FIFTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel. State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	
Plaintiffs,	)	Nos. 20294 & 22600 CONSOLIDATED
vs.	)	
L.T. LEWIS, et al., UNITED STATES OF AMERICA,	)	Carlsbad Basin Section Carlsbad Irrigation District
Defendants.	)	

OPINION RE THRESHOLD LEGAL ISSUE NO. 2

THIS MATTER comes on for consideration by the Court in connection with Threshold Legal Issue No. 2 which has been phrased as:

> Whether the decree in United States of America v. Hope Community District, U.S. District Court Cause No. 712 Equity (1933) provides the United States and the District with res judicata and estoppel defenses to filed objections.

See PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHT CLAIMS filed on February 26, 1996, at page 6.

I. BACKGROUND [1]

The Court has reviewed and considered the following submissions in connection with the preparation of this opinion:

---

[1]The United States of America is referred to herein as the United States, the State of New Mexico is referred to as the State, the Carlsbad Irrigation District is referred to as CID, Pecos Valley Artesian Conservancy District is referred to as PVACD and the Carlsbad Project is referred to as the Project.

1. MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2, WHETHER RES JUDICATA AND ESTOPPEL DEFENSES ARE AVAILABLE TO PRECLUDE OBJECTIONS submitted by Lynn A. Johnson, Esq. and Steven L. Hernandez, Esq. (US/CID Memorandum)

2. STATE'S RESPONSE BRIEF TO THE US/CID'S BRIEF ON THRESHOLD LEGAL ISSUE NO. 2 - *RES JUDICATA* AND COLLATERAL ESTOPPEL submitted by Rebecca Dempsey, Esq. (State's Response)

3. DEFENDANT'S BRIEF ON THRESHOLD LEGAL ISSUE NO. 2 submitted by A. J. Olsen, Esq. of Hennighausen & Olsen on behalf of defendants identified on an attached Exhibit A. This submission adopted and incorporated by reference the arguments submitted by Pecos Valley Artesian Conversancy District described in paragraph 4.

4. PVACD'S RESPONSE ON THRESHOLD LEGAL ISSUE #2 submitted by Fred H. Hennighausen, Esq. (PVACD's Response)

5. CONSOLIDATED REPLY MEMORANDUM OF THE UNITED STATES AND THE CARLSBAD IRRIGATION DISTRICT ADDRESSING THRESHOLD LEGAL ISSUE NO. 2, WHETHER RES JUDICATA AND ESTOPPEL DEFENSES ARE AVAILABLE TO PRECLUDE OBJECTIONS submitted by Lynn A. Johnson, Esq. and Steven L. Hernandez, Esq. (US/CID Reply)

and referenced exhibits and attachments.

The Court, having considered the aforesaid submissions of the parties and being otherwise sufficiently advised in the premises, submits this opinion in connection with Threshold Legal Issue No. 2.

Summarization in this opinion of all of the claims, contentions and arguments of the parties would serve no useful purpose. They are available to all interested parties for review.

The parties have agreed and the Court concurs that oral arguments are not

necessary in connection with the respective submissions and contentions of the parties in regard to Threshold Legal Issue No. 2.

The terms and provisions of the proposed Stipulated Offer of Judgment (hereafter Offer) submitted by the State, the United States and the CID filed herein on June 22, 1994 are incorporated herein by reference. A copy of the Offer is attached as Exhibit 4 to the US/CID Memorandum.

The claims and objections of the parties concerning the proposed Offer in connection with the Project are set forth in the PRETRIAL ORDER FOR CARLSBAD PROJECT WATER RIGHT CLAIMS filed on February 26, 1996.

An opinion concerning Procedural Issue No. 3[2] was the subject matter of the Court's letter opinion dated July 17, 1996. This opinion discussed matters which are pertinent to those involved in connection with Threshold Legal Issue No. 2. The opinion includes a discussion of matters pertaining to notice, service, service by publication, the binding effect of decrees upon unknown claimants in interest, due process and the requirement that all who may be bound or affected by a decree must

---

[2] Procedural Issue No. 3 provides:

> Whether the decree adjudicating the project water rights will be binding on all water right claimants in the Pecos River Stream System or only on those claimants made defendants through personal service of summons and complaint.

be afforded notice and an opportunity to be heard "...so that they may have their day in court...". Letter opinion, page 16, *et seq.* and cases cited therein. Pertinent matters and citations of authorities referred to in the July 17, 1996 letter opinion have been reviewed, but to reiterate the discussion of these matters in this opinion would serve no useful purpose.

Our Supreme Court has held that the fact that water rights of some of the claimants in a stream system are determined and adjudicated without the determination and adjudication of the water rights of all claimants in a stream system does not affect the Court's jurisdiction and such determinations are binding upon the parties whose water rights are determined; however, this is not to suggest that one not impleaded or served will be bound by the decree. *El Paso & R.I. Ry. Co. v. District Court of the Fifth Judicial District*, 36 N.M. 94, 8 P.2d 1064 (1981); *State v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959); *See also State ex rel. Reynolds v. Pecos Valley Artesian Cons. District*, 99 N.M. 699, 663 P.2d 358 (1983). There does not appear to be any disagreement among the parties concerning these determinations.

The US/CID argue that the doctrine of *res judicata* or collateral estoppel should be applied in connection with the determination of water and storage rights claims of the United States in connection the Project in these proceedings because of the determinations and the adjudication of these rights in ~~United States in~~ *United States v. Hope Community Ditch*, No. 712, Equity D.N.M. (May 4, 1933) (*Hope* Proceedings). (A copy of the decree is submitted as Exhibit 3 with the US/CID Memorandum and is

hereafter referred to as the *Hope* Decree).[3] On May 6, 1935, the Court relinquished jurisdiction of the administration of water rights determined in the *Hope* Decree to the State Engineer. Attachment 2 to Affidavit of Calvin Chavez dated February 17, 1997 submitted with the State's Response. The US/CID also argue that the doctrine of estoppel by judgment, or preclusion, bars litigation of issues involving the water rights of the United States in these proceedings which were determined in connection with the Project in the proceedings involving the Black River, a tributary of the Pecos River, in *United States v. Judkins*, No. 112, D.N.M. (January 3, 1912) (hereafter *Judkins* Decree). (A copy of the Final Decree is submitted as Exhibit 1 with the US/CID Memorandum). The water rights of the United States in the *Judkins* proceedings were later reaffirmed in *United States v. D.R. Harkey*, No. 1610 Equity (D.N.M Sept. 30, 1930). (A copy of the Final Decree is attached as Exhibit 2 to the US/CID Memorandum). *See* US/CID Memorandum, at 1 and 2. The *Judkins* and *Harkey* proceedings are collectively referred to herein as the Black River Proceedings. While the claims of the US/CID in connection with the Black River Proceedings do not appear to fall within quoted Threshold Legal Issue No. 2, there have been no objections to the Court considering the effect of the Black River Proceedings, and, in the absence of such objections, the Court is disposed to consider the effect of the Black River Proceedings in connection with Threshold Legal Issue No. 2. The Court notes,

---

[3]The complaint in *Hope* did not extend to the determination of water rights in connection with the Black River which had been adjudicated in *Judkins* or the Rio Hondo above Hondo Reservoir which were the subject of an ongoing adjudication . *Hope* Complaint, Exhibit 5 to US/CID Memorandum, at 28.

however, that the submitted excerpts from the pleadings pertaining to the Black River Proceedings are sparse. The Court's opinion is based upon the submissions of counsel. No independent review of the Court files concerning the *Hope* Proceedings or the Black River Proceedings has been made by the Court.

A summary of pertinent provisions of the Bill of Complaint and the general provisions, findings of fact and conclusions of law in connection with the *Hope* Proceedings are set forth in attached Exhibit A.

Volume II of the *Hope* Decree sets forth the adjudicated water rights of the United States exercised and to be exercised through the Project. A summary of pertinent excerpts contained in this portion of the *Hope* Decree is attached as Exhibit A-1.

Pertinent excerpts from the submissions of the parties in connection with the Black River Proceedings are contained in Exhibit B.

Considerable argument is devoted in the memorandum briefs to the question of the ownership of water and storage rights by the United States in connection with the Project. Obviously, these questions tie into the issues involving *res judicata* and collateral estoppel; however, they also tie to the nature and extent of water rights owned by the United States and threshold issue 3 which provides:

> Whether project water rights described in the Offer are rights of the United States and/or the District or rights of the District members.

Since issues of ownership of water and storage rights in connection with the Project must be defined and considered in the context of threshold issue 3, except as

discussed in this opinion, they are reserved for determination and will be discussed in connection with threshold issue 3.

Issues concerning the nature of the availability of water and storage rights of the United States vis-a-vis members of CID involve questions of law and do not appear to have been raised nor were they the subject matter of, or determined in the *Hope* Proceedings or the Black River Proceedings. Therefore, the proceedings in the case at bar as to these issues do not involve the same "cause of action" as that involved in the *Hope* Proceedings or the Black River Proceedings. *See Cartwright v. Public Service Co. Of New Mexico*, 66 N.M. 64, 343 P.2d 654 (1958); *City of Las Vegas v. Oman*, 110 N.M. 425, 796 P.2d 1121 (N.M. App. 1990); and *City of Los Angeles v. City of San Fernando, et al.*, Exhibit C, page 18.

The US/CID contend that the decrees in *Hope* and the Black River Proceedings established the decreed rights to the use of water by the United States in connection with the Project which form the basis of the Offer entered into among the State, the United States and the CID. The US/CID argue that objectors to the Offer seek to re-litigate the water rights adjudicated to the United States in the aforesaid proceedings by challenging the Offer.[4] US/CID Memorandum, at 2.

The US/CID argue that objectors should be precluded under the doctrine of *res judicata* from raising the following categories of objections which were or could have

---

[4]The US/CID point out that the Offer differs from the decrees because (1) neither decree adjudicated a duty of water; (2) the US/CID voluntarily compromised the storage rights set forth in the *Hope* Decree; and (3) the *Hope* Decree was modified by administrative hearings before the State Engineer in 1972 and 1986. *See* US/CID Memorandum at 12 and 13.

been litigated in the *Hope* or Black River Proceedings which are quoted from the US/CID Memorandum at pages 18-20:[5]

1. With respect to diversion rights, beneficial use and historic supply, whether:

   a. The offer of direct diversions in addition to storage rights allows an improper aggregation...

   c. Reasonable beneficial use of the claimed right has been made by the District.

   d. The claimed diversion right must be limited by the historic beneficial use in the project and reflect the historic supply in the river.

2. With respect to priorities and acreage, whether:

   a. Claimed priorities are justified.

   b. Project acreage must be established by acreage actually and continually irrigated. [Footnote omitted]

3. With respect to consumptive use, irrigation efficiency, and conveyance loss, whether:

   b. The claimed project water right has been established or expanded through waste

5. With respect to impoundment, diversion, and storage, whether:

   a. Storage claims are excessive...

   b. The total storage right of 176,500 acre feet has been put to beneficial use within a reasonable time. [Footnote omitted]

   c. The 1906 priority for Lake Sumner and Santa Rosa Lake is correct and should apply to additional lake

---

[5]The category numbers and sub-category letters are taken from the Pretrial Order. *See* US/CID Memorandum, at 18, footnote 9.

surface areas and evaporation.

d. The 1893 priority for Brantley Lake is correct and should apply to additional lake surface areas and evaporation.

e. The total quantities of water for the project are reasonable, and consistent with conservation.

6. With respect to project water right claims of the United States and the District in the Offer, whether they should be required to make bases [sic] for the following claims more definite:

b. Project use of reservoir storage

c. Water right acreages expressed in acres and acre feet and the priorities attached to said acreages.

Essentially, the prior proceedings established the historic basis for the quantities, priorities, proper initiation and reasonable development, and beneficial use of the rights included in the Offer. The objections listed above address those issues or issues which could have been raised in the prior proceedings and therefore are barred by res judicata.

Alternatively, if the Court determines that preclusion is only appropriate under the doctrine of collateral estoppel, rather than res judicata, objection categories 1.d. (specifically regarding the potential limitation by historic flows of the river), 2.b. (regarding forfeiture and abandonment), 3.b. and 5.e. (regarding whether the total quantities are consistent with conservation) would not be precluded as those issues were not actually determined in the prior proceedings.

On the present record, the Court is uncertain and is not convinced that the categories of objections set forth in subparagraphs 1.a. and c. (there is no subparagraph b.); 2.b.; (there is no subparagraph 3.a. or 4.); 5.a., b., c., and d.; 6.b. and c (there is no subparagraph a.) were raised in *Hope* or the Black River Proceedings; although, conceivably, they could have been raised.

The Offer includes six (6) distinct water rights claimed by the United States for

use in connection with the Project, all of which the US/CID argue are derived from the aforesaid proceedings, and consist of the following:

1. **Direct diversion rights.**

As was adjudicated in the Hope Decree, the Offer provides for a diversion right to water from the mainstream of the Pecos River with a priority split between July 1887 and July 1888. Consistent with the findings in Hope, the Offer limits irrigation to an area not to exceed 25,055 acres within the boundaries of the Carlsbad Project. Offer, Ex. 4 at ¶ I.A.

From the Judkins decree, the Offer provides for a diversion right from the Black River for the irrigation of 700 acres (included within the 25,055 total), with a priority of 1889. Id. at ¶ I.B.

2. Storage Rights

Again from the Hope Decree, the Offer provides a right to store 7,000 acre feet of water in Lake Avalon with an 1889 priority. Id. at ¶ II.A. The Offer also provides for a right for the storage of 40,000 acre feet in Brantley Lake with an 1893 priority, reflecting the Hope Decree and subsequent changes approved by the State Engineer. Id. at ¶ II.B.

