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No. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF JULY 1, 2019
TELECONFERENCE BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning
at 2:00 p.m.

APPEARANCES:

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PROCEEDINGS

(July 1, 2019)

JUDGE MELLOY: This is Judge Melloy.

Good afternoon, everyone. This, of course, is a hearing in connection with United States Supreme Court Original No. 141 and we're going to hear arguments this afternoon on the Motion To Intervene, which has been referred to me by the Supreme Court from what are commonly referred to as the Pre-Federal Claimants.

Let's start by getting some appearances. I'll start with Mr. Simon. Are you on the line?

MR. SIMON: Yes, Your Honor.

JUDGE MELLOY: Okay. Anybody with you?

MR. SIMON: Yes, sir. I have a few people. I have two of my clients. I have Mr. Scott Boyd and I have Mr. Sammie Singh, Jr. Both of them are -- Mr. Singh is a member of the pre-federal representative group of the Lower Rio Grande Adjudication and Mr. Boyd represents the Boyd interests, so all of my constituent groups are here.

JUDGE MELLOY: All right. Then let's just go through the list here. Who is on for the State of Texas?

1 MR. SOMACH: Your Honor, this is Stuart
2 Somach and with me are Theresa Barfield, Francis
3 Goldsberry, Robert Hoffman and Sarah Klahn.

4 I am uncertain if anybody from the Attorney
5 General's office is on, but I'll allow them to
6 introduce themselves if they are.

7 JUDGE MELLOY: Anyone from the Texas
8 Attorney General's Office?

9 (No response.)

10 JUDGE MELLOY: Apparently not.

11 Then New Mexico?

12 MR. ROMAN: Good afternoon, Your Honor.
13 This is David Roman on behalf of the State of New
14 Mexico. On the line with me is Michael Kopp. I
15 believe we are the only representatives for the
16 State on the line right now, but if there is anyone
17 else I would ask them to introduce themselves.

18 JUDGE MELLOY: Anyone else from the State
19 of New Mexico or anybody from the New Mexico
20 Attorney General's Office?

21 (No response.)

22 JUDGE MELLOY: What about the State of
23 Colorado? Anyone on from Colorado?

24 MR. WALLACE: Yes. Good afternoon, Your
25 Honor. This is Chad Wallace for the State of

1 Colorado.

2 JUDGE MELLOY: Okay. And then the amici,
3 Albuquerque Bernalillo County Water Utility
4 Authority? Anyone on?

5 MR. BROCKMAN: Yes, Your Honor. This is
6 Jim Brockmann for the Albuquerque Bernalillo County
7 Water Utility Authority.

8 JUDGE MELLOY: City of El Paso?

9 MR. CAROOM: Doug Caroom for the City of
10 El Paso, Your Honor.

11 JUDGE MELLOY: City of Las Cruces?

12 MR. STEIN: Good afternoon, Your Honor.
13 This is Jay Stein for amici City of Las Cruces, New
14 Mexico.

15 JUDGE MELLOY: Elephant Butte Irrigation
16 District?

17 MS. BARNCastle: Good afternoon, Your
18 Honor. This is Samantha Barncastle for the
19 Elephant Butte Irrigation District.

20 JUDGE MELLOY: El Paso County Water
21 Improvement District?

22 MS. O'BRIEN: Good afternoon, Your Honor.
23 This is Maria O'Brien and also on the line is Sara
24 Stevenson on behalf of El Paso County Water
25 Improvement District No. 1.

1 JUDGE MELLOY: Anyone on from the
2 Hudspeth County Conservation & Reclamation District
3 No. 1?

4 (No response.)

5 JUDGE MELLOY: Apparently not.
6 Anyone from the State of Kansas?

7 (No response.)

8 JUDGE MELLOY: How about the New Mexico
9 Pecan Growers?

10 MS. DAVIDSON: Good afternoon, Your
11 Honor. This is Tessa Davidson on behalf of New
12 Mexico Pecan Growers.

13 JUDGE MELLOY: Anyone from New Mexico
14 State University?

15 (No response.)

16 JUDGE MELLOY: All right. Apparently
17 not.

18 All right. Before we get into the merits --

19 MR. DUBOIS: Your Honor, this is James
20 Dubois from the Department of Justice. You sort of
21 skipped --

22 JUDGE MELLOY: Oh. I'm sorry. I skipped
23 the United States. How could I do that? I'm
24 sorry.

25 Who is on the for the United States?

1 MR. DUBOIS: James Dubois for the United
2 States. I'll be speaking today. I believe Stephen
3 MacFarlane is also on. I'm not sure if there's
4 anybody beyond that.

5 JUDGE MELLOY: Anyone else? Anybody from
6 the Solicitor General's Office?

7 Mr. MACFARLANE: No, Your Honor. This is
8 Steve MacFarlane. There will nobody on for
9 Interior today.

10 JUDGE MELLOY: All right. Thank you.
11 Other than A.J. Olsen, have I missed anybody else?
12 (No response.)

13 JUDGE MELLOY: Is A.J. Olsen on?
14 Mr. Olsen?
15 (No response.)

16 JUDGE MELLOY: All right. Just for the
17 record, Mr. Olsen filed a Motion for Substitution
18 of Counsel for Alvin Jones. I understand Mr. Jones
19 passed away last week and I'm sorry to hear that.
20 Apparently Mr. Olsen is not on the phone right now.
21 We do need to clarify their status at some point,
22 but I'll take that up with either another
23 proceeding or some type of written Order because
24 they're actually not an amicus at this point.
25 Anyway, we'll clarify their status at some future

1 time.

2 MR. OLSEN: Your Honor, A.J. Olsen. I'm
3 sorry. I somehow got disconnected.

4 JUDGE MELLOY: Okay. Well, we were just
5 talking about you. All right. I'm sorry to hear
6 that Mr. Jones passed away, but you're going to be
7 substituting for him?

8 MR. OLSEN: Yes, Your Honor.

9 JUDGE MELLOY: The clerk's office was a
10 little puzzled by what to do with your substitution
11 of counsel because you're not actually in the case
12 in any formal respects. Do you wish to file a
13 motion to appear as amicus?

14 MR. OLSEN: Well, Your Honor, I thought
15 that that had been done for the limited purpose of
16 filing an amici brief with the Pecan Growers. Up
17 to that time there had not been a motion filed by
18 the diverse crop farmers to participate as amici,
19 but there was a motion, as I say, filed along with
20 the amici brief at the same time with the Pecan
21 Growers.

22 JUDGE MELLOY: And that brief was filed,
23 but I didn't know what you anticipate your role to
24 be going forward. Are you going to actually
25 participate or join in briefs occasionally? What

1 do you see as your role? As of right now you're
2 not on the service list.

3 MR. OLSEN: Yes, Your Honor. It's our
4 position we'd like to participate in the role of
5 participating in briefs.

6 JUDGE MELLOY: You want to be an amicus,
7 then?

8 MR. OLSEN: Yes, sir.

9 JUDGE MELLOY: Well, then I would ask
10 that you file a motion to be allowed to join as an
11 amicus if that's what your desire is.

12 MR. OLSEN: Yes, Your Honor. I'll do so.

13 JUDGE MELLOY: Very good. Okay. Then
14 we'll get to the matter of the Motion To Intervene
15 filed by the Pre-Federal Claimants.

