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

STATE OF NEW MEXICO on the Relation of State Engineer,	)	
	)	68cv07488-BB
Plaintiff,	)	70cv08650-BB
	)	Consolidated
vs.	)	
	)	RIO SANTA CRUZ
JOHN ABBOTT, et al.,	)	RIO DE TRUCHAS
	)	
Defendants.	)	
	)	

ACEQUIA DEL LLANO DE ABEYTA'S OBJECTIONS TO SPECIAL MASTER REPORT (DOC. NO. 2728)

COMES NOW Acequia del Llano de Abeyta ("Abeyta"), by and through its attorneys, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., and pursuant to Federal Rule of Civil Procedure 53, for its Objections to the Special Master Report issued by Vickie L. Gabin concerning Rio de Truchas Acequias Priorities and Customary Allocation Practices (Doc. 2728) states:

I. INTRODUCTION

There are five community acequias in the Rio de Truchas Stream System that obtain water from the transmountain diversion channel that begins in the North Fork of the Rio Quemado. The three upper ditch associations (the Posesion, the Llano Quemado and the Acequia Madre) are jointly organized under the Acequia de la Sierra (Sierra). The two lower ditch associations, the Acequia del Llano de Abeyta (Abeyta) and the Acequia de los Llanitos (Llanitos) are separately organized.

Abeyta irrigates lands known as the "Llano de Abeyta" which are located west of Truchas, and south of the Rio de Truchas. In her recent report, the Special Master recommended priority dates for each of the acequias. Of significance to these objections, the Special Master assigned Abeyta the latest priority date. That determination is inconsistent with evidence presented reflecting distribution of lands in Llano Abeyta in 1752, and cultivation of Llano Abeyta long before the 1882 priority date recommended by the Special Master. Moreover, the unfounded priority date assigned to LLano Abeyta is in conflict with the more-lenient treatment afforded to the other acequias. Abeyta therefore objects to the Special Master's Report.

For the reasons discussed below, the Court should exercise its discretion to conduct an evidentiary hearing, at which live testimony of Dr. John Baxter and Dr. Stanley Hordes may be presented. *See* Fed. R. Civ. P. 53(f) ("In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."). The Court should also consider the benefit of conducting its own site visit, which would provide a more-complete understanding of the issues. And, following the de novo review of the Special Master's findings and conclusions required by Federal Rule of Civil Procedure 53, the Court should assign the same 1752 priority date to all of the acequias. In the alternative, the Court should assign Abetya a priority date of 1800 based on documents reflecting longstanding cultivation of the area by the 1850s.

II. THE FIVE ACEQUIAS SHOULD SHARE A 1752 PRIORITY DATE.

Both Abeyta and Llanitos urged the Special Master to recommend the same 1752 priority date for all of the acequias. *See* SM Report at 4. But the Special Master recommended different priority dates for each of the acequias. In particular, she recommended the following priority

dates: 1752 for the Acequia Madre; 1829 for the Acequia del Llano; 1852 for the Acequia de la Posesion; 1874 for the Acequia de los Llanitos; and 1882 for the Acequia del Llano de Abeyta. SM Report at 24, ¶ 1. These dates are identical to the priority dates assigned by the court-appointed expert, Dr. John Baxter, and the Special Master expressly noted that she relied heavily on Dr. Baxter's Report," *see* SM Report at 5. Accepting the opinions of Dr. Baxter, the Special Master concluded that "[t]hese dates reflect the chronological development of the acequia system." SM Report at 2.

