UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel., State Engineer,	)	
Plaintiff,	)	68cv07488-BB
	)	70cv08650-BB
v.	)	Consolidated
	)	Rio Santa Cruz and Rio de Truchas
JOHN ABBOTT, et al.,	)	Stream Systems
Defendants.	)	Pueblo Claims Subproceeding II

STATE OF NEW MEXICO'S RESPONSE TO OBJECTIONS TO SPECIAL MASTER'S PROCEDURAL ORDER ON THE DETERMINATION OF IRRIGATION WATER RIGHTS REQUIREMENTS

COMES NOW the State of New Mexico ("State") and provides this Response to the Objections filed by the United States, the Pueblo of San Juan (Ohkay Owingeh), and the Pueblo of Santa Clara (Doc. Nos. 2622, 2624, 2625, respectively) to the Special Master's May 11, 2009 Procedural Order on the Determination of Irrigation Water Requirements (Doc. No. 2619) ("Procedural Order").

I. Summary of Arguments

The Special Master's Procedural Order 1) is genuinely procedural, so that it must stand absent an abuse of discretion; 2) is not an abuse of discretion and prejudices no party; 3) is reasonable; and 4) should be left to stand unmodified. This Response addresses each of these points in turn.

II. The Special Master's Procedural Order Is Indeed Procedural as Contemplated by F.R.Civ.P. 53(c)(1)(A) and Therefore May Only Be Set Aside for an Abuse of Discretion.

The Procedural Order decides no substantive issues or facts, only: a) the timing and scope of the planned unified hearing on irrigation water requirements; and b) the scope of this Subproceeding (Subproceeding II). Procedural Order at 1-2. Its sole operative effect is to establish whether evidence regarding the quantification of the Pueblo and United States' claims for aboriginal water rights outside the San Juan Pueblo Grant based on a "technologically diverse array of methods of altering the landscape for purposes of diverting and capturing water within their aboriginal territory, including canals, reservoirs and other impoundments, terraces, snow fences or other barriers, check dams, gravel mulches, pits swales, and spreaders" (*Subproceeding Complaint of Pueblo of San Juan, paragraph* 14) shall be heard in the present Subproceeding or shall be heard in the so-called unified irrigation water rights hearing, to be held soon after the evidentiary hearing in this Subproceeding. After briefing, oral argument and an opportunity for parties to comment on her proposed Procedural Order, the Special Master decided to hear this evidence in the present Subproceeding. Procedural Order, at 4. The Procedural Order is therefore an obvious example of the Special Master exercising the authority explicitly granted to her to "regulate all proceedings." F.R.Civ.P. 53(c)(1)(A). The Special Master also specifically concluded that it would be most efficient to hear all of the pre-Columbian water use issues in this Subproceeding, (Procedural Order, at 3, par.9), pursuant to her authority to "take all appropriate measures to perform the assigned duties fairly and efficiently." F.R.Civ.P. 53(c)(1)(B). As a consequence, the Procedural Order may be set aside only for an abuse of discretion. F.R.Civ.P. 53(f)(5). The United States and Pueblo objectors agree. United States' Objections at 1, 10; Santa Clara Pueblo

Objections at 1; Ohkay Owingeh Objections at 1 (concurring in United States' Objections).

III. The Special Master's Procedural Order is Not an Abuse of Discretion.

The objectors assert that the Special Master committed that abuse of discretion by adopting a presumption of fact they allege to be "prejudicial" (United States' Objections at 2, Santa Clara Pueblo Objections at 1.[1] The United States claims that the Special Master abused her discretion by presuming "that Pueblo Indians did not make use of channelization or defined diversions before the arrival of European influence," while Santa Clara Pueblo claims as an abuse of discretion "the presumption in the May 11 procedural Order that irrigation which relies upon 'channelization, defined diversions, or methodologies other than the manipulation of surface water run-off' did not occur by the Pueblos prior to the arrival of the Spanish." United States' Objections at 4; Santa Clara Objections at 1.

