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

STATE OF NEW MEXICO, ex rel. the State Engineer,	)	
Plaintiff,	)	68cv7488 BB 70cv8650 BB Consolidated
v.	)	
JOHN ABBOTT, et al.,	)	Rio Santa Cruz and Rio Truchas Stream Systems Pueblo Claims Subproceeding 2
Defendants.	)	

UNITED STATES' REPLY IN SUPPORT OF OBJECTIONS TO SPECIAL MASTER'S PROCEDURAL ORDER ON THE DETERMINATION OF IRRIGATION WATER REQUIREMENTS

The Plaintiff United States of America ("United States") hereby replies to the *Rio de Truchas Acequias' Response to Objections by the United States, Ohkay Owingeh, and the Pueblo of Santa Clara to the Special Master's Procedural Order on the Determination of Irrigation Water Requirements* (Doc. No. 2630) ("Truchas Acequias Response") and the *State of New Mexico's Response to Objections to Special Master's Procedural Order on the Determination of Irrigation Water Rights Requirements* (Doc. No. 2631) ("State Response"), both of which were filed June 30, 2009.

Reply to the Truchas Response

The Truchas Acequias Response argues that the two negotiated agreements reached in Pueblo Claims Subproceeding 1 of this case establish a "precedent" (Truchas Acequias Response at 3) for distinguishing pre-Columbian water uses from other water uses. Notably, both of those agreements contain express disclaimers of any precedential effect. See March 15, 2002 *Settlement Agreement Concerning Certain Claims for Water Rights for the Pueblo of Nambé and the Pueblo of*

San Ildefonso (Doc. No. 2374) at Paragraph 5.2 ("Other than with respect to the specific water rights claims affirmatively identified in the preceding paragraphs 1.5 and 1.6, and the specific agreed facts stated in Parts 3 and 4 of this Agreement, this Agreement shall not be construed to establish precedent or to resolve any question of law or fact in this or any other judicial or administrative proceeding."), and September 12, 2005 *Consent Order Concerning Certain Claims for Rights to Use Water on Pueblo of San Ildefonso Lands* (Doc. No. 2497) at Paragraph 4.2 ("This Consent Order shall not be construed to establish precedent or to resolve any question of law or fact in this or any other judicial or administrative proceeding.") Accordingly, the Truchas Response is incorrect.

Nonetheless, the United States agrees with the last phrase of the Truchas Acequias Response, which states that "the amount of water to be applied to any specifically identified acreage should be addressed in the unified proceeding." The United States likewise contends that, without regard to whether the evidence offered in support of claims for specific irrigated acreage dates to the pre-Columbian or the post-Columbian time period, the amount of water to be applied to such acreage should be determined by use of the methodology or methodologies selected in the unified proceeding.

Reply to the State Response

The State's lengthy and fervent response contains several mischaracterizations of the record in this case, including the following:

1. Page 2 of the State Response makes reference to "the Pueblo and United States' claims for aboriginal water rights outside the San Juan Pueblo Grant . . . ." This characterization of the United States as having made claims for aboriginal water rights outside the San Juan Pueblo Grant is false. The United

States, in Subproceeding 2 or otherwise, has asserted no claims on behalf of Ohkay Owingeh for water rights of any character appurtenant to, or based on uses on, lands outside the Congressionally-recognized San Juan Pueblo Grant. Ohkay Owingeh, on its own behalf, has asserted such claims, but the United States has not joined in those separate claims.

2. At pages 4-5, the State Response claims the United States has not alleged that the Special Master's May 11, 2009 *Procedural Order on the Determination of Irrigation Water Requirements* (Doc. No. 2619) ("May 11 Procedural Order") "represents a clear error of judgment or exceeds the bounds of permissible choice in the circumstances." The State Response is merely mincing words. The *United States' Objections to Special Master's Procedural Order on the Determination of Irrigation Water Requirements* (Doc. No. 2622) ("U.S. Objections"), at 10, states: "the United States asserts that it is an abuse of discretion to incorporate presumptions concerning contested facts into a procedural ruling or to apply State court procedural rules in this Federal court proceeding." Ordinary language suffices to establish the equivalence of "is an abuse of discretion" and "exceeds the bounds of permissible choice." The United States has in fact alleged that the May 11 Procedural Order exceeds the bounds of permissible choice in the circumstances.

3. At page 10, the State Response characterizes the Special Master's October 13, 2005 *Scheduling Order for Pueblo Claims Subproceeding II* (No. 2506) ("2005 Scheduling Order") as "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's

characterization is simply false: the referenced Scheduling Order contains no such decision. Indeed, the document contains no decision whatsoever about what subjects of discovery are "appropriate." To the contrary, the Scheduling Order, at 7, states:

> One or more parties intend to make discovery requests concerning the following types of information. Other parties may dispute whether such information is properly discoverable in this proceeding under the Federal Rules of Civil Procedure, or, even if such information is discoverable, whether it is admissible under the Federal Rules of Evidence. Until specific discovery requests, or attempts to introduce evidence, are made, it is not possible to further specify the nature of such potential disputes.

(Emphasis added.)

