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

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

OHKAY OWINGEH'S RESPONSE TO
TRUCHAS ACEQUIAS' OBJECTIONS AND MOTION
REGARDING SPECIAL MASTER'S ORDER ON MOTION TO COMPEL

Introduction

Pursuant to the joint motion (Doc. #2841) and proposed order submitted by the parties, Ohkay Owingeh hereby responds to both Truchas Acequias' Objections to Special Master's Order on Motion to Compel (Doc. #2828) and Truchas Acequias' Motion to Adopt in Part and Modify in Part Special Master's Order on Motion to Compel (Doc. #2829).

Truchas Acequias object to the Special Master's ruling that protected from disclosure an agreement between Ohkay Owingeh and the Pueblo of Santa Clara. That agreement was correctly deemed by the Special Master to be beyond the scope of discovery. It addresses the protocols to be followed in discussions between the two Pueblos on the scope of their water rights claims. It does not reflect an agreement resolving any potentially overlapping claims. It has no bearing on the testimony of experts in this case.

Truchas Acequias' motion to modify the Special Master's ruling asks that the Court order production of comments and questions that Ohkay Owingeh's experts prepared for its attorneys to use in depositions of experts retained by opposing parties. The Acequias ask that the ruling be

modified to include comments and questions prepared by Dr. Kurt Anschuetz, who is a consulting, non-testifying expert for Ohkay Owingeh. Materials of this type are protected work product, even if prepared by testifying experts. In addition, all communications with Dr. Anschuetz are work product, because he served solely as a consultant to Ohkay Owingeh, not a testifying expert.

Argument

I. THE AGREEMENT BETWEEN OHKAY OWINGEH AND SANTA CLARA PUEBLO IS CONFIDENTIAL AND BEYOND THE SCOPE OF DISCOVERY.

At the center of the dispute over whether an agreement between Ohkay Owingeh and the Pueblo of Santa Clara must be produced is a difference over what sort of agreement it is. Truchas Acequias are concerned that it may be a substantive agreement, perhaps actually agreeing on certain territories, water sources or watersheds that will be or may be claimed or not claimed, or evidence that may be presented in support of claims. But as Ohkay Owingeh stated in its privilege log, the agreement was a memorandum of understanding ("MOU") relating to "*efforts to resolve* possible conflicts of aboriginal claim areas." (Doc. 2702-5, p. 6) (emphasis added). It addressed protocols to be followed in any discussions between the two Pueblos. It did not reflect any agreement on the substance of claims or any resolution of potentially conflicting claims. Declaration of Lee Bergen, paragraphs 3-5 (attached hereto as Exhibit 1).

Therefore, Truchas Acequias' concern that the agreement might have a bearing on the reports and testimony in this case is unfounded. Nothing in the agreement discusses or pertains to evidence or testimony in this case. Nor does it discuss land areas or water sources. Exhibit 1, paragraphs 3-5.

Thus the MOU also does not reference or discuss "Tract B", an area in the Santa Cruz River Basin. The Truchas Acequias point to Ohkay Owingeh's exclusion of the area referred to as Tract B from their aboriginal claim area in the lower Rio Santa Cruz Basin. They assert that that area was excluded "in order to avoid conflict with Santa Clara Pueblo" (Doc. #2828, p. 3), and speculate that the exclusion may have been a product of the MOU. (*Id.*, p. 4, note 1). This is inaccurate. Tract B was excluded from Ohkay Owingeh's claims for the simple reason that the Indian Claims Commission treated that area as part of the aboriginal use and occupancy area of Santa Clara Pueblo. 30 Ind.Cl.Comm. 259, 66 (1973). Relevant pages of the Commission's Findings of Fact are attached as Exhibit 2 hereto.

Tract B has nothing to do with the issue here, which is whether the MOU is discoverable. The exclusion of Tract B was based on the Claims Commission decision alone. The effect of that decision, and the exclusion of the Tract, may be subjects the Truchas Acequias will want to cover in cross-examination of expert witnesses. But the Tract B question provides no support for the Acequias to see the MOU, which has nothing to do with Tract B.

Likewise, the MOU does not concern expert testimony. All communications between counsel for Ohkay Owingeh and its testifying experts have already been disclosed, the experts' reports have been provided, and the depositions of the experts have taken place. Disclosure of the MOU will not add to Truchas Acequias' understanding of the expert opinions in the case.