The Offer also draws two storage rights from the 300,000 acre foot storage right appropriated by notice to the state engineer as adjudicated in the Hope Decree and later addressed by the September 22, 1972 order of the State Engineer. Those rights allow for storage in Lake Sumner (formerly Alamagordo Reservoir) of the reservoir capacity at elevation 4,261 feet with a February 2, 1906 priority (Id. at ¶ II.C.) and storage in Santa Rosa Lake (formerly Los Esteros Lake) of 176,500 acre feet, less the total reservoir capacity available for storage in Lake Avalon, Brantley Lake, Lake Sumner (or any replacement or additional lake or reservoir) with a Feb. 2, 1906 priority. Id. at ¶ II.D.

Finally, in conformance with the Hope decree and the State Engineer's September 22, 1972 order, the Offer also allows for the storage of up to 300,000 acre feet of 'unappropriated flood water,' as defined in the Pecos River Compact, in Brantley Lake and Santa Rosa Lake, with the permission of the State Engineer. Id. at ¶ II.E.

US/CID Memorandum, at 16 and 17.

The specific parties (other than a general reference to all objectors) who the US/CID claim are in privity with the parties in the *Hope* Proceedings or the Black River Proceedings and which they claim should be bound by the doctrines of *res judicata* or collateral estoppel are not identified. Neither the State or PVACD were named as parties to either of these proceedings. Apparently, the US/CID claim that all objectors in these proceedings were in privity with the parties in the *Hope* Proceedings and the Black River Proceedings.

II. MATTERS WHICH WERE NOT DETERMINED IN THE *HOPE* OR BLACK RIVER PROCEEDINGS AND WHICH MAY BE CONSIDERED IN THESE PROCEEDINGS.

The following is a summary of matters that were not determined or adjudicated in the *Hope* Proceedings or Black River Proceedings and which the Court determines may be considered during the course of these proceedings:

A. All water rights in the *Hope* Decree[6] were adjudicated, determined and fixed as of June 15, 1931. General provision IX, page 5. The decree should not be deemed or construed to adjudicate or determine water rights involving water in the Hondo stream system above Hondo Reservoir, lands lying below Avalon Dam or the appropriation of water from the Pecos River stream system under any right initiated subsequent to June 15, 1931.

B. The *Hope* Decree should not be deemed or construed as validating or

---

[6]The proceedings in *Hope* did not extend to a determination of water rights in connection with the Black River Proceedings. Page 5, footnote 3, supra.

reviving any right adjudicated therein which has been lost by abandonment, operation of law or otherwise subsequent to June 15, 1931. General provisions, II, page 8.

C. The water rights set forth in the *Judkins* Decree were adjudicated, determined and fixed as of January 3, 1912. Exhibit 1 to US/CID Memorandum. All water rights set forth in the *Judkins* Decree were reaffirmed in the *Harkey* Decree and were adjudicated, determined and fixed as of September 30, 1930. Neither decree should be deemed or construed to adjudicate or determine water rights involving the appropriation of water from the Pecos River stream system under any right initiated subsequent to September 30, 1930.

D. The *Harkey* Decree and the *Judkins* Decree should not be deemed or construed as validating or reviving any right adjudicated therein which has lapsed by abandonment, operation of law or otherwise subsequent to September 30, 1930.

E. Groundwater rights were not determined or adjudicated in the *Hope* Proceedings or the Black River Proceedings. The proceedings which resulted in the *Hope* Decree, the *Harkey* Decree or the *Judkins* Decree should not be deemed or construed as determining or adjudicating water rights in groundwater.

F. The ownership and incidents of ownership of water and water storage rights of the United States vis-a-vis members of CID.

III. MATTERS ABOUT WHICH THERE ARE NO GENUINE ISSUES OF MATERIAL FACT OR CONTROVERSIES AMONG THE PARTIES CONCERNING THOSE PERSONS PRECLUDED UNDER *RES JUDICATA* OR COLLATERAL ESTOPPEL FROM RELITIGATING MATTERS DETERMINED OR ADJUDICATED IN THE *HOPE* PROCEEDINGS OR THE BLACK RIVER PROCEEDINGS.

The following is a summary of matters about which there are no genuine issues of material fact or controversies among the parties concerning who may assert the doctrine of *res judicata* or collateral estoppel as a result of the *Hope* Proceedings or Black River Proceedings:

A. Anyone joined as a party in the *Hope* Proceedings or the Black River Proceedings or successors in interest may assert the doctrine of *res judicata* against any other party or successors in interest.

B. Anyone joined as a party in the *Hope* Proceedings or the Black River Proceedings or successors in interest may assert the doctrine of collateral estoppel against any other party or successor in interest.

IV. ISSUES FOR DETERMINATION[7]

In *Bounds v. Carner*, 53 N.M. 234, 205 P.2d 216 (1949), the Court discusses the binding effect of the *Hope* Decree and affords guidance in connection with the determination of Threshold Legal Issue No. 2. Thus, the Court stated in connection

---

[7]The determination of threshold legal issues at the present stage of these proceedings is somewhat unique and difficult. Essentially, the threshold legal issues can only be determined if there are no genuine issues of material fact. The Court is of the opinion that the procedures to be followed are analogous to the procedures followed in connection with determining motions for summary judgment. An initial determination must be made as to the existence of genuine issues of material fact. Then, and only then, can consideration be given to resolution of the legal issue as a matter of law.

with the *Hope* Proceedings that:

> ...the bill and decree show that the suit was brought to adjudicate the rights (if any) of all the parties thereto to the use of water flowing in the Pecos River Stream System, presumably as provided by Ch. 77, Art. 4, N.M. Sts. 1941,[8] a proceeding for the adjudication of water rights of stream systems... .[9]

Bounds, 53 N.M., at 242.

Referring to the judgment and decree the Court stated:

> ...it was the judgment of the court as to all defendants; although in the nature of a contract as between some of the parties. It operates as res judicata as between the parties to that suit, or their privies, as any other judgment would. 31 A.J. "Judgments" Sec. 464.

Bounds, 53 N.M., at 243. (Underscoring for emphasis added.)

The Court then referred to the "purpose and intent" provisions of the *Hope* Decree and stated that it fixed and determined:

---

[8]It would appear that part of the chapter and article contained in the 1941 Compilation is contained at § 72-4-17 NMSA 1978 Comp. This statute provides in part that: "...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...". *See also* Sec. 77-406, N.M. Sts. 1941. The statute also provides in part: "... 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 life time, 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 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...".

[9]Interestingly, the US/CID argue in their reply, at page 65 et seq. that *Hope* "...was not filed pursuant to New Mexico's general adjudication statute but rather was a quiet title action intended to quiet title to water rights in the Pecos River. Indeed, the Special Master noted that he was not bound by the requirements of New Mexico's adjudication statutes in formulating the decree..." and that the proceedings "...were purely and simply an action in equity, in a Federal Court in Chancery, which is unhampered in the full exercise of its equity jurisdiction by any state statute pertaining to the adjudication of water rights...". The US/CID further argue that *Hope* was simply an "action in equity" relying upon the special report of the Special Master, US/CID Opn. Brf. Iss. No. 2, Exhibit 18 at 22-23. I consider that I am bound by the decision of our Supreme Court in *Bounds, supra.*

> ...not only the water rights of the plaintiff, the United States of America, as against the water rights of each and every defendant herein, but to also fix and determine the water rights of each and every defendant herein as against the water rights of said plaintiff and of each, every and all other defendants inter se.

Bounds, 53 N.M., at 243.

The Court in *Bounds* did not define the term "privies". The current version of Am. Jur., i.e. 47 Am. Jur. 2d 84 et seq. § 663 states that "...privity is an 'admittedly amorphous'; or 'ambiguous' term; an 'elusive and manipulable concept;' and a 'somewhat fluid concept.'" "...In determining whether privity exists, courts generally employ a functional analysis, which entails a careful examination of the circumstances of the case and the rights and interests of the parties to be held in privity. Thus, the question of who is privy is a factual one requiring a case-by-case examination. Privity should be applied with flexibility, literal privity is not required...". At §663, pp 84 and 85. (Underscoring for emphasis added.) *See also C&H Const. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 167, 597 P.2d 1190 (1979).

While there are limited and expanded definitions of "privity", the definition must be consistent with due process and "...In the context of collateral estoppel, due process requires that the party in a succeeding action have an identity or community of interest with, and adequate representation by, a party in the first action, and the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. This approach necessarily requires notice and opportunity to be heard...". 47 Am. Jur. 2d §664 at 93 and 94.

Probably, one of the principal issues about which the parties are in

disagreement is whether the objectors or any of them are in "privity" with the parties involved in *Hope* or the Black River Proceedings. In connection with the issue of privity "...'federal law will incorporate state law when the issue is more distinctly substantive, as with the concept of privity'...". *Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989).

The US/CID argue:

> Thus, to gain the benefit of either res judicata or collateral estoppel, the United States and CID must show three things: (1) that the prior proceedings were final judgments on the merits; (2) that the objectors either participated in the prior proceedings or are in privity with the participants; and (3) that the Objectors or their privies had a full and fair opportunity to litigate their claims. In addition, if res judicata is to apply, and all claims which could have been brought in the prior proceeding are to be barred, the prior proceeding must have involved the same cause of action. If instead collateral estoppel is to apply, and only-those issues actually determined in the prior proceedings are to be barred, the issue on which preclusion is sought must have been actually determined in the prior proceeding.

US/CID Memorandum, at 24.

The US/CID contend:

> ...The Tenth Circuit found '[t]here is no definition of "privity" which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel.[14] Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same.' Id. (citing St. Louis Baptist Temple v. Federal Deposit Ins. Corp., 605 F.2d 1169, 1174 (10th Cir. 1979)).
>
> [Footnote 14: There is no set definition that can be applied because 'privity depends on the circumstances.' Satsky, 7 F.3d 1464 (quoting IB Moore's Federal Practice ¶0.411[1] at III-215 (1993).]

US/CID Memorandum, at 25 and 26.

In *Rex, Inc. v. Manufactured Hous. Comm. of NM*, 119 N.M. 500, 892 P.2d 947

(1995) in discussing the doctrine of collateral estoppel, the Court stated:

> The issues in this case present several novel questions involving the application of collateral estoppel. We previously noted in *Shovelin v. Central New Mexico Electrical Cooperative, Inc.*, 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993), that the doctrine of collateral estoppel promotes judicial economy by preventing the relitigation of ultimate facts or issues actually litigated and necessarily decided in a previous suit. In order for the court to apply collateral estoppel, or 'issue preclusion,' the moving party must show that:
>
> > (1) the party to be estopped was a party [or privy] to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.
>
> *Id.* If the moving party demonstrates each element of this test, the court must then determine whether the non-moving party 'had a full and fair opportunity to litigate the issue in prior litigation.' *Id.*; *see also Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987).

Rex, 892 P.2d at 951. *See also Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) and *Richard v. Jefferson County*, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996), summarized at pages 19-25 of Exhibit C.

In *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996) in defining privity the Court stated:

> There are three generally recognized categories of nonparties who will be considered in privity with a party to the prior action and who will be bound by a prior adjudication: (1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequately represented by a party to the original action. *See generally 18* Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction §§ 4451, 4454-57, and 4462 (1981 & Supp.1990). This case focuses on the third category.

xxx

> However, the Court did note one important exception to the general rule: a party to the second case will be bound by the result of an earlier case to which it was not a party 'when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment.' *Id.* at ____, 116 S.Ct. at 1766. Although the Court provided some examples of what could constitute privity, it did not offer a general definition of that term. Rather, the Court acknowledged that 'the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.' *Id.*
>
> Virtual representation falls squarely within this exception. A court will apply virtual representation only when it finds the existence of some special relationship between the parties justifying preclusion. In essence, this is a finding that the two parties are in privity. *See Gerrard*, 517 F.2d. at 1134 ('Privity ... is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.') (quoting *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950)). When, as in *Richards*, the two parties are strangers to each other, then virtual representation would not be appropriate. However, where there is a special relationship between the parties determined after analyzing the factors listed below, the parties are in privity, and *Richards* is simply inapposite.

In *Bentz v. Peterson*, 107 N.M. 597, 762 P.2d 25 (N.M. App.1988), the Court defined the relationship of privity as follows:

> ...A person in privity with another is a person so identified in interest with another that he represents the same legal right. *Searle Bros. v. Searle*, 588 P.2d 689 (Utah 1978). This definition includes a mutual or successive relationship to rights in realty. *Id.*

See also Johnson v. Aztec Well Services Co., 117 N.M. 701, 875 P.2d 1132 (App.1994).

The State argues that as a corollary to *Bounds v. Carner*, *supra*, the case of *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 343 P.2d 654 (1958) held:

> ...Persons who were not named or joined as parties to the Hope adjudication are not bound by *res judicata* or collateral estoppel under the Hope Decree. 66 N.M. at 76.

State's Response at 6. It is questionable that the doctrines would be limited to persons named and joined as parties. The *Cartwright* court apparently did hold that claims of rights under the Pueblo Rights Doctrine could be raised by the appellees therein since the issue of whether the doctrine should be applied was not involved or determined in the *Hope* Proceedings.

The State argues that the State Engineer and the Pecos River Watermaster consistently interpreted the *Hope* Decree as adjudicating only surface water rights in the Pecos River stream system and binding only on parties and rights which included in the decree. State's Response, pages 2, 8-12. *See also* PVACD's Response, at page 7. Apparently, the State claims that these interpretations in some manner preclude the US/CID from raising the doctrines of *res judicata* or collateral estoppel in these proceedings but cites no authority in support of its arguments. This opinion has been prepared with due regard to the decisions of the Supreme Court in *State v. Myers*, 64 N.M. 186, 193, 326 P.2d 1075 (1958); *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 99, 678 P.2d 1170 [*citing Valley County Club v. Mender*, 64 N.M. 59, 323 P.2d 1099 (1958)]; and *State v. Aamodt*, 111 N.M. 4, 800 P.2d 1061 (1990) concerning the effect of administrative decisions.

In addition to the foregoing issues, there are additional issues and summaries of New Mexico and federal authorities that discuss principles concerning the applicability of the doctrines of *res judicata* and collateral estoppel which are helpful in determining

whether they should be applied in these proceedings because of the determinations in the *Hope* Proceedings and the Black River Proceedings which are set forth in Exhibit C.