In response, the State notes first that there is no unambiguous evidence that the Special Master adopted such a presumption, as the United States acknowledges ("To the extent any definition of these methodologies can be inferred from indirect references in the Order, the references suggest...;" "...it is unclear to what extent the Special Master has accepted the State's arguments..."). US Objections at 3, 8, emphasis added. Second, the objectors' claim is essentially that the Special Master has made an error of fact, not of law, and has made a scheduling decision which was based on that erroneous conclusion: "The United States has disclosed in Subproceeding 2, and is prepared to offer in Court, evidence that such a presumption is contrary to the written accounts of the earliest

[1] The United State has also claimed that the Special Master abused her discretion by relying on a State law procedural rule that is inapplicable in this Court, and further applies such State rule inconsistently. US Objections at 1, 8-9. This allegation is addressed in Section VI. below.

Spanish visitors to Northern New Mexico as well as the conclusions of numerous archaeological studies." United States' Objections at 4. The State responds that it, and other parties, have disclosed contrary evidence establishing that there is no direct archaeological or historic evidence of canal irrigation in the Santa Cruz basin prior to the arrival of the Spanish. The Special Master has made no recommended findings of fact on the issue, and no objector has cited any authority suggesting that the mere act of entering a scheduling order based on an error of fact constitutes an abuse of discretion. Third, even if the claimed factual presumption had been adopted by the Special Master for purposes of drafting her Procedural Order, there is substantial factual evidence to support the presumption (see below). Finally, and perhaps most importantly, the Special Master specifically denies that she has made any determinations of fact, and expressly declares that:

> References to "Pre-Columbian" methods of irrigation are made only for descriptive and narrative purposes, and should not be construed as the Court's approval or acknowledgment of these methodologies in these proceedings. Procedural Order at 2, ftnt. 2.

The objectors' argument that this is an impermissible presumption flies in the face of the Special Master's explicit disavowal of such an intent and effect. This argument does not rise to anywhere near the level of demonstration of an abuse of discretion that is required by the law, which requires that the reviewing court have "a definite and firm conviction that the lower court made a clear error of judgment or exceed the bounds of permissible choice in the circumstances." *Boughton v. Cotter Corp.*, 65 F.3d 823, 832 (10th Cir.1995) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553 (10th Cir. 1991). Neither the United States nor the Pueblos, however, have alleged that the Procedural Order represents a clear error of judgment or exceeds the bounds of

permissible choice in the circumstances. Given the absence of such an argument, the objectors have fallen far short of the showing necessary to establish an abuse of discretion, and there is thus no cause for setting aside the Procedural Order.

IV. The Special Master's Procedural Order Prejudices No Party

The United States and the Pueblos have made absolutely no attempt to show that any prejudice at all will result to them from the Procedural Order. The United States merely asserts that it will be prejudiced (United States' Objections at 1, 2, 3); Santa Clara Pueblo speaks only of the alleged presumption being "potentially prejudicial" (Santa Clara Pueblo Objections at 1). In neither case is the allegation supported by even the most superficial of analyses to demonstrate the claimed prejudice. But without a showing of prejudice there can be no abuse of discretion. *Unioil, Inc. v. Elledge*, 962 F.2d 988, 993 (10th Cir. 1992):

> In light of Unioil's failure to demonstrate actual prejudice resulting from the requested amendment,...we cannot say the bankruptcy court abused its discretion allowing the Trust's claim.

In accord is *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F3rd 1221, (10th Cir. 1999), where the Tenth Circuit found that plaintiff's mere allegations of error and claims that the prejudice to it were "obvious" were insufficient to support a claim of abuse of discretion. Id, at 1230, ftnts 3-4.

The Pueblo of Santa Clara states that "the Court should be clear" that litigation of pre-Columbian water use quantification methodologies in the present Subproceeding "will be done without prejudice" to any and all of the parties participating in that Subproceeding who will later participate in the unified proceeding. The Procedural Order specifically notes that the Pueblo of Santa Clara is a party to this Subproceeding

and "should participate in the current litigation of issues arising from Ohkay Owingeh's claims which rely on Pre-Columbian irrigation methods." Procedural Order, at 3, par.11.