16 Mr. Simon, I'll let you go forward and tell us
17 what you'd like us to hear about that motion.

18 MR. SIMON: Thank you, Your Honor. I
19 really don't want to take very long. I think I've
20 fully argued my case in my motion and my reply and
21 I really think that the case turns on two issues.
22 One is the 1903 decree by the Territorial Court of
23 New Mexico which we claim cannot be res judicata as
24 to our claims because the Pre-Federal Claimants
25 were not provided notice nor were they joined nor

1 were they in privity with any party to that case.
2 It's a unique situation, Your Honor, because for
3 privity there has to be some kind of representation
4 by a party in the case with the ability to
5 represent you. What we have in this case is a
6 conspiracy to create a sham proceeding as a fraud
7 against the judicial system because what happened
8 was when the U.S. was trying to gain control of the
9 river after the passage of the Reclamation Act in
10 1902, the way they did that was they filed an
11 amended complaint or a supplemental complaint
12 against the two named defendants, neither of which
13 were viable entities. The two corporate entities
14 named in their original suit existed in 1897 when
15 the case was originally filed in the Territorial
16 Court. As you're aware, there was significant
17 litigation over the years and, unfortunately, the
18 U.S., we believe, used improper litigation in that
19 initial case because they claimed the right of
20 controlled navigation, but the Rio Grande is not a
21 navigable waterway or in any way involved in
22 commerce and we believe the reason that they filed
23 against us was because -- when I say "us", I mean
24 the Rio Grande Dam & Irrigation Company -- was to
25 secure the use of the water that had previously

1 been appropriated by the Rio Grande Dam &
2 Irrigation Company for all the farmers in New
3 Mexico, Texas and Mexico. As you know, the Rio
4 Grande Dam & Irrigation Company thought to
5 deliver -- capture the water in Elephant Butte and
6 then deliver it for a fee to the farmers in New
7 Mexico, Texas and Mexico. We believe that we had
8 the prior rights and we can prove them. I'd be
9 happy if we did nothing further than proceed to
10 determine who has the best title to the
11 appropriated rights.

12 Going back to the litigation, the U.S. then in
13 1903 when it filed its supplemental complaint
14 never -- we claimed and I believe we can prove by
15 the 1923 World Court case that the United States
16 knew and the attorneys for the companies knew that
17 those companies no longer existed as viable
18 entities, had no assets and all their assets after
19 1900 were conveyed to Dr. Nathan Boyd who is the
20 great-great-grandfather of Mr. Scott Boyd here. So
21 what they did was they did not serve process, they
22 did not join them and they took a judgment by
23 default against two entities that had no existence
24 in fact. Those two named corporations own no
25 assets because those assets had been conveyed away

1 from them upon the liquidation of those
2 corporations in 1900 and they knew that in 1903.
3 In fact, their two attorneys who had represented
4 those two corporations then conspired with the U.S.
5 Government and perhaps the Court to create a
6 default by not responding to the supplemental
7 complaint in 1903 thereby creating a default
8 against two non-functioning corporations. The
9 Government then prior to that date, as you see from
10 my discussion in my memo, sent in a survey team to
11 survey the dam site in March of 1903 before the
12 judgment of default was even rendered. We claim
13 that through the history of prior appropriations
14 and under the prior appropriation doctrine those
15 farmers who now own the water in the Lower Rio
16 Grande and Texas and Mexico all secured their water
17 by creating their own ditches and creating the
18 diversion rights from the river. Then when Rio
19 Grande Dam & Irrigation Company was formed in 1893
20 by those community ditches and financed by
21 Dr. Boyd, they connected in 1897 those three main
22 community ditches that were connected through
23 drains the other ditches in the Mesilla Valley and
24 down into Texas and they linked their ditches up to
25 the Leasburg Canal and the Fort Selden diversion

1 and that completed an irrigation system for a
2 portion of the floodwater. Now, as you know, in
3 1896 and '97 the U.S. Government had its intent to
4 take those waters for its El Paso International Dam
5 & Reservoir thought to enjoin the Rio Grande Dam &
6 Irrigation Company from completing its reservoir
7 and dam at Elephant Butte and it was successful.
8 It created the mechanism by which they prevented
9 the completion of the dam, but they did not
10 complete -- I mean, they did not stop the
11 completion of the Leasburg Canal, which is a
12 six-mile canal connecting the three main ditches,
13 and the Fort Selden Diversion and they also had
14 diversions upstream and downstream. There was a
15 Percha and the Rincon Valley and Caballo diversion
16 upstream that the company made and then they
17 appropriated and made a west side diversion. There
18 was a completion of work. The question that we
19 have before us in this case that I would request
20 that you consider is whether the completion of
21 those works by that Rio Grande Dam & Irrigation
22 Company constituted completions within the five
23 years under Section 20 of the Federal Act of
24 March 3, 1891 and the Territorial Act of February
25 1887 and 1891 that provided for affidavits and

1 public notices of commencement of construction and
2 upon completion those works were appropriated.
3 There were also prior appropriations as early as
4 1843 by farmers in the Doña Ana area, which is
5 upstream. It's south of Fort Sullivan and north of
6 Las Cruces. They commenced their safety of
7 construction in 1843. We have a group of statutes
8 including the Treaty of Guadalupe-Hidalgo, the 1887
9 Act, the 1891 Act and the 1891 Federal Act that all
10 come into play. And, of course, we have some case
11 law that in New Mexico in 1905 determined that
12 those who built a canal or an acequia were the
13 owners in common to that acequia and, of course,
14 they are the owners of the waterways.

15 Now, it looks like Texas has never addressed
16 their interest in the water, but the original
17 intent of the Irrigation Company was to provide
18 water to all within that range within that area and
19 that is most identical to what the project then
20 later did. The project then trespassed on the
21 easement that Boyd owned in 1903 and built their
22 Rio Grande Project on top of our dam or next to it
23 and took all the water that we had appropriated for
24 their project and then basically copied our plan of
25 distribution. When I say "our", I again am talking

1 about the initial Rio Grande Dam & Irrigation
2 Company until 1900 and after 1900 the Boyd interest
3 and the farmers' interest in their ditches and
4 their water rights under their prior appropriation
5 rights.

6 JUDGE MELLOY: Now, do I understand you
7 to be arguing that because of your prior
8 appropriation and a prior appropriation date that
9 predates 1900 that both the 1906 treaty with Mexico
10 and the Compact itself are invalid because they are
11 trespassing on your rights and giving away your
12 water?

13 MR. SIMON: I think to the extent that
14 they are not delivering our full measure of water
15 that we appropriated prior to the Compact and prior
16 to the treaty that they would be invading our
17 rights. There is enough -- I'll answer your
18 question directly. We agreed to deliver water to
19 Mexico. The original Rio Grande Dam & Irrigation
20 prospectus, which you will see in the 55th 2nd
21 Session, publication 255 of the public records of
22 the Senate, there's a copy of the prospectus and
23 that provides that the intention or the planned
24 area of distribution of water of the project that
25 my clients initiated was to include both Texas and

1 Mexico. My clients had provision for distribution
2 of water to Mexico. The only difference is that we
3 were going to charge for that water. So in the
4 case of the treaty it would be the U.S. that would
5 owe the delivery fees and the capture and storage
6 fees for that water. We are not saying that the
7 treaty is nullified. We're simply saying that our
8 prior rights require a delivery of the prior water
9 that we appropriated to us first and that if there
10 is water yet to be delivered because there's a
11 shortfall in delivery that the U.S. Government or
12 somebody has to make a -- the State of New Mexico
13 would have to make a call on junior rights holders
14 upstream that they have given water to since 1907.

15 Now, with regard to the project rights, you
16 are correct. The project rights we hold in fee
17 simple and those have never been divested. We have
18 to either be compensated or there is a trespass
19 action available for the intrusion of federal
20 control of our facilities and our project rights.

21 JUDGE MELLODY: So, in essence, you're
22 arguing that you own the Elephant Butte Reservoir.

23 MR. SIMON: Well, you know, there are
24 equitable rights that accrue to one who trespasses,
25 but as it relates to those prior rights for the

1 actual appropriation of those project rights, yes.
2 Now, the Federal Government has spent a lot of
3 money and done a lot of things to create a
4 distribution system that they have stopped us from
5 creating. We would either have to have an
6 ejectment and we go back into possession and we
7 then create a distribution system or there would
8 have to be some reconciliation with the U.S.
9 Government to accommodate us through compensation
10 in some manner that would recognize those prior
11 rights.

