was ineffective service on Nathan Boyd.

This issue was raised on pages 4 through 6 and 38 through 43 of Boyd’s Motion to Reconsider and pages 26 through 33 and pages 35 through 40 of Boyd’s Response to the Motion to Dismiss.

Argument: Nathan Boyd was not a party in the 1903 Forfeiture case and there

was never service of the Amended Complaint on Nathan Boyd.

The District Court below erred in not finding that or investigating whether the 1903 Territorial Court lacked jurisdiction to enter its judgment of forfeiture because the real party in interest, namely Dr. Boyd, was not joined as a party in the litigation. Since there was never proper service of the Supplemental Complaint on the real party in interest, the District Court wrongly assumes on Page One of its Order Granting the U.S' Motion to Dismiss that the 1903 Forfeiture Decision forfeited the works that had been owned by the RGD&IC.

As stated above the rights owned by the English Company through ownership of the stock of the RGD&IC passed to Nathan Boyd, individually, in 1901, after the English Company and RGD&IC were liquidated in 1900, thus making Nathan Boyd the sole owner of the assets of the RGD&IC and the Elephant Butte and Leasburg irrigation project. Newman v. Toy 926 S.W.2d 629, 631, Citizens' Nat. Ban v. Greene, 258 Ky. 373, 80 S.W, 2d 6 (Ky. App. 1935).

Since A. B. Fall only represented the named Defendants, the RGD&IC and the English Company in 1903, and not Nathan Boyd, he could not accept

service of the Amended Complaint for Nathan Boyd. Therefore the Third Judicial District Court's Forfeiture Decision did not constitute a forfeiture of the works and right-of-ways, then owned individually by Dr. Nathan Boyd.

This issue has never been adjudicated. Issue Eight :

The Movants' Motion to Dismiss is collaterally estopped by the decision by Chief Magistrate Judge W. W. Deaton in 1999 in the Federal District Court quiet title case, which was res judicata on the Movants' allegations.

This issue was raised on page 34 in Boyd's Motion to Reconsider.

Argument - The Movants in this case offered the same proofs and facts in opposition to Boyd's intervention in U.S. v. Elephant Butte Irr, et al., U.S. District Court, District of New Mexico (Albuquerque) No: 1:97-CV-00803-JAP-RLP ("the federal quiet title case"). Judge Deaton granted Boyd the right to intervene in the federal quiet title case, so Judge Deaton's decision in the federal quiet title case acts as a *Res Judicata* limitation decision to bar the movants' Motion to Dismiss in this case.

The same Movants that filed the Motion to Dismiss in this case filed a

Motion to Dismiss Boyd's Motion to Intervene in the federal quiet title case in which they raised the same or similar allegations as those they plead in this case as the basis for dismissal of Boyd's Motion to Intervene. Judge Deaton's decision is a *res judicata* decision and collateral estoppel that bars the Movants from raising again in this proceeding the same or similar issues they raised in their Motion to Dismiss Boyd's Motion to Intervene and Judge Deaton's decision is entitled to be treated as the basis of Judicial Estoppel to bar the Motion for Dismiss in this case. Rosette, Inc. v. U.S. Dept. of the Interior, 169 P.3d 704, 2007 NMCA 136, 142 N.M. 717 (N.M. App., 2007).

Judge Deaton instead of dismissing the Boyd claims ordered an evidentiary hearing over what was completed under the 1891 Act, thus denying the Movants' objection to Boyd's standing and establishing collateral estoppel as to the issues raised by Movants' in the federal case from being re-litigated again in this proceeding. Chief Magistrate Judge William Deaton on January 12, 1999 ordered a settlement conference between the U.S. and the Boyd Estate

Before any decision and what was vested by Boyd, the U.S. appealed to the Federal 10th Circuit Court of Appeals, upon remand the Federal

District Court Judge James Parker (not related to Judge Frank Parker in 1903 decision), administratively stayed the case and thus maintained Boyd's standing, and remanded the case to the Third District court for adjudication where this appeal originated.