Truchas Acequias argue that they are entitled to review the MOU and decide its relevance. But the MOU resulted from confidential discussions between Ohkay Owingeh and Santa Clara Pueblo. Its purpose was to establish the protocol for future discussions. Those discussions may be jeopardized if they are interrupted and the comments of the parties are disclosed to opposing parties with antagonistic interests in the litigation. The "strong public interest in favor of secrecy

of matters discussed by parties during settlement negotiations" outweighs the Acequias' hope that the MOU will provide an additional point for cross-examination of an expert at trial. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003); *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982); *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453, 461 (N.D.N.Y. 1999).

Finally, and alternatively, in the event of any doubt Ohkay Owingeh requests that the Court or Special Master review the MOU *in camera* to verify that it does not contain any substantive matter relevant to the issues to be tried in this case.

II. COMMUNICATIONS BETWEEN COUNSEL AND EXPERTS IN PREPARATION FOR DEPOSITIONS OF OTHER EXPERTS ARE NOT DISCOVERABLE.

Truchas Acequias seek the comments and questions that some of Ohkay Owingeh's experts provided to its attorneys, for the attorneys' use in taking depositions of opposing parties' experts. As Ohkay Owingeh noted in its own appeal of the Special Master's ruling on that point, such items are clearly work product, and cases hold that they are not discoverable.[1] Moreover, the premise of the Acequias' argument—that all communications between counsel and experts witnesses should be discoverable—is incorrect. The new changes to Rule 26 of the Rules of Civil Procedure go in the other direction, and remove that premise.

The new rule changes, effective December 1, 2010, make communications between counsel and experts privileged, unless they contain facts, data or assumptions relied upon by the expert in forming his or her opinions. The Advisory Committee comment to the new rule states the reasons for rejecting the assumption that all attorney-expert communications must be

[1] *See* Ohkay Owingeh's Objections and Motion to Adopt in Part Special Master's Order on Motion to Compel, pp. 14-15 (Doc. # 2827).

disclosed. It notes that "Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports", and then goes on to list the problems that resulted from that approach. Comments on 2010 Amendments, Rule 26. The new changes limit disclosure to "facts or data" considered by the expert, rather than "data or other information". The Comment states, "This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports." *Ibid*., Subdivision (a)(2)(B).

Another new change is to Rule 26(b)(4). Subsection (b)(4)(C) provides work-product protection for attorney-expert communications, in any form, in order to "protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." *Id*., Subdivision (b)(4). Under the new rule, attorney-expert communications are generally protected. The only exceptions—for communications relating to expert compensation and to facts, data or assumptions provided by the attorney—are not applicable here. *See* Rule 26(b)(4)(C)(i), (ii) and (iii).

Truchas Acequias' requests here are at odds with the purpose of these changes. Their argument rests on a claimed absolute right to disclosure of *all* communications between counsel and experts. They seek not only communications with testifying experts, but communications with Dr. Kurt Anschuetz, who consulted to the Ohkay Owingeh attorneys on matters unrelated to his own testimony for the United States. They seek sensitive and highly confidential communications between attorney and client.[2] And, they seek disclosure of comments from experts to attorneys that were done after the experts' reports were written, solely to assist the attorneys in taking depositions. For the reasons stated in Ohkay Owingeh's objections filed

[2] This issue is also addressed in Ohkay Owingeh's Objections and Motion to Adopt in Part Special Master's Order on Motion to Compel, pp. 2-12 (Doc. # 2827).

previously (Doc. #2827) and in line with the upcoming rule changes, all communications between counsel and Dr. Anschuetz, and the communications between counsel and all experts relating to the taking of depositions, are work product, protected by Rule Rules 26(b)(3)(A) and (b)(4)(B). The ruling of the Special Master should be reversed as to those communications. Alternatively they should be reviewed *in camera* to determine whether portions of them are so related to the reviewing experts' own testimony that they must be disclosed.

Dated: October 13, 2010

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2010, I filed the foregoing response and attached exhibits electronically through the CM/ECF system, which caused CM/ECF participants to be served electronically pursuant to Local Rule CV 5.6.

/s/
Earl Mettler