12 JUDGE MELLOY: In all this material that
13 I reviewed there was some reference to the fact
14 that under normal water flow you basically were
15 appropriating all the water of the Rio Grande. Is
16 that accurate?

17 MR. SIMON: No, it's not. Let me
18 explain. We know from that from time and memorial
19 there have been diversions of water upstream and
20 downstream from that Lower Rio Grande and we can
21 only claim that water that is unappropriated --

22 JUDGE MELLOY: But didn't you claim all
23 of it, all the unappropriated water?

24 MR. SIMON: No, sir. We claimed -- What
25 the Rio Grande Dam & Irrigation Company did was it

1 claimed all the unappropriated floodwater of the
2 Rio Grande that reached Elephant Butte on the Rio
3 Grande. It also agreed to hold, capture and
4 distribute -- store, capture and distribute the
5 historic waters that had been appropriated by those
6 farmers in the Lower Rio Grande and in Texas and
7 Mexico if they chose to allow us to do so for them
8 to hold their pre-1893 water rights for that water
9 that is the surface water that they had been using
10 for their farms prior to 1893. There might still
11 be enough water to provide for the project. We
12 don't know how much water there is. All I'm saying
13 is that we appropriated enough water to serve those
14 farms within that area that reached Elephant Butte
15 and we want to be sure that those people are not
16 shorted in their water rights that they
17 appropriated.

18 Does that answer your question, Your Honor?

19 JUDGE MELLOY: Well, I'm not sure it
20 entirely does, but let's move on.

21 MR. SIMON: I guess what I'm trying to
22 say is we've never had -- The problem with the
23 adjudication in the Lower Rio Grande, Your Honor --
24 We would propose that the prior appropriation
25 doctrine be followed as it relates to all the

1 water. We only claim that water which is a part of
2 the floodwater that was unappropriated that reached
3 Elephant Butte Dam at that time.

4 JUDGE MELLOY: Well, let me try and
5 understand exactly who you represent -- the
6 interest that you represent in this Petition In
7 Intervention.

8 As I understand it, there are a group of
9 farmers who have prior appropriation rights that
10 predate 1890. All right?

11 MR. SIMON: 1893. Yes.

12 JUDGE MELLOY: 1893. Did they assign
13 their rights to the Irrigation District?

14 MR. SIMON: Well, they did in 1905, but I
15 contend that that was under coercion.

16 JUDGE MELLOY: So they assigned them
17 their rights to the project as --

18 MR. SIMON: The delivery rights.

19 JUDGE MELLOY: Let me finish here. Just
20 a second. Let me go back. Let me just say this.
21 As I understand it, if there is a farmer out there
22 in the Lower Rio Grande in New Mexico who claims
23 that they never delivered their rights to anybody,
24 that they have rights that predate the ones that
25 the United States claims to have, which I think is

1 1904, they can still adjudicate those rights;
2 correct?

3 MR. SIMON: Yes. That's what they're
4 trying to do.

5 JUDGE MELLOY: No. I'm not talking about
6 that. What I'm talking about is if they didn't
7 have anything to do with the Rio Grande Irrigation
8 District.

9 MR. SIMON: Right. We also have a New
10 Mexico case on that.

11 JUDGE MELLOY: But all the people that
12 you represent are people who are asserting claims
13 through the Rio Grande Irrigation District; is that
14 correct?

15 MR. SIMON: Let's get the names correct,
16 Your Honor. There's two -- I'm going to try to
17 clarify that understanding.

18 JUDGE MELLOY: Okay. Rio Grande Dam &
19 Irrigation Company.

20 MR. SIMON: January 12, 1893 is the
21 priority date for the water rights derived from Rio
22 Grande Dam & Irrigation Company and those rights
23 are the rights to the floodwater, the floodwater of
24 the Rio Grande, so that's the excess water that
25 comes off the lower Rockies in the spring and the

1 fall that is in excess of the amount that was then
2 diverted for farming purposes on surface flows.
3 In addition, prior to 1893 there were a number of
4 ditches and a number of diversions and those
5 farmers created water rights to most of the surface
6 flow of the Rio Grande and some of it went to Texas
7 and Mexico. It wasn't a complete consumption or
8 appropriation of all the water. It was just that
9 portion that was unappropriated that they had
10 historically used for their surface water
11 irrigation prior to 1893 and that's the claimants
12 that Mr. Singh and others are in. For example,
13 Mr. Singh has an 1851 or 1852 La Mesa ditch
14 irrigation right. The 1905 assignments were of a
15 forced and coerced assignment. It wasn't
16 voluntary. What the U.S. Government did was said,
17 "Well, we've taken control of the project and we
18 now control your historic rights to water and if
19 you want us to deliver your historic surface flows
20 that you historically diverted before 1893, you're
21 going to have to assign us your rights and you're
22 going to have to pay for this project", because
23 under the Reclamation Act Congress will not pay the
24 full price like the Rio Grande Dam & Irrigation
25 Company was going to pay for its project and made

1 the farmers give up their rights and pay for the
2 dam and the distribution system that they now call
3 the U.S. Rio Grande Project and liened their
4 properties.

5 JUDGE MELLOY: Are there any claimants
6 who are not either claiming through the Rio Grande
7 Dam & Irrigation Company or who have not previously
8 assigned their claims to the United States?

9 MR. SIMON: Well, not within this group,
10 Your Honor, but I represent two others who are --
11 one other group that's in that category. I think
12 it's upriver. They are within the project, but
13 they don't get delivery of water.

14 JUDGE MELLOY: Okay. I want to keep
15 these two separate for a second.

16 As I understand it, anybody who is claiming
17 through the Rio Grande Dam & Irrigation Company
18 arguably has had their claim cut off by the 1903
19 decree and the 1909 Supreme Court decision which
20 you claim is invalid; is that correct?

21 MR. SIMON: Yes, sir.

22 JUDGE MELLOY: And so then you add the
23 second group of claimants who you say were coerced
24 or defrauded or somehow forced to give up their
25 rights in 1905. I didn't understand that they were

1 part of the intervention. Maybe I missed that. I
2 thought we were only talking about the Boyd Estate
3 issues.

4 MR. SIMON: No, sir. There's two
5 different groups. Let me --

6 JUDGE MELLOY: Let me ask you this. Why
7 can't the second group -- that is, the 1905 coerced
8 claimants if you want to call them that -- why
9 can't they just adjudicate their claims in the
10 ongoing proceedings in the Lower Rio Grande
11 Adjudication Court in New Mexico?

12 MR. SIMON: Well, because the Court won't
13 let them. See, the problem, Your Honor, is that we
14 have a hodgepodge of rights. Let me take Mr. Singh
15 here at the table with me. Okay? Mr. Singh is in
16 the second group that you have identified, but
17 Mr. Singh claims both pre-1893 rights through an
18 1851 ditch and he also claims 1893 floodwater
19 rights under the Rio Grande Dam & Irrigation
20 Company. Most of my clients --

21 JUDGE MELLOY: That's what I'm trying to
22 get at, Mr. Simon, is if -- To the extent any of
23 your clients claim through the 1893 Rio Grande Dam
24 & Irrigation Company, their claims are cut off by
25 the 1909 Supreme Court decision, as I understand

1 it, subject to your claim that that's an invalid
2 decision.

3 Now, to the extent somebody has another claim
4 because they had pre-1893 rights, they can
5 adjudicate that in New Mexico State Court, can't
6 they?

