

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

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

UNITED STATES' REPLY TO TRUCHAS ACEQUIAS' RESPONSE TO
OHKAY OWINGEH'S OBJECTION AND MOTION TO ADOPT IN
PART SPECIAL MASTER'S ORDER ON MOTION TO COMPEL

The Plaintiff United States of America (“United States”) hereby replies to the October 13, 2010 *Truchas Acequias Response to Ohkay Owingeh's Objection and Motion to Adopt in Part Special Master's Order on Motion to Compel* (No. 2844) (“Truchas Response”). In the Truchas Response, the Truchas Acequias for the first time suggest that their discovery dispute with Ohkay Owingeh might provide grounds for the Court to strike the testimony of all of the United States’ witnesses in this case. There is no trace of merit in the Truchas Acequias’ suggestion.

Specifically, page 2 of the Truchas Response asserts that if the Truchas Acequias do not get what they want from Ohkay Owingeh, “the only alternative is to strike Dr. Anschuetz’s testimony and that of all experts with whom he worked.” Again, page 8 of the Truchas Response states: “The Truchas Acequias are entitled to review the materials in question; absent disclosure, the testimony of Dr. Anschuetz and the other experts must be struck.” As the Truchas Acequias know full well, Dr. Anschuetz has been named as a testifying witness only by the United States, not by Ohkay Owingeh,

and all of the United States other named witnesses are experts who have worked with Dr. Anschuetz. See *United States' Identification of Witnesses*, filed August 30, 2010 (No. 2812). Accordingly, the Truchas Acequias are asserting that their discovery dispute with Ohkay Owingeh provides grounds for the Court to impose the extreme sanction of prohibiting the United States from offering the testimony of any witnesses in this case.

Of course, the Truchas Acequias have never cited, and cannot cite, any authority that would remotely support such draconian relief. Nowhere in the Federal Rules of Civil Procedure, or in the case law interpreting those rules, is there any plausible basis for believing that a discovery dispute between two parties can provide grounds for imposing a sanction on a third party.¹ The Truchas Acequias' careless assertion that they may be entitled to such relief rather starkly illuminates the overreaching character of the arguments they have made in support of compelling discovery of communications that would reveal the litigation decision processes of Ohkay Owingeh and the thought processes of Ohkay Owingeh's counsel. In any event, their wild claims that, absent access to all such communications, they will be "severely prejudiced in their preparation for trial and cross-examination of experts," Truchas Response at 2, are entirely unsubstantiated.

In an attempt to make the Truchas Acequias' arguments appear to have a plausible relationship to the question of whether Dr. Anschuetz's testimony should be permitted at trial, the Truchas Response asserts, at 2, that the communications they seek "are very likely to have influenced . . . Dr. Anschuetz's own testimony." With even more exaggerated emphasis, the Truchas Response at 4-5 claims "not only is it likely that the

¹ Notably, the Truchas Acequias never sought to compel disclosure or discovery from the United States. The United States provided numerous documents to the Truchas Acequias in response to informal requests, served timely responses to the only formal discovery the Truchas Acequias served on the United States, and made timely disclosure of all the witnesses listed on the *United States Identification of Witnesses*. *United States' Reply to Truchas Acequias' Response to Ohkay Owingeh's Objection and Motion to Adopt in Part Special Master's Order on Motion to Compel*, Page 2

communications influenced the testimony of Dr. Anschuetz . . . under the circumstances it is virtually a foregone conclusion that they did so.” Unfortunately for the Truchas Acequias, the footnote they attach to this last statement actually proves it to be false.

That footnote asserts:

This is borne out by, for example, a “second” archeological reconnaissance Dr. Anschuetz undertook personally in the Truchas watershed after the Pueblo’s testifying expert, Mike Marshall, identified few relevant features there. See Exhibit C attached to this Response.

Truchas Response at 5 n.2. The referenced Exhibit C is an invoice from Dr. Anschuetz, dated November 5, 2006, for activities during the preceding month of October. However, the “complete statement of all opinions [Dr. Anschuetz] will express and the basis and reasons for them,” Fed.R.Civ.P. 26(a)(2)(B)(i), is contained in the report *Documentation of Pre-Columbian Pueblo Farmland Irrigation on the San Juan Pueblo Grant Near the San Juan Airport Within the Geographic Scope Of New Mexico v. Abbott* that is dated September 22, 2006 and was disclosed by the United States to *inter alia* the Truchas Acequias on September 29, 2006. See Exhibit 1, submitted herewith. Accordingly, Dr. Anschuetz’s testimony was finalized and disclosed before the October 2006 archeological reconnaissance that the Truchas Acequias claim influenced that testimony. The backwards causality the Truchas Acequias are suggesting is not by any means a “forgone conclusion.”

Moreover, Dr. Anschuetz’s expert testimony in this case will not concern the Truchas watershed. A search of the entire 542 page report that disclosed that testimony will reveal exactly one instance of the word “Truchas,” on page 2.11: “The Canadian Life Zone replaces the Transition habitat on the Sangre de Cristo Mountain slopes exceeding 2,600 m (18,528 ft) in elevation, such as east of the present-day village

United States' Reply to Truchas Acequias' Response to Ohkay Owingeh's Objection and Motion to Adopt in Part Special Master's Order on Motion to Compel, Page 3

of Truchas some 20 km (12.5 mi) east of the San Juan Airport.” This is hardly an assertion that is likely to have been influenced by any communications Dr. Anschuetz had in connection with his role as a non-testifying consultant to Ohkay Owingeh and, even if it was, such influence is not conceivably material to any issue in this case. This point also renders incredible the Truchas Response assertion, at 3, that “[t]here is simply no distinction between the substance or subject matter of [Dr. Anschuetz’s] role as ‘consultant’ and the substance or subject matter of his role as testifying and collaborating expert.” While Dr. Anschuetz may have consulted at length with Ohkay Owingeh’s attorneys and other experts on matters connected with the Truchas watershed, the testimony the United States will offer by Dr. Anschuetz in this case will not address those subject matters at all.

In conclusion, the United States respectfully submits that the Truchas Response’s new attempt to collaterally attack the United States’ witnesses is legally and factually baseless and must be rejected. The United States requests that the Court’s order on review of the Special Master’s *Order on Motion to Compel* (No. 2845), and the objections to and motions to adopt in part said Order filed by Ohkay Owingeh and the Truchas Acequias (Nos. 2827, 2828, & 2829), deny the Truchas Acequias any relief with regard to the United States’ witnesses.

Dated: October 22, 2010

_____/s/_____
BRADLEY S. BRIDGEWATER
U.S. Department of Justice
South Terrace, Suite 370
999 Eighteenth Street
Denver, CO 80202
(303) 844-1359

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 22, 2010, I filed the foregoing *United States' Reply To Truchas Acequias' Response To Ohkay Owingeh's Objection And Motion To Adopt In Part Special Master's Order On Motion To Compel* 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