

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

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

v.

No. CV-96-888
Lower Rio Grande Adjudication

ELEPHANT BUTTE IRRIGATION DISTRICT, et al.

James J. Wechsler, Presiding Judge

Defendants.

Stream System Issue No. 97-107
Pre-Project Interests
D-307-SS 9700107

**PRE-1906 CLAIMANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT-**

INTRODUCTION

This case presents a threshold jurisdictional question that must be resolved before any trial on the merits. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998).

The United States admits that pre-Project appropriations existed. The only issue is whether those vested rights were lawfully extinguished.

No federal statute provides authority to extinguish prior appropriated rights.

United States v. City of Las Cruces, 289 F.3d 1170, 1184–86 (10th Cir. 2002), stated that federal law does not create, define, or displace water rights governed by state prior appropriation doctrine.

Because jurisdiction is lacking, all defenses fail as a matter of law.

I. STANDING

U.S. RESPONSE ARG. I

Standing exists as a matter of statute.

Under NMSA 1978, § 72-4-17, all claimants must be joined in an adjudication. *Rosette, Inc. v. U.S. Department of Interior*, 2007-NMCA-136, ¶ 20.

Rosette, ¶ 21, held that the McCarran Amendment waived sovereign immunity and provided that the United States could be joined in state adjudications, thereby providing the statutory jurisdictional basis for its joinder.

This Court's **Order Designating Stream System Issue No. 107 Regarding Surface Water Rights Developed Before the Rio Grande Project**, entered on July 6, 2016, creating SSI-107, states in Paragraph 4 on page 2:

“Claimants currently participating in Stream System Issue No. 104 are deemed participants in this stream system proceeding and do not need to file a Form B Notice of Intent to Participate.”

Since the Claimants participated in the litigation in SSI-104, they, and all other Pre-1906 Claimants they represent, are joined as participants in SSI-107 pursuant to the Court's Order of July 6, 2016, regardless of their later attempted untimely filing of a Form B.

The Court's July 6, 2016 Order orders inclusion of the participants from SSI-104. Therefore, the Pre-1906 Claimants have standing to participate.

The United States cannot impose additional procedural barriers inconsistent with statute. *State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 18.

Furthermore, water rights are property rights, and holders have standing to assert them. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

II. CONTINUOUS USE

U.S. RESPONSE ARG. II

The United States' argument fails as a matter of law.

Water rights arise through diversion and beneficial use. *Snow v. Abalos*, 1914-NMSC-022, ¶ 10.

Once vested, water rights are protected property rights, subject to adjudication in accordance with NMSA 1978, §§ 72-4-13 to -19.

Snow v. Abalos, 1914-NMSC-022, ¶ 24, states:

“It was the evident design of the legislature, by chapter 49, S. L. 1907, to have adjudicated and settled by judicial decree all water rights in the State, to have determined the amount of water to which each water user was entitled, so that the distribution of water could be facilitated, and the unappropriated water to be determined, in order that it might be utilized.”

Federal project operations do not alter ownership or priority. *United States v. City of Las Cruces*, 289 F.3d at 1184–86; *Ickes v. Fox*, 300 U.S. 82, 95 (1937); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106–08 (1938).

Nor may the government rely on conditions it contractually created to create a forfeiture. *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996); *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

III. EBWUA CONTRACTS

U.S. ARG. I & II

This issue is controlled by precedent and collateral estoppel.

Snow v. Abalos, supra, ¶ 29, held that the 1905 EBWUA contracts providing for future conveyance or federal administration of water did not transfer ownership of vested rights.

Collateral estoppel bars relitigation of issues actually and necessarily decided. *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 14.

Shovelin v. Central N.M. Elec. Coop., 1993-NMSC-015, ¶ 10, states that if the movant introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation, citing *Silva v. State*, 1987-NMSC-107.

Silva v. State, 1987-NMSC-107, ¶¶ 5–6, states:

“[W]here the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation.”