7 MR. SIMON: Yes. Yes.

8 (Talking in the background.)

9 MR. SIMON: What my client, Mr. Boyd, is
10 saying is that we have a damage issue perhaps in
11 that the U.S. Government created an embargo in 1896
12 that prevented further diversion and development of
13 water rights on the main stem of the Rio Grande.

14 JUDGE MELLOY: But that's the Rio Grande
15 Dam & Irrigation Company issue; right?

16 MR. SIMON: Perhaps. Yes.

17 JUDGE MELLOY: Okay. So I think part of
18 the problem here and what I'm trying to get my head
19 around is, first of all, as I understand the
20 litigation history of this case, you have a 1903
21 decree, you have a 1909 Supreme Court decision
22 affirming that decree, you then have some type of
23 proceedings in the early 1920's, the World Court
24 proceedings, which were brought by some British
25 investors. But then, as I understand it, there

1 were no proceedings of any kind any place until
2 sometime in the 1980's when there was something
3 filed in the Court of Claims; is that correct?

4 MR. SIMON: There was a 1914 case also,
5 but the 19 -- Boyd died in '25 and then the case
6 wasn't taken up again until the grandson filed in
7 the Court of Claims in '97 or '98.

8 JUDGE MELLOY: What I'm getting at is
9 nothing happened for 70 years. Is that what you're
10 saying?

11 MR. SIMON: Right. Part of that has to
12 do with sovereign immunity and --

13 JUDGE MELLOY: But it all goes back to
14 the issue of you have to set aside the 1909 Supreme
15 Court decision.

16 MR. SIMON: Yes. And the 1903. Yes.

17 JUDGE MELLOY: Okay. On what conceivable
18 basis can you say we can go in 120 years later or
19 110 years later and set aside a Supreme Court
20 decision? Particularly, I don't know why you would
21 ask a District Court to do that. Only a Supreme
22 Court could do that, couldn't they?

23 MR. SIMON: That's an interesting issue.
24 The New Mexico District Court in the Lower Rio
25 Grande adjudication found that that was a federal

1 issue and they did not have jurisdiction to do it.

2 JUDGE MELLOY: Of course. I mean, I was
3 a District Court Judge and I wouldn't even
4 contemplate the possibility that I could take a
5 Supreme Court decision and say it's invalid.

6 MR. SIMON: Let me give you a couple of
7 examples of what I believe answers your question.
8 If we look at what I call Arizona vs. California,
9 No. 304, the U.S. Supreme Court decision in 2000,
10 that was the case that involved the Fort Yuma
11 Apache Reservation. What happened in that case is
12 very similar to what happened in our case. In 1893
13 the Department of the Interior basically made a
14 fraudulent agreement with the Indians and took
15 15,000 acres or 30,000 acres of their reservation
16 and the Indians fought that and in 1940 they won a
17 judgment that said that -- I believe the judgment
18 was that that was an invalid agreement. Then maybe
19 it was in 1976 -- I may not have my dates
20 perfect -- but the Government finally admitted that
21 that was a fraudulent taking of the Indians 'land
22 and they compensated the Indians for that taking.
23 Then the Indians sued in the 1990s, I believe,
24 which would now be 100 years later, for the water
25 rights that were taken from them by the fraudulent

1 taking of their land. The Supreme Court found in
2 Arizona vs. California in 2000 that that was --
3 that the Indians had been denied their water rights
4 and ordered that they be allocated water rights
5 under the Lower Colorado Compact. I don't know who
6 gave up water rights, but those people got their
7 water rights. That Indian tribe was given an
8 allocation of water. That's exactly what I'm
9 arguing here.

10 We also have the U.S. vs. Truckee-Carson
11 Irrigation District, another case in which the
12 Indian tribe -- in this case the Paiute Indians --
13 the Pyramid Lake Paiute Tribe -- fought to have
14 water rights to its fishing rights at Pyramid Lake
15 adjudicated and they were finally granted and very
16 pretty recently the rights to those water rights
17 for fishing rights that they had been denied and
18 there was a res judicata claim made in that case
19 that they had been part of the Orr Ditch
20 adjudication and they were granted over 3,000 acres
21 of water under that irrigation district, but they
22 then later came back and said , wait a minute,
23 you're destroying our fishing rights and we have to
24 be -- we have to have water for our fishing rights,
25 which, again, go back hundreds of years.

1 The U.S. Supreme Court in that case -- or maybe it
2 was a district court -- said that they had rights
3 to the fishing rights and that the district could
4 not draw off that amount of water that represented
5 their historic rights to their fishing rights.
6 That's what we're arguing here. We have prior
7 rights and those have to be recognized.

8 JUDGE MELLOY: All I'm saying, Mr. Simon,
9 though, is it seems to me that if you are going to
10 go -- if your argument turns on the invalidity of a
11 1909 United States Supreme Court decision, you need
12 to go into the United States Supreme Court and ask
13 them to set aside that decision. I don't think any
14 other court has jurisdiction to do that.

15 MR. SIMON: Your Honor, I do agree with
16 you in that sense and that's why we're here.

17 JUDGE MELLOY: But that gets to the
18 timeliness issue. I don't know why you didn't do
19 that years ago because you kept --

20 MR. SIMON: I don't know the answer --
21 I've only represented these clients since 2011, but
22 Your Honor, my client is telling me that he didn't
23 have access to those records until after the
24 Freedom of Information Act made them available.
25 Let me just say that jurisdiction is always subject

1 to attack and we're attacking the jurisdiction of
2 the 1903 case and the 1909 Supreme Court case
3 because they did not have in their jurisdiction
4 either the issue, the res or the people who owned
5 those rights and it was an invalid judgment in 1903
6 and it was an invalid judgment in 1909 and we're
7 attacking the jurisdiction of those courts to
8 render those decisions.

9 JUDGE MELLODY: All right. Well, thank
10 you, Mr. Simon. Maybe I'll hear from the United
11 States first. Mr. Dubois or Mr. MacFarlane? I'm
12 not sure who is going to speak.

13 MR. DUBOIS: James Dubois for the United
14 States, Your Honor. I will keep it fairly simple
15 and clear. The ruling from the court has
16 established that the standards for intervention in
17 original cases by non-state entities is very high
18 largely because of the respect for the sovereignty
19 of states which represent the interest of their
20 citizens in the original actions and that counsels
21 for restraint and allowing intervention by
22 non-state parties. Here, while the Pre-Federal
23 Intervenors have paid lip service to the standards
24 for intervention, in New Jersey vs. New York and
25 South Carolina vs. North Carolina, in acknowledging

1 those cases they really completely misconstrued the
2 meaning in holding the cases. In addition, they
3 appear to misunderstand the nature of the issues in
4 this original action. The Courts held that the
5 intervenor whose state is already a party has a
6 burden of showing a compelling interest in its own
7 right apart from the interest of a class of
8 citizens and other creatures of the state and it's
9 not properly represented by the state. As we set
10 forth in our brief, the Pre-Federal Intervenor
11 have failed in each respect to meet the standards
12 of intervention. And as you've pointed out, in
13 addition, the motion is not timely. The
14 Pre-Federal Claimants have not shown that they have
15 got a compelling interest in the subject and
16 factual issues of this action because the claims
17 they seek to raise are really adjudicatory claims,
18 an intramural dispute within New Mexico. This
19 action that's in front of you now is a -- concerns
20 the interpretation of the Rio Grande Compact which
21 apportions the water of the Rio Grande and defines
22 the rights and obligations of the states under that
23 compact. New Mexico in entering the compact bound
24 its citizens to the terms of that agreement and
25 those obligations may impact water right within a

1 state regardless of a prior adjudication.
2 Certainly a classic example of that is Hinderlider
3 v. La Plata River & Cherry Creek Ditch Company.
4 In that case the Court said whether the
5 apportionment of the water of an interstate stream
6 is to be made by compact or by decree of the Court,
7 the apportion that's binding on the citizens of
8 each state and all water claims or that the state
9 has granted water rights before it entered into the
10 compact. What this case is about is the rights of
11 the states in the compact and what the Pre-Federal
12 Claimants are trying to bring into this matter is
13 essentially an adjudication of their rights. That
14 is something that the Court has been very
15 clear about in that intramural disputes over a
16 distribution of water is not something that
17 represents a unique and distinct interest and that
18 is something that is really within the control of
19 the state. The fight over distribution of water
20 within New Mexico is squarely within the category
21 of interest for which the state must be deemed to
22 represent its citizens. It the sort of dispute
23 that the Courts in New Jersey vs. New York said it
24 would not entertain.