Importantly, however, Abeyta presented well-reasoned expert testimony of a highly-qualified historian, Stanley Hordes, controverting some of Dr. Baxter's most-significant opinions. Dr. Hordes has a Ph.D. in colonial Mexican history from Tulane University, and was at one time the State Historian of New Mexico. Hordes Deposition, July 12, 1996, at 3. Dr. Hordes performed an in-depth study of the historic settlement of Truchas and the Llano de Abeyta and early water use in that area. Dr. Hordes's sound opinions reflect cultivation of Llano Abeyta beginning with the original distribution in 1754. Of particular significance, Dr. Hordes concluded that (1) the 1754 distribution began at the western boundary of the Truchas grant; (2) the 1754 distribution began at Llano Abeyta; (3) the Acequia Llano Abeyta had been in use since the original 1752 settlement; (3) the Acequia Llano Abeyta should therefore share the 1752 priority of the Acequia Madre.

With little explanation, the Special Master largely rejected Dr. Hordes's conclusions, and instead accepted Dr. Baxter's conclusions. Because Dr. Baxter's conclusions are inconsistent with much of the evidence concerning the Truchas settlement, and in particular, conflict with evidence regarding where the 1754 distribution of private farming tracts began, and evidence reflecting early settlement and cultivation of the Llano Abeyta area, the Court should not adopt

the Special Master's recommended 1882 priority date for Abeyta. The Court should instead assign at 1752 priority date for all the acequias, including Abeyta.

a. The Special Master's Conclusion Regarding the Beginning Point of the Distribution Directly Conflicts With the 1754 Grant Documents, Which Decreed that Lands Would Be Distributed from West To East Beginning at the Western Boundary of the Grant, the Camino Real Que Va Para Picuris.

The Special Master's paramount error is her determination concerning how the distribution of land within the Truchas grant occurred. This error is reflected by a review of the original grant documents. Those documents provide that a grant was made in 1754 to a group of fourteen families. Baxter Revised Report at 1. At the time the grant was established in 1754, an acequia was already in place and the settlers had engaged in small-scale agriculture for two years. *See id.* at 1-2. In 1754, each of the fourteen families received two tracts of farming land measuring 150 varas each, as well as a small garden plot near a defensive plaza. *See id.*

Distribution of the private farming tracts began at the western boundary of the grant, the Camino Real qu va para Picuris, and proceeded eastward. *See* Official Truchas Land Grant Documents (in Spanish), Act of Possession (April 24, 1754), Exhibit A-4; Revised Hordes Report at 1, 5. Each family was initially allocated one tract of land measuring 150 varas. Revised Hordes Report at 1; Revised Baxter Report at 2. A second distribution followed, during which each of the families received another tract measuring 150 varas. Revised Hordes Report at 1; Revised Baxter Report at 2. The land was allocated in this way so that each of the families would have land located near the Truchas settlement. Revised Hordes Report at 2.

A total of 150 varas around the plaza was also allocated for individual garden plots. Revised Hordes Report at 1. Finally, the Act of Possession reflects that the alcalde was to set aside one league of commons within the grant for the use of the settlers. Revised Hordes Report, at 1; Exhibit A-5, Translation of Archive No. 771, Decree of Grant dated March 15, 1754. The

specific stated purpose of these commons was for the pasturing and breeding of the settlers' livestock. *See id.* These commons were located to the east of the distributed farmland. *See id.; see also* Hordes Deposition, July 12, 1996, at 7, 10.

Although all parties agree as to the amount of land distributed, and as to the fact that the western boundary of the grant was the "Camino Real que va para Picuris," there is a dispute concerning exactly where the distribution of lands began, and whether the lands were distributed contiguously.

1. **The Special Master's Determination Concerning How Lands Were Distributed Reflects a Misunderstanding of the Evidence.**

The Special Master concluded that "[t]he cultivated lands allocated in 1754 were distributed from east to west, beginning at the 'camino real' . . .marked as the Camino Picuris on Map Sheet No. 4 of the hydrographic survey." SM Report at 6-7, ¶ 4. This determination comports with neither the Grant documents nor any other available evidence in this case. There is not a "camino real" on Map Sheet No. 4 of the hydrographic survey. More importantly, there is no dispute among the parties that the distribution occurred from west to east—not east to west as determined by the Special Master. Revised Hordes Report at 1; Revised Baxter Report at 2. It is of course possible that this statement merely reflects a typographical or editorial error, but the fact that the Special Master made such a significant finding that is entirely inconsistent with undisputed evidence calls into question her understanding of the evidence regarding how the distribution occurred.

