

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. STATE
ENGINEER,

Plaintiff,

v.

No. 66cv6639 MV/WPL

R. LEE AAMODT, et. al.,

Defendants,

and

UNITED STATES OF AMERICA,
PUEBLO DE NAMBE,
PUEBLO DE POJOAQUE,
PUEBLO DE SAN ILDEFONSO,
And PUEBLO DE TESUQUE,

Plaintiffs-in-Intervention.

**RESPONSE TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AND
RESPONSE TO PLAINTIFF'S MOTION TO BAR UNTIMELY "ERROR AND
OMISSION AAMODT LITIGATION WATER RIGHTS TOWN OF
JACONA LAND GRANT"**

The Town of Jacona Land Grant ("Land Grant"), by and through its counsel, Sommer, Udall, Sutin, Hardwick & Hyatt, P.A. (Kurt A. Sommer), responds to the State's above-titled Motions as follows:

1. The Town of Jacona Land Grant ("Land Grant"), through its President of the Board of Trustees of the Jacona Land Grant Association, Paul Ortiz, filed an *Error and Omission* pleading on July 26, 2016.

2. As the recently appointed President of the Board of Trustees, Mr. Ortiz only just became aware that the Land Grant was never provided personal service or notice of the Aamodt litigation.

3. On August 10, 2016, Plaintiff filed its *Motion for Default Judgment* and on August 12, 2016 Plaintiff filed the *Motion to Bar Untimely "Error and Omission Aamodt Litigation Water Rights Town of Jacona Land Grant* ("*Motion to Bar*" and collectively the "*Motions*").

4. Subsequently, undersigned counsel entered his appearance on behalf of The Town of Jacona Land Grant with the Court on August 24, 2016.

HISTORICAL BACKGROUND OF THE LAND GRANT FORMATION

5. Prior to statehood, in 1699, the King of Spain provided a deed granting the real property and all rights appurtenant, which is now known as the Land Grant, to the original Grant members. Importantly, upon information and belief, the appurtenant rights include water rights.

6. Roughly two (2) years prior to New Mexico becoming a state, on November 15, 1909, William H. Taft, then President of the United States of America, signed a Patent confirming the private land claim known as the Town of Jacona Grant granting the surveyed tract together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, to the heirs, successors, assigns, and legal representatives of Ignacio de Roibal, Fancisca Gomez and their children and setting forth the boundaries of the Land Grant. The Patent excludes any right or title to any gold, silver or quicksilver mines or minerals of the same and the right to work the mines as property of the United States. See Exhibit A.

7. In confirming all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging of the private land claim, the Patent includes water rights to the Land Grant members, heirs, successors and assigns.

8. Throughout its occupation of the premises, the Land Grant and its members have been using surface and groundwater within its boundaries for grazing, agricultural and personal use purposes. The Land Grant consists of approximately 6900 acres more or less.

TIMING OF THE STATE'S MOTION FOR DEFAULT JUDGMENT

9. The State's *Motion for Default Judgment*, asking the Court to grant default judgment against unknown claimants of interest to surface or groundwater rights within the NPT stream system and bar their assertion of any further claims in the proceedings to the use of surface of groundwater in the NPT stream system, relies upon the State's compliance with the Court's *Procedural Order for Notice by Publication of Claims Deadline* ("*Procedural Order*") (Doc. 7919, August 15, 2013), alleging that in publishing notice to unknown claimants as required by the *Procedural Order*, the deadline for unknown claims of interest to file claims to water rights within the NPT stream system was November 10, 2013.

10. It is suspect that on the heels of the Land Grant's *Error and Omission* filing, fifteen (15) days later, and almost three (3) years after the November 10, 2013 deadline for unknown claimants to file a claim, the State requested this blanked default judgment to bar unknown claimants from filing claims to water rights within the NPT stream system.

11. Even if the Court grants the State's *Motion for Default Judgment*, the Court should allow the Land Grant's claim to be considered as it was filed prior to the State's *Motion for Default Judgment*, and as explained further below, the Land Grant is an easily ascertainable claimant, thus its assertion of claim in these proceedings should not be barred.

NOTICE TO KNOWN CLAIMANTS VERSUS NOTICE TO UNKNOWN CLAIMANTS

12. The Land Grant has been in official existence since 1699, the initial date of the warranty deed from the King of Spain, and was thereafter confirmed by President Taft through a Patent signed and dated in 1909, prior to New Mexico becoming a state of the United States.