25 JUDGE MELLOY: Let me ask you this

1 question. I think looking at it from the
2 prospective of the Pre-Federal Claimants that
3 they're in kind of a catch-22 situation because
4 every time they try to assert their interest
5 whether it's in New Mexico Adjudication Court or
6 U.S. District Court in New Mexico, they run up
7 against the roadblock of the 1903 Decree and 1909
8 Supreme Court decision, which everyone says is res
9 judicata, you're out of court, that's it, we're not
10 even going to hear your claim.

11 How does that play into this? It's sort of a
12 catch-22. On the one hand we're saying we don't
13 want them to have any forum within which to
14 litigate the validity of the 1909 decision and 1903
15 Decree, but on the other hand, that's the roadblock
16 that prevents them from getting any adjudication of
17 their claims anywhere.

18 MR. DUBOIS: Your Honor, I think New
19 Mexico in its briefing went through the history of
20 the series of losses in court over these issues
21 that these parties have gone through. They have
22 had a number of opportunities including in the
23 lower Rio Grande Adjudication. They did not take
24 their most recent loss in that case on appeal to
25 the U.S. Supreme Court when the Court determined

1 that there was not an avenue for going after -- I'm
2 not particularly familiar. I'll defer to New
3 Mexico on sort of the specifics of that. They have
4 had opportunities. They have not taken them to
5 even take the LRT opinion or ruling to the Supreme
6 Court. What you're asking, however, is that this
7 become -- or what they're asking is that this Court
8 take on a general adjudication kind of role because
9 their water rights that they assert exist affect
10 all other water rights. This is not something that
11 is simply an issue with the United States. This is
12 an issue that applies against all of the water
13 rights in New Mexico.

14 JUDGE MELLOY: Well, actually, it
15 applies --

16 MR. DUBOIS: It's a vast expansion of
17 this case.

18 JUDGE MELLOY: Well, as I understand it,
19 they say they also have all of New Mexico -- not
20 only New Mexico's water, but they also have all of
21 Texas and Mexico's water subject to those entities
22 buying it from them.

23 MR. DUBOIS: Which I believe, Your Honor,
24 kind of goes back to your original question about
25 whether or not what they are seeking is to overturn

1 the compact itself.

2 JUDGE MELLOY: Well, I understand that is
3 exactly what they are seeking.

4 MR. DUBOIS: I don't disagree with you,
5 Your Honor.

6 JUDGE MELLOY: I guess the question is,
7 is there any authority that would allow anyone to
8 overturn a compact that provides for an equitable
9 apportionment of water?

10 MR. DUBOIS: Which is also a federal
11 statute, Your Honor. I know of no authority that
12 would allow that. I don't think any such authority
13 exists. I think it would be a very curious thing
14 to allow or to have an individual Claimant for
15 water override both its state sovereign and the
16 federal sovereignty over compacts generally based
17 on a simple disagreement on -- well, particularly
18 in this case -- on a 100-year-old ruling. I know
19 of no authority for that.

20 MR. SIMON: Your Honor, I believe I can
21 address that issue and that question. I know of a
22 precedence.

23 MR. DUBOIS: Your Honor, I did not
24 interrupt Mr. Simon.

25 JUDGE MELLOY: That's right, Mr. Simon.

1 MR. DUBOIS: I'd like to finish up our
2 argument first.

3 JUDGE MELLOY: Let Mr. Dubois finish his
4 argument.

5 I have a question about that. Let's assume
6 that you had a situation where you did have a water
7 rights claimant that did have legitimate claims to
8 the water -- upstream water -- and then another
9 state, New Mexico, and let's say another state,
10 Texas, comes in and says, "We want our equitable
11 apportionment of the water which we're entitled
12 to", and the state then enters into an agreement --
13 Who has the authority in that situation to
14 negotiate the equitable apportionment? The owners
15 of the water rights or the state?

16 MR. DUBOIS: I'm not sure I follow the
17 question, but let me try. My understanding is that
18 you're assuming -- Let's say it's the City of
19 Albuquerque, rights of Elephant Butte. Let's say
20 they came in and said, "We have a legitimate claim
21 to water." Let's say that it went back to a pueblo
22 right for the City of Albuquerque with an 1840
23 water right just making it up. We think that the
24 compact should be reapportioned?

25 JUDGE MELLOY: No. What I'm saying is

1 who has the authority to enter -- Let's take that
2 example --

3 MR. DUBOIS: Only a state has an
4 authority to enter into a compact.

5 JUDGE MELLOY: Let's take your example.
6 So Albuquerque says, "We have a prior appropriation
7 right that goes back to 1840 and that allows us to
8 take 60 percent of the water of the Rio Grande."
9 Texas comes in and says, "But we also have a right
10 to equitable apportionment." If you're going to
11 equitably apportion the water, it's going to cut
12 into New Mexico's prior appropriation right.

13 Does that make sense?

14 MR. DUBOIS: Yes. That, in fact, Your
15 Honor, is exactly what occurs in Colorado. They
16 have both priority call sort of within the state
17 when water is sufficient, but Colorado also will
18 curtail priority rights to make their compact
19 obligation because the compact supersedes or trumps
20 the state appropriation system, which is
21 essentially --

22 JUDGE MELLOY: And so in that --

23 MR. DUBOIS: The state can only allocate
24 that water to which it is entitled. If it is
25 entitled to less because of the compact, even

1 within the state they can only allocate what they
2 are entitled to use within that state.

3 JUDGE MELLOY: And just to kind of
4 complete the circle, what a compact does at the end
5 of the day is to take what are competing interests
6 of equitable apportionment -- Texas, Colorado and
7 New Mexico -- and rather than have the Supreme
8 Court adjudicate a formula, you agree upon a
9 formula that says Texas you get so much, New Mexico
10 you get so much, Colorado you get so much, and they
11 enter into a compact that does the equitable
12 apportionment. Am I summarizing that correctly?

13 MR. DUBOIS: Yes.

14 JUDGE MELLOY: And to the extent that
15 under prior apportionment some entity within a
16 state has to give up water, do they have any rights
17 to participate in that compact negotiation?

18 MR. DUBOIS: As a practical matter my
19 experience is, yes, the water users tend to have a
20 great deal of input during compact negotiations.
21 That's what I've seen running through the histories
22 of this compact, the Yellowstone River Compact, the
23 Republican River Compact. That is typical for them
24 to have input, but it is the state that is the
25 ultimate decision-maker.

1 JUDGE MELLOY: And they are the ultimate
2 signatory to the compact subject to congressional
3 approval.

4 MR. DUBOIS: Because, in fact, they are
5 asserting and defending sovereign rights to their
6 apportionment of the water of the system.