V. COURT'S DECISIONS, SUMMARY OF ADDITIONAL ACTION REQUIRED IN ORDER TO DISPOSE OF ISSUES INVOLVED IN CONNECTION WITH THRESHOLD LEGAL ISSUE NO. 2 AND COURT'S ORDERS IN CONNECTION THEREWITH.

The Court is of the opinion that some of the issues involved in connection with the determination of Threshold Legal Issue No. 2 need not be decided; that some of the issues can be decided as issues of law; and that in order to determine other issues an evidentiary hearing will be required. The following opinions and orders are entered in connection therewith:

A. Issues In Connection With The Requirement That In Order For Res Judicata To Apply, The Proceedings Now Before The Court And Those Involved In The Hope Proceedings And The Black River Proceedings Must Involve The Same "Cause Of Action"

In connection with the issue of whether the proceedings involved herein, those involved in the *Hope* Proceedings and the Black River Proceedings involve the same "cause of action" for purposes of determining the applicability of *res judicata*, the Court is of the opinion that the pending proceedings, the *Hope* Proceedings and the Black River Proceedings (to a far more limited extent) generally involve a determination of water and storage rights claims of the United States in connection with the Project. Therefore, generally, all of the proceedings involve the same "cause of action" for the purposes of determining whether the doctrine of *res judicata* should apply. *See*

Nevada v. United States, Exhibit C, page 12 *et seq.*;[10] and *Rex, Inc. v. Manufactured Hous. Comm. of NM*, Exhibit C, page 9. In connection with issues concerning the ownership and incidents of ownership of water and storage rights of the United States, vis-a-vis the members of CID, however, these issues do not involve the same "cause of action". *See* discussion, supra, at 7.

B. Persons Bound By The Determinations And Decrees In The *Hope* Proceedings And The Black River Proceedings.

In addition to parties and their successors in interest, the doctrines of *res judicata* and collateral estoppel are binding on "privies" to persons joined as parties and properly served with notice in the *Hope* Proceedings and the Black River Proceedings. In order to determine the issues involving "privity" discussed at pages 15-18, *supra*, and those persons who properly fall within the definition of "privies", an evidentiary hearing will be required.

C. Due Process Requirements.

An evidentiary hearing will be required in order to determine whether persons who the US/CID claim to be bound by *res judicata* or collateral estoppel were afforded due process in connection with the *Hope* Proceedings or the Black River Proceedings. *See supra*, pages 3 and 4 and the Court's letter opinion dated July 17, 1996; *Richards v. Jefferson County*, Exhibit C, paged 18-22, *citing Mullane v. Central Hanover Bank & Trust Co.*, Exhibit C, page 20; *Tyus v. Schoemehl*, Exhibit C, pages 22 and 23; and *Romero v. Star Markets, Ltd.*, Exhibit C, pages 26 and 27. See also *City of*

---

[10]Full citations of authorities are set forth in Exhibit C with corresponding page references.

Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1963); *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District, et al.*, 99 N.M. 699, 701, 663 P.2d 358, 360 (1983) *citing State ex rel. Reynolds v. Allman*, 78 N.M. 1, 3-4, 427 P.2d 886, 888-889 (1967); *State ex rel. Reynolds et al., v. L. T. Lewis, et al.*, 84 N.M. 768, at 772, 508 P.2d 577 (1973).

As a part of this hearing, the US/CID must establish that: (1) claimants of water rights in the *Hope* Proceedings and the Black River Proceedings were properly categorized into those who were living, those who were deceased, heirs at law of deceased persons, unknown heirs at law of deceased persons and unknown claimants in interest; (2) required notices were served and omitted parties put on notice that the water and water storage rights claims of the United States would be conclusively determined against them by virtue of the *Hope* Proceedings or the Black River Proceedings, (3) persons claimed to be precluded under either doctrine were afforded a full and fair opportunity to participate in the proceedings and present their claims and contentions as to the water and storage rights claims of the United States in connection with the Project; and (4) application of collateral estoppel would be fundamentally fair. *Silva v. State*, Exhibit C, page 2 et seq.; *Reeves v. Wimberly*, Exhibit C, page 6; *Hyden v. The Law Firm of McCormick, Forbes, Caraway & Tabor*, Exhibit C, page 8; *Rex v. Manufacturing Hous. Comm. Of NM*, Exhibit C, page 9; *State ex rel Martinez v. Kerr-McGee*, Exhibit C, page 10; *Arizona v. California*, Exhibit C, page 12; *Richards v. Jefferson County*, Exhibit C, page 21 and *Tyus v. Schoemehl*, Exhibit C, page 26.

D. An Evidentiary Hearing Will Be Required To Determine Whether Procedures Were Adopted In The *Hope* Proceedings And The Black River Proceedings For The Protection Of Omitted Parties Of The Same Class As Those Joined As Parties And To Ensure A Full And Fair Consideration Of The Common Issue.

The US/CID must establish as part of the evidentiary proceedings that "procedures in connection therewith were 'so devised and applied as to ensure that those present are of the same class as those absent and the proceedings were so conducted as to ensure the full and fair consideration of the common issue' ..." *See Richards v. Jefferson County*, Exhibit C, pages 21 and 22; *Tyus v. Schoemehl*, Exhibit C, page 26.

At this phase of the proceedings it would appear that such procedures were not adopted; however, the US/CID should be afforded an opportunity to introduce evidence in connection with these matters.

E. US/CID Should Be Afforded An Opportunity, If They So Desire, To Supplement Their Submissions As To Matters Which They Claim Should Be Precluded From Redetermination Under The Doctrines Of *Res Judicata* Or Collateral Estoppel.

The US/CID do not separate their claims of preclusion into categories of factual issues, legal issues or mixed issues of law and fact. The State and PVACD do not respond to the categories of matters which the US/CID have set forth and claim are barred by *res judicata* or collateral estoppel. Unless the record is sufficient to determine what issues were actually and necessarily determined, there is no basis for applying the doctrine of *res judicata* or collateral estoppel. *Howell v. Anaya*, 102 N.M. 583, 698 P.2d 453, 455 *citing Edwards v. First Federal Savings & Loan, infra*; *United States v.*

Lasky, 600 F.2d 765, 769 (9th Cir.) *cert. denied* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979). The burden is on the party asserting preclusion to show with clarity and certainty what was determined by the prior judgment or decree. *State ex rel. Martinez v. Kerr-McGee*, 120 N.M. 118, 898 P.2d 1256, at 1263 *citing Clark v. Bear Streams & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) which also held: "...It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the proceeding to enable the trial court to pin point the exact issues previously litigated...". *Citing United States v. Lasky*, *supra*. *See also State ex rel Martinez v. Kerr-McGee*, Exhibit C, page 10; *Silva v. State*, Exhibit C, page 4; *Reeves v. Wimberly*, Exhibit C, page 6; *Hyden v. The Law Firm of McCormick, Forbes, Caraway & Tabor*, Exhibit C, page 8.

The US/CID are granted leave to supplement their prior submissions with transcript references, where appropriate, by filing them with the Court no later than October 20, 1997. The State, PVACD or any other party are granted leave to respond to the US/CID submissions with appropriate transcript references, where appropriate, by November 20, 1997. The US/CID may reply by December 1, 1997.

F. In Connection With The Aforesaid Evidentiary Proceedings, Evidence May Be Adduced And Factual And Legal Determinations Will Be Made By The Court In Connection With The Hope Proceedings And The Black River Proceedings As To Whether Incentives For Vigorous Defense Were Afforded In Connection With Said Proceedings; Whether There Were Inconsistencies Of Forum; And Whether There Were Other Matters Which Might Militate For Or Against The Application Of The Doctrines Of *Res Judicata* Or Collateral Estoppel By Virtue Of The Proceedings.

On the present record, the Court is not in a position to determine these matters.

It may be that determinations of such issues will not be required. In any event, if such determinations are required, they cannot be made at this time. *See Silva v. State*, Exhibit C, page 4 (*citing Parklane Hosiery Co.); Reeves v. Wimberly*, Exhibit C, page 6; *Hyden v. The Law Firm of McCormick, Forbes, Caraway & Tabor*, Exhibit C, page 8.

In addition to the foregoing issues, the following issues are involved and are determined by the Court as follows:

1. Whether The US/CID Are Barred By Laches From Asserting The Claimed Preclusive Effect Of The *Hope* Or Black River Proceedings.

While it is not clear, apparently PVACD claims that the US/CID are barred by the doctrine of laches from asserting the claimed preclusive effect of the *Hope* Proceedings and Black River Proceedings in connection with the water right claims of the United States pertaining to the Project, particularly in connection with the United States claim of a 300,000 acre feet storage claim. (PVACD's Response, pages 38-42).

In *Garcia v. Garcia*, 111 N.M. 581, 808 P.2d 31 (1991), the Court held: "The defense of laches is not favored, and it should be applied sparingly. *Cain v. Cain*, 91 N.M. 423-25, 575 P.2d 607-09 (1978)...". 808 P.2d at 39. *See also Butcher v. City of Albuquerque*, 95 N.M. 242, 620 P.2d 1267, 1270 (1980).

In *Homestake Mining Co. v. Mid Continent Exploration Co.*, 282 F.2d 787 (10th Cir. 1960), the Court stated that the "...Failure to assert a claim when duty so require is a recognized ground for laches..". 282 F.2d at 801.

As held in *Jicarilla Apache Tribe v. Andrews*, 546 F.Supp. 569, affd, in part, rev. in part, at 687 F.2d 1324:

> ...The elements of a finding of laches are (1) a delay in filing suit, (2) which delay is unreasonable under the circumstance, and (3) undue prejudice to those asserting the defense... . Laches is a question of fact addressed to the sound discretion of the trial court based on the circumstances of the particular case. 546 F.Supp. at 581.

(Underscoring for emphasis added.)

See also *Baker v. Benedict*, 92 N.M. 283, 587 P.2d 430 (1978).

The Supreme Court discussed the elements necessary to establish laches in the context of a dispute over water rights in *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 678 P.2d 1170 and held:

> ...There are four elements necessary to establish laches:
>
> > (1) Conduct on the part of the defendant, or of one under whom he claims, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy * * *;
> >
> > (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit;
> >
> > (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
> >
> > (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.
>
> *Morris v. Ross*, 58 N.M. 379, 381-82, 271 P.2d 823, 824-25 (1954) (quoting 19 Am.Jur. Equity § 498 (1939)).

See also Garcia v. Garcia, 111 N.M. 581, 808 P.2d 31, 38-39 (1991) *citing Baker v.*

Benedict, supra, *Cove v. Cove*, 81 N.M. at 802-803, 474 P.2d at 485-86; *C&H Const. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 163, 597 P.2d 1190 (1979).

In *Nevada v. United States*, 463 U.S. 110 at page 141, the Supreme Court quoting from *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917) stated as follows:

> 'As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or remove a cloud from it.' *Ibid.*

See also *United States v. California*, 332 U.S. 19, 40 (1947); *State ex rel Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983, 989 (1957).

Aside from the foregoing authorities, the parties do not discuss or cite authorities as to whether in these proceedings the United States is acting in a governmental capacity to enforce a 'public right or protect a public interest' within the contemplation of the aforesaid citations of authority.

As held in *Jicarilla Apache Tribe, supra*, whether the doctrine of laches should be applied in a particular case involves the determination of issues of fact and is not a threshold legal issue. These matters can only be determined in connection with summary judgment procedures (after a determination has been made that there are no genuine issues of material fact) or after an evidentiary proceeding. There are questions as to (1) the existence of a duty on the part of US/CID; (2) whether there was an unreasonable delay in US/CID asserting claims of res judicata or collateral estoppel;

(3) whether there was any injury or prejudice to objectors because of the alleged failure to assert such claims; and (4) whether the delay was attributable to the neglect or omission of public officers to do their duty which cannot work an estoppel against the government. *State v. McLean, supra*, and cases cited thereat. The posture of these proceedings at this time is such that the Court does not consider it appropriate to determine these issue as threshold legal issues.

With due regard to the foregoing authorities, at this time, the Court expresses no opinion as to whether the United States is barred under the doctrine of laches from asserting the preclusion of matters because of the determinations in the *Hope* or Black River Proceedings.

2. Whether The Claimed Preclusive Effect Of The *Hope* Or Black River Proceedings Should Be Applied Because The Determinations Therein Are Rules-Of-Property Or Because Of "Strong Public Interests".

In connection with the arguments of the US/CID that the provisions of the *Hope* Decree and *Judkins* Decree should stand under the "rule-of-property" doctrine, in *Bogle Farms v. Baca*, 122 N.M. 422, 925 P.2d 1184 (1996), the Court stated:

> The rule-of-property doctrine has ancient roots, *see* 1 James Kent, *Commentaries on American Law* *475-76 (14th ed.1896), and was first recognized by this Court in *Arellano v. Chacon*, 1 N.M. 269 (1859). That case considered whether an appeal lies from a court determination of an election contest. This Court ultimately overruled a previous decision which had allowed such appeals. *Id.* at 272, 278. Writing for the Court, Chief Justice Benedict stated:
>
> > In overruling the decision of this court, . . . we are not discouraged in our sense of duty by the reflection that heavy and important interests as to property and persons have grown up, under the protection, and by virtue of that

> decision, which our present rulings would disturb, embarrass, and destroy. No such interests have arisen. If they had, we would long have hesitated touching the question discussed, let our opinions have been as they may. Circumstances may sometimes exist, when a court should pass previous adjudications as a 'sealed book' though they may have been erroneously made at the beginning.

Id. at 278-79.

The California Supreme Court explained the role of a rule of property in the application of stare decisis in *Abbot v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484, 494-95 (1958) (in bank). ...The court explained the rule-of-property doctrine thus:

> [D]ecisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error.

