

the defendant and as among the defendant and other water rights claimants.

(Emphasis added.) In this stream system issue proceeding, the sole water rights claim at issue is that of the United States as associated with the Rio Grande Project. Elements of United States' rights are being addressed in specifically designated subproceedings.² Participants in this proceeding may advance arguments concerning the legal foundations of the United States' water right, such as whether the United States legally established the distinct elements of the claimed right. The current subproceeding before the Court concerns the amount of water and the priority date(s) for the United States' Rio Grande Project right, and proceeding participants may present evidence, objections, and arguments concerning either the amount of water or the priority dates claimed by the United States. Subsequent subproceedings will address other issues concerning the United States' claimed water rights as necessary. However, the water rights of other claimants in the Lower Rio Grande will not be addressed in this proceeding.

In their reply brief and at the December 13, 2012 hearing, the Pre-1906 Claimants asserted distinct water rights that pre-date the claimed priority of the United States' interest in the Rio Grande Project and possibly an interest in storage and diversion works that are also claimed as part of the Rio Grande Project. Although the water rights of the Pre-1906 Claimants will be determined within the Lower Rio Grande adjudication, their rights are not at issue in this proceeding and do not bear upon the independent adjudication of the United States' interests in the Rio Grande Project. The Pre-1906 Claimants' rights will either be determined as the subfile adjudication process progresses or in an expedited *inter se* proceeding if properly established.

Water Rights Do Not Constitute a "Source of Water" For Other Water Rights

In asserting that as a matter of law the United States was not and is not permitted to claim the senior, vested water rights of the Pre-1906 Claimants as a source of water for the Rio Grande Project, the Pre-1906 Claimants misapprehend the scope of the legal determination of "source of water." Within this adjudication, the "source of water" element refers to either a surface water or groundwater origin, such as the surface waters of the Rio Grande, and is associated with a specific

² The first designated subproceeding addressed the source or sources of water for the United States' Rio Grande Project.

physical point of diversion, such as a surface water diversion dam or a groundwater well. For example, in the order entered August 16, 2012 regarding the source or sources of water for the Rio Grande Project, this Court determined that the right asserted by the United States is a surface water right under New Mexico law and encompasses specific points of diversion.

As observed by the State of New Mexico in its response to the Pre-1906 Claimants' motion for summary judgment, the source of water for the Rio Grande Project and for all surface water irrigation rights in the Lower Rio Grande is the surface waters of the Rio Grande. Surface water irrigation rights in the Lower Rio Grande divert water from a common source. Although the priority dates of appropriators to a common source may differ, appropriators with senior rights do not serve as the "source" of water for the junior appropriators or limit the determination of legally established water rights that are junior in priority.

To the extent that the Pre-1906 Claimants' motion requests a determination regarding the seniority of their rights, and perhaps the apportioning of water rights according to priority, it addresses matters that are beyond the scope of this stream system issue proceeding. NMSA 1978, §§ 72-4-15 (1907), 72-4-17 (1965). Stream System Issue 104 is limited to the United States' legally established interests in the Rio Grande Project. The effect of these interests on other claimants who may claim senior priority dates, or upon matters concerning subsequent priority administration of water rights, are not properly considered as part of this stream system issue proceeding.

Several responding parties note that genuine issues of material fact exist that preclude judgment as a matter of law pursuant to Rule 1-056(C) NMRA. However, as described above, the Pre-1906 Claimants' factual assertions concerning the seniority of their surface water rights are not material to the requested relief, namely the determination that vested senior rights cannot be a source of water for the Rio Grande Project. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 11, 148 N.M. 713, 242 P.3d 280. ("In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment.")

Pre-1906 Claimants Have Failed To Properly Request Designation of a Stream System Issue

In their motion filed August 22, 2012, the Pre-1906 Claimants state:

Further relief is respectfully requested that upon determination by this Court that any Pre-1906 water rights are separate and not a source of the United States' Project water that such claims be designated for an *inter se* proceeding as Stream System Issue #106, such that the processes, procedures, and criteria to determine those senior water rights may be briefed and decided by this Court.

At the hearing held December 13, 2012, counsel for the Pre-1906 Claimants further clarified that the Pre-1906 Claimants seek a judicial determination concerning whether certain pre-1906 priority dates for certain irrigation rights were waived or surrendered. Claimants have failed to comply with the established procedure for requesting designation of either a stream system issue or an expedited *inter se* proceeding, as specified in Rule 1-071.2 (A) and (B), and the Second Amended Case Management Order Authorizing Limited Notice by Quarterly Report and Setting Procedures for Stream System Issue Proceedings, filed August 16, 2010. As a result, the motion to designate an expedited *inter se* proceeding is denied.

Whether Pre-1906 Claimants opt to seek designation of an expedited *inter se* proceeding for resolution of certain pre-1906 claims, or designation of a stream system issue to address whether certain priority dates associated with certain irrigation rights were surrendered, they must file a motion that explains why the issue should be resolved as either a stream system issue or expedited *inter se* and how the designation will promote judicial efficiency. Paragraph 5 on page 6 of the Second Case Management Order states:

5. The Court may enter an order designating a stream system issue if it finds that:
 - a. It is an issue that could affect the interest of all or a substantial number of parties, and,
 - b. A resolution of the issue which did not bind all parties would create a risk of:
 - i) inconsistent or varying decisions with respect to various claimants; or,
 - ii) a decision which would, as a practical matter, be dispositive of the interests of other claimants; or,
 - iii) a decision that would, for other reasons, substantially impair or impede the ability of claimants or the State to protect their interests; and,

- c. A timely decision, binding on all parties to the adjudication, will promote judicial efficiency and completion of the adjudication.

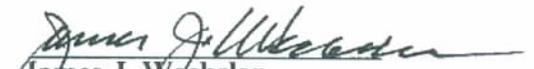
All future motions to designate either a stream system issue or expedited *inter se* proceeding must comply with the procedures and requirements of Rule 1-071.2 (A) and (B), and the Second Amended Case Management Order Authorizing Limited Notice by Quarterly Report and Setting Procedures for Stream System Issue Proceedings.

It is therefore ordered that:

(a) the Pre-1906 Claimants' motion for summary judgment is denied; and

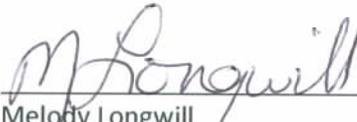
(b) the Pre-1906 Claimants' request that the Court designate a new expedited *inter se* proceeding is denied.

IT IS SO ORDERED.


James J. Wechsler
Presiding Judge

CERTIFICATE OF MAILING

I, Melody Longwill, hereby certify that I have mailed a true and correct copy of the foregoing on January 15, 2013, to the following:


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