IN THE UNITED STATES DISTRICT COURT
FOR THE 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**

PUEBLO OF SANTA CLARA'S REPLY IN SUPPORT OF ITS OBJECTIONS TO THE SPECIAL MASTER'S PROCEDURAL ORDER ON THE DETERMINATION OF IRRIGATION WATER REQUIREMENTS

The Pueblo of Santa Clara ("Santa Clara") files this brief to reply specifically to the *State of New Mexico's Response to Objections to Special Master's Procedural Order on the Determination of Irrigation Water Requirements* (Doc. 2631) filed June 30, 2009 ("State Response to Objections"). The State of New Mexico ("State") claims that Santa Clara has failed to demonstrate prejudice in objecting to the Special Master's May 11, 2009 *Procedural Order on the Determination of Irrigation Water Requirements* (Doc. 2619)("May 11 Procedural Order"), and appears to believe no prejudice can occur now because, eventually, the issues for the unified proceeding will be sorted out in subsequent orders of the Special Master. *See* State Response to Objections at 6. The State appears to misapprehend Santa Clara's position regarding the unified proceeding and has muddled the issues so much in its response that this reply focuses solely on explaining the development of this litigation as it relates to Santa Clara's primary concern – the prevention of prejudice to all parties, including Santa Clara, in the unified proceeding to

determine irrigation water requirements for this adjudication.

In its *Motion to Clarify Deferral of Determination of Irrigation Water Requirements* (Doc. 2586) filed on January 23, 2009 ("Santa Clara Motion"), Santa Clara requested that the Court enter an order affirming that the determination of irrigation water requirements ("IWRs") for all irrigation rights to be adjudicated in the *Abbott* case would occur in a unified proceeding, as previously agreed to in 2002 by all the parties currently active in Subproceeding II and as subsequently approved by the Court by Consent Order entered in 2005.[1] Santa Clara also requested that "submissions by any parties in the current subproceeding relative to this [IWR] issue . . . be held in abeyance pending such a unified proceeding." Santa Clara Motion at 3-4. In Santa Clara's reply brief filed in support of the motion, Santa Clara explained that it supported the request of the City of Española ("City") "that each party shall have the right to amend or supplement any expert reports previously served that address or rely on diversion/depletion estimates or to serve new reports, in preparation for the [unified] proceeding." *The Pueblo of Santa Clara's Reply in Support of Motion to Clarify Deferral of Determination of Irrigation Water Requirements* (Doc. 2602), filed on February 26, 2009 ("Santa Clara Reply"), at 7.

Only the State and the City opposed Santa Clara's motion. The response brief filed by

[1] It is not clear that the parties to Subproceeding II share a common definition of "irrigation water requirements," which term Santa Clara understands involves equations or methodologies to calculate the quantity of water that must be applied to crops to enable them to grow, depending upon various factors including (but not limited to) cropping patterns, climate, effective precipitation and others, and taking into account water losses associated with irrigation efficiencies. It does appear, however, that the active parties to Subproceeding II all agreed in 2002 that "the methodology, crop mixes and other data to be used in calculating irrigation water requirements throughout the scope of this adjudication" would be determined in a unified proceeding. *See* the March 15, 2002 *Settlement Agreement Concerning Certain Claims for Water Rights for the Pueblo of Nambe and the Pueblo of San Ildefonso* (Doc. 2374) at ¶ 4.6.

the City, however, revealed that the City, like Santa Clara, merely sought greater clarity regarding how and when IWRs should be determined in the adjudication, and the Special Master found that "[t]here is no disagreement between the United States, Santa Clara, and the City that the Court should clarify that all claims, both Pueblo and non-Pueblo, which are based on irrigated agriculture, including those of Ohkay Owingeh, should be deferred to a unified proceeding." *Order on Motion to Clarify Deferral of Determination of Irrigation Water Requirements* (Doc. 2605), filed on March 10, 2009, at 4, ¶8.