13. The New Mexico State Historian provides the following history of the Land Grant:

Ensign Ygnacio de Roybal petitioned Governor Pedro Rodriguez Cubero for a rancho on which to raise enough food to support his family and pasture his herds of livestock. He reminded the governor that Captain Jacinto Palaez previously had been granted two *fanegas* of corn land at the Pueblo of Jacona and stated that his application covered the "surplus" lands at that site. He described the tract as being bounded:

On the north, by the road which leads from the new village to Jacona and some bluffs above said road; on the east, by the lands of Juan de Mestas and the lands of Oyu, formerly owned by Francisco de Anaya Almanzan; on the south, by the forest between this village and Jacona; and on the west, by a cañada, which comes down by a house built by Matias Madrid and some red bluffs near the little mesa of San Ildefonso.

Cubero granted all of the tract embraced within the above boundaries to Roybal on October 2, 1702, save and except the two *fanegas* tract which was owned by the minor son of Jacinto Palaez. He also directed the Alcalde of Santa Fe, Roque Madrid, to deliver possession of the grant to Roybal in the customary manner. The grant was entered in the corporation book of Santa Fe on September 7, 1713. Roybal allegedly was placed in royal possession of the concession, and it is generally accepted that he and his family moved to the grant and commenced cultivating the premises. By 1846, there were at least fifty families living at the Town of Jacona.

The inhabitants of the Town of Jacona, as the heirs and legal representatives of Roybal and Palaez, petitioned Surveyor General James K. Proudfit on January 5, 1874, seeking the confirmation of the two ancient grants. After a brief investigation, Proudfit, in an opinion dated June 10, 1874, found the grant papers to be genuine and recommended that the grant be confirmed to the legal representatives of said Roybal by Congress, "according to the boundaries set forth in the petition of said Roybal to Governor Cubero, and as granted by said governor." A preliminary survey of the grant was made in September, 1878, by Deputy Surveyors Griffin & McMullen for 46,341.48 acres.

Notwithstanding Proudfit's favorable report, Congress took no action on the claim. Therefore, following the creation of the Court of Private Land Claims, the inhabitants of the grant turned to that forum for relief. They filed their petition on September 21, 1892, alleging that a valid grant had been made to Roybal in 1702, and was subsequently confirmed in 1782 by Governor Jun Bautista de Anza. In support of this contention the plaintiffs, referred to Archive No. 1261, which was a copy of the confirmation proceedings. This record showed that Mateo Roybal, a son

of the original grantee had requested the confirmation of the entire grant. Anza, in his decree dated September 11, 1782, stated:

I granted and do grant in the name of his majesty (whom God preserve) that portion of land which he possessed and actually possesses as his own and no more in accordance with what is expressed in the documents relating to the entirety of the grant which was made of the aforesaid Jacona to the Ensign Don Ignacio de Roybal and without prejudice to what may be owned in the same by the other heirs....

Anza also directed the Alcalde of Santa Cruz, Jose Campo Redondo, to place applicant in royal possession of "the aforesaid portion of land." In compliance with the governor's instructions, Redondo, on September 26, 1782, delivered to Mateo Roybal possession of a tract of land bounded:

On the west, the edge of an Arroyo which likewise serves as the boundary of the heirs of Juana Lujan, the landmark of which is a rock which is on the edge of said Arroyo on the slope of a hill which also serves as the boundary towards the south, and looking from said rock in a straight line towards the north the boundary in this direction is the hills on the other side of the Nambe River; on the east with the lands of his brother Don Bernardo Roybal....

The plaintiffs argued that these proceedings were a judicial determination by a proper officer and that the entire grant was valid. The government in its answer asserted that the grant was incomplete since there was no evidence that the original grantees had been placed in possession and that the 1782 proceedings confirmed only the lands actually occupied by Mateo Roybal. It also pointed out that the court had no authority to confirm the portion of the Town of Jacona Grant which conflicted with the previously confirmed grants to the Pueblos of San Ildefonso, Tesuque, and Pojoaque.