Ullrich v. Blanchard, 142 N.M. 835, 171 P.3d 774 (N.M.App. 2007), addresses both res judicata and collateral estoppel when it states:

{19}"[C]ollateral estoppel, also called issue preclusion, prevents a party from re-litigating 'ultimate facts or issues actually and necessarily decided in a prior suit. ' " Deflon v. Sawyers, 2006-NMSC-025, ¶ 13, 139 N.M. 637, 137 P.3d 577 (quoting Adams v. United Steelworkers of Am., 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). In order for collateral estoppel to apply, four elements must be met: "(1) the parties in the current action were the same or in privity with the parties in the prior action, (2) the subject matter of the two actions is different, (3) the ultimate fact or issue was actually litigated, and (4) the issue was necessarily determined." City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 10, 134 N.M. 216, 75 P.3d 816.

Issue Nine:

The District Court erred when it refused to impose a constructive trust on the U.S.' in favor of Boyd for conversion of Boyd's rights without just compensation and in contravention of the Federal Reclamation and Territorial laws.

This issue was raised on pages 22 through 23 and pages 33 through 35 of Boyd's Response to the Motion to Dismiss and Exhibits 6, 8, 9 and 16 attached to Boyd's Response to the Motion to Dismiss and pages 33 through 38 of Boyd's Motion to Re-consider.

Argument-- Aragon v. Rio Costilla Co-op. Livestock Ass'n, 812 P.2d 1300, 1304, 112 N.M. 152, 156 (N.M., 1991) defined constructive trusts as a means to avoid fraud and unjust enrichment. When the U.S. converted the RGD&IC's assets to its benefit without just compensation it unjustly enriched itself. The Court in Aragon v. Rio Costila Co-op, Ibid. at 1304 and 156, stated:

“Constructive trusts. A constructive trust, on the other hand, except to the extent it may arise out of an express trust or the attempt to create one, is not imposed to effectuate the intention of the parties, but is imposed to prevent the unjust enrichment that would result if the person having the property were permitted to retain it. *Id.* at Secs. 404.2, 462.1. The circumstances where a court might impose such a trust are varied. They may involve fraud, constructive fraud, duress, undue influence, breach of a fiduciary duty, or similar wrongful conduct. *Id.* at Secs. 404.2 and 462; see, e.g., *In re Estate of McKim*, 111 N.M. 517, 807 P.2d 215 (1990); *Garcia v. Marquez*, 101 N.M. 427, 684 P.2d 513 (1984). When the court imposes a constructive trust, the person holding title to the property is subject to an equitable duty to convey the property to another person as a remedy.”

The U.S. was clearly unjustly enriched by its seizure and use of Boyd’s assets and property rights for over 100 years.

The District Court arbitrarily avoids any mention of the facts of Boyd’s claim that the Reclamation Bureau took active control over the Elephant Butte site in March 1 1903, several months before the forfeiture proceeding nor is

there any mention to of the applicability of the Reclamation Act of 1902 to the taking of Boyd's rights in the District Court's Order of February 24, 2012, or mention of the 1905 Committee hearing in Washington, D.C. after the passage of the Reclamation Act in 1902 which discussed the historical rights of Boyd and Spanish community grants.

Issue Ten:

The Court erred when it arbitrarily and capriciously avoided scrutinizing the facts presented by Boyd in its Response to the Motion to Dismiss, its Motion for Leave to Clarify the Record, and its Motion to Reconsider.

This issue was raised and preserved in many of the pleadings filed by Boyd, including pages 12 through 24 and pages 33 through 35 of Boyd's Response to the Motion to Dismiss and Exhibits 6, 8, 9 and 16 attached and pages 1 through 20 of Boyd's Motion to Re-consider.

Argument - The District Court below, was fully aware when it entered its Order Granting the Motion to Dismiss on February 24, 2012 that the U.S.'s actions from 1897 through the present demonstrate a consistent pattern to deny Boyd his vested property rights and the opportunity to present his claims in a full

hearing on the merits to the 1903 forfeiture decision and that the federal Embargo and injunction were intended to prevent RGD&IC from completing its works.

The District Court below, knows that the Leasburg diversion dam was built and six miles of canals were completed and hooked up to the community ditches and construction on Elephant Butte Dam had started before the U.S. filed its injunction in 1897, thus fulfilling the RGD&IC's obligations under existing law sufficient to vest in RGD&IC the property rights to the irrigation system in the Lower Rio Grande Valley under the Mendenhall Doctrine, Reynolds V. Mendenhall, 68 N.M. 467, 362 P.2d 990 (N.M. 1961).