7 JUDGE MELLOY: All right. I may have
8 gotten you off track here, Mr. Dubois. Is there
9 anything else you want to say?

10 MR. DUBOIS: I mean, really, we've burned
11 a fair amount of time on this already. I think
12 that as we've said in our briefing that the -- that
13 there's no interest that these intervenors have
14 that's different from the assistance of the creeks
15 of the state with respect to the issues that we are
16 litigating in this interstate action. They are
17 simply another water user. They are trying to
18 quantify their water rights under state law. That
19 does fall -- that distribution of water issue falls
20 squarely within the category of interest that the
21 state must be deemed to represent its citizens on.
22 By the same token, to some degree -- I will let the
23 states address this, but the State of New Mexico
24 does represent these folks with respect to this
25 compact action. This is not an adjudication

1 action. It's not quantifying or adjudicating
2 rights to the United States. This is dealing with
3 the rights and obligations to the state and the
4 state in that sense does not represent any
5 individual claimant whether they agree with them or
6 not. They represent sovereign interests. That's
7 what this case is about.

8 And then finally, sort of related to the point
9 that you were making earlier about the timeliness
10 of this, these folks are bringing this motion six
11 years after Texas filed its motion for a bill of
12 complaint and five years after we intervened, a
13 couple of years after the Special Master entered a
14 report and well after the Supreme Court has weighed
15 in. Frankly, we are well down the road in moving
16 this case forward. There's been a substantial
17 amount of document protection and discovery. In
18 addition to sort of as you've pointed out the
19 70-odd years where nothing happened, this motion is
20 not even timely within the context of this case.
21 For all of those reasons we would advocate that the
22 motion to intervene be denied.

23 JUDGE MELLOY: All right. Thank you.
24 Mr. Somach, do you want to speak for the State of
25 Texas or anybody else going to speak on their

1 behalf?

2 MR. SOMACH: No. It will be me, Your
3 Honor, and I will be brief.

4 If one ignores all the issue preclusion
5 arguments that may or may not be out there, if one
6 ignores all of the time barring issues that may or
7 may not be out there and focuses on just simply the
8 question of whether or not all things being equal
9 these folks should be allowed to intervene, we
10 don't believe that that intervention meets or that
11 their motion or their arguments meet either the New
12 Jersey standard or the South Carolina standard and
13 Mr. Boyd addressed that in terms of --
14 notwithstanding the fact that they know that's a
15 standard, there's nothing in their briefing that
16 remotely meets the argument that would be necessary
17 to be sustained in order to meet those standards
18 for intervention. Quite frankly, I'm not sure that
19 they could meet the standards -- the normal
20 standards for intervention in a District Court
21 based upon what they have argued let alone the high
22 standard that the Supreme Court has set in original
23 actions.

24 The second point I want to make very quickly
25 is that the rights that they are asserting are

1 rights that are purely created by state law. Even
2 if I conceded again on the issue preclusion issues
3 that might be out there and conceded they had some
4 kind of right, that right doesn't arrive in some
5 kind of a vacuum. It has to generate or stem from
6 something or some entity and that entity has got to
7 be either New Mexico territorial law or it's got to
8 be New Mexico state law. Either way, it is a right
9 that is purely a creature of New Mexico law in one
10 shape or another. It doesn't have a -- it can't
11 possibly have any other basis on it. If you take a
12 look at even their response to the opposition
13 briefs -- take a look at page 3, take a look at
14 page 5, listen to the argument that Mr. Simon just
15 made -- it's all talking about the law of prior
16 appropriation, appropriate water rights and so
17 forth. Again, those are the very kinds of rights
18 that the Hinderlider case talks about and the
19 Supreme Court was very clear about that. Assuming,
20 again, issue preclusion is defeated, statute of
21 limitations is defeated, their recourse, if any, is
22 an action I guess against New Mexico or the United
23 States in some way, shape or form to get
24 compensation assuming they can prove what they want
25 to prove. It is not an involvement in a Supreme

1 Court original action dealing with the 1938 Rio
2 Grande Compact. In fact, there are no compact
3 issues that are raised in their intervention papers
4 at all. Arguing that somehow the creation of the
5 compact was flawed -- and that's about as close as
6 they get to it -- is not the kind of thing that one
7 can raise as an intervenor in a case like this. I
8 don't think that there is a catch-22 for two
9 reasons. Number one, it would ignore all the prior
10 litigation that they have been involved with and
11 the fact that they did unsuccessful doesn't create
12 a situation where they have had no remedy. They
13 exercised that remedy in arguments of sham
14 proceedings and coercion, all these other kinds of
15 things. There are forums -- assuming, again, they
16 are not time-barred, there are forums where they
17 could file lawsuits on those types of issues, but
18 not in an original action like this one.

19 With respect to everything that they have
20 argued, it's all very, very kind of interesting and
21 colorful, but it really is not the stuff of which
22 intervention in an original action is made. An
23 original action is among sovereigns as Mr. Dubois
24 has indicated. This is a case primarily between
25 New Mexico and Texas. All these issues that have

1 been raised are issues as against the State of New
2 Mexico, tangentially perhaps the United States.
3 They have no place in this action and we ask that
4 the motion be -- we recommend that the motion be
5 denied. Otherwise, we simply rely upon the
6 papers we've filed in this case.

7 JUDGE MELLOY: Thank you, Mr. Somach.
8 Mr. Roman?

9 MR. ROMAN: Thank you, Your Honor.
10 There's very little for me to say because the
11 issues have all been briefed pretty much.
12 As Mr. Dubois indicated, we've already taken up a
13 lot of time with this issue, so I don't want to say
14 too much.

15 As we've discussed, clearly the question is a
16 priority of individual water rights within New
17 Mexico, which is what the base of this claim is, is
18 simply not at issue in this case. The Pre-Federal
19 Claimants haven't shown any unique or compelling
20 interest in actual subject matter in this
21 litigation. Namely, the interpretation of their
22 respective compacting party's rights and
23 obligations under the compact. As Mr. Somach
24 indicated, it's clear that the Pre-Federal
25 Claimants aren't raising or defending compact

1 claims, but rather just asserting their rights to
2 water they contend are somehow superior to the
3 compact's apportionment. You can tell just how
4 infrequently they refer to the compact at all in
5 their moving papers. As Mr. Dubois and Mr. Somach
6 indicated, under the Hinderlider case it's very
7 clear that state law rights in an interstate
8 stream -- even those rights that predate a compact
9 are still subject to the compact's apportionment.
10 This is strictly a New Mexico state law action and
11 it's not proper for an original action in this
12 forum. The state adjudication that's ongoing is
13 the proper forum for litigation of a state water
14 right. As I say, it's ongoing at the present time.
15 In seeking to intervene here while there's already
16 an ongoing adjudication -- albeit one that's stayed
17 right now -- the Pre-Federal Claimants are
18 attempting to preemptively appeal a pending matter
19 that hasn't even been decided yet. As previously
20 discussed, the claims that they are attempting to
21 raise here have already been litigated and rejected
22 multiple times in multiple forums, including the
23 Supreme Court, over more than the past century and
24 it wouldn't be appropriate to revive them here
25 especially because their interests are really no

1 different from those of any other New Mexico water
2 user or Elephant Butte Reservoir who claims their
3 water right in which case they are standing in the
4 same shoes as tens of thousands of other water
5 users in the state of New Mexico whose rights are
6 being adjudicated. So therefore, it isn't a
7 catch-22 as Mr. Somach pointed out. They had the
8 forum to raise these. Their claims have been
9 rejected in the past. It's not that they didn't
10 have an opportunity. It's just that opportunity
11 was denied under merit. The last thing I'd point
12 out is that both EBID and EP No. 1 were also
13 earlier in this litigation denied the ability to
14 intervene because it was determined that their
15 respective states represented them despite the fact
16 that at least EBID and New Mexico are at odds over
17 certain aspects of this litigation. And if one of
18 these that are holding contract rights to project
19 water can't show a unique and compelling right in
20 this intervention sufficient to merit their
21 intervention, the Pre-Federal Claimants certainly
22 can't and we join with the other two parties in
23 urging you to deny the motion to intervene.