The Court in *Silva* cited *City of Santa Fe v. Velarde*, 1977-NMSC-040, ¶ 5.

Silva, ¶ 6, further states:

“Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Under collateral estoppel, or ‘issue preclusion,’ the cause of action in the second suit need not be identical with the first suit.”

Since the issue of ownership of the prior appropriated water rights was litigated and decided in *Snow v. Abalos*, the same parties, or those in privity with them, are collaterally estopped from litigating that issue again.

IV. RES JUDICATA AND THE 1903 PROCEEDING

U.S. ARG. III

The United States and most other Respondents rely on the prior decisions in *RGD&IC v. United States*, 13 N.M. 386, 85 P. 393 (1906), and *RGD&IC v. United States*, 215 U.S. 266 (1909), to preclude Claimants from establishing their rights in the LRGA.

A. Introduction

This case presents a threshold question of law that governs the entire proceeding: whether SSI-107, the 1903 Proceeding, ever possessed jurisdiction or statutory authority—under either the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, or the Act of March 3, 1891, ch. 561, 26 Stat. 1095—to divest, seize, or extinguish water rights that had already vested under territorial law through completed diversions and beneficial use.

The answer is no.

Prior to the federal Project, farmers in the Lower Rio Grande Valley appropriated water through diversion works constructed and applied to beneficial use under territorial irrigation law and the common law. Upon completion of those works and application to use, those rights vested as property under the doctrine of prior appropriation. NMSA 1978, § 72-1-2.

At the federal level, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899), confirmed that federal authority over the Rio Grande is limited and does not displace local appropriation absent a valid navigation-based jurisdiction:

“The power of the state to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power and the necessity of preserving the general interests of the people of all the states, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge.”

The Act of March 3, 1891 was limited to rights-of-way across public lands for reservoir construction and did not control privately vested irrigation rights.

The framework for adjudication of water rights pursuant to territorial and state law was confirmed in *Snow v. Abalos*, 1914-NMSC-022, ¶ 24, reaffirmed in *United States v. City of Las Cruces*, 289 F.3d 1170, 1184–86 (10th Cir. 2002), and reinforced by *Ickes v. Fox*, 300 U.S. 82, 94–96 (1937).

Since the application of res judicata turns on jurisdiction, and since the 1903 Proceeding did not extend its subject matter jurisdiction to examining or extinguishing vested territorial irrigation rights, summary judgment is required.

B. Jurisdiction Must Be Resolved Before Any Dispositive Ruling

The threshold issue of jurisdiction must be resolved before the Court may consider any dispositive motion on the merits.

It is a fundamental principle that a court must assure itself of jurisdiction before proceeding further. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998), the

Supreme Court held that jurisdiction must be established as a threshold matter and cannot be assumed in order to reach the merits.

Without jurisdiction, a court cannot proceed at all.

Lack of jurisdiction can be raised at any time to nullify a judgment. “Failure to state a cause of action is jurisdictional and may be raised for the first time on appeal.” *Sundance Mechanical & Utility Corp. v. Atlas*, 109 N.M. 683, 688, 789 P.2d 1250, 1255 (1990), citing *Campbell v. Smith*, 68 N.M. 373, 375–76, 362 P.2d 523, 524 (1961), citing *Phillips v. Allingham*, 38 N.M. 361, 363, 33 P.2d 910, 911 (1934), recognizing the “well-established rule ... that the failure of a complaint to state a cause of action is jurisdictional.”

Therefore, the Court should consider whether the 1903 Court Judgment was properly a res judicata decision barring adjudication of Claimants’ claims in this case.

Claimants are not making a collateral attack on the 1903 Default Judgment; they are attacking the 1903 Proceeding’s jurisdiction for three reasons.

First, the Claimants’ predecessors were not named or joined in the 1903 proceeding. Therefore, their rights were not affected by the default judgment. *Rio Puerco Irrigation Co. v. Jastro*, 1914-NMSC-041; *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021, ¶ 7, stated: “The farmers and stockholders were not made parties to the suit, and their claims for damages, if they had any, were not in question.”