2. **The Special Master Erred In Accepting Dr. Baxter's Conclusion As to The Starting Point of the Distribution.**

Abeyta expects that the Special Master intended to agree with Dr. Baxter, who opines that the distribution possibly began at the road designated as "Camino Picuris" on the 1970

hydrosurvey rather than the grant boundary (but just mistakenly concluded that the distribution occurred from east to west, rather than from west to east). *See* Baxter Deposition, September 16, 1996, pp. 171, 199. To the extent the Special Master accepted this conclusion, she, like Dr. Baxter, disregarded clear and simple evidence in favor of a strained interpretation of the available evidence.

A. The Distribution Began At The Grant Boundary.

To begin with, the Official Truchas Land Grand Documents clearly reflect that the distribution of private farming land began at the western boundary of the grant, the Camino Real que va para Picuris. *See* Official Truchas Land Grant Documents (in Spanish), Act of Possession (1754), Exhibit A-4. The Act of Possession of 1754 describes the western boundary of the Truchas grant as the "Camino Real que va para Picuris," and expressly provides that the distribution began at the "Camino Real." *See* Revised Hordes Report at 3; *see also* Exhibit A-4, Official Truchas Land Grant Documents (in Spanish).

And there is no dispute as to the location of the Camino Real que va para Picuris. In 1895, Albert Easley performed a survey on behalf of the United States government, and as part of that survey identified the western boundary of the grant as the Main Road to Picuris." Exhibit A-8; *see also* Easley Field Notes, Exhibit A-11 (reflecting that he was following "the main road that leads to Picuris."); Baxter Deposition, September 16, 1996, at 256 (western boundary was probably correctly placed).

This should end the inquiry concerning where the distribution commenced. In accordance with the language of the grant documents, the Court should conclude that the distribution began at the Camino Real que va Para Picuris, which forms the western boundary of the grant. The eastward distribution would, therefore, have included Llano Abeyta (indeed, the distribution

would have started at Llano Abeyta), rendering the late priority date recommended by the Special Master entirely incorrect.

B. The Distribution Did Not Begin at the "Camino Picuris" Identified On the 1970 Hydrosurvey.

Dr. Baxter departs from the grant documents and instead opines that the distribution perhaps started at a completely different road labeled "Camino Picuris" in the State Engineer's 1970 hydrosurvey. Dr. Baxter posits that there may have been two "Camino Reales" going to Picuris at the time of the grant: the grant boundary, and a second road to Picuris. The reasons for this creative theory are tenuous at best. Dr. Baxter reached this conclusion simply because he believed that the land distributed would have been closer to the Truchas settlement than it would have been if the distribution began at the Camino Real que va para Picuris. *See* Baxter Deposition, July 11, 1996, at 87; Baxter Deposition, September 16, 1996, at 171-72.

Dr. Baxter's theory that the distribution began at a second Camino Real rather than the grant boundary was apparently first proposed by counsel for Sierra during the course of Mr. Baxter's Deposition. *See* Baxter Deposition, July 11, 1996 at 87. At that time Dr. Baxter was hesitant to opine that there could have been "two Camino Reales at the same time." *See id.* at 88; *see also* Baxter Deposition, July 12, 1996, at 130 (noting "some skepticism" with respect to the possibility of there being two Camino Reales in 1754, but observing that "it is not completely impossible"). In stark contrast to his initial opinions concerning the possibility of two Camino Reales, when Dr. Baxter's deposition continued two months later, Dr. Baxter had accepted the theory that the distribution began at a second road—the Camino Picuris identified on the 1970 hydrosurvey—rather than the grant boundary. Baxter Deposition, September 16, 1996, at 250; Baxter Deposition, September 16, 1996, at 171.