The State, in its response to Santa Clara's motion, expressly stated that it "supports the deferral of determination of IWR [sic] to a 'unified proceeding'. . ." *State of New Mexico's Response to Motion to Clarify Deferral of Determination of Irrigation Water Requirements* (Doc. 2594), filed on February 9, 2009, at 1. However, the State drew a distinction regarding quantification of water amounts specifically associated with "pre-Columbian" irrigation claims in Subproceeding II.[2] *See id.* at 2. Although it is not entirely clear from its filings, the State appears to be of the opinion that an IWR methodology does not necessarily need to be determined in order to quantify those water rights, if such rights are even ultimately recognized in Subproceeding II (although, for some of the State's arguments, certain component equations used for irrigation water requirements seem to be implicated in proving up why it claims no water

[2] Santa Clara wishes to make clear that its use of the term "pre-Columbian" throughout this memorandum is intended as a shorthand employed by the Special Master for irrigation techniques that do not involve movement of water by canal or ditch, and rather refers to techniques for augmenting and concentrating the effects of precipitation, runoff and intermittent streamflow to achieve and enhance crop growth. Nothing herein should be taken as indicating that Santa Clara in any way accepts or agrees with the claim, made by the State and others in this proceeding, that pre-Columbian farmers in New Mexico (including in the area covered by this adjudication) did not use hand-dug canals and ditches as one of their irrigation strategies.

right should be associated with the pre-Columbian claims in Subproceeding II). *See*, *e.g.*, State Response to Objections at 9 (listing myriad issues of importance to the State, some of which appear to implicate IWR issues - such as the discussion of the CIR or consumptive irrigation requirement associated with the pre-Columbian claims – and some of which appear to negate the need to determine IWRs for the pre-Columbian claims) and 12-13 (discussion of State's proposed pre-Columbian crop mix – a topic specifically referenced by the parties settling in 2002 as a matter for the unified proceeding – and the State's conclusion as to the irrigation water requirement associated with it). After reviewing the State's laundry list of what it views are Subproceeding II pre-Columbian claim issues, *see id.* at 9, it appears that the State contends that water requirements applicable to pre-Columbian claims, if any such claims are recognized by the Court, should be determined during Subproceeding II because, under at least some of the State's legal theories, IWR methodologies are not necessarily needed for the resolution or quantification of those claims.

The Special Master, in her May 11 Procedural Order, ruled that "all factual and legal issues pertaining to Pre-Columbian methodologies" including "the amount of water to be adjudicated for Ohkay Owingeh's claims based on those methodologies" should be heard during Subproceeding II, *see* May 11 Procedural Order at 4,¶1, and noted that Santa Clara "should participate in the current litigation of issues arising from Ohkay Owingeh's claims which rely on Pre-Columbian irrigation methods." *Id*. at 3,¶ 11. Although the State appears to believe otherwise, *see* State Response to Objections at 5-6 and 7 (in which the State makes much of the fact that it does not even know if Santa Clara will file claims based on pre-Columbian uses in Subproceeding III), the Special Master's admonition regarding participation in the determination

of pre-Columbian irrigation methods during Subproceeding II did not appear to signal that Santa Clara needed to hire an expert for Subproceeding II to address any IWR methodology issues that, as described below, the Special Master expressly ruled would be addressed during the unified proceeding. *See* May 11 Procedural Order at 4, ¶3.

It is noteworthy that the United States, Ohkay Owingeh, and the Rio de Truchas acequias all agreed, in objections, responses, and replies regarding the Special Master's May 11 Procedural Order, that only acreage amounts, not irrigation water requirements, should be determined with respect to the pre-Columbian claims in Subproceeding II, and that the amount of water associated with such rights, if water rights are found to arise from such claims, should be determined during the unified proceeding on IWRs. *See Objections of Ohkay Owingeh to Special Master's Procedural Order on Irrigation Water Requirements* (Doc. 2624), filed on June 12, 2009, at 2; *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. 2630), filed on June 30, 2009, at 3; *United States' Reply in Support of Objections to Special Master's Procedural Order on the Determination of Irrigation Water Requirements* (Doc. 2632), filed on July 10, 2009 ("U.S. Reply in Support of Objections"), at 2. Santa Clara agrees with this position and still believes that it would not promote efficiency to attempt to quantify the irrigation requirements associated with pre-Columbian claims during Subproceeding II.[3]