The test to be applied in determining whether to grant a motion to dismiss a complaint is to accept, for the purposes of the motion, as true all facts well pleaded and question only whether plaintiffs might prevail under any state of facts probable under the claim. Rutherford v. Buhler, 555 P.2d 715, 719, 89 N.M. 594 (N.M. App., 1976) citing Groendyke Transp. Inc., v. New Mexico St. Corp Com'n 85 N.M. 718, 516 P 2d. 689 (1973). The Court in the case below did not do this.

Boyd has presented documentary evidence and the decision on Boyd v. United States, No.96-476L, slip op (Fed. Claims Ct. April 21, 1997), that if taken as true proved that, not only did the RGD&IC complete various works such as Leasburg Dam and six miles of canals prior to the seizure by the U.S. in 1897, but that the local landowners continued for years after completion of the RGD&IC's diversion and diverting water in Dona Ana County to irrigate approximately 30,000 existing acres and an additional 10,000 or more acres newly irrigated from the Leasburg diversion.(See letter from C.A Thompson, Alcalde of the San Pedro Ditch, to Elephant Butte Water Users Assn.; Exhibit 8 attached to Boyd's Motion to Reconsider).

The 1896 completion alone of the Leasburg diversion works was enough to appropriate a water right and the farmers did use the water for beneficial use as was planned. This court's arbitrary avoidance and denial of these facts and others is unconvincing and error.

Conclusion

There has been no remedy or due process for Boyd or any other pre 1906 claimants ever since the 1903 reversal of the prior decisions against the United

States' navigation and Treaty claims in 1898. Rio Grande Irrigation and Land Co., Ltd. V. U.S., Reports of International Arbitral Award, Vol. VI, pp 131-138, November 28, 1923.

The U.S. has resisted any attempt to adjudicate of the Rio Grande since United States v. Rio Grand Dam & Irrigation Co., 184 U.S. 416 (1902) and Snow vs. Abalos, 18 N. Mex. 681, 140 P. 1044 (N.M. 1914).

The District Court appears to be perpetuating an unchecked governmental administrative war power claim over the Rio Grande that the Court favors over private rights vested by prior appropriation in many cases.

The Winters vs. United States - 207 U.S. 564 (1908) the Supreme Court established a federal reserve claim over the waters of the west in reliance on its US vs. RGD&IC 1909 case law that had the effect of creating a federal "exemption" to state laws in the appropriations of water. Justice William McKenna who delivered the Winters opinion, had his start as the Attorney General for the US in the muddy waters of the early Rio Grande case.

In the absence of a legally sufficient adjudication, neither the U.S. nor the OSE may exercise legal administrative control over the historic pre-1906 senior

rights. Tri-state Generation vs. John D'Antonio Jr., 2011-NMCA-014 August 31, 2007 recognized that only after an adjudication can the OSE exercise administration over priority rights. In Tri-State, Ibid. this court assured us that the court's role is to enforce the priority rights of even the State Engineer's permits and to determine if there is water available to appropriate under a permit. Tri-State, Ibid. at ¶12 states,

{12} Additionally, permits and licenses by necessity identify usage elements. . . . They also incorporate a priority date. See NMSA 1978, § 72-5-3 (1941). The licensing, permitting, transfer, and forfeiture statutes also, as we have stated, require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights.

In this Lower Rio Grande Adjudication, the Court below has allowed the U.S. and OSE to prevent the adjudication of priority rights and whether the purported 1903 forfeiture should be allowed to stand without ever litigating to a final determination the issues of whether RGD&IC's construction of the Elephant Butte Dam affected the navigational capacity of the Rio Grande and whether RGD&IC's held any vested rights that were taken by the U.S. by collateral fraud.

Based upon the above facts and law Appellant prays that this Court

reverse the District Court's February 24th Order Granting the Movant's Motion to Dismiss the Boyd Estate and James Scott Boyd claims and order the State Engineer and the Court to prepare a comprehensive report of all historic water uses predating 1906 and then hold a de novo proceeding in which all pre-1906 claimants can present evidence and testify as to what rights were vested when the U.S. seized the RGD&IC project in 1896 and what property rights are vested in the Boyd Estate. The U.S. does not deny that the U.S. seized the RGD&IC's property in 1897. It is also apparent that during the last 110 years the U.S. has used the courts to avoid facing the consequences of their seizure.