4. At pages 10-11, the State Response asserts that the U.S. Objections, at page 8, contain "the United States' demand that irrigation water requirements must be determined in the same way for pre-Columbian and post-Columbian agriculture . . . ." (Emphasis in State Response.) The State's assertion is false: neither page 8, nor any other part of the U.S. Objections, contain a demand that irrigation water requirements must be determined in the same way for pre-Columbian and post-Columbian agriculture, or for all irrigation methodologies. The U.S. Objections do assert, at page 8, that "any presumption that the determination of irrigation water requirements will be inherently different for the two classes of rights is an abuse of discretion." (Emphasis added.) As the State Response itself amply demonstrates, the question of whether the determination of irrigation water requirements should be the same for all categories of rights is hotly disputed by the parties. The United States asserts that it is facially prejudicial and an abuse of discretion to resolve such a contested

issue by means of a presumption of fact without the benefit of a record established through an evidentiary hearing. Cf. United States v. Pena-Hermosillo, 522 F.3d 1108, 1116 (10th Cir. 2008) ("It would be an abuse of discretion for the district court to decide a disputed question of fact against a party without giving that party an opportunity to present relevant and admissible evidence."). However, the U.S. Objections, at Paragraph13, specifically assert that resolution of the issue in "a unified proceeding need not prejudice any party's ability to argue and present evidence that irrigation water requirements for different types of irrigation water rights claims should be determined using different methodologies." The U.S. Objections overtly contemplate that the issues concerning irrigation water requirements, and concerning types of irrigation, are disputed, and will be disputed by the parties at trial, and seek only a fair and unbiased hearing of the United States evidence and arguments concerning the matter.[1]

5. The State Response, at 13, claims the U.S. Objections "contain much discussion of definitions of 'irrigation,' arguing for an extremely broad definition which includes what is generally known as 'dryland farming.'" To the contrary, the U.S. Objections, at 6, merely assert that the State has failed to provide any definition of the term "irrigation" and, in footnote 5, references the fact that a previous pleading filed by the United States quoted generally accepted definitions of "irrigate" and "irrigation." Notably, the very same source that the State Response, at 13, quotes for a definition of "dryland farming" (which definition essentially says no more than that dryland farming is farming without

[1] The State Response also contains a tedious argument to the effect that the straw man position the State falsely attributes to the United States is unsupported by any citation of authority.

the use of irrigation), -- i.e., the United States Department of Agriculture, National Agricultural Library, Agricultural Thesaurus, online at http://agclass.canr.msu.edu – defines "irrigation" to be the "[a]pplication of water to soil for the purpose of plant production." The United States denies that it has ever advocated a broader definition of irrigation.

6. The State Response, at 14-15, asserts that the "United States also argues for the existence and prevalence of pre-Columbian irrigation as if they were undisputed facts," citing to pages 5-6 of the U.S. Objections. The State's characterization is false: Nothing on pages 5-6 of the U.S. Objections suggests that any facts concerning pre-Columbian irrigation are undisputed. To the contrary, pages 4-5 of the U.S. Objections describe allegations contained in pleadings filed by the United States and evidence that the United States is prepared to offer, and also quotes from this Court's opinion in New Mexico ex rel. State Engineer v. Aamodt, 618 F.Supp. 993 (1985),[2] precisely for the purpose of showing that the facts concerning pre-Columbian irrigation are disputed and therefore should not have been presumed in the Special Master's procedural order.

Paradoxically, the State Response, at 2, asserts that the Special Master's May 11, 2009 *Procedural Order on the Determination of Irrigation Water Requirements* (Doc. No. 2619) ("May 11 Procedural Order") "decides no substantive issues or facts" and then, at 8, appears to argue that the Order is supported by "substantial evidence" (which has never been admitted into the record at an evidentiary hearing and which consists of an excerpt from a deposition taken after the May 11 Procedural Order was

[2] The U.S. Objections, at 4, n. 3, expressly deny that the cited Aamodt decision is binding precedent.

entered). If the Order truly decided no substantive issues or facts, the "evidence" cited by the State would be irrelevant.

According to the State Response at 2, the "sole operative effect" of the May 11 Procedural Order "is to establish whether evidence regarding the quantification of . . . claims for aboriginal water rights outside the San Juan Pueblo Grant . . . shall be heard in the present Subproceeding or shall be heard in the so-called unified irrigation water rights hearing . . . ." If that is correct, then the May 11 Procedural Order has no application to the United States' claims for aboriginal water rights, all of which are inside the San Juan Pueblo Grant. However, at 6, the State Response asserts that 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," and, at 16, the State Response asserts, *inter alia*, that the May 11 Procedural Order "is a reasonable approach to . . . hearing in this Subproceeding all issues of fact and law related to the Pre-Columbian uses of water claimed by the United States . . . ." If those statements are correct, then the May 11 Procedural Order does apply to the United States' claims based on evidence of pre-Columbian irrigation within the San Juan Pueblo Grant.

These inconsistencies in the State Response indicate that even the State is confused about the effect of the May 11 Procedural Order and support the United States' contention that the order must be amended. At present, the parties are engaged in an intensive, and expensive, deposition schedule, including depositions of the authors of expert reports bearing on the subject of irrigation water requirements. Some of those latter depositions have already occurred. Despite the May 11 Procedural Order, it is still unclear whether parties who are bearing the expense of producing their experts for these depositions may be required to do so again during a subsequent unified proceeding and

whether participation in the current set of depositions may impair the ability of parties to call for or participate in a second round of depositions of the same witnesses. Santa Clara Pueblo's January 23, 2009 *Motion to Clarify Deferral of Determination of Irrigation Water Requirements*, which was opposed only by the State and the City of Española, specifically sought to resolve that ambiguity. The May 11 Procedural Order purported to address the Santa Clara Pueblo motion, but wholly failed to resolve the issue presented by that motion.

Accordingly, the United States urges the Court to sustain the U.S. Objections and to amend the May 11 Procedural Order as requested in the U.S. Objections.

Dated: July 10, 2009

_____/s/_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 10, 2009, I filed the foregoing *United States' Reply In Support Of Objections To Special Master's Procedural Order On The Determination Of Irrigation Water Requirements* electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____/s/_____
Bradley S. Bridgewater