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[3] As Santa Clara noted in earlier briefing on this subject:

> It is the determination of overall IWR methodology in Subproceeding II that would be of concern to Santa Clara, not the inputs to that methodology which may be unique to the specific facts of Ohkay Owingeh's claim based upon more

However, a primary focus of Santa Clara's objections was to ensure that fundamental fairness is preserved during the unified proceeding in light of the confusion surrounding the nature and extent to which IWRs are implicated in the adjudication of the pre-Columbian claims in Subproceeding II.[4] Thus, Santa Clara objected to a presumption inherent in the Special Master's May 11 Procedural Order that the quantification of water amounts associated with the pre-Columbian claims in Subproceeding II would not in any way implicate the IWR methodologies to be determined in the unified proceeding. Santa Clara Objections at 2 (citing ¶¶ 1 and 3 on page 4 of the May 11 Procedural Order). Whether or not IWR methodologies are or should be used to determine water amounts associated with the pre-Columbian claims that have been asserted in Subproceeding II is a hotly contested issue (of fact and, perhaps, law) that has

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> ancient irrigation techniques. . . Santa Clara submits that it would be most appropriate for all of these issues to be addressed in a unified proceeding, that can serve as the basis for determining what the water requirements are for lands irrigated by ditch as well as those irrigated by older, traditional means, and that having such a proceeding separate and apart from the adjudication of any one party's rights will ensure proper notice and preparation so that no party is prejudiced.

Santa Clara Reply at 6.

[4] As Santa Clara stated in its objections:

> Santa Clara's arguments here simply go to preventing prejudice to all of the parties to the unified proceeding in the event that the Court adopts the Special Master's recommendation to quantify the water amounts associated with Ohkay Owingeh Pre-Columbian acreage during Subproceeding II.

Pueblo of Santa Clara's Objections to the Special Master's Procedural Order on the Determination of Irrigation Water Requirements (Doc. 2625), filed on June 12, 2009 ("Santa Clara Objections"), at 2, fn. 1.

not yet been decided.

As described in Santa Clara's memorandum in support of the motion it filed on this issue in January, the United States, the State, and Ohkay Owingeh all filed expert reports in Subproceeding II which address the issue of irrigation water requirements. *See Memorandum in Support of Santa Clara's Motion to Clarify Deferral of Determination of Irrigation Water Requirements* (Doc. 2587), filed January 23, 2009, at 1-2. The United States' expert report addressing IWRs and the State's expert report addressing IWRs both contain discussions of water requirements associated with claims for both pre-Columbian irrigation and so-called post-Columbian (*i.e.*, ditch only, per the State and Special Master) irrigation. Ohkay Owingeh's expert report addressing IWRs only addresses water needs associated with the pre-Columbian claims filed by Ohkay Owingeh.

Under at least some of the State's theories, it appears IWR methodologies may not be implicated for the pre-Columbian claims in Subproceeding II, but under the United States' theory, they are (even though the inputs to those IWR equations could differ for the pre-Columbian claims). The contested question of whether or not the determination of IWR methodologies or equations should be the same for all categories of rights (regardless of inputs to those equations) is a factual issue that should not be pre-determined through the wording of a procedural order. That is an abuse of discretion which "represents a clear error of judgment or exceeds the bounds of permissible choice in the circumstances." *See* State Response to Objections at 4 (citing definition of "abuse of discretion" in *Boughton v. Cotter Corp*., 65 F.3rd 823, 832 (10th Cir. 1995)).

In the May 11 Procedural Order, the Special Master ordered that "[t]he scope of the

unified proceeding will include factual and legal questions regarding *any and all* methodologies used in determining irrigation water requirements" although the "precise questions to be determined" in the unified proceeding will not actually be addressed until sometime in the coming year through procedural and scheduling orders. May 11 Procedural Order at 4, ¶3 (emphasis added). Notably, the Special Master did not, as requested by Santa Clara in its initial motion on the matter, hold in abeyance those portions of the expert reports filed in Subproceeding II which address the very IWR issues that the Special Master indicated in the May 11 Procedural Order would be determined in the unified proceeding. This has led to significant confusion amongst the parties to Subproceeding II about those expert reports, and scope of depositions based on them.