24 JUDGE MELLODY: Let me ask you a quick
25 question. I'm looking through my stuff here and I

1 can't find what I'm looking for, but -- There's
2 reference in Mr. Simon's brief or moving papers to
3 an adjudication I think it was in the U.S. District
4 Court about the United States priority date and
5 there's some dispute about whether or not the Court
6 got it right. That was then apparently put on hold
7 to allow for settlement negotiations. What's the
8 status of that case?

9 MR. ROMAN: Just to be clear, Your Honor,
10 it's not in Federal District Court, that issue.
11 That would be in State District Court in the Third
12 Judicial District in New Mexico. That is part of
13 the New Mexico Adjudication which is broken up into
14 different stream system issues. I believe the one
15 you're referring to is Stream System Issue 104
16 which was adjudicating the U.S.'s water right.
17 You're correct that that is still currently stayed
18 pending discussions on essentially whether other
19 parties of the adjudication are going to appeal the
20 finding of a 1903 priority date on the part of the
21 United States. And as I understand it, even though
22 I'm not directly involved in that adjudication,
23 there's also the question of whether the U.S. may
24 appeal a finding that its project right is a
25 groundwater only project right. I'll certainly let

1 the U.S. chime in if I'm misstating the potential
2 appeal there. Currently it is still stayed with
3 the District Court Judge overseeing the case
4 holding hearings every approximately six months to
5 determine whether the ongoing stay is still merited
6 based on the progress that's being made on the
7 settlement discussions. And as you can probably
8 imagine, a number of the issues being discussed
9 there are kind of overlapping some of the issues
10 that we're dealing with in this litigation as well.
11 In that Stream System 104 stay there's also a stay
12 of the Stream System 107 issue, which is what is
13 relevant to the Pre-Federal Claimants -- what they
14 are moving for here because that 107 issue is
15 determining whether any pre-project irrigation
16 rights survive formation of the project. Those two
17 stream system issues are what are currently stayed
18 in the State District Court.

19 Does that answer your question?

20 JUDGE MELLOY: Yes. Thank you. Do any
21 of the amici want to be heard on this issue?

22 (No response.)

23 JUDGE MELLOY: If not, I'll give
24 Mr. Simon the last word. Mr. Simon?

25 MR. SIMON: Thank you, Your Honor. There

1 have been a number of statements I'd like to
2 address. Let me just say in terms of the posture
3 of the case and whether intervention is
4 appropriate, the U.S. has tried to assert its
5 claims to the project starting in -- well, it tried
6 to dismiss this adjudication in 1995 and the case
7 started in 1986. There was a U.S. vs. New Mexico
8 decision in 1995 where they determined that the
9 stream system for adjudication was the Lower Rio
10 Grande. The U.S. then in 1997, I believe, went to
11 U.S. Federal Court and tried to obtain validation
12 by Declaratory Judgment Act of its claim to the
13 project. My client entered that case. That case
14 went to the 10th Circuit and the 10th Circuit in
15 2002 approved abstention and sent it back to the
16 state court for adjudication of the U.S. interest.
17 This case started again in 2010 and that's where we
18 are today.

19 With regard to our positions, we hold that the
20 thing that makes us uniquely different than every
21 other Claimant in contradiction to everything that
22 was said by the U.S., New Mexico and Texas is that
23 we hold the rights -- senior rights -- to the
24 project from 1893 and the water rights for the
25 flood waters from 1893. The state adjudication has

1 denied both of those claims and they have not, as
2 you've noticed, dealt with the pre-claimant's
3 rights before 1893, but -- well, yeah. 107 is the
4 last -- 104 -- Where we stand in the state
5 adjudication, as Mr. Roman mentioned, is the state
6 has yet to make a final decree as to the priority
7 dates of the Federal Government and it has yet to
8 finally determine the pre-federal rights of the
9 farmer claimants. They're open issues. The U.S.
10 is now using this mechanism to try to validate its
11 project rights by saying that it holds project
12 rights and it has the right to have those allocated
13 by equitable allocation under the compact. Well,
14 that's simply not right and their reference to
15 Hinderlider is not right either. I'm quoting from
16 U.S. vs. Nevada and California, 412 U.S 534-539 and
17 Judge Rehnquist's decision. "It is true that
18 upstream or downstream water uses and priorities
19 are important considerations when the judiciary
20 equitably apportions an interstate stream." He
21 quotes Hinderlider and Nebraska vs. Wyoming and
22 Wyoming vs. Colorado.

23 This Court has the right to address the prior
24 rights in this adjudication. Not adjudication, but
25 in this compact case. Hinderlider at 108 says

1 that, "If these states do not consider all the
2 prior rights" -- just like this quote from
3 Rehnquist says -- "that there is an infirmity in
4 the legality of the compact." What we're saying is
5 we hold rights senior to the U.S. The U.S. has
6 been granted intervention and they are asserting
7 their ownership of the compact rights and the
8 project rights that went into the compact and those
9 are inextricably connected. What we're saying is
10 that you cannot decide whether this compact has
11 legally allocated rights to Texas that deny the
12 farmers in the southern part of the state their
13 historic priority without taking into consideration
14 those water uses and priorities that are important
15 consideration when the judiciary equitably
16 apportions an interstate stream. That's where we
17 are today. You're being asked to consider the
18 validity of the appropriations of the U.S.
19 Government and all the rights that went into the
20 compact and we're saying that not all the rights
21 that were then vested were considered when the
22 compact was drafted. And to the extent that Texas
23 or the Mexicans or anyone else believe that they
24 have a claim superior to those prior vested rights,
25 there's an infirmity in the compact that has to be

1 examined. Hinderlider says -- You know,
2 Hinderlider was a much easier case because
3 Hinderlider dealt only with fully-appropriated
4 rights. Both the Cherry Creek Ditch and the New
5 Mexico claimants had vested rights and they were
6 simply allocating the days of delivery. The
7 Colorado Court had granted the ditch 10 days of
8 sustained diversions and -- or 20 days -- and they
9 all agreed amongst the states that they would each
10 take 10 days each instead of 20 days straight or
11 something like that. That case dealt with
12 appropriated rights. What we have here the a
13 different case. What we have here is is the
14 compact considering fully the vested rights that
15 are vested in each state? Let me go on to some of
16 these other people. You said that -- Mr. Dubois
17 said that the intervention is high, the standards
18 for intervention, but this is not simply an
19 intrastate case. This is an interstate case where
20 we claim all the project rights and our rights are
21 unique. No one else in this case -- in any of
22 these cases or under the project has made a claim
23 to interstate free federal project rights. That is
24 what is at issue in this case and why you should
25 grant intervention. We have a compelling interest,

1 the state has failed to consider it or refused to.
2 We stand in the same position as the U.S. just as
3 Mr. Roman said. The state has not granted a
4 priority date to the U.S. and they have not granted
5 us a priority date for our project rights. As soon
6 as that happens there's going to be an appeal as
7 Mr. Somach or Roman or someone may have mentioned
8 and we will be right back here discussing whether
9 there was a valid forfeiture of our rights and
10 whether we hold superior rights. This is like the
11 high standard that Judge Ginsberg and Roberts and I
12 believe the New Jersey vs. New York case mentions
13 and that is that they in their dissent said it
14 would be preferable to allow intervention to the
15 City of Philadelphia since the City of Philadelphia
16 has compelling interest in the water that is the
17 subject of the New Jersey vs. New York
18 adjudication. Even though the Court said that they
19 shouldn't, the dissent said that it should have.
20 The water that the U.S. put into the compact
21 included some of the prior appropriated water or
22 the floodwaters that we claimed. Hinderlider at
23 108 says that if there are interests in vested
24 rights that were not considered in the compact,
25 that creates an infirmity in the legality of the

1 compact. We represent our rights. The state will
2 not represent our rights. It has rejected our
3 rights. Therefore, our claim is unique. There is
4 no one who is making our claims. We meet that
5 three-part check.