Id. (quoting 14 Am.Jur. *Courts* § 65, at 296 (1941)); *see also Barrows v. McDermott*, 73 Me. 441, 448-49 (1882) (stating that rule should not be overturned when 'it has been so largely accepted and acted upon by the community as law that it would be fraught with mischief to set it aside').

xxx

The crucial inquiry, then, when it is advocated that a proposition must be adhered to as a rule of property, is likewise twofold. First, to what extent has the proposition cited as a rule of property become settled or fixed? As the California Supreme Court explained in *Hart*:

> 'The *rule of property*,' then, is not necessarily created or shown by the mere decision, or two or three decisions of a Court. It is the settled, fixed, stable principle regulating

> titles and the estimate of their validity and value in the minds of practical men, who draw their conclusions from judgments which have been commonly acquiesced in as settled law, or the general titles affirmed, by which they have passed beyond contention and dispute.
>
> 15 Cal. at 609. Second, we must assess the extent to which a proposition cited as a rule of property has induced persons to enter into transactions in actual or demonstrable reliance thereon.

Bogle Farms, 925 P.2d at 1192 and 1193.

See also Nevada, supra, 463 U.S. at 129, n.10.

Bogle Farms also stands for the proposition that where strong public interest are at issue, the need to re-examine a question may outweigh the interests of judicial economy embodied in the collateral estoppel doctrine. 925 P.2d at 1191. *See also Nevada v. United States,* 463 U.S. 110, 129 (1983) quoting *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332 (1866) and *City of Los Angeles v. City of San Fernando*, 123 Cal.Rptr. 1, 537 P.2d 1250, 1273.

The Court is of the opinion that the issues presented concerning whether the determinations in the *Hope* Proceedings or the Black River Proceedings are rules of property which should not be disturbed should not be decided at this time. *See City of Las Vegas v. Oman*, 110 N.M. 425, 796 P.2d 1121 (N.M. App. 1990). The exact principles claimed to be rules of property are not clear and the determination thereof involves the determination of factual matters which can only be decided after evidentiary proceedings are conducted as outlined above. Therefore, at this time, the Court will defer ruling on whether the rule of property doctrine should be applied in these proceedings.

These proceedings involve issues of the ownership of water and storage rights of the United States which are of "strong public interest". These proceedings also involve issues of "strong public interest" which may outweigh the interest of judicial economy embodied in the preclusion doctrines of *res judicata* and collateral estoppel. These public interest issues include the question of whether fundamental rights of due process were afforded to those claimed to be bound as privies or who were not made parties to the *Hope* Proceedings or Black River Proceedings and whether the aforesaid proceedings are binding upon them.

The matter of the applicability of the principles set forth in *Bogle, supra*, are deferred at this time.

VI. CONCLUSION RE THRESHOLD LEGAL ISSUE NO. 2.

With specific reference to Threshold Legal Issue No. 2, subject to the terms and provisions of this opinion, *res judicata* and collateral estoppel defenses may be available to the United States and the Carlsbad Irrigation District.

VII. OTHER MISCELLANEOUS ORDERS.

On or before October 20, 1997, counsel shall submit their comments and suggestions concerning this decision and recommendations to the Court concerning alternate dates for a pretrial hearing (if deemed desirable) and an evidentiary hearing.

Counsel for the State is requested to serve a copy of this opinion upon all parties appearing *pro se* who have elected to participate in this phase of these proceedings.

HARL D. BYRD
DISTRICT JUDGE PRO TEMPORE

EXHIBIT A

Summaries and Excerpts From Bill of Complaint and General Provisions of the *Hope* Decree.

1. **Summary of Bill of Complaint**

The following is a summary of pertinent matters from the *Hope* Proceedings based upon the submissions of the parties:

The United States filed its "Bill of Complaint" in *Hope* seeking a determination of its water rights in connection with the Carlsbad Project against the Hope Community Ditch, a body corporate under the laws of the State of New Mexico, named community ditches, persons, corporations and unincorporated associations, co-partnerships and the unknown heirs of deceased persons. The State was not named as a party nor does it appear that the proceeding consisted of separate phases vis-a-vis the State and these *inter se* proceedings.The Bill of Complaint sought relief against:

> "...all unknown claimants in interest in or to the waters of said Pecos River Stream System, above the Lake Avalon Reservoir of the Carlsbad Irrigation Project of the plaintiff, except any and all claimants of right or interest in or to the waters of the Hondo River stream system above the Hondo Reservoir, a suit for the adjudication of which is now pending...".

Bill of Complaint, page 37.

Paragraph I of the Bill of Complaint provides:

> That the jurisdiction of this court over this cause rests upon the fact that the United States of America is a party thereto.

Paragraph III of the Bill of Complaint provides:

> The plaintiff is the owner and in possession and control of certain lands lying along and upon said Pecos River and its tributaries as aforesaid, and of lands within the boundaries of the Carlsbad project, hereinafter described, and each one of the defendants herein is also the owner of or claimant to some interest in or title to certain lands upon or

> tributary to the said stream system, situate above said Carlsbad project and in connection therewith owns or claims some water-right in said stream system, such water-right or interest being derived from or claimed in connection with some one or more of the community ditches hereinbefore mentioned, or from some other irrigation system, private ditch, pumping plant, or in other ways to plaintiff unknown; and all of the lands aforesaid are so located as to be irrigable from the said stream system, and are naturally arid and the rainfall in the said vicinity is so slight that the said lands cannot be successfully cultivated otherwise than by irrigation by means of the waters from said stream system.

Bill of Complaint, at 38.

The Bill of Complaint then sets forth the claimed water rights of the United States in connection with the Carlsbad Project. Bill of Complaint, at 39-46. Paragraph XIV of the Bill of Complaint alleges that the defendants make claim to the use of waters of the Pecos River, or its tributaries, adverse to those of the United States, but the plaintiff has no definite knowledge and therefor is unable to state ,what if any rights the defendants or any of them have to the use of waters of said stream system, and states that plaintiff is ignorant of the extent of such rights, the dates of defendants' claimed priorities and the periods of each year during which such rights may be legally and rightfully enjoyed. The complaint then alleges that the defendants, to the great and irreparable injury of plaintiff, are diverting large quantities of water over and above the amounts required for properly irrigating their lands in and in excess of the quantities to which they can beneficially use and to which they are entitled, alleges that the defendants are wasting and dissipating waters and requests that the injunctive power of the Court be utilized in order that a multiplicity of suits may be avoided and the Court require all of the defendants to appear and disclose in detail what, if any rights they

have to the use of waters of the Pecos River stream system and their claimed rights in connection therewith. Bill of Complaint, at 46-47.

Additional parties were added by motion and order of the Court. In the request for relief the United States stated:

> First: That writ of subpoena issue to the defendants herein named and each of them, directing them at a day certain and under penalty therein to be named, to appear before this Honorable court, and then and there full, true and direct answers make to all and singular the premises, and to stand to, perform and abide by such other and further directions and decrees as may be made against them in the premises:
>
> Second: That the court by its decree determine and fix the relative rights of the parties hereto in and to the waters of said Pecos River stream system in New Mexico (save as to Black River and the Rio Hondo and its tributaries above the Hondo reservoir) both natural or low-water flow and flood waters, to the end that there may be known and established, the land upon which water is used, the amount of water so used, the priority, the purpose for which used, the period of use in each irrigation season or at other times during each year, and the place and means of diversion or extraction otherwise from said stream system, together with such other conditions as may be necessary to define the rights and relative priority of each and every party hereto.
>
> Third: That the court decree to plaintiff the water-rights hereinbefore set forth and claimed by and for the United States: that its title therein and thereto be forever quieted and set at rest, and that said defendants and each of them be perpetually enjoined from in any wise interfering therewith, and that there be provided such other and further means of carrying out its decree as may be necessary and proper.
>
> xxx

2. General Provisions, Findings of Fact and Conclusions of the *Hope* Decree.

The following are pertinent general provisions, findings of fact and conclusions of law set forth in the *Hope* Decree.

GENERAL FINDINGS AND CONCLUSIONS

xxx

III

That for the sole purposes of determining and adjudicating water rights in this Decree, the respective tracts of land, the respective ditches, canals, reservoirs, pipe lines, pumping plants and other diversion and distribution works with the rights-of-way therefor and the sites thereof, together with the water rights appurtenant thereto or exercised thereon or therethrough, are owned by the respective party or parties plaintiff or defendant as hereinafter named and set out in the specific portions of this Decree, but this Decree shall not be construed as having adjudicated, determined or affected the title to any lands or rights in any property whatsoever other than the rights to the diversion and use of water as herein determined and established.

IV

That the Plaintiff and each of the defendant present owners of or their predecessors in title to the respective tracts of land, in the specific portions of this Decree described or shown by reference to the Hydrographic Survey Map Sheet upon which the same appear, diverted and appropriated waters of the Pecos River Stream System for the irrigation of said lands, for domestic use and the watering of livestock, on or about the date in said specific portions of this Decree set forth, and continuously thereafter has applied and does now apply the same to beneficial use.

At 3 and 4.

xxx

VII

That for the purposes of this Decree, where the specific portions thereof describe the owners of any lands and water rights appurtenant thereto under the general designation "estate of" or "heirs of" any person deceased, or "administrator" or "executor", such designation shall be deemed and construed to describe any and all persons in whom, whether as heirs of any deceased person, or as executors or administrators or other representatives of any person deceased or the estate of any person deceased, to vested, by testamentary disposition or by operation of law, title to the lands and water rights so described.

VIII

That except and unless the specific portions of this Decree otherwise provide and set forth, all water rights hereafter fixed, determined and limited are appurtenant to the lands upon which the waters diverted and appropriated under such rights are beneficially used, as set forth in such specific portions of this Decree, and such appurtenant water rights may be severed hereafter from said lands, only in accord with the provisions of the Laws of the United States of America or of the State of New Mexico in such case made and provided.

At 5.

IX

All water rights in this Decree adjudicated are determined and fixed as of the date of the closing of the taking of testimony and evidence herein, to-wit, the 15th day of June, 1931.

At 5.

X

That subject to such possible change and modification of the duty of water to be used upon specific lands, as is provided for in the "General Provisions" of this Decree, the duty of water, appropriated and to be used under rights adjudicated herein, is that amount hereinafter in this Decree specified.

XI

To the end that the waters of the Pecos River Stream System may be properly and equitably diverted, apportioned and delivered in accordance with the rights herein adjudicated, this Court has full power:

1. To retain jurisdiction in this cause for any proper change or modification of this Decree and for the administration thereof.

At 6.

XXX

GENERAL PROVISIONS

I

That the following General Provisions, numbered I to XXII inclusive, shall

apply to and govern the Specific Provisions of this Decree concerning each and every specific water right herein adjudicated in so far and only in so far as said General Provisions do not conflict with said Specific Provisions. Where and when there is such conflict, such Specific Provisions shall govern and control these General Provisions to the extent, but only to the extent of such conflict.

At 7 and 8.

II

Nothing in this Decree contained shall affect the appropriation of water from the said Pecos River Stream System under any right initiated subsequent to the 15th day of June, 1931, and nothing in the Decree contained shall be construed as validating or reviving any right herein adjudicated which has been lost by abandonment, operation of law or otherwise subsequent to said date.

At 8.

III

Beneficial use is and shall be the basis, the measure and the limit of every water right in the Decree fixed and determined, and nothing herein contained shall be considered as giving to any owner of any water right herein adjudicated the right to divert more water than can be beneficially used upon the number of acres of land or in the various purposes particularly mentioned and described in the Specific portions of this Decree, or to allow any water diverted to run to waste: Provided However that this paragraph shall not be construed as denying to the Plaintiff, the United States of America, the right, hereinafter to it decreed, to reserve without use 300,000 acre feet per annum of the waters of the Pecos River Stream System, but, if and when said Plaintiff shall divert and use any of such reserved waters, its use thereof is and shall be measured by and limited to a beneficial use of the waters so diverted.

At 8 and 9.

VII

That in addition to water allowed for irrigation and other purposes provided in the Specific Provisions of this Decree, water from said Stream System may be used for stock and domestic purposes upon lands of all parties herein, upon which such use is necessary, without any provision therefor in the Specific Provisions of this Decree, but water shall not be diverted at any time for such purposes unless such diversion can be made without waste and without damage to prior appropriations; and such use shall be limited to the amount of

water appropriated as of June 15th, 1931.

At 10.

VIII

That except as otherwise provided in the Specific Provisions of this Decree, the owner of any right to divert and impound water for storage, within the limits of his priority, may divert water for such storage at any and all times during the year up to the total amount he is entitled to divert and impound under his said right.

At 10.

IX

That until the actual administration of this Decree shall demonstrate in specific instances that any hereinafter designated water duty is not compatible with and not in conformity with actual necessities of beneficial use of water upon specific lands, the following respective maximum duties of water are hereby determined, adjudged and fixed, to- it:

At 10-14.

This provision established a maximum water duty for sections referred to in the Hydrographic Survey; however, no specific duty was established for the Carlsbad Project. In connection with the Carlsbad project, paragraph X provided in pertinent part:

...Provided Nevertheless, That in lieu of any specifically determined water duty, beneficial use is and shall be the basis, measure and limit of the right of the Plaintiff Government to divert, impound or store water for the irrigation of any lands lying under the Irrigation System of its Carlsbad Project under the water rights by it purchased from the Pecos Irrigation Company... .

At 15.

Paragraph XII states "...That to the end that beneficial use shall be the actual

basis, measure and limit of any water diverted from the Pecos River Stream System, under any right herein adjudicated..." and then provides for procedures to amend the water duties provided in the decree by the Water Master appointed thereunder or by the Court. At 16-19.

XV

> That said Water Master be and he is hereby authorized and empowered to require and enforce the rotation of water deliveries and use of water under the rights herein adjudicated as between individual water users or as between different ditches and diversion systems, when and where no destruction or appreciable impairment of a superior right is caused thereby, if in his opinion, such rotation will result in a greater and more beneficial and economical use of such waters, or the Court itself may order, require and enforce such rotation.