In addition to determining that all pre-Columbian water use evidence will be presented within the present Subproceeding, the second function of the Procedural Order is to establish that the unified irrigation water rights hearing contemplated by the parties and the Special Master will be held "as soon as possible following the completion of Subproceeding II hearings." Procedural Order at 4, par. 3. Further, the precise scope and the questions to be determined "will be framed in the procedural and scheduling orders which will be developed throughout the coming year by the Special Master and interested counsel." Given the opportunity expressly provided by the Special Master to all parties to help craft the Special Master's procedural and scheduling orders, there can be no prejudice to any party.

V. The Special Master's Procedural Order Is a Reasonable Approach to Hearing the Multitude of Factual and Legal Issues Related to the Pre-Columbian Water Use Claims and Defenses in this Subproceeding.

As noted in Section II above, the Procedural Order establishes a schedule in which all of the factual and legal questions relating to Ohkay Owingeh's claims in this Subproceeding will be heard. The principal effect of the Procedural Order is that all issues related to the claimed Pre-Columbian uses of water will be heard in this Subproceeding, with all other irrigation water requirements issues being set for the unified hearing to be held as soon as possible after the Subproceeding II hearing, and with the precise scope of the unified hearing to be framed by the Special Master in future procedural and scheduling orders, as noted above. Procedural Order, at 4, pars. 1, 3. In these circumstances, the Procedural Order is a reasonable, efficient and effective way to

order the presentation of evidence on this complex aspect of this very complex larger Subproceeding.

First, it is completely unknown to the State whether the Pueblo of Santa Clara will also make claims, in Subproceeding 3, for water rights based on alleged pre-Columbian uses, or whether those claims, if made, would resemble those of Ohkay Owingeh in terms of types of use, places of use, diversion quantities, depletion quantities, and a host of other characteristics that may be unique to Ohkay Owingeh's claims. Ohkay Owingeh's pre-Columbian claims should be treated precisely as the Special Master's Procedural Order treats them – as factually specific, perhaps unique claims.

Second, the Special Master heard arguments from the objectors regarding when to hear this specific use evidence, and her Procedural Order was entered after consideration of those arguments. Specifically, the United States and Pueblo were heard in briefing and then at oral argument on April 8, 2009. The United States did not respond to the Special Master's April 26, 2009 letter asking for comments on her approach to the proposed Procedural Order.

Third, the Special Master's Procedural Order should be seen for what it is – a choice of the order of presentation of evidence on the pre-Columbian components of this set of claims in this complex Subproceeding. That complexity is clear from the fact that the parties have disclosed Rule 26(a)(2) reports authored by some 32 experts, who are being individually deposed now. In fact, the United States explicitly admits that "[t]he issues in this case are complex, and the Special Master has authority to sever issues in the interest of deciding them efficiently..." United States' Objections at 9.

Fourth, there is substantial evidence already produced to support the conclusion that pre-Columbian Pueblo irrigation methods did indeed differ qualitatively from the Iberian canal, or acequia, system introduced by the Spanish. Even the Pueblo's expert archaeologist concedes this point:

> Q. Now you don't claim that pre-Columbian Tewa perennial source irrigation canals were of the same type as the later Iberian canals, do you?
>
> A. I do not.
>
> Q. And would you agree that there's no evidence that any pre-Columbian perennial source irrigation canals performed in the same way that Iberian canals do?
>
> A. I – I – I would think that they would not perform in the same way.

Oral deposition of Michael P. Marshall, June 9, 2009, p. 81, page copy attached as Exhibit A hereto.

This and other evidence developed so far support the Special Master's decision to schedule evidence on the actual nature and performance of these pre-Columbian farming methods supposed to have been used for these specific Ohkay Owingeh uses within this Subproceeding, as opposed to hearing that evidence later within a unified proceeding on irrigation water requirements.