Santa Clara did not object to the Special Master's ruling that it will be the unified proceeding, not Subproceeding II, which will address "factual and legal questions regarding any and all methodologies used in determining irrigation water requirements." However, because there is still a contested question in Subproceeding II regarding the applicability of IWR methodologies to the quantification of water amounts associated with pre-Columbian irrigation claims, and because there are expert reports in Subproceeding II containing opinions regarding which IWR methodology is appropriate (that, in some cases, are discussed in the context of both pre-Columbian and post-Columbian claims), depositions have already occurred where questions, over Santa Clara's objections, are being asked that pertain directly to the very issues Santa Clara understood from the May 11 Procedural Order would be addressed in the unified proceeding. Unless this issue is clarified now, this is a recipe for endless briefing on motions in limine later in Subproceeding II.

The State, for reasons Santa Clara cannot fathom, does not believe this situation rises to the level of prejudicing Santa Clara or any other party to Subproceeding II (including the State) that will be participating in the later unified proceeding on IWRs, and it advocates leaving the May 11 Procedural Order in its current ambiguous state. *See* State Response to Objections at 10 (heading of section VI is entitled "The Special Master's Procedural Order Should Stand Unmodified"). As the United States described in its reply brief:

> 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.

U.S. Reply in Support of Objections at 7-8.

Santa Clara submits that the Special Master's finding that legal and factual issues regarding water rights claims that rely on pre-Columbian irrigation methodologies "are most efficiently litigated first within the framework of the April 10 2009 Amended Scheduling Order [for Subproceeding II]" does little to resolve the questions described by the United States as it is entirely unclear what the Special Master meant by the use of the underlined term "first" vis-a-vis those parties to the adjudication participating in Subproceeding II. *See* May 11 Procedural Order at 3, ¶ 9 (emphasis included).

Whether there are distinctions between overall methodologies that should be used to quantify water amounts associated with pre-Columbian versus post-Columbian claims, and the process outlined in the May 11 Procedural Order for addressing in Subproceeding II quantification methods associated only with pre-Columbian claims, are issues that are not as clean and separable at this juncture in the litigation as the State would have the Court believe. It

would indeed be prejudicial to Santa Clara to not allow the Pueblo during the unified proceeding that will determine IWR methodologies to depose those experts who are now opining about IWRs during Subproceeding II because of the still unresolved factual (and, perhaps, legal) issue about the applicability of IWR methodologies to pre-Columbian claims. It is prejudicial to Santa Clara now not to have clarity on that issue, since resolution of that issue affects whether Santa Clara needs to seek to hold open the current deposition schedule in Subproceeding II.

Given the fact that the State is already on record supporting the determination of IWR methodologies through a unified proceeding for all but the pre-Columbian claims, one way to ensure no prejudice to all the parties to the unified proceeding is to clarify in any order adopting, modifying, or remanding the Special Master's May 11 Procedural Order that no party to Subproceeding II will be waiving its rights to take depositions during the unified proceeding regarding IWR methodologies (that are to be determined through the unified proceeding) of those experts who are now opining in Subproceeding II about IWR methodologies as they relate to pre-Columbian claims. It would also help to clarify, as Santa Clara advocated many months ago, that all parties to Subproceeding II shall have the right to amend or supplement any expert reports previously served in Subproceeding II that address or rely on diversion/depletion estimates or to serve new reports during the unified proceeding to determine IWRs. If the ambiguity in the May 11 Procedural Order is left to stand, as the State advocates, this issue will be the subject of briefing later in Subproceeding II through motions in limine that could be easily prevented through clarifying language in an order now.

CONCLUSION

For the foregoing reasons, and those set forth in the *Pueblo of Santa Clara's Objections*

to the Special Master's Procedural Order on the Determination of Irrigation Water Requirements, Santa Clara respectfully requests that the May 11 Procedural Order be amended to correct the deficiencies described in Santa Clara's objections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 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/ Electronically signed 7/14/09
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