At 19 and 20.

xxx

XXI

> That each and every of the parties to this suit, his, hers or its successors and assigns, and his, hers or its agents and servants, be and they are hereby forever restrained and enjoined from violating or attempting to violate any of the provisions of this Decree; from interfering with or attempting to interfere with any other party hereto, his, hers or its successors and assigns, in the lawful or proper use of water under such rights herein decreed, and from interfering with any water master in the proper and lawful exercise of his powers and duties in the administration of this Decree or in the supervision of the distribution of the waters of the Pecos River Stream System in accordance herewith, and any party to this Decree, his, hers or its successors or assigns in right, title, interest or use of waters under any right herein adjudicated, who shall wilfully fail or refuse to obey any proper and lawful order, rule or regulation of the Court or of the Water Master by it or him made or to be made in the administration of this Decree, shall be deemed guilty of contempt of this Court and shall be punished accordingly.

At 22 and 23.

XXII

That until further order of this Court, the Court retains jurisdiction of this cause for carrying out and enforcing the terms and provisions of this Decree; for the administration of the distribution of water under the rights herein determined and decreed; for making all necessary and proper rules and regulations for such administration; for the appointment and employment of a water master and such assistants as the Court may deem necessary; for the taxation and enforcement of collection of the costs of this suit and of the costs of the administration of this Decree, including the salaries and expenses of such water master and his assistants; for the changing and final determination of the duty of water upon specific lands under rights herein adjudicated, and for the punishment of those who may violate the injunction in this Decree set forth and contained. Provided, However, And notwithstanding the Court retains jurisdiction of this cause for the purposes last above mentioned, this Decree is and shall be final and appealable as to all matters and things relating to the character, limitation, extent, acreage or priority of any water right in the specific portions of this Decree fixed and determined.

Provided Further, That the Court, whenever it may deem it necessary or proper so to do, may wholly and finally relinquish, surrender or renounce jurisdiction of this cause, or it may relinquish, surrender or renounce jurisdiction for one or more of the purposes above set forth and for which jurisdiction is above retained, and retain jurisdiction for the remaining purposes, and this the Court may do upon its own motion and with or without notice.

At 24.

EXHIBIT A-1

Volume II, Hope Decree - The Carlsbad Project

Volume II of the *Hope* Decree sets forth the adjudication of water and storage rights of the United States exercised and to be exercised through the Carlsbad Project. The following are pertinent excerpts from Volume II.

> That the Plaintiff, the United States of America, being the owner of all of the dams, reservoirs, reservoir sites, canals, ditches, laterals, conduits, aqueducts, head-gates, flumes, syphons, diversion works and all other structures, plants and devices constituting the storage, diversion and distribution system of what is known as the Carlsbad Project situate in Eddy County, New Mexico, under, in conformity with and pursuant to the Act of Congress approved June 17th, 1902 (32 Stat. 368) commonly called the Reclamation Act, and all acts or parts of acts amendatory thereof, has the absolute and indefeasible vested rights in and to the use of waters of the Pecos River and its tributaries in the State of New Mexico as follows, to-wit:
>
> I
>
> That the Plaintiff, the United States of America, has the absolute and indefeasible vested right, formerly exercised through what was known as the Halagueno Ditch, with a priority date as of July, 1887, to divert perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is known as the Carlsbad Project, to an amount of 300 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose of domestic use and the watering of livestock.
>
> II
>
> That the Plaintiff, the United States of America, in addition to its water right last above in paragraph I set forth, has the absolute and indefeasible vested right, with a priority date as of July, 1888, to divert perennial and flood waters of the Pecos River at any and all times throughout each calendar year through and by means of what is now known as the Carlsbad Project to an amount of 700 second feet for the purpose of irrigating lands lying under its said Project and Distribution System, and for the purpose of domestic use and the watering of livestock.

III

That in addition to its rights last hereinabove in paragraph I and II set forth, the Plaintiff, the United States of America, has the absolute and indefeasible vested right, with a priority date as of the year 1889, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert, impound and store in its Avalon Reservoir, constructed across the stream bed of said River with a capacity of 7, 000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefor, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock.

IV

That in addition to its water rights last hereinabove in paragraphs I, II and III set forth, the Plaintiff, the United States of America, has the absolute and indefeasible vested right, with a priority date as of the year 1893, of the perennial and flood waters of the Pecos River at any time flowing therein, to divert, impound and store in its McMillan Reservoir, constructed across the stream bed of said River with a capacity of 90,000 acre feet, a sufficient amount of water to fill and re-fill said reservoir to its full capacity, as often as waters are available therefor, and to store and to use the same for the purpose of irrigating lands lying under its said Carlsbad Project and Distribution System, and for the purpose of domestic use and the watering of livestock.

V

That beneficial use of the waters at any time diverted, impounded or stored by the Plaintiff under its rights last above set forth in paragraphs I, II, III and IV, is and shall be the basis, the measure and the limit of said rights to the Plaintiff's use of waters of the said Pecos River and its tributaries.

VI

That in addition to its water rights last above in paragraphs I, II, III, IV and V set forth, and under and by reason of its certain written Notice to the Territorial Engineer of the then Territory, now State of New Mexico, that it intended to utilize certain specified waters of the Pecos River, which said Notice was filed with the said Territorial Irrigation Engineer on or about the 2nd day of February, 1906, in conformity with the provisions of Section 22 of Chapter 102, Session Laws of 1905, of the then Territory of New Mexico, the Plaintiff, the United States of America has the absolute and indefeasible vested right, with a priority

date as of the 2nd day of February, 1906 to divert, impound, store and utilize through, in, by means of or in connection with its Carlsbad Project, as now constructed, or as it may be enlarged, added to or otherwise changed hereafter, 300,000 acre feet per annum of the perennial and flood waters of the Pecos River and its tributaries, at its Avalon and McMillan Dams and Reservoirs and at such other points above the Avalon Dam as may be available for such diversion or storage; that such right remains and shall remain reserved and vested until formally released in writing by an Officer of the United States thereunto duly authorized, irrespective of lapse of time or failure to utilize the waters so reserved.

At 449-452.

EXHIBIT B

Summaries of the *Judkins* Proceedings and the *Harkey* Proceedings.

Based upon the submissions of the US/CID and PVACD (no independent review of the Court files having been conducted by the Court), the following is a summary of pertinent matters from the *Judkins* Proceedings and the *Harkey* Proceedings collectively referred to in the Court's opinion as the Black River Proceedings.

A. *Judkins* Proceedings.

The *Judkins* Proceedings involved an action brought in the Fifth Judicial District Court of the Territory of New Mexico by the United States of America, as plaintiff, against Edward F. Judkins, D. R. Harkey & C. R. Brice, Daniel Beach, Julian Smith, & Lucus Bros. & Reynolds, a copartnership, consisting of Daniel H. Lucus, J. G. Lucus, & George T. Reynolds, defendants, requesting that the Court determine and adjudicate the surface water rights of the United States in the Blue River, a tributary of the Black River, and the Black River for the irrigation of arid lands located in the North one-half of Township No. Twenty-four (24) South, Range Twenty-eight (28) East, N.M.P.M. for raising agricultural crops thereon and for domestic purposes. Complaint, US/CID Exhibit 27.

The complaint requested the following relief:

> a. That under the provisions of an act of the 37th Legislative Assembly of the Territory of New Mexico (1907) entitled, "An act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial Engineer; to create a board of Water Commissioners and for other purposes, an order shall issue out of the court directing the Territorial Engineer to furnish a complete hydrographic survey of said Black and Blue Rivers, including measurements of ditches and irrigated areas thereunder, and to report to this court.

b. That all persons claiming any right or interest in the waters of said Black and Blue Rivers be brought in and made parties to this suit to the end that a complete adjudication of the rights and priorities on said Black and Blue Rivers may be had.[1]

c. That this court ascertain at trial hereof the respective rights of the parties hereto in said water of said Black and said Blue Rivers.

d. That this court make and enter a decree herein determining and apportioning the water of said Black River and its tributary, Blue River, to the parties hereto according to their rights.

e. That the plaintiffs and defendants be enjoined from diverting said waters otherwise than as decreed by this court.

In the Final Decree entered in the *Judkins* Proceedings on January 3, 1912 (Exhibit 1 to US/CID Memorandum) the Court refers to appearances of defendants, Edward F. Judkins by L. O. Fullan, Esq., Lucus Bros. and Reynolds, Albert Johnson, Julian Smith and Daniel Beach by Messrs. Grantham & Dye, Harkey and Brice by Messrs. Bujac and Brice and Messrs. Reed and Harvey.

The Court determined that the United States was entitled to "a declaration of a valid appropriation of 9.33 second feet, constitutes in favor of plaintiff the fourth water right on the Black River system...". (The Black River system includes the Blue River and Castle Springs.) US/CID, Exhibit 1, page B-6 and B-8.

B. *Harkey* Proceedings.

The *Harkey* Proceedings involved a suit brought by the United States in the United States District Court against D. R. Harkey and Sophie C. Harkey, His Wife,

---

[1]The submissions do not reflect that this provision was implemented, that there was service of summons or notice of the proceedings by mail, publication or otherwise. The Final Decree is entered against the named defendants.

Defendants. US/CID Memorandum, Exhibit 29, Bill of Complaint.

The Bill of Complaint alleged that "...the plaintiff, since December 18, 1905, has been, and now is, the owner of a right to the use of 9.33 cubic feet of water per second from said Black River, for use on the lands of said Carlsbad irrigation project, the same being the fourth water right on said Black River stream system;...". Id. at 2. The Bill of Complaint then referred to the *Judkins* Proceedings adjudicating said right to the use of water from the Black River and stated: "...no appeal was prosecuted from said decree and the same is now final...". *Id.* at 3.

The United States requested the following relief:

> First: That a temporary restraining order be issued, directed to the defendants, their agents, employees, and servants, and to all persons acting or pretending to act under the authority, instruction or direction of the defendants, restraining them, and each of them, until this court shall otherwise order, from diverting and using the 200 acre-feet of water in conflict with plaintiff's rights, as described herein, or any part thereof; and from in any manner interfering with plaintiff, its agents, servants or employees, in the diversion and use of the 9.33 cubic feet or water per second from Black River as described herein;
>
> Second: That an order be issued, directed to the defendants, commanding them to show cause , at such time and place as may be fixed by said order, why a preliminary injunction should not issue, pending the final determination of this cause.
>
> Third: That, upon final hearing in this cause, the right and title of plaintiff to the use of 9.33 cubic feet of water per second from said Black River, for irrigation use on lands of the said Carlsbad Federal irrigation project, be forever quieted and set at rest, and such preliminary injunction be made permanent.

Id. at 3 and 4.

In the final decree in the *Harkey* Proceedings, the Court ordered, adjudged and

decreed that:

> That the plaintiff's right to the waters of Black River sufficient for the economic and beneficial irrigation of seven hundred (700) acres of land not to exceed at any time 9.33 second feet and not to exceed in any one year 2800 acre feet measured at the point of diversion from Black River into plaintiff's ditch, be and is hereby established and confirmed, subject only to prior rights numbered first, second and third in the final decree above described; and that the remainder of the 9.33 second feet of water not decreed to the plaintiff has been appropriated by the defendants and they are entitled to the use of the same.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendants take nothing by their claim of 200 acre feet in so far as the same affects the waters herein awarded to the plaintiff.
>
> IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this cause for the purpose of appointing a water commissioner upon the application of either of the parties hereto to distribute, under the direction of the Court and in pursuance of this decree, the waters of Black River to which the parties hereto are entitled.
>
> To all of which action of the Court the plaintiff, by its counsel, excepts.

US/CID Memorandum, Exhibit 2, page C-2.

The submissions in connection with the *Harkey* Proceedings indicates that it did not purport to bind those who are not joined as parties, heirs of deceased parties or unknown claimants in interest.

An order was subsequently entered on September 30, 1930 which provided in pertinent part:

> IT IS ORDERED upon the stipulation that the waters of said stream shall be distributed by rotation as follows, to-wit:
>
> That for the month of April the plaintiff shall be entitled to divert all the waters of said stream to the extent of 555 acre feet; and during the month of May 450 acre feet, and the month of June 500 acre feet, and the month of July 555 acre feet, and the month of August 400 acre feet, and

the month of September 340 acre feet, being a total of 2800 acre feet, as provided in the decree of the court herein.

IT IS FURTHER ORDERED that such use shall begin on the 1st day of each month and continue until the amounts described shall have been diverted, and when such amounts have been diverted the defendants shall be entitled to the use of the waters of said stream for the remainder of the month at defendant's point of diversion.

That this order shall apply to the normal flow of such stream and not to flood waters thereof, and during the period said defendants are using said stream any waters diverted from the said stream by the plaintiff shall not be charged against it as to the 2800 acre foot limitation herein.

It is understood that by the stipulation entered into herein by the plaintiff shall not be charged against it as to the 2800 acre foot limitation herein.

IT IS FURTHER ORDERED that WM A. Wilson be and he hereby is appointed by the court as water master herein with authority and instructions to distribute the waters of the said Black River in accordance with the decree entered in this cause, and in accordance with this order. The compensation of the said water master is to be hereafter fixed by the court.

EXHIBIT C

AUTHORITIES RE APPLICABILITY OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

The following is a summary of selected, pertinent, determinative authorities which discuss principles which should be considered in determining the applicability of *res judicata* and collateral estoppel as a result of the *Hope* Proceedings and the Black River Proceedings:

In *Edwards v. First Federal Sav. & Loan Ass'n*, 102 N.M. 396, 696 P.2d 484 (N.M. App.1985), the Court (*citing* 18 Federal Practice and Procedure, §4468 and other authorities) stated that while the authorities were not unanimous, when the federal question to be determined is the effect to be given a prior federal judgment, the authorities leave no doubt that the federal rule is the measure for determination of at least most *res judicata* questions. *See also State ex rel. Martinez v. Kerr-McGee*, 120 N.M. 118, 898 P.2d 1256, 1259 (N.M. App.1995). The federal rule, according to the Court in *Edwards*, should also be applied in order to determine the preclusive effect of collateral estoppel if New Mexico law has not held that the New Mexico law of collateral estoppel applies to the particular situation. *See Silva v. State, infra*, page 3.