The power of the Special Master to sever claims as necessary and to schedule the presentation of evidence before her is particularly important in this Subproceeding II, as virtually all factual and legal aspects of the claims and defenses are hotly disputed, and virtually all of these are the subject of expert reports and anticipated expert testimony by the above-mentioned experts. The most important of these disputed legal and factual issues for the purposes of the objections to the Procedural Order are those surrounding

the claimed uses of water by Puebloan Indians in pre-Columbian times within the geographic scope of this adjudication, including:

1. the quantities, methods, purposes and dates of use of water;

2. whether it is possible to associate any such pre-Columbian uses with any existing Pueblo;

3. whether, under Spanish and Mexican law, a water right could only exist in a common water source relied on by others;

4. if it is claimed that water from a common source was used, the quantity by which the use depleted that common source;

5. whether a water right can be recognized based on what is essentially known as "dryland farming";

6. whether a landowner's use of precipitation on his land which would not contribute to a common source can give rise to a water right;

7. whether a water right can be recognized for an agricultural crop water use where the CIR is zero or less – i.e., where crop water use is less than the effective precipitation[2]; and

8. whether the amount of water right for a claimed agricultural practice should be quantified as the total crop evapotranspiration, or should be quantified as the CIR.[3]

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[2] The Consumptive Irrigation Requirement, or CIR, is the total crop evapotranspiration, or ET, less the effective precipitation. See, Order Adjudicating Irrigation Water Requirements, U.S. v. Abousleman, et al., June 3, 1997 (USDC New Mexico; case No. 83-1041).

[3] The State asserts that the proper measure of an irrigation water right is the CIR (defined in ftnt 2 above). "CIR is the measure of the depletion or beneficial consumptive use right." Order Adjudicating Irrigation Water Requirements, id., at 1. Ohkay Owingeh has claimed the entire alleged crop evapotranspiration as the measure of its pre-Columbian water right for some 11,000+ acres of fields: "For stormwater runoff diverted for irrigation, the entire amount of the diversions is considered to be the depletions." "Hydrologic Assessment of Ohkay Owingeh Aboriginal Water Rights within the Geographic Scope of New Mexico v.

Given that the State and other parties are entitled to a full evidentiary hearing on all these complex pre-Columbian water use issues, whether in this Subproceeding or otherwise, it was perfectly reasonable, to schedule the presentation of all evidence on these issues within this Subproceeding.

VI. The Special Master's Procedural Order Should Stand Unmodified

As an initial matter, the State notes that it relied on the Special Master's October 13, 2005 Scheduling Order for Pueblo Claims Subproceeeding II (No. 2506) deciding that all aspects of the pre-Columbian water use claims, including evidence of quantities and dates of water use, were appropriate subjects of discovery for this Subproceeding. The State retained expert witnesses on the subjects of hydrology, archeology, history, water use and conservation, and agricultural science, and those experts provided extensive reports setting out their opinions after many months of work**.** Indeed, the Special Master specifically referred to this significant expenditure of resources in reliance on her Scheduling Order in the May 11 Procedural Order (Paragraph 7). The Special Master's Procedural Order should stand in order that the efforts of the State and others not be impaired.

A. Responses to the Specific Objections of the US and Santa Clara.

Although the objectors argue that the Special Master is prejudicing them by use of an alleged impermissible presumption of fact, their cure is worse than the disease: they would force the Court to make an affirmative contrary presumption that pre-Columbian Pueblo irrigation methods were no different than post-Columbian and that the Court must instruct the Special Master to so treat them. See, e.g., the United States' demand that

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Abbott," August 6, 2007, Prepared for Ohkay Owingeh by Mark Miller, Senior Hydrogeologist, at page 50, copy attached as Exhibit B.