Second, the 1903 proceeding was not a trial on the merits. Summary proceedings without full due process and joinder of all indispensable parties do not meet the standard for a due process trial on the merits. *Potter v. Pierce*, ¶ 15; Restatement (Second) of Judgments § 27, at 250 (1982).

The 1903 Proceeding deprived Claimants' predecessors of joinder and thus a trial on the merits to establish their ownership of rights. Issue preclusion requires the issue of fact or law actually to have been litigated and determined in a valid and final judgment between the parties. *Deflon v. Sawyers*, supra, ¶ 14, citing *Shovelin v. Central N.M. Elec. Coop.*, 1993-NMSC-015, ¶ 20.

A party's full and fair opportunity to litigate is the essence of res judicata. *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 11; Restatement (Second) of Judgments § 2, at 33–34 (1982); *Potter v. Pierce*, supra, ¶¶ 15–16, 54; Restatement (Second) of Judgments § 27, at 250 (1982).

Because the 1903 proceeding intentionally deprived Claimants of notice of the United States' Supplemental Complaint and joinder, the 1903 Decree was not a valid judgment and therefore cannot be preclusive. Restatement (Second) of Judgments § 2 (1982).

Accordingly, before addressing Respondents' theories of forfeiture, abandonment, or extinguishment, this Court must first determine whether the United States ever possessed jurisdiction—under the Rivers and Harbors Act of 1890 or the Act of March 3, 1891—to reach vested territorial rights.

C. Respondents Fail to Establish Federal Jurisdiction

Neither the Rivers and Harbors Act of 1890 nor the Act of March 3, 1891 provides jurisdiction to divest vested rights.

The 1891 Act applies only to rights-of-way across public lands and does not extend to completed irrigation works and water rights appurtenant to lands perfected under common law or territorial law on lands not within dam sites and rights-of-way.

Because no federal jurisdiction existed, all Respondents' theories pertaining to the 1903 Proceeding fail at the jurisdictional threshold.

D. Controlling Law Establishes Vesting and Ownership

The doctrine of prior appropriation governs beneficial use of water in New Mexico. N.M. Const. art. XVI, § 2, provides: "Priority of appropriation shall give the better right."

In *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), the Supreme Court confirmed that priority governs allocation across interstate river systems, including those involving federal projects.

Thus, federal projects operate within the priority framework; they do not supplant it.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 108 (1938), states:

"Hence the apportionment made by the Compact cannot have taken from the Ditch Company any vested right, unless there was in the proceedings leading up to the Compact or in its application, some vitiating infirmity."

In *United States v. City of Las Cruces*, 289 F.3d 1170, 1184–86 (10th Cir. 2002), the Tenth Circuit held that federal reclamation law does not displace the prior appropriation system.

City of Las Cruces reaffirmed that federal law does not create water rights. Thus, federal projects operate within the priority framework; they do not supplant it.

E. Project Control and Pro Rata Delivery Do Not Extinguish Rights

Project control alters delivery, not ownership. *Hinderlider*, 304 U.S. at 108.

The same water continued to be applied to the same lands, constituting continuous beneficial use.

Snow v. Abalos, *supra*, ¶ 29.

The United States cannot rely on conditions it created to establish forfeiture. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

Pro rata delivery is administrative and does not alter priority. *Hinderlider*, 304 U.S. at 108.

F. The 1903 Proceeding Has No Preclusive Effect

The 1903 proceeding addressed federal rights-of-way on public lands, not ownership of water rights.

Claimants’ predecessors were not parties and were not afforded due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Snow v. Abalos, supra, ¶ 29, confirms that ownership of prior appropriated water still existed when the United States first closed its gates at Elephant Butte Dam.

The United States’ administrative measures, such as pro rata delivery, affected the timing and extent of use, but they did not extinguish or redefine the underlying water rights. *Hinderlider*, 304 U.S. at 108.