By decision dated August 23, 1893, the court held that while there was no documentary evidence that possession of the grant had been delivered to the original grantee, the long continuous possession of the premises raised a presumption that the ceremony had been performed. As an alternative ground, the court found that the recitals in the 1782 proceedings indicated that they were brought not to cure a defect in the 1702 grant arising from the failure of the grantee to obtain legal possession of the premises, but evidenced a voluntary partition of the grant amongst Roybal's heirs. Therefore, the court believed it was justified in holding that Anza had recognized the entire grant and confirmed the rights all the heirs of the original grantee. However, the court excepted from its confirmation of the grant all lands lying within the Pueblo of San Ildefonso, Tesuque, and Pojoaque.

The government appealed the decision to the Supreme Court on the grounds that the court was not justified in presuming that possession had been delivered and, in the absence of a delivery of possession, the grant to Ignacio Roybal would not be one which the United States was obligated under the Treaty of Guadalupe Hidalgo to recognize. If the original grant was involved, then the confirmation should be limited to the tract described in the 1782 proceedings. For some unexplained reason the Solicitor General of the United States, on February 1, 1897, requested the

court to dismiss the appeal. In response to said motion, the court entered a decree dismissing the appeal.

The grant was surveyed by Deputy Surveyor Clayton Coleman in July, 1898. His survey showed that the grant contained 6,952.84 acres after excluding 1,163.64 acres which conflicted with the Pueblo of Tesuque Grant, 901.996 acres lying in the Pueblo of San Ildefonso Grant and 2,775.96 acres situated within the Pueblo of Pojoaque Grant. The grant was patented on November 15, 1909. <http://newmexicohistory.org/people/town-of-jacona-grant>, (internal citations omitted).

14. The State confirms in its *Motion to Bar*, in paragraph 7, that the Court has adjudicated water rights within the boundaries of the Land Grant for individual defendants, who are members of the Land Grant Association. While the Land Grant members may hold fractional units of membership interests in the Land Grant, those members' water rights individually are not part of the Jacona Land Grant Association's real property comprising the Jacona Land Grant nor are their water rights part of the Land Grant's water rights.

15. Given the established, known history of the Land Grant within the NPT stream system region, the significant geographic area of the Land Grant within the region and the State's interactions with individual Grant members in the adjudication of their individual water rights, it is not credible that the Land Grant was an "unknown" claimant and that none of its officers or directors were ever personally served during the adjudication regarding its water rights.

16. N.M.S.A. § 72-4-17 which governs suits for determination of water rights, parties, hydrographic survey, jurisdiction and unknown claimants, provides in relevant part:

In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties...and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes, and all unknown persons who may claim any interest or right to the use of the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of

such stream system in his lifetime, may be made parties in such suit by their names as near as the same can be ascertained, such unknown heirs by the style of the unknown heirs of such deceased person and said unknown persons by the name and style of unknown claimants of interest to water in such stream system, and service of process on, and notice of such suit, against such parties may be made as in other cases by publication. (emphasis added).

17. As the single largest owner of land within the NPT other than the Pueblos, the Land Grant is not an “unknown” claimant thus service of process on and notice of such suit against the Land Grant may not be made by publication. The Land Grant could have been ascertained, with reasonable diligence, as is required by N.M.S.A. § 72-4-17.

18. Moreover, the Court’s *Procedural Order* and the resultant *Notice of Deadline*, govern Notice of the deadline for unknown claimants, thus the November 10, 2013 deadline to file claim to water rights within the NPT stream system is inapplicable to the Land Grant as it is known, historic, long-standing entity in the region and reasonably a claimant in the adjudication.

19. Pursuant to the Rules of Civil Procedure for the District Court governing statutory stream system adjudication suits; stream system issue and expedited *inter se* proceedings, NMRA, Rule 1-071.2C, Notice requirements are as follows:

Notice. Notwithstanding Rule 1-004 NMRA, notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given in accordance with this paragraph. Notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given to all claimants, regardless of whether they have been served and joined as defendants, claiming water rights within the section or sections of the stream system identified by the court. Notice shall be given by first class mail with proper postage to all known claimants whose names and addresses are reasonably ascertainable. For all unknown claimants and claimants whose addresses cannot reasonably be determined, notice shall be given in a manner reasonably calculated under all the circumstances to apprise claimants of the proceeding and shall be approved by the court. (emphasis added).

20. Thus with respect to the Land Grant, a known potential claimant whose name and address was and remains reasonably ascertainable to the State, the State's Notice of the deadline to file claims through publication violates NMRA, Rule 1-071.2C.