In *Silva v. State*, 106 N.M. 745 P.2d 380 our Supreme Court stated:

> Application of the doctrine of *res judicata*, or 'claim preclusion,' depends upon identity of prior and subsequent actions in four respects: (1) parties or privies, (2) capacity or character of persons for or against whom the claim is made, (3) cause of action, and (4) subject matter. *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982); *Adams v. United Steelworkers of Am.*, AFL-CIO, 97 N.M. 369, 640 P.2d 475 (1982)... .

> [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.

City of Santa Fe v. Velarde, 90 N.M. 444, 446, 564 P.2d 1326, 1328 (1977).

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. *Adams v. United Steelworkers of Am.*, AFL-CIO; *see Torres v. Village of Capitan*; *City of Santa Fe v. Velarde*; and *Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 102 N.M. 396, 400, 696 P.2d 484, 488 (Ct.App.1985) (with analysis of 'issues actually and necessarily decided').

It is clear from the cited New Mexico authorities that, in deciding whether to apply the doctrine of collateral estoppel, the trial judge may determine that its application would be fundamentally unfair and would not further the aim of the doctrine, which is to prevent endless relitigation of issues. Fundamental fairness requires that the party against whom estoppel is asserted had a full and fair opportunity to litigate. To give rise to estoppel, the finding of ultimate facts in the prior action must have been final. *See C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 160-61, 597 P.2d 1190, 1200-01 (Ct.App.1979). Also, for application of collateral estoppel, New Mexico has adhered to the rule that the parties in the second suit must be the same or in privity with the parties in the first suit. A growing number of jurisdictions hold that, absent fundamental unfairness in a given case, the doctrine of collateral estoppel may be applied against parties or their privies to both suits regardless of whether the party asserting the doctrine was privy to the first suit.

> The reason given for the 'same parties' requirement is the doctrine of mutuality. The mutuality requirement prevents a litigant from invoking the conclusive effect of a judgment unless that litigate had gone the other way. Dissatisfaction

> with the mutuality requirement resulted in a 'modern' view of mutuality, which dispenses with the 'same parties' requirement. *Atencio v. Vigil,* 86 N.M. 181, 521 P.2d 646 (1974). The modern view has two aspects --defensive collateral estoppel, *see Blonder--Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), and offensive collateral estoppel, see *Parklane Hosiery Co. v. Shore* [439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)].

Edwards, 102 N.M. at 401, 696 P.2d at 489. In *Edwards*, defensive collateral estoppel was allowed despite defendant's [sic] not having been a party to a prior federal court action brought by Edwards against the United States claiming that a tax was wrongfully levied on First Federal Savings Association of Clovis.

The *Edwards* court held that the federal law of collateral estoppel governs the preclusion effect of the federal judgment in a case which decided a federal question, and that the application of collateral estoppel in federal courts is not grounded upon the 'mechanical requirement of mutuality,' but is tested by whether a litigant has had a 'full and fair opportunity for a judicial resolution' of the issue. In the subsequent suit for damages against First Federal, Edwards claimed First Federal's response to the levied tax was to unlawfully use trust funds rather than the personal funds of the taxpayer. To the contrary, in his memorandum opinion, the federal judge had stated that, '[b]ecause the Trust is a nullity and sham for tax purposes, property held in the name of the Trust is not shielded from levy by the government,' The showing by First Federal in support of summary judgment based upon the use of collateral estoppel as a complete defense to Edward's claim consisted of the memorandum and decision in the federal suit. This satisfied movant's burden of showing a prima facie case for summary judgment, The federal judgment, deciding a federal question, precluded in subsequent state proceedings any issue which was actually and necessarily decided in the federal suit. It was then respondent's burden to show there was a factual issue as to a full and fair opportunity to litigate. Respondent did not do so. To the extent the court of appeals affirmed the summary judgment on the basis of defensive collateral estoppel, we specifically approve Judge Wood's excellent opinion in *Edwards.*

Plaintiffs in the present case, however, assert the offensive use of collateral estoppel as adopted in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), a stockholder's action against

a corporation, its officers, directors and others who were claimed to have issued false and misleading proxy statements. Before the action came to trial, the Securities and Exchange Commission sued the same defendants and obtained a declaratory judgment based upon findings that the proxy statement was false and misleading in essentially the same respects claimed by Shore in his suit. As did the plaintiffs in the present case, Shore moved for partial summary judgment asserting that Parklane, its officers, directors and other defendants were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC.

In *Parklane Hosiery Co.*, the Supreme Court adopted a general rule that a trial judge may allow the use of offensive collateral estoppel except in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant. Unfairness was discussed as arising where a defendant had little incentive to defend vigorously in the first suit, where the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant, or where the second action affords the defendant procedural opportunities unavailable in the first action that could have easily caused a different result. *Id.* at 330-31, 99 S.Ct. at 651-52... .

In accordance with the principles discussed herein, we hold that the doctrine of defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; and that the doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action.

The trial court is in the best position to decide whether a party against whom estoppel is asserted has had a full and fair opportunity to litigate. Neither the offensive or defensive use of collateral estoppel is to be applied where the record is insufficient to determine what issues were actually and necessarily determined by prior litigation. *Howell v. Anaya*, 102 N.M. 583, 698 P.2d 453 (Ct.App.), *cert. denied*, 102 N.M. 613, 698 P.2d 886 (1985), and it is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule whether the doctrine is applicable. *International Paper Co. v. Farrar*, 102 N.M. 739, 700 P.2d 642 (1985). When the movant has made a prima facie showing, the trial court must consider the countervailing equities

including, but not limited to, prior incentive for vigorous defense, inconsistencies, procedural opportunities, and inconvenience of forum as discussed in *Parklane Hosiery Co.* Although the Supreme Court also noted that the presence of absence of a jury is basically neutral, we do not believe such a fact to be altogether immaterial. To be similarly considered is the use of a special master or other alternative or administrative dispute resolution techniques in the prior litigation.

Silva, 745 P.2d at 382-384. (Underscoring for emphasis added.)

In *Reeves v. Wimberly*, 107 N.M. 231, 755 P.2d 75 (N.M. App.1988), the Court stated:

> Reeves contends that the trial court erred in applying the doctrine of collateral estoppel. Collateral estoppel works to bar the relitigation of ultimate facts or issues actually and necessarily decided in the prior suit by a valid and final judgment. *Torres v. Village of Capitan*, 92 N.M. 64, 582 P.2d 1277 (1978); *City of Santa Fe v. Velarde*, 90 N.M. 444, 564 P.2d 1326 (1977). The purpose of collateral estoppel is to prevent endless relitigation of the same issues under the guise of different causes of action. *Adams v. United Steelworkers of Am.*, 97 N.M. 369, 640 P.2d 475 (1982); *Torres v. Village of Capitan*. Traditionally, in order for collateral estoppel to exist, there must be two different causes of action in which an ultimate issue or fact actually and necessarily decided in the previous litigation is found to constitute a conclusive bar to the parties and their privies in the subsequent cause of action. *Torres v. Village of Capitan*; *City of Santa Fe v. Velarde*. The reason for requiring the same parties is the doctrine of mutuality. The doctrine of mutuality prevents a litigant from invoking the conclusive effect of a judgment unless he would have been bound in the event that the judgment had been decided adversely. *Edwards v. First Federal Savings & Loan Ass'n*, 102 N.M. 396, 696 P.2d 484 (Ct.App.1985).
>
> The doctrine of collateral estoppel or issue preclusion differs from res judicata. *Torres v. Village of Capitan*. Collateral estoppel applies to identical issues in two suits where the same parties or parties in privity are involved in both actions even though the subject matter in the second action differs from the first. *Id.*
>
> The doctrine of collateral estoppel, similar to res judicata, is a measure grounded upon enforcement of judicial economy and designed to bar relitigation of ultimate facts or issues actually and necessarily

decided in a prior suit in which the decision is final. *Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987); *International Paper Co. v. Farrar*, 102 N.M. 739, 700 P.2d 642 (1985). In order to invoke collateral estoppel a party must establish the existence of four elements: (1) the parties are the same or in privity with the parties in the original action; (2) the subject matter or cause of action in the two suits are different; (3) the ultimate facts or issues were actually litigated; and (4) the issue was necessarily determined. *International Paper Co. v. Farrar*; *Torres v. Village of Capitan*.

Reeves, 755 P.2d at 77.

xxx

A limitation on the use of offensive or defensive collateral estoppel exists, however, where the record is insufficient to determine what issues were actually and necessarily determined by the prior litigation. *See Howell v. Anaya*, 102 N.M. 583, 689 P.2d 453 (Ct.App.1985). Moreover, a further limitation exists where the party against whom collateral estoppel has been asserted has not been found to have had a full and fair opportunity to litigate the issue in the first action. Determination of whether a party has had a full and fair opportunity to litigate the issue is ordinarily left with the trial court which has the best opportunity to make such a decision. *Silva v. State.*

Collateral estoppel should be applied only where the trial judge determines that its application would not be fundamentally unfair. The party against whom it is invoked must have had a full and fair opportunity to litigate the issue or issues. *Silva v. State.*

The movant invoking collateral estoppel has the burden to introduce sufficient evidence for the court to rule whether the doctrine is applicable. *Silva v. State*; *International Paper Co. v. Farrar*. Once the movant has made a prima facie showing, the trial court must consider the countervailing equities that include, but are not limited to, prior incentive for vigorous defense, inconsistencies, procedural opportunities, and inconvenience of forum. *Silva v. State.*

Based on *Silva*, the argument for the propriety of the assertion of the bar of collateral estoppel turns not on the determination of whether Wimberly was in privity with Miller, since *Silva* dispenses with the mutuality requirement, but instead on whether Reeves had a full and fair opportunity to litigate the issues of the lease extension. Further, the issues must have been determined by the prior litigation, and the prior

decision must be final. *See Edwards v. First Federal Savings & Loan Ass'n.*

Reeves, 755 P.2d at 78 and 79. (Underscoring for emphasis added.)

In *Bentz v. Peterson*, 107 N.M. 597, 762 P.2d 25 (N.M. App.1988), the Court defined the relationship of privity as follows:

> ...A person in privity with another is a person so identified in interest with another that he represents the same legal right. *Searle Bros. v. Searle*, 588 P.2d 689 (Utah 1978). This definition includes a mutual or successive relationship to rights in realty. *Id.*

See also Johnson v. Aztec Well Services Co., 117 N.M. 701, 875 P.2d 1132 (App.1994).

In *Blea v. Sandoval*, 107 N.M. 554, 761 P.2d 432 (N.M.App.1988), the Court stated in pertinent part:

> New Mexico courts, on the other hand, explicitly distinguish res judicata from collateral estoppel. *Torres v. Village of Capitan*, 92 N.M. 64, 582 P.2d 1277 (1978). Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a subsequent suit involving the same parties or their privies based on the same cause of action. Id. Under the doctrine of collateral estoppel, the second action is upon a different cause of action and the judgment in a prior action precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Edwards v. First Fed. Sav. & Loan Ass'n*, 102 N.M. 396, 696 P.2d 484 (Ct.App.1985) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)). Collateral estoppel differs from res judicata in that the issue to be stopped must actually have been litigated, whereas res judicata bars relitigation of any issue which was, or might have been, litigated in the first suit. *Romero v. State*, 97 N.M. 569, 642 P.2d 172 (1982). Moreover, collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. *Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987). In New Mexico, we recognize that default judgments do not have collateral estoppel effect in future litigation, although they may have res judicata effect.

Blea, 761 P.2d at 436.

In discussing the elements of the doctrine of collateral estoppel as determined in *Silva, supra*, our Supreme Court stated in *Local 2839 v. Udall*, 111 N.M. 432, 806 P.2d 572 (1991):

> Justice Ransom in *Silva, id.* at 475-76, 745 P.2d at 383-84, has already analyzed the United States Supreme Court's holding in *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), wherein the Court enunciated its standard for application of offensive collateral estoppel. We will not repeat that discussion here. We find support for the position we have taken herein in post-*Parklane* decisions by the Court involving claim and issue preclusion. We find the Court moving away from technical definitions and standards for the imposition of doctrines like collateral estoppel and toward determinations based on a policy of finality that is to be arrived at on a case by case basis. In other words, in recent years, the Court has cared less for the name by which one calls claim or issue preclusion than it has for the policy which is to be served in applying principles of finality.

Local 2839, 806 P.2d at 577. (Underscoring for emphasis added.)

The Court, in *Hyden v. The Law Firm of McCormick, Forbes, Caraway &Tabor*, 115 N.M. 159, 848 P.2d 1086 (1993), in discussing the elements required in order for the doctrine of collateral estoppel to apply, stated:

> ...'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.' *Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987). In addition to the requirement that the issue have been actually and necessarily decided, fundamental fairness requires that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* To invoke collateral estoppel, then, the moving party must show that (1) the subject matter or causes of action in the two suits are different; (2) the ultimate fact or issue was actually litigated; (3) the ultimate fact or issue was necessarily determined; and (4) the party to be bound by collateral estoppel had a full and fair opportunity to litigate the issue in the prior suit. *Reeves v. Wimberly*, 107 N.M. 231, 233, 755 P.2d 75, 77 (Ct.App.1988). Even when these elements are present, the trial court must consider whether

countervailing equities such as lack of prior incentive for vigorous defense, inconsistencies, lack of procedural opportunities, and inconvenience of forum militate against application of the doctrine. *Id.* at 235, 755 P.2d at 79; *Silva*, 106 N.M. at 476, 745 P.2d at 384.

> New Mexico recognizes both defensive and offensive collateral estoppel. *Id.* ... Neither defensive nor offensive collateral estoppel is to be applied when the record is insufficient to determine what issues were actually and necessarily determined by prior litigation. *Id.*; *Howell v. Anaya*, 102 N.M. 583, 585, 698 P.2d 453, 455 (Ct.App.1985).

Hyden, 115 N.M. at 164. (Underscoring for emphasis added.)