6 Now, let me go on to the other issues that
7 were stated. What you asked was what do we do when
8 an assertive claim runs up against a 1903 and 1909
9 judgment? Is there a catch-22? You're correct.
10 We have been denied the rights to a full trial on
11 the merits of our rights by the State Courts of New
12 Mexico. You can tell from the pleadings that New
13 Mexico endorses or asserts or agrees with the
14 U.S.'s right to the project. New Mexico is
15 fighting us to destroy our rights in the Lower Rio
16 Grande while it's endorsing the rights of the U.S.
17 in this case, so it will not and has not protected
18 our rights.

19 You then asked, "Who has the right to allocate
20 water when there are prior rights?" I referred you
21 back to Judge Rehnquist's decision and the citing
22 of Hinderlider, Nebraska vs. Wyoming and Wyoming
23 vs. Colorado where there is a dispute over
24 priorities. This Court has always applied the
25 prior appropriation doctrine and looked at the

1 dates of priorities as determinative of the rights
2 as it allocates those rights between the states.
3 That's what it did in Wyoming vs. Colorado. It
4 said that the Wyoming project had an earlier date
5 than the Colorado project. Even though Colorado
6 had a legitimate argument for the use of the water,
7 the Wyoming earlier project took priority and they
8 were granted those rights as between Wyoming and
9 Colorado. That's exactly what we're arguing here.
10 We're saying we have a case in which the state has
11 given water under a compact without regard to the
12 prior rights of some of those vested right-holders
13 and the U.S. Supreme Court needs to step in as it
14 did in Truckee-Carson and the -- there's all of
15 these cases we cited -- and made an allocation of
16 that water and made that part of the consideration
17 of the compact. The compact has an infirmity
18 because it did not consider our prior rights. The
19 reason it didn't is because the U.S. and the State
20 of New Mexico wants the U.S. to control the project
21 and they have for the last 100 years . They have
22 tried to divest us of our rights and they have
23 delayed us from asserting our rights for over 100
24 years. This is real clear to me. I don't see any
25 issue here. This is, to me, an assertion by the

1 U.S. again after 30 years of litigation of its
2 right to control the project when it never
3 appropriated the rights under law, it never
4 followed Section 7 and 8 of the Reclamation Act and
5 it never followed the state law as required by
6 Section 8. There's a case here where it says the
7 U.S. always followed state law and got its permit
8 for its projects. Well, Your Honor, that's not
9 what happened here. This is a different animal.
10 This is a case where the U.S. never followed the
11 Reclamation Act. It knew that there were prior
12 rights and it never condemned them, it never
13 compensated for them. It simply took them by
14 seizure and trespass and then put them into the
15 compact and said let's all get together and divide
16 up these rights, but never considering those prior
17 vested rights of my clients under prior law. I'd
18 like for the Court to at least take the time to put
19 our chain of title up against the U.S. chain of
20 title. I think we could show you that we have the
21 legal vested rights to those project rights and
22 that the U.S. never obtained the legal vested
23 rights as it's required to under the Reclamation
24 Act and it never did under state law under the
25 state permit procedures.

1 JUDGE MELLODY: All right.

2 Well, Mr. Simon, I think you're sort of
3 repeating yourself here. Unless you have anything
4 else to say, why don't we bring it to a close.

5 MR. SIMON: Yes. The other thing that
6 Mr. Somach said that I'd like to address is he said
7 that this is simply a claimant under New Mexico law
8 that's making a claim that can be made in New
9 Mexico Court. That's not true. What we are
10 claiming, Your Honor, is that we've created a
11 project pursuant to the Federal Act of March 3,
12 1891 that created a vested project right that
13 encompassed New Mexico, Texas and Mexico and that
14 we've completed a project pursuant to that 1891 Act
15 and that pursuant to the 1891 Act we hold vested
16 rights that have not been acknowledged or
17 established or granted the opportunity. We also
18 claim as it relates to Mr. Singh and others their
19 vested rights prior to statehood under the Treaty
20 of Guadalupe Hidalgo, so we have federal claims
21 that are not being considered in the state court
22 that need to be considered. We claim the project
23 rights, the project is an integral part of the
24 compact, because those rights are not being
25 acknowledged and considered there is a defect in

1 the compact. That's Hinderlider, page 108.

2 Again, I'd simply say when the U.S. Government
3 sought to intervene in this case, the reason that
4 it took seven years or six years to get involved in
5 this case is we were trying to litigate in the
6 state court adjudication. When the state came into
7 this case and raised its rights under the project,
8 we had to enter this case because we claim a
9 superior right to the U.S. that also has to be
10 considered in relation to the contract. I would
11 ask the Court to give us the merits trial or a
12 hearing on the merits with the opportunity to
13 present our evidence that the State of New Mexico
14 has never granted us to present our chain of title
15 and to show the Court the infirmities of the U.S.
16 title and the compact and the correct vested chain
17 of title that we claim.

18 I really only want to mention one other thing
19 that's still confusing the Court and that is the
20 actions. I think I mentioned that in 1997 or 8 the
21 U.S. sought to declare its rights in Federal Court
22 and that ended up with the 2002 U.S. vs. Las Cruces
23 decision that sent the case back to the state
24 court. So it was a federal case and it was a case
25 started by the U.S. Government and that was what

1 ended up as initiating this new round of
2 adjudications in this case. And as you probably
3 suspect, Your Honor, what the U.S. and Texas and
4 these others are doing is they have stopped us from
5 litigating our rights in the adjudication while
6 they come over here to the U.S. Supreme Court and
7 seek to validate their rights in this case.
8 There's no other party that has the unique claim to
9 project rights other than us. We stand on the same
10 footing as the U.S. The U.S. has no priority date
11 and we have no priority date because the state
12 court has yet to grant one. We have as good of
13 right to be here as the U.S. We have a better
14 right than they do to the rights that this Court is
15 considering. And it's not a matter for the State
16 of New Mexico. This affects the compact and we
17 would ask the Court to take that into
18 consideration. We ask you to consider our rights
19 right alongside the U.S. and the states as they --
20 to determine whether they have adequately
21 considered all the prior vested rights when they
22 made their compact. Thank you, Your Honor.

23 JUDGE MELLODY: Thank you, Mr. Simon. All
24 right. I'm going to show this matter submitted and
25 try to get out a report as soon as possible. In

1 the meantime, I'm not going to make any adjustments
2 in the discovery to schedule or anything of that
3 nature. Obviously if Mr. Simon's clients are
4 granted the right to intervene, that will totally
5 change this litigation and will require some
6 serious adjustments in discovery and trials and
7 everything else, but until that happens we're going
8 to continue on the current schedule and not make
9 any adjustments at this time.

10 Is there anything else we need to take up
11 before we sign-off?

12 (No response.)

13 JUDGE MELLOY: If not, then I appreciate
14 everybody's time. Thank you very much. We'll be
15 adjourned.

16 (The conference was adjourned at 3:34 p.m.)

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CERTIFICATE

I, Shannon N. Benter-Moine, Certified Shorthand Reporter of the State of Iowa, do hereby certify that, on the 1st day of July, 2019, at Cedar Rapids, Iowa, that I reported in shorthand the above teleconference, reduced the same to printing under my direction and supervision, and that the foregoing transcript is a true record of all proceedings.

I further certify that I am not related to or employed by any of the parties to this action, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and seal this 9th day of September, 2019.

/s/ Shannon Benter-Moine

Certified Shorthand Reporter

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