As the administrative record reflects, diversions were curtailed or adjusted in order to satisfy Compact obligations, not to alter ownership or priority. See U.S. Response, p. 14:

“Into the 1960s, the United States continued its practice of controlling the allotment of Project water on an equal acre-foot per acre basis, with no reference to any priority given natural flow rights.”

See also *Hinderlider*, 304 U.S. at 108.

This distinction is controlling. Delivery obligations, whether imposed by interstate compact, federal project operations, or state administration, operate on the use of water, not the existence

of the right itself. Accordingly, such requirements cannot serve as a legal basis to divest, extinguish, or abandon vested water rights established by prior appropriation.

G. Respondents' Theory Would Disrupt the Entire System

If federal construction could extinguish native flow rights, then all upstream and downstream rights throughout the Western United States would fall under federal control, which would overturn the doctrine of prior appropriation.

V. FEDERAL LAW DOES NOT SUPERSEDE PRIOR APPROPRIATION

The controlling authority is *United States v. City of Las Cruces*, 289 F.3d at 1184–86:

- Federal reclamation law does not create water rights;
- State law governs priority and ownership.

The Supreme Court likewise confirmed that federal authority does not displace vested rights absent clear congressional action. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899); *California v. United States*, 438 U.S. 645, 653–55 (1978).

The Act of March 3, 1891 controls rights-of-way only. It does not control vested irrigation rights.

VI. PROJECT CONTROL DOES NOT ALTER PRIORITY

Administrative control does not alter prior appropriated water rights.

Under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106–08 (1938), administrative actions by a federal project, including scheduling water deliveries, cannot alter vested rights.

Under *United States v. City of Las Cruces*, supra, federal law must operate within state priority systems.

Snow v. Abalos, supra, ¶ 29, held that ownership of water rights survives the creation of a federal project despite administrative changes.

Delivery ≠ ownership.

Regulation ≠ extinguishment.

Therefore, the *Snow* holding collaterally estops the State and others from relitigating whether farmers' ownership was conveyed, abandoned, forfeited, or extinguished by signing the 1905 EBWUA contracts. The United States could have joined the *Snow* trial and chose not to. Since the United States was involved with, or aligned with, the EBWUA/EBID project administration in 1914, it should not now be permitted to allege that its change of the natural flow of the river extinguished Claimants' ownership over 100 years ago.

VII. PRIVITY DOES NOT EXIST

Privity requires a successive legal relationship to the same property interest. *Shovelin v. Central New Mexico Electric Cooperative, Inc.*, 115 N.M. 293, 297.

The rights the Claimants allege survived the Project are rights that pre-date the Rio Grande Dam & Irrigation Company and arose independently under territorial law.

The uses of water for which Claimants seek summary judgment are the rights they appropriated prior to 1893 and prior to the formation of RGD&IC, plus those rights the farmers appropriated pursuant to territorial law by their additional diversions of water through their community ditches after 1893.

The farmers' pre-federal rights created pursuant to territorial law were not part of the irrigation works created by RGD&IC and therefore were not in privity with RGD&IC and still exist today.

RGD&IC clarified the distinction in ownership of rights between the diversion rights it was creating by capturing the floodwaters of the Rio Grande and the prior diversion and water rights appropriated by the farmers who previously diverted and beneficially used the surface flow of the river. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 693 (1899).

Therefore, the State's Argument 4 on page 4 of its Response—that res judicata bars the Claimants from presenting their claims in this case—is without merit as it relates to the original water rights and diversion rights created by the Claimants' predecessors prior to the federal project because those claims, pursuant to *Snow v. Abalos*, supra, ¶ 29, continued to be owned and still existed in 1914.

The lack of any conveyance, successive ownership, or other action creating privity is proven in both *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), and *Snow v. Abalos*, supra.

Snow v. Abalos was the only proceeding in which the Claimants' prior appropriations were fully litigated and in which they were joined as parties. *Snow* held the opposite of Respondents' position: that the Claimants still owned their water rights in 1914.