This muddled, late-formed opinion is the one apparently accepted by the Special Master. But it is utterly lacking in support. If there were in fact two roads to Picuris at the time of the grant (and in 1970), they would have existed at all times between 1754 and 1970. Yet, importantly, a sketch of the grant included in the 1892 translation of the land grant documents does not depict two roads to Picuris, but rather only depicts the road at the western boundary of the grant, the main road to Picuris. *See* Exhibit A-5. Similarly, Easley's 1895 survey map lists only one road to Picuris—the western boundary of the grant. *See* Exhibit A-8.

Perhaps more importantly, Easley's map demonstrates that if the "Camino Picuris" shown on the 1970 hydrosurvey existed in 1895, it was not called the "Camino Picuris" Easley's map identifies another road in the approximate location of the "Camino Picuris" identified on the 1970 hydrosurvey, but significantly, labels that road as "Penasco Wagon Road." *See* Exhibit A-8. Thus, there was no second road to Picuris in 1895—which is obviously closer in time to 1754 than 1970. Instead, there was only one road to Picuris (the "Main Road to Picuris" forming the western boundary of the grant) and, by at least 1895, another road to Penasco.

Accordingly, to accept Dr. Baxter's opinion, one is required to conclude that there were two Camino Reales going to Picuris in 1754, even though the grant documents only identify one Camino Real as the western grant boundary, and no other road; the sketch map included with the translation of the grant documents only depicts one road to Picuris at the western boundary of the grant; and Easley's 1895 survey only identifies one Main Road to Picuris as the western grant. Furthermore, the 1970 hydrosurvey identifies no Camino Reales (but rather, identifies the western grant boundary, and a "Camino Picuris," and the state highway that leads to Penasco). Dr. Baxter's creative interpretation of the documents, and more specifically, of what is not in them, is unwarranted and unnecessary. Quite simply, there have never been two Camino Reales

going to Picuris, and even the 1970 hydrosurvey on which Baxter relies does not identify two Camino Reales going to Picuris. There was only one Camino Real at the time of the grant, and that was the western boundary of the grant.

Moreover, it is highly unlikely that the "Camino Picuris" identified on the 1970 hydrosurvey existed in 1754. When Truchas was initially settled the Camino Real que va para Picuris was already in existence.*See* Hordes Deposition, July 12, 1996, at 84-85. Thus, as reflected in Easley's 1895 survey, the Camino Real que va para Picuris did not go to Truchas. *See* Exhibit A-8. In contrast, the "Camino Picuris" identified on the 1970 hydrosurvey goes to Truchas and then straight up to Picuris, suggesting the existence, at least by 1970, of Truchas. *See* Hordes Deposition, July 12, 1996, at 84-85; Hordes Deposition, August 27, 1996, at 306-07. The Camino Picuris depicted in the 1970 hydrosurvey goes through, and quite clearly was constructed after, TruchasFor that reason, the 1970 "Camino Picuris" cannot possibly be the Camino Real que va para Picuris identified in the grant documents. *See id.*

In sum, the 1970 "Camino Picuris" simply cannot be the Camino Real que va para Picuris. That road did not exist in 1754, and was not even described as a road to Picuris until sometime after 1895 (it was labeled "Wagon Road to Penasco" in Easley's 1895 survey). There is consequently no basis for Dr. Baxter's strained conclusion that the distribution began at a second road to Picuris located in the middle of the grant. Such an assertion expressly contradicts the plain language of the 1754 Act of Possession, which provides that the distribution began at the Camino Real que va para Picuris, the western boundary of the grant.

C. **The Private Farming Tracts Were Not Distributed Contiguously.**

Dr. Baxter's concern that the tracts would not have reached the Truchas settlement if distribution began at the grant boundary can be explained on a much more reasonable basis than

Dr. Baxter has articulated. This potential discrepancy only exists if the lots were distributed contiguously. And significantly, there is evidence reflecting that the tracts were not contiguous. *See* Hordes Deposition, July 12, 1996, at 9. Indeed, the Special Master expressly noted in her report that "[a] wide range of evidence was introduced to support or refute the proposition that lands were allotted and settled in a non-contiguous manner." SM Report at 5.