irrigation water requirements must be determined in the same way for pre-Columbian and post-Columbian agriculture and that it would be an abuse of discretion to do otherwise. United States' Objections at 8. No authority is cited for this proposition. Nevertheless, the United States has apparently asserted that its approach is the only acceptable one as a matter of law. But that assertion is contradicted by the actual evidence produced so far, referred to above, which tends to establish the differences, not the similarities, between the pre-Columbian Puebloan farming techniques and those of the Spanish. The unreasonable nature of the United States position that its view of the evidence is the only legally permissible one is also illustrated by its insistence that State's methodology "is largely based on unreliable crop yield data from water-stressed crops and is erroneous and contrary to law for that reason" [emph. in orig.] The statement that a water use quantification methodology can be "contrary to law" because the factual data upon which it is based are "unreliable" is an extraordinary one, demanding an extraordinarily authoritative citation. Unfortunately, no citation of any type was included, nor any elaboration, so the reader is unable to identify the "law" to which it purports to refer. The assertion is also noteworthy because it is actually the United States which has explicitly claimed that the quantification methodology for its pre-Columbian claim should assume that the Pueblo crops were water-stressed:

> Once crops become stressed due to lack of soil moisture, plant growth decreases, and plants lack the growth and vigor required to transpire water at their potential. This condition is accounted for by Kc values, and adjustments are made accordingly.

Memorandum, Dr. Niel Allen to Bradley Bridgewater Esq., "Water Use Rates for San Juan Pueblo for New Mexico v. Abbott," September 21, 2006, at 5, page copy attached as Exhibit C.

Questions involved in the quantification of the claimed water use by the pre-Columbian Puebloan peoples are not limited to the "water-stress" issue. The Special Master will also have to take account of the crop-mix issue, also directly related to the actual water use. The State has disclosed expert testimony, and is prepared to prove to the Court, that the United States and Ohkay Owingeh have claimed a quantity of pre-Columbian water use quantified by their experts using a completely inappropriate crop mix – i.e., one including modern high water use crops such as alfalfa and wheat, which both United States and Pueblo experts admit were introduced by the Spanish and were not grown by pre-Columbian Puebloan people. For example, to quote Ohkay Owingeh's archaeologist again:

> Q. Okay. Do you know, Mr. Marshall, if pre-Columbian Tewa peoples grew alfalfa?
>
> A. No, they didn't.
>
> Q. Do you know if they grew wheat?
>
> A. They did not.
>
> Q. If one were going to model pre-Columbian agricultural water use, would it be accurate to include those two crops in the calculation?
>
> Q. No, it would not.

Oral deposition of Michael P. Marshall, June 9, 2009, p. 83, page copy attached as Exhibit D.

By contrast, the State's experts, according to testimony disclosed, have reconstructed the likely Puebloan pre-Columbian crop mix (68% maize, 28% squash, beans, mixed vegetables, and 4% native plants), which results in a much lower crop water use than a modern crop mix would imply, and an irrigation water requirement (amount of

water required in excess of the effective precipitation) which is very small or zero. The Special Master will have to grapple with all of these complex pre-Columbian water use issues, and she did not abuse her discretion in making the reasonable decision to hear them all in this Subproceeding.

The objectors wish to impose on the Special Master's procedural decision their own view of the evidence and their own theories of water use quantification, even to the extent of claiming that any contrary view would be "contrary to law." The Special Master rejected that approach and, in view of the complexity of the issues before her, rightly so.

The United States' objections contain much discussion of definitions of "irrigation," arguing for an extremely broad definition which includes what is generally known as "dryland farming." Again, the Special Master will have the opportunity to hear all the pre-Columbian use claims arguments in this Subproceeding, so no decision on these matters need be made for the purposes of review of the United States' and Pueblos' objections to the Procedural Order, but the State notes that the United States Department of Agriculture has defined dryland farming as "[a] system of producing crops in semiarid regions {usually with less than 20 inches of annual rainfall) without the use of irrigation." (Emphasis added). (United States Department of Agriculture, National Agricultural Library, Agricultural Thesaurus, online at http://agclass.canr.msu.edu). More specifically, in the northern New Mexico context, Wozniak points out:

> In all discussions of irrigation systems or the potential for irrigation systems one must be extremely careful to distinguish between water or moisture conservation systems, which are not irrigation systems, and water diversion systems, which are.
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> Wozniak, Frank, Irrigation in the Rio Grande Valley, New Mexico: A Study and Annotated Bibliography of the Development of Irrigation Systems. Forest

Service Rocky Mountain Forest and Range Experiment Station, Fort Collins, Colorado.