Snow also considered whether the statutory change of administration of acequias and ditches located in the Mesilla Valley into community ditch corporations altered their rights, holding:

“The words, ‘that such officers shall have general charge of all affairs pertaining to the same,’ ... do not disturb property rights as they previously existed in the various co-partners; they do not disturb or destroy priorities as they existed before the statute of incorporations; they do not give

the power to take away from one the water belonging to him and to give it to another.”

Snow v. Abalos, supra, ¶ 21.

The State states in its November 2015 Statement of Position that drought caused abandonment of the pre-Project water rights and that the United States’ 1906 and 1908 reservations of water amounted to an appropriation, but the facts and law are otherwise. The French Maps show irrigation throughout the Mesilla Valley through an elaborate system of connected ditches. Therefore, drought did not cause abandonment.

The United States did not acquire ownership of the farmers’ prior appropriated water rights by reservation either. The law under which the United States filed its 1908 reservation expressly provided that reservations could apply only to waters “so described and unappropriated.” NMSA 1978, § 72-5-33(A); *Snow v. Abalos*, supra, ¶ 29.

No prior court has examined whether the 1903 Default Judgment was a meritorious judgment based on due process, or whether Claimants’ predecessors were in privity with the corporate defendants in 1903.

Thus, no privity exists.

VIII. CONTROLLING SEQUENCE OF JUDICIAL DETERMINATIONS

The governing law arises from a consistent sequence of judicial decisions affirming that pre-federal diversion-based rights vested under territorial and state law and were never lawfully extinguished.

In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899), the United States Supreme Court recognized that appropriation rights arise under local law and are not displaced by federal authority.

In *Snow v. Abalos*, 1914-NMSC-022, ¶ 10, the New Mexico Supreme Court confirmed that water rights vest through diversion and beneficial use.

In *United States v. City of Las Cruces*, 289 F.3d 1170, 1184–86 (10th Cir. 2002), the Tenth Circuit reaffirmed that federal law does not create or displace such rights.

In *State of New Mexico v. Garcia*, No. A-1-CA-36269 (N.M. Ct. App. 2023), ¶ 3, the Court of Appeals recognized that completion of diversion works establishes vested rights under New Mexico law, stating: “The Company completed a portion of the intended irrigation project by constructing two diversion dams and one canal.”

These authorities establish that:

- Pre-federal rights vested upon diversion and beneficial use;
- Those rights remain protected property interests;
- Federal statutes, including the Act of March 3, 1891, do not extinguish the prior appropriated rights; and

Administrative control does not alter ownership or priority.

The 1903 default judgment cannot operate as res judicata because it lacked subject matter jurisdiction and failed to include necessary parties.

IX. SUMMARY JUDGMENT

Summary judgment is appropriate where no genuine issue of material fact exists. See Rule 1-056 NMRA; *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7.

The material facts are undisputed:

- Pre-Project rights existed;
- No lawful extinguishment occurred;
- Federal law does not displace those rights.

Claimants are entitled to judgment as a matter of law.

WHEREFORE:

Claimants respectfully request that the Court:

1. Determine that the Act of March 3, 1891, does not confer subject matter jurisdiction over vested territorial irrigation and diversion rights;
2. Determine that the 1903 proceeding lacked subject matter jurisdiction and due process and therefore has no preclusive effect;
3. Determine that federal reclamation, treaty, and project administration do not create, extinguish, or supersede vested prior appropriation rights;
4. Reject Respondents' responses, defenses, and legal conclusions inconsistent with controlling law; and
5. Enter summary judgment confirming that Claimants vested pre-1906 rights survived the Project.

Respectfully submitted,

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Certificate of Service

I, Robert Simon, hereby certify that a true copy of the **PRE-1906 CLAIMANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was sent via email to the counsel for parties of record located on the SS-97-107 service list on the Lower Rio Grande Adjudication Website on May 6, 2026.

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