In *Rex, Inc. v. Manufactured Hous. Comm. of NM*, 119 N.M. 500, 892 P.2d 947 (1995) in discussing the doctrine of collateral estoppel, the Court stated:

> The issues in this case present several novel questions involving the application of collateral estoppel. We previously noted in *Shovelin v. Central New Mexico Electrical Cooperative, Inc.*, 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993), that the doctrine of collateral estoppel promotes judicial economy by preventing the relitigation of ultimate facts or issues actually litigated and necessarily decided in a previous suit. In order for the court to apply collateral estoppel, or 'issue preclusion,' the moving party must show that:
>
> > (1) the party to be estopped was a party [or privy] to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.
>
> *Id.* If the moving party demonstrates each element of this test, the court must then determine whether the non-moving party 'had a full and fair opportunity to litigate the issue in prior litigation.' *Id.*; *see also Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987).

Rex, 892 P.2d at 951.

In *State ex rel. Martinez v. Kerr-McGee*, 120 N.M. 118, 898 P.2d 1256 (1995), the Court stated:

> Issue preclusion bars litigation of an issue (1) that was 'actually litigated' (that is, contested in a prior action), and 'actually and necessarily determined' in a final judgment; and (2) when preclusion of subsequent litigation would be fair or, as more commonly stated, when the parties had a full and fair opportunity to litigate the issue in the first proceeding. See *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C.Cir.1992); *Oglala Sioux Tribe*, 722 F.2d at 1413; Restatement (Second) of Judgments §27. Whether an issue was actually and necessarily determined in the prior action is a question of law to be addressed de novo by the appellate court. *See Connors*, 953 F.2d at 684. The party seeking to preclude litigation of an issue has the burden of showing with clarity and certainty that the issue was actually and necessarily determined; if the basis of the prior decision is unclear, subsequent litigation may proceed. *See id.; Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir.1992); *see also Gulf Tampa Drydock Co. v. Germanischer Lloyd*, 634 F.2d 874, 877-78 (5th Cir.1981).

State ex rel. Martinez, 898 P.2d at 1260.

xxx

> ...('There are few immutable rules to the doctrine of collateral estoppel because it is based on general notions of fairness.'); State v. Santomauro, 261 N.J.Super. 339, 618 A.2d 917, 919 (1993) ('Moreover, collateral estoppel is an equitable doctrine and need not be applied. . . if it would not be fair to do so.'); see generally Restatement (Second) of Judgments § 27; 1B James W. Moore et al., Moore's Federal Practice ¶¶0.441-0.445 (1988).

State ex rel. Martinez, 898 P.2d at 1260 and 1261.

In connection with the doctrine of *res adjudicata*, the Supreme Court of the United States, in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stated:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-

353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887). As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927), an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].' We have observed that '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.' *Reed v. Allen*, 286 U.S. 191, 201 (1932).

At 452 U.S. at 398 and 399. (Underscoring for emphasis added.)

The Court further held that there were no exceptions to the application of the doctrine "...such as that suggested by the Court of Appeals, which countenanced an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party" or "simple justice" or "public policy"...". 452 U.S. at 400-401.

In discussing the applicability of the doctrine of *res judicata* in the context of a water rights adjudication proceeding, the Supreme Court of the United States in *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), stated:

> First, while the the [sic] technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. 1B Moore ¶0.407, pp. 931-935; R. Field, B. Kaplan, & K. Clermont, Material on Civil Procedure 860 (4th ed. 1978). Nevertheless, a fundamental precept of common-law adjudication is that

an issue once determined by a competent court is conclusive. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877). 'To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.' *Montana v. United States*, *supra*, at 153-154.

In no context is this more true than with respect to rights in real property. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided should no longer be considered open. *Minnesota Co. v. National Co.*, 3 Wall. 332, 334 (1866); *United States v. Title Ins. Co.*, 265 U.S. 472, 486 (1924). Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804 (1976). The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

460 U.S. at 619 and 620.

In a case analogous to the proceedings involved in the case at bar, the Supreme Court of the United States in *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), stated:

Recent cases in which we have discussed principles of estoppel by judgment include *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Allen v. McCurry*, 449 U.S. 90 (1980); *Brown v. Felsen*, 442 U.S. 127 (1979); *Montana v. United States*, 440 U.S. 147 (1979). But what we said with respect to this doctrine more than 80 years ago is still true today; it ensures 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial

tribunals would be invoked for the vindication of rights of person and property, if ...conclusiveness did not attend the judgments of such tribunals.' *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897).[10 1]

Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). The final 'judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.' *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). See *Chicot County Drainage District v. Baxer State Bank*, 308 U.S. 371, 375, 378 (1940). [Footnote omitted]

To determine the applicability of res judicata to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the same 'cause of action' that was asserted in *Orr Ditch*; we must then decide whether the parties in the instant proceeding are identical to or in privity with the parties in *Orr Ditch*. We address these questions in turn.

---

10 Footnote 10 - The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. See *Arizona v. California*, 460, U.S. 605, 620 (1983); *United States v. California & Oregon Land Co.*, 192 U.S. 355, 358-359 (1904); 2A. Freeman, Law of Judgments §874, pp. 1848-1849 (5th ed. 1925). As this Court explained over a century ago in *Minnesota Co. v. National Co.*, 3 Wall. 332 (1866): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change....[W]here courts vacillate and overrule their own decisions... affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on the subject of this nature, when once decided, should be considered no longer doubtful or subject to change.' *Id.*, at 334. A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because 'it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.' 3 C. Kinney, Law of Irrigation and Water Rights §1535, p. 2764 (2d ed. 1912)]

Definitions of what constitutes the 'same cause of action' have remained static over time. Compare Restatement of Judgments §61 (1942) with Restatement (Second) of Judgments §24 (1982). See generally 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶0.410[1], pp. 348-363 (1983). We find it unnecessary in these cases to parse any minute differences which these differing tests might produce, because whatever standard may be applied the only conclusion allowed by the record in the *Orr Ditch* case is that the Government was given an opportunity to litigate the Reservation's entire water rights to Truckee, and that the Government intended to take advantage of that opportunity.

463 U.S. at 129-131.

xxx

Having decided that the cause of action asserted below is the same cause of action asserted in the *Orr Ditch* litigation, we must next determine which of the parties before us are bound by the earlier decree. As stated earlier, the general rule is that a prior judgment will bar the 'parties' to the earlier lawsuit, 'and those in privity with them,' from relitigating the cause of action. *Cromwell v. County of Sac*, 94 U.S., at 352.

There is no doubt but that the United States was a party to the *Orr Ditch* proceeding, acting as representative for the Reservation's interests and the interests of the Newlands Project, and cannot relitigate the Reservation's 'implied-reservation-of-water' rights with those who can use the *Orr Ditch* decree as a defense. See *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 482-486 (1924). We also hold that the Tribe, whose interest were represented in *Orr Ditch* by the United States, can be bound by the *Orr Ditch* decree. [Footnote omitted]. This Court left little room for an argument to the contrary in *Heckman v. United States*, 224 U.S. 413 (1912), where it plainly said that 'it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts... these wards should themselves be permitted to relitigate the question.' *Id.*, at 446. See also Restatement (Second) of Judgments §41(1)(d) (1982). We reaffirm that principle now. [Footnote omitted].

We then turn to the issue of which defendants in the present litigation can use the *Orr Ditch* decree against the Government and the Tribe. There is no dispute but that the *Orr Ditch* defendants were parties to the earlier decree and that they and their successors can rely on the

decree. The Court of Appeals so held, and we affirm.

> The Court of Appeals reached a different conclusion concerning TCID [Truckee-Carson Irrigation District] and the Project farmers that it now represents. The Court of Appeals conceded that the Project's interests, like the Reservation's interests, were represented in *Orr Ditch* by the United States and thus that TCID, like the Tribe, stands with respect to that litigation in privity with the United States. The court further stated, however, that '[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings,' and that in 'representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant.' 649 F.2d, at 1309. Since the pleadings in *Orr Ditch* did not specifically allege adversity between the claims asserted on behalf of the Newlands Project and those asserted on behalf of the Reservation, the Court of Appeals ruled that the decree did not conclude the dispute between them.

(Matter in brackets added for clarification.)

> At the commencement of the *Orr Ditch* litigation, the United States sought water rights both for the Pyramid Lake Indian Reservation and for the irrigation of lands in the Newlands Project. It was obviously not 'adverse' to itself in seeking these two separate allocations of water rights, and even if we were to treat the Paiute Tribe and the beneficial owners of water rights within the Project as being in privity with the Government, it might be that in a different kind of litigation the res judicata consequences would be different. But as the Court of Appeals noted:
>
> > 'A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. See *Frost v. Alturas*, 11 Idaho 294, 81 P. 996, 998 (1905); Kinney, Irrigation and Water Rights at 277. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose.' 649 F.2d, at 1309.
>
> We agree with these observations of the Court of Appeals. That court felt, however, that these factors did not control these cases because the 'Tribe and the Project were neither parties nor co-parties, however. They were non-parties who were represented simultaneously by the same government attorneys.' *Ibid.* We disagree with the Court of Appeals as to

the consequence of this fact.

It has been held that the successors in interest of parties who are not adversaries in a stream adjudication nevertheless are bound by a decree establishing priority of rights in the stream. See, e.g., *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938). In that case the Idaho court said:

> '" [I]n the settlement of cases of this character every user of water on the stream and all of its tributaries in litigation are interested in the final award to *each claimant* . . . . *Every claimant of the water* of either stream, it matters not whether it be at the upper or lower end of either, or after the junction of the two, *is interested in a final adjudication of all* the claimants of all the waters that flow to the claimants at the lower end of the stream after its junction. In other words, . . . it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute."' Id., at 681, 79 P.2d, at 299.

This rule seems to be generally applied in stream adjudications in the Western States, where these actions play a critical role in determining the allocation of scarce water rights, and where each water rights claim by its 'very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims. *Marlett v. Prosser*, 1919, 66 Colo. 91, 179 P. 141, 142.' *City of Pasadena v. City of Alhambra*, 180 P.2d 699, 715 (Cal. App. 1947). See *Pacific Live Stock Co. v. Ellison Ranching Co.*, 52 Nev. 279, 296-297, 286 P.120, 123 (1930); *In re Chewaucan River*, 89 Ore. 659, 666, 171 P. 402, 403-404 (1918). See also 6 Waters and Water Rights §513.2, p.304 (R. Clark ed. 1972 and Supp. 1978).

Nevada, 463 at 134-140.

The Court then discussed the relationship between the United States, the Paiute Tribe and the Newlands Project land owners and stated:

> ...We hold that under the circumstances described above, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the *Orr Ditch* suit.
>
> We turn finally to those defendants below who appropriated water

from the Truckee subsequent to the *Orr Ditch* decree. These defendants, we believe, give rise to a difficult question, but in the final analysis we agree with the Court of Appeals that they too can use the *Orr Ditch* decree against the plaintiffs below. While mutuality has been for the most part abandoned in cases involving collateral estoppel, see *Parklane Hoisery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), it has remained a part of the doctrine of res judicata. Nevertheless, exceptions to the res judicata mutuality requirement have been found necessary, see 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4464, pp. 586-588 (1981 and Supp. 1982), and we believe that such an exception is required in these cases.

Orr Ditch was an equitable action to quiet title, an *in personam* action. But as the Court of Appeals determined, it 'was no garden variety quiet title action.' 649 F.2d, at 1308. As we have already explained, everyone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under 'these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators' to hold the Reservation to the claims it made in *Orr Ditch*; '[a]ny other conclusion would make it impossible ever finally to quantify a reserved water right.' 649 F.2d, at 1309.

In conclusion we affirm the Court of Appeals' finding that the cause of action asserted below and the cause of action asserted in *Orr Ditch* are one and the same. We also affirm the Court of Appeals' finding that the *Orr Ditch* decree concluded the controversy on this cause of action between, on the one hand, the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators of the Truckee River, and, on the other hand, the United States and the Tribe. We reverse the Court of Appeals, however, with respect to its finding concerning TCID, and the Project farmers it represents, and hold instead that the *Orr Ditch* decree also ended the dispute raised between these parties and the plaintiffs below.

Nevada, 463 U.S., at 143-145. (Underscoring for emphasis added.)

The preclusive effect of *res judicata* and collateral estoppel may differ depending upon whether the prior determinations involve a question of law or a question of fact. In *City of Los Angeles v. City of San Fernando, et al.*, 123 Cal.Rptr. 1, 537 P.2d 1250, at 1273 (1975), the Court stated:

> The res judicata effect of the prior determination between the parties of a question of law may differ from the effect of such prior determination of a question of *fact*. This court observed in Louis Stores, Inc. v. Department of Alcoholic Beverage Control (1962) 57 Cal.2d 749, 757, 22 Cal.Rptr. 14, 18, 371 P.2d 758, 762, as follows:
>
> > An important qualification of the doctrine of collateral estoppel is set forth in section 70 of the Restatement of Judgments, which reads as follows: "Where a *question of law* essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; *and in any event it is not conclusive if injustice would result.*" (Italics added.) Comment f to this section explains: "The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, *if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons.*" (Italics added.) The conclusion and reasoning of the Restatement find support in *United States v. Stone & Downer Co.*, 274 U.S. 225, 235-237, 47 S.Ct. 616, 71 L.Ed. 1013. (See also Cochran v. Union Lumber Co. (1972) 26 Cal.App.3d 423, 427-428, 102 Cal.Rptr. 632.)

A. Extension of Doctrine of Res Judicata and Collateral Estoppel to Those Not Designated Parties or Served in Prior Proceedings.