The large amount of land distributed suggests that the farming tracts in Truchas would not have been contiguous throughout the course of the distribution. Importantly, the governor instructed the alcalde to make grants of land to each family of the "same quality and quantity." *See* Hordes Deposition, August 27, 1996, at 191-92. It would not have been feasible to satisfy this standard if the tracts were contiguous. It is instead highly likely that the alcalde would have skipped poorer sections or continued past intruding arroyos and selected the better sites for allocation. *See* Hordes Deposition, July 12, 1996, at 13.

Reasonably assuming non-contiguous distribution, Dr. Hordes concludes that the private allotments began at the western boundary of the grant (at Llano Abeyta), and not only reached the town of Truchas, but also extended past Truchas up the valley by approximately one-half to three-quarters of a mile. *ld.* at 8-9, 39. This opinion both solves Dr. Baxter's concern about the distribution not reaching the settlement, and renders possible the intended distribution of tracts of equal quantity and quality. This is especially clear given that the mesa narrows considerably moving to the east. If the lands were contiguous, and distributed beginning at the 1970 "Camino Picuris," irrigable portions of the private tracts at the eastern end of the settlement would have been significantly shorter measured from north to south, and therefore would not have been equal in quantity or quality to those further to the west. It is much more likely that the private farming tracts would have ended where Dr. Hordes estimates they ended--about one-half to

three-quarters of a mile east of Truchas, before the mesa narrows. *See* Hordes Deposition, July 12, 1996, at 39; Hordes Deposition, August 27, 1996 at 211-215.

Dr. Hordes's opinion concerning non-contiguous distribution, therefore, is consistent with the language in the grant documents regarding the starting point of the distribution, and regarding distribution of tracts of equal quality and quantity.

D. Dr. Baxter's Opinion Regarding How the Private Farming Tracts Were Distributed Is Inconsistent with Language in the Act of Possession Concerning The Commons.

Dr. Hordes's opinion regarding non-contiguous distribution of the private farming tracts is also consistent with the fact that the Act of Possession indicated that commons intended for the pasturing of livestock were located to the east of the private farming tracts. As discussed above, according to the well-reasoned opinion of Dr. Hordes, the non-contiguous private allotments began at the western boundary of the grant (at Llano Abeyta), and extended past Truchas up the valley by approximately one-half to three-quarters of a mile. *ld.* at 8-9, 39. The tracts east of that point would have been commons—a substantial portion of which would have been located on land presently irrigated by the Acequia Madre. This is consistent with the facts that the commons were supposed to be located to the east of the private farming tracts, were not intended to be located in mountainous terrain less suitable for farming and livestock, and were designated specifically for livestock. *See* Exhibit A-5, Translation of Archive No. 771, Decree of Grant dated March 15, 1754.

In contrast, Dr. Baxter's opinion cannot be reconciled with language in the Act of Possession reflecting that the commons were located to the east of the private farming tracts. *See* Exhibit A-5, Translation of Archive No. 771, Decree of Grant dated March 15, 1754; *see also* Hordes Deposition, July 12, 1996, at 7, 10. In Dr. Baxter's opinion, all of Llano Abeyta and the

Llanitos existed as unalloted commons within the grant after its initial settlement in 1754. *See* Deposition of John Baxter, Vol. I, July 11, 1996, pp 84-5. But Llano Abeyta and Llanitos are not located to the east of the private farming tracts, but instead, are to the west of where Dr. Baxter contends the distribution of private farmland began.

E. There Is No Reasonable Explanation As To Why Highly Suitable Farming Land Located Adjacent to the Camino Real Que Va Para Picuris Would Not Have Been Distributed in 1754.