The State believes the Wozniak formulation captures the relevant concepts and distinctions that will inform the Special Master's later factual determinations better than the formulations presented so far by the United States. Even more specifically, with respect to the claimed pre-Columbian water conservation and management strategies, the State asserts that only a diversion from an established watercourse, and not the mere manipulation or collection of precipitation, will suffice to support an irrigation water right claim.

This is particularly relevant to the United States' surprising argument that all water except groundwater is surface water and therefore all agricultural water use is surface water irrigation, which is a grand and misleading statement. United States' Objections at 3. The real point is that 11,000 of the claimed 12,000 pre-Columbian "irrigated" acres are for non-"canal" irrigation – i.e., is agriculture by "precipitation-dependent farming." In advancing the argument that all such claims are for irrigation, the United States is attempting to obscure through sophistry the very distinctions that the United States and Ohkay Owingeh made in their claims. This underscores the need for the State and other parties to be able to fully explore and present evidence on all aspects of the claimed wide range of irrigation technologies supposedly employed and their actual results in terms of quantities of water used.

The United States also argues for the existence and prevalence of pre-Columbian irrigation as if they were undisputed facts, to support the proposition that if the Special Master scheduled proceedings on the basis of a fact which differed from the United States' view of the evidence, it must be an abuse of discretion. United States' Objections

at 5-6. The State does not view the matter in the same way; we find no authority for the claimed proposition. Moreover, we emphasize that these matters are disputed: as to the particulars of pre-Columbian uses, Wozniak, quoted above, was also of the opinion that:

> in the period before 1540 the northern Rio Grande Anasazi focused their energies on extensive systems of soil and moisture conservation rather than on intensive systems such as irrigation diversions.
> Id., at 9.

The State finds the Wozniak opinion on the prevalence of pre-Columbian irrigation more compelling and credible than the "Spanish visitors" evidence argued by the United States (US Objections at 4), but it is not prepared to claim that the Special Master must adopt its view of the evidence for scheduling purposes. At hearing, the Special Master will hear all these matters in their entirety, as it should be.

The United States has also claimed that the Special Master abused her discretion by relying on a State law procedural rule that is inapplicable in this Court, and that she has applied such State rule inconsistently. United States' Objections at 1. In the actual discussion of this claim, however, the United States admits that the reference to the subject State law rule "appears to serve no function." A reference to State law and procedure which serves no operative function in the Procedural Order cannot, manifestly, be an abuse of discretion, if for no other reason than that the objectors can hardly demonstrate actual prejudice from a non-operative reference. And, as argued in Section IV above, without demonstrated prejudice, there is no abuse of discretion. Beyond that, because the reference has no operational effect, there is no point in modifying the Procedural Order.

In summary, given the range and complexity of the pre-Columbian water use issues presented, the circumstances of this Subproceeding strongly support the Special

Master's decision. The Procedural Order should not be modified.

B. The Revisions to the Procedural Order Proposed by the United States Are Not Needed

The United States suggests that, if the Special Master's decision is sustained, the Procedural Order's "prejudice" may be avoided by its proposals to distinguish between claims based on a temporal or on an irrigation methodology distinction. United States' Objections at 12. The State does not agree that the present decision to hear all pre-Columbian water use and quantification matters in this Subproceeding is unclear or needs modification, nor does it agree that it is an implementation of an impermissible presumption of fact. Further, as noted above, the Special Master has expressly stated that the precise scope of the unified hearing will be determined in the future. The United States' proposed revisions are simply unnecessary.

V. Conclusion.

The Special Master's Procedural Order is a reasonable approach to: 1) hearing in this Subproceeding all issues of fact and law related to the Pre-Columbian uses of water claimed by the United States and Ohkay Owingeh, including irrigation methodologies, water use quantities, and acreages; and 2) addressing all other, or post-Columbian water requirements questions in the unified hearing to come after this Subproceeding. The Special Master's approach prejudices no party, is not an abuse of discretion, is reasonable and should be left to stand unmodified.

Electronically filed,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2009, I filed the foregoing electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

__/s/_John Stroud_____