During the last 110 years all claimants have been prevented from defending their rights to Lower Rio Grande water as provided in Section 72-4-15 NMSA 1978. Now there are no longer any legal limitations on New Mexico's court system to render decisions to recognize the historic property and water rights of claimants in the adjudication of the Lower Rio Grande, and to hold federal claims accountable for the first time under state, territorial and federal laws. See Sections 72-1-2, and 72-5-33 (NMSA1978), U.S. V. City of Las Cruces, 2289 F. 3d 1170 (10th Cir., 2002), Sections 7 and 8 under the

National Irrigation Act or Reclamation Act, chap. 1093, 32 Stat. 388 (June 17, 1902)

The Boyd Estate and all other pre-1906 claimants deserve the right pursuant Sections 72-4-15 and 17 to a full hearing to claim their historic priorities.

Many generations of New Mexicans have spent lifetimes of honest work and vast investments to insure their rights based upon the property concept of priority ownership of water along the Rio Grande. After having been delayed for over 100 years, it is time for their government and courts to fairly adjudicate their historic rights. That is all the Boyd Estate and the other pre-1906 claimants want; to be allowed to prove their rights in a legally sufficient adjudication.

V. LIST OF AUTHORITIES FOR EACH STATEMENT OF THE ISSUES

Issue One –

Farmers' Development Co. V. Rayado Land and Irrigation Co 28 N.M. 357, 213 P. 202, 206 (N.M. 1923)

Turner v. Bassett, 2003-NMCA-136, 134 N.M. 621 (2005)

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Article II, Section 20 of the New Mexico Constitution.

Sections 7 and 8 of the National Reclamation Act, chap. 1093, 32 Stat. 388

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689 (1973)

Chisholm v. House, 160 F.2d 632 (10th Cir. 1947).

14th Amendment to the U.S. Constitution.

McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666 (1952)

General Revision Act of 1891(26 Stat.1095)

72-1-2 (NMSA 1978)

72-4-13 (NMSA 1978)

72-4-17 (NMSA 1978)

72-4-19 (NMSA 1978)

72-5-33 (NMSA 1978)

Issue Six:

U.S. v. Elephant Butte Irrig. Dist., et al., U.S. District Court for District of New Mexico, 97-CV-00803-JAP-RLP.

U.S. vs. RGD&IC 9 N.M. 292, 51 P. 674.

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Section 20 of the Act of 1891 (Fifty-first Sess. II, Ch. 561 (1891) page 1101

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Issue Seven:

Newman v. Toy 926 S.W.2d 629, 631

Citizens' Nat. Bank v. Greene, 258 Ky. 373, 80 S.W, 2d 6 (Ky. App. 1935)

Issue Eight :

U.S. v. Elephant Butte Irr, et al., U.S. District Court, District of New Mexico (Albuquerque) No: 1:97-cv-00803-JAP-RLP (“the federal quiet title case,”)

Rosette, Inc. v. U.S. Dept. of the Interior, 169 P.3d 704, 2007 NMCA 136, 142 N.M. 717 (N.M. App., 2007)

Ullrich v. Blanchard, 142 N.M. 835, 171 P.3d 774 (N.M.App. 2007)

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Issue Nine:

Aragon v. Rio Costilla Co-op. Livestock Ass'n, 812 P.2d 1300, 1304, 112 N.M. 152, 156 (N.M., 1991)

Estate of McKim, 111 N.M. 517, 807 P.2d 215 (1990)

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Issue Ten:

Reynolds V. Mendenhall, 68 N.M. 467, 362 P.2d 990 (N.M. 1961).

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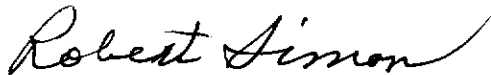
689 (1973)

Boyd v. United States, No.96-476L, slip op (Fed. Claims Ct. April 21, 1997)

Item VI. The proceedings were all tape recorded.

Item VII. There are no other pending appeals related to Boyd's claims and no prior appeals of Boyd's claims have been filed since 1909.

Respectfully submitted,



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Proof of Service

I, Robert Simon, certify that I served a copy of the above Docketing Statement pursuant to Rule 12- 208 and 202 by delivering an original to the Court of Appeals and by serving a copy of the Docketing Statement to the trial judge, the Third Judicial District Court, the court monitor or court reporter who took the record, and trial counsel of record for each of the three movants by fax or mail or by electronic service on this 14th day of May, 2012, and another copy by post to the Third Judicial Dist. Ct
Robert Simon on July 2, 2012

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