21. Minimum due process requires notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and affords them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

22. Without personal service, the State's actions are incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication and deprive a known entity with known whereabouts, of substantial property rights.

23. The lack of notice by personal service upon the Land Grant constitutes an illegal taking of the Land Grant's potential water rights.


WHEREFORE, the Town of Jacona Land Grant requests the Court:

- A. Deny the State's *Motion to Bar Untimely Error and Omission Aamodt Litigation Water Rights Town of Jacona Land Grant*;
- B. Enter a finding that the Town of Jacona Land Grant is and was at the initiation of the proceeding a known potential claimant;
- C. Enter a finding that the State was required to personally serve Notice on the Town of Jacona Land Grant and failed to do so throughout the past Fifty (50) years of adjudication;
- D. Grant the Town of Jacona Land Grant the opportunity to file its *Declaration of Water Rights* in the proceeding and have its claim adjudicated with due process of law.

Respectfully submitted,

SOMMER, UDALL, SUTIN, HARDWICK
& HYATT, P.A.

By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on August 24th, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and served the following by U.S. Mail:

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A handwritten signature in black ink, appearing to read 'K. Sommer', positioned above a horizontal line.

Kurt A. Sommer



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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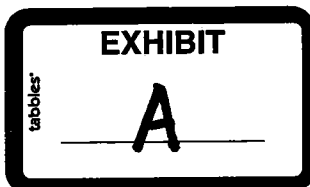
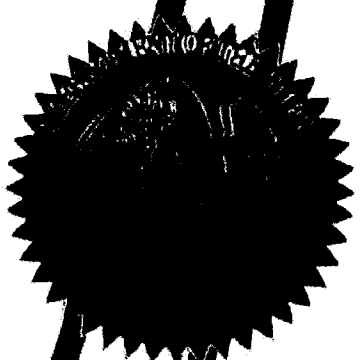
July 29, 2015
(Date)

To Whom It May Concern:

I HEREBY CERTIFY THAT the attached reproduction is an (extract) copy of documents on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed on the above day and year.

Valerie Chavez
(Authorized Signature)



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The United States of America,

P. L. C.
Docket No. 92, New Mexico.

To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office of the United States evidence whereby it appears that in accordance with the provisions of the Act of Congress approved March 3, 1891, entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," the private land claim known as the Town of Jacona Grant, has been duly confirmed to the HEIRS, SUCCESSORS, ASSIGNS, and LEGAL REPRESENTATIVES of IGNACIO de ROIBAL, FRANCISCA GOMEZ, and THEIR CHILDREN; and

WHEREAS, Said Claim has been surveyed and designated as in Townships eighteen and nineteen north of Ranges eight and nine east of the New Mexico Meridian, New Mexico, containing six thousand nine hundred fifty-two and eight hundred forty-four thousandths acres, according to the plat and survey of the said grant approved by the Court of Private Land Claims, September 7, 1899, copies of which are on file in the office of the Surveyor General for the Territory of New Mexico and in the General Land Office; said Grant being more particularly described as follows:

On the east by the lands of Juan de Mestas and lands of Oyu formerly of Francisco de Anaya de Alamazan; on the north by a road that leaves from the New Town (Santa Cruz de la Canada) to Jacona and some bluffs above said road; on the west by a canada which comes down by a house built by Metias Madrid and some red bluffs near the little Mesa of San Ilderfonso; and on the south by the forest (wooded hills) between this town (Santa Fe and Jacona):

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Heirs, Successors, Assigns, and Legal Representatives of Ignacio de Roibal, Francisca Gomez and their children, and to their heirs, the tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Heirs, Successors, Assigns, and Legal Representatives of Ignacio de Roibal, Francisca Gomez and their children, and to their heirs and assigns, forever, in accordance with the terms of the decree of said Court, but subject to the proviso that this grant shall not confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, but all such mines and minerals shall remain the property of the United States, with the

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right of working the same; and that said grant is made subject to all the limitations and terms of the said Act of Congress of March 3, 1891, and all the restrictions and limitations of said decree.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the FIFTEENTH day of NOVEMBER, in the year of our Lord one thousand nine hundred and NINETY, and of the Independence of the United States the one hundred and THIRTY-FOURTH.

(SEAL)

By the President: Wm H. Taft
By M. W. Gray Secretary.
R. H. Anderson
Recorder of the General Land Office.

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