In the case of *Richards v. Jefferson County*, 116 S.Ct. 1761, 135 L.Ed.2d 76

(1996), the Court held:

> The limits on a state court's power to develop estoppel rules reflect the general consensus '"in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940).... This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C.Wright, A. Miller, & E. Cooper, Federal Practice and Procedure $ 4449, p.417 (1981).' *Martin v. Wilks*, 490 U.S. 755, 761-762, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989). As a consequence, '[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.' *Id.* at 762, 109 S.Ct., at 2184; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971).
>
> Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notable, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust. Moreover, although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. See generally Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments).
>
> In addition, as we explained in *Wilks*:
>
> > We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S.Ct.115, 117-118 (1940) ("class" or "representative" suits); Fed.Rule Civ. Proc. 23 (same); *Montana v. United States*, 440 U.S. 147, 154-155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) (control of litigation on behalf of one of the parties in that litigation.) Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings

may terminate pre-existing rights if the scheme is otherwise consistent with due process. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-530, n. 10, 104 S.Ct. 1188, 1198, n. 10, 79 L.Ed.2d 482 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court ... or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (non-claim statute terminating unsubmitted claims against the estate).' 490 U.S., at 762, n.2, 109 S.Ct., at 2184, n.2.

Here, the Alabama Supreme Court concluded that res judicata applied because petitioners were adequately represented in the *Bedingfield* action. 662 So.2d, at 1130. We now consider the propriety of that determination.

We begin by noting that the parties to the *Bedingfield* case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because, as we explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' Id., at 314, 70 S.Ct., at 657, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-2975, 86 L.Ed.2d 628 (1985); *Schroeder v. City of New York*, 371 U.S. 208, 212-213, 83 S.Ct. 279, 282-283, 9 L.ed.2d 255 (1962)... .

Richards, 116 S.Ct., at 1765-1766.

xxx

Our answer is informed by our decision in *Hansberry v. Lee*, 311 U.S., at 40-41, 61 S.Ct., at 117-118. There, certain property owners brought suit to enforce a restrictive covenant that purported to forbid the sale or lease of any property within a defined area to 'any person of the colored race.' *Id.* at 37-38, 61 S.Ct., at 116. By its terms the covenant was not effective unless signed by the owners of 95 percent of frontage in the area. At trial, the defendants proved that the signers of the covenant owned only about 54 percent of the frontage. Nevertheless, the trial court held that the covenant was enforceable because the issue had been resolved in a prior suit in which the parties had stipulated that the owners of 95 percent had signed. *Id.*, at 38, 61 S.Ct., at 116 (referring to *Burke v. Kleiman*, 277 Ill.App.519 (1934)).

Despite the fact that the stipulation was untrue, the Illinois Supreme Court held that the second action was barred by res judicata. See *Lee v. Hansberry*, 372 Ill. 369, 24 N.E.2d 37 (1939). Because the plaintiff in the earlier case had alleged that she was proceeding 'on behalf of herself and on behalf of all other property owners in the district,' *id.*, at 372, 24 N.E.2d, at 39, the Illinois Supreme Court concluded that all members of that 'class,' including the defendants challenging the stipulation in the present action, were bound by the decree. We reversed.

We recognized the 'familiar doctrine ... that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or ... the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.' *Hansberry*, 311 U.S., at 42-43, 61 S.Ct., at 118-119. We concluded, however, that because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the doctrine of representation of absent parties in a class suit could not support the decree.

Even assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice, but, *cf., id.*, at 40, 61 S.Ct., at 117; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 319, 70 S.Ct., at 659-660, it may not be read to permit the application of res judicata here. Our opinion explained that a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.' 311 U.S., at 43, 61 S.Ct., at 119; cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S., at 811-812, 105 S.Ct., at 2974. It is plain that the *Bedingfield* action, like the prior proceeding in *Hansberry* itself, does not fit such a description.

The Alabama Supreme Court concluded that the 'taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here,' 622 So.2d., at 1130 (emphasis added), but the three county taxpayers who were parties in *Bedingfield* did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind

any county taxpayers who were nonparties. That the acting director of finance for the city of Birmingham also sued in his capacity as both an individual taxpayer and public official does not change the analysis. Even if we were to assume, as the Alabama Supreme Court did not, that by suing in his official capacity, the finance director intended to represent the pecuniary interests of all city taxpayers, and not simply the corporate interests of the city itself, he did not purport to represent the pecuniary interests of county taxpayers like petitioners.

As a result, there is no reason to suppose that the *Bedingfield* court took care to protect the interests of petitioners in the manner suggested in *Hansberry*. Nor is there any reason to suppose that the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.' *Hansberry*, 311 U.S., at 46, 61 S.Ct., at 120.

Because petitioners and the *Bedingfield* litigants are best described as mere 'strangers' to one another, *Martin v. Wilks*, 490 U.S., at 762, 109 S.Ct., at 2184-2185, we are unable to conclude that the *Bedingfield* plaintiffs provided representation sufficient to make up for the fact that petitioners neither participated in, see *Montana v. United States*, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979), nor had the opportunity to participate in, the *Bedingfield* action. Accordingly, due process prevents the former from being bound by the latter's judgment.

xxx

Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging and allegedly unconstitutional deprivation of their property. Accordingly, the judgment of the Alabama Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Richards, 116 S.Ct. At 1767-1768.

In *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), the Court stated:

However, due process concerns are present when the party sought

to be precluded was not an actual party in the first lawsuit. Because preclusion based on privity is an exception to the 'deep-rooted historic tradition that everyone should have his own day in court,' *Richards v. Jefferson County, Ala.*, ___ U.S. ____,____, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996) (citation omitted), courts must ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion. Thus, the due process clauses prevent preclusion when the relationship between the party and non-party becomes too attenuated.' *Southwest Airlines Co. V. Texas Int'l Airlines*, 546 F.2d 84, 95 (5th Cir.) *cert. denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977).

There are three generally recognized categories of nonparties who will be considered in privity with a party to the prior action and who will be bound by a prior adjudication: (1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequately represented by a party to the original action. *See generally 18* Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction §§ 4451, 4454-57, and 4462 (1981 & Supp.1990). This case focuses on the third category.

Preclusion based on adequate representation, otherwise known as 'virtual representation,' was given its clearest statement in *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). In that case the court noted that

> [u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Id. at 719. Although this principle is generally accepted, courts are sharpy divided on how to implement this strand of issue preclusion.

Some courts permit a wide use of virtual representation, inquiring whether there exists a substantial relationship between the party and nonparty, such that the party adequately represented the interests of the nonparty. *See, e.g., NAACP v. Hunt*, 891 F.2d 1555 (11th Cir.1990). Because of the fact-incentive nature of these inquires, there is no clear test that can be employed to determine if virtual representation is appropriate. It is evident, however, that because virtual representation rests on the notion that it is fair to deprive a nonparty of his day in court,

'virtual representation has a pronounced equitable dimension.' *Gonzales v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir.1994). A nonparty will be barred from bringing his claim only when 'the balance of the relevant equities tips in favor of preclusion.' *Id.*

Other courts would permit a nonparty to be bound by a prior judgment under a theory of virtual representation only in very limited, technical situations. For example, in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir.1978), the court noted that '[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.' *Id.* at 1008; *see also Klugh v. United States*, 818 F.2d 294, 300 (4th Cir.1987) (same). Examples of such a relationship would be '"estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee."' *Pollard*, 578 F.2d at 1008-09 (quoting *Southwest Airlines Co.*, 546 F.2d at 97). Under this view, virtual representation is little more than the doctrine of preclusion based on representation that has historically been accepted by courts.

We agree with those courts that give wider use to virtual representation. This liberal use better accommodates the competing considerations of judicial economy and due process. Although we are cognizant of the concerns underlying the *Pollard* decision--that broad use of this doctrine will completely eviscerate the notion that a party is entitled to his day in court--we believe that these concerns are better addressed through a careful application of the doctrine to the facts in a given case than by artificially limiting the scope of the doctrine.

This conclusion is not altered by the recent Supreme Court decision in *Richards, supra*. In *Richards*, the Court permitted a group of taxpayers to challenge a municipal tax as an unconstitutional deprivation of property, even though an earlier group of taxpayers had already litigated this issue and lost. The Court began by reaffirming the general rule that '"one is not bound by a judgment in personam in a litigation in which he is not designated as a party. . . ."' *Richards*, ___ U.S. ____, 116 S.Ct. at 1765-66 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22(1940)). Because the two sets of plaintiffs were 'mere "strangers" to one another,' *id.* at ____, U.S., 166 S.Ct. at 1768, the Court concluded that the plaintiffs to the earlier suit did not provide 'representation sufficient to make up for the fact that [the second set of plaintiffs] neither participated in, nor had the opportunity to participate in, the [earlier] action.' *Id.* (citations omitted).

However, the Court did note one important exception to the general rule: a party to the second case will be bound by the result of an earlier case to which it was not a party 'when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment.' *Id.* at , 116 S.Ct. at 1766. Although the Court provided some examples of what could constitute privity, it did not offer a general definition of that term. Rather, the Court acknowledged that 'the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.' *Id.*

Virtual representation falls squarely within this exception. A court will apply virtual representation only when it finds the existence of some special relationship between the parties justifying preclusion. In essence, this is a finding that the two parties are in privity. *See Gerrard*, 517 F.2d. at 1134 ('Privity ... is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.') (quoting *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950)). When, as in *Richards*, the two parties are strangers to each other, then virtual representation would not be appropriate. However, where there is a special relationship between the parties determined after analyzing the factors listed below, the parties are in privity, and *Richards* is simply inapposite.

Due to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine. There are, however, several guiding principles. First, identity of interests between the two parties is necessary, though not alone sufficient. *See Mann v. City of Albany, Ga.*, 883 F.2d 999, 1003 (11th Cir.1989). Other factors to be considered 'include a close relationship between the prior and present parties; participation in the prior litigation; apparent acquiescence; and whether the present party deliberately maneuvered to avoid the effects of the first action.' *Petit v. City of Chicago*, 766 F.Supp. 607, 612 (N.D.Ill.1991) (citing 18 Wright, Miller & Cooper, Federal Practice & Procedure; Jurisdiction § 4457).

Another factor to consider is adequacy of representation, *Gonzales*, 27 F.3d at 762, which is best viewed in terms of incentive to litigate. [Footnote omitted]. That is, one party 'adequately represents' the interests of another when the interests of the two parties are very closely aligned and the first party had a strong incentive to protect the interests of

the second party.

Finally, the nature of the issue raised— whether a public law issue or private law issue—is important. Although virtual representation may be used in the private law context, its use is particularly appropriate for public law issues. As the Supreme Court recently noted, when a case challenges a 'public action that has only an indirect impact on [a party's] interests,' *Richards*, U.S. at , 116 S.Ct. at 1768, due process concerns are lessened. In this situation, courts have 'wide latitude to establish procedures ... to limit the number of judicial proceedings....' *Id.*

xxx

The panel opinion does not directly address the issue of 'notice' here and concludes that all that is necessary to satisfy the 'sufficient representation' prong of Richards is that the plaintiffs in the first suit had the 'incentive' to raise the same issues the parties in the second suit would raise. However, the Supreme Court's opinion appears to require something more than just incentive: 'a prior proceeding, to have binding effect on absent parties, would at least have to be "so devised and applied as to insure ... that the litigation is so conducted as to insure the *full and fair consideration* of the common issue. *Richards*, ___ U.S. at ___, 116 S.Ct. at 1767, *quoting Hansberry v. Lee*, 311 U.S. 32, 43, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) (emphasis added).

In considering due process requirements with due regard to *Richards, supra*, the Court, in *Romero v. Star Markets, Ltd.*, 82 Hawai'i 405, 922 P.2d 1018 (Hawai'i App. 1996) stated:

"[T]he requirement of reasonable notice must be regarded as part of the due process limitations on the jurisdiction of a court.' 4 C. Wright & A. Miller, *Federal Practice and Procedure*: Civil § 1074, at 456 (2d ed. 1987) (4 *Wright & Miller*) (footnote omitted). Thus, '[t]o acquire jurisdiction over the person, a court must serve on the person a document, "such as a summons, notice, writ, or order."' *McQuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907 (5th Cir. 1995) (citation omitted). 'Such formal notice of contemplated action... is part of the due process limitations' on the jurisdiction of a court. Id. (citing 4 *Wright & Miller* § 1074, at 456). 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of

the pendency of the action and to afford them an opportunity to present their objection.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed 865 (1950) (citations omitted). Consequently, '[it is elementary law that a judgment binding on the person of the defendant may not be rendered in an action classified as in personam without some form of personal service sufficient to satisfy the requirements of due process of law.' Lynch v. Blake, 59 Haw. 189, 204, 579 P.2d 99, 108 (1978) (citation and quotation marks omitted). The basis for this fundamental precept is that

> 'in Anglo-American jurisprudence ... one is not bound by a judgment in personam in a litigation in which he [or she] is not designated as a party or to which he [or she] has not been made a party by service of process.' Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115 [117], 85 L.Ed. 22 (1940).... This rule is part of our 'deep-rooted historic tradition that everyone should have his [or her] day in court.' 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1981).

Richards v. Jefferson County, Ala., ___ U.S. _____, _____ _ _____, 116 S.Ct. 1761, 1765-66, 135 L.Ed.2d 76, 83 (1996).

xxx

In addition, the court should have held in favor of Respondents in deciding the jurisdictional defense because Respondents were deprived of property without due process.

The '[b]asic requisites of "due process" ... where property rights may be affected, [are that] notice and an opportunity to be heard must be afforded to all interested persons.' In re Ellis, 53 Haw. 23, 30, 487 P.2d 286, 290 (1971). See also Price v. Zoning Bd. of Appeal of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994) ('The basic elements of due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.') (citations omitted).

The New Mexico Supreme Court has repeatedly held that "...due process entitles 'all who may be bound or affected by a decree to notice and hearing, so that they may have their day in court'...". For example, *see City of Albuquerque v. Reynolds*, 71 N.M.

428, 379 P.2d 73 (1963); *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District, et al.*, 99 N.M. 699, 701, 663 P.2d 358, 360 (1983) *citing State ex rel. Reynolds v. Allman*, 78 N.M. 1, 3-4, 427 P.2d 886, 888-889 (1967); *State ex rel. Reynolds et al., v. L. T. Lewis, et al.*, 84 N.M. 768, at 772, 508 P.2d 577 (1973).