Another factor suggesting that the Llano de Abeyta would have been included in the original distribution of 1754 is its topography and suitability for farming. *See* Hordes Deposition, July 12, 1996, at 42. Llano Abeyta is generally flat, and contains some of the most fertile soils in the Truchas area. *See* Deposition of Dennis Martinez, July 17, 1996, at 7, 68-69; Deposition of Phillip Trujillo, Jr. July 17,1996, at 31; Deposition of Elmer Martinez, January 22,1997, at 35. There is no reasonable explanation for why potential farmland located within a half mile of the town of Truchas (and to the east of the Camino Real que va para Picuris) would not have been cultivated until almost 150 years after other less-fertile areas. *See* Baxter Deposition, September 16, 1996, at 248. It is much more likely that the irrigable farmland near Truchas--including that in Llano Abeyta--would have been cultivated sooner than lands further from Truchas. Hordes Deposition, July 12, 1996, at 42.

F. Conclusion

In sum, the Special Master's conclusion regarding the location of the starting point for distribution of the private farmlands is based on a blind acceptance of Dr. Baxter's unfounded conclusions. The Court should not accept the strained opinions of Dr. Baxter, but rather, should accept the simple conclusions of Dr. Hordes, which are not fraught with problems that plague Dr. Baxter's opinions, and better comport with the available evidence. In particular, the Court

should conclude that the distribution began exactly where the grant documents say it began—at the Camino Real que va para Picuris, forming the western boundary of the grant. *See* Hordes Deposition, August 27, 1996, at 305. The Court should then find that lands were distributed beginning in Llano Abeyta (which borders the grant boundary), noncontiguously based on appropriateness for farming, and proximity to Truchas. . *See* Hordes Deposition, July 12, 1996, at 8-9, 48, 84; Hordes Deposition, August 27, 1996, at 211-12, 221, 265-66. This simple conclusion not only explains how lands of equal quality and quantity would have been distributed, but also avoids the need to identify a second Camino Real, in contravention of the evidence. Accordingly, based on the well-reasoned conclusions of Dr. Hordes, the Court should assign a 1752 priority date to Abeyta.

b. The Special Master Misinterpreted the *Titulos de Propriedad* Filed With Respect to Property in Llano Abeyta.

The Special Master's 1882 priority date not only disregards the ample evidence detailed above reflecting cultivation of Llano Abetya in 1752, but also overlooks the significance of *titulos de propiedad* filed with respect to property in Llano Abeyta in the 1800s. These *titulos* were filed pursuant to statutes enacted by the New Mexico Legislature in 1878 and 1884 allowing individuals to record notice of their possession of land. SM Report at 7, ¶ 8. Most of the *titulos* concerning land in Llano Abeyta were filed pursuant to an act of 1884, which provided:

> any person or persons who have acquired and hold any real estate by purchase or otherwise, and have lost or never had any legal evidence of title to such real estate, may make a statement in writing containing a description of such real estate by metes and bounds ... and setting forth in detail the manner in which he or they acquired such real estate, how long they and their predecessors in possession have held the same, and showing fully all claim which they have to such real estate, either in law or in equity .... Such statement upon being recorded as aforesaid, shall be considered as notice to all the world of the rights and claims of the person making such statement in and to the real estate therein described. . . .

See Exhibit A-22, An Act Relative to Titles to Real Estate, New Mexico Laws 1884. And consistently with this the 1884 Act, most of the *titulos* concerning land in Llano Abeyta stated that the claimant "lacked the original title" to the land, and many described how the lands had been occupied as far back as the 1750s. *See* Hordes Revised Report at 8-10, 13-14. For instance, the *Titulo de Propiedad* of Encarnacion Cordova filed June 21, 1889 states:

> I testify that I, Encarnacion Cordoba, of the County of Rio Arriba in the Territory of New Mexico, in conformity with Section 2747 of the contracted laws of New Mexico of 1884, *not having legal evidence of title to lands that I currently occupy and possess and enjoy, and with the end of furnishing myself with title,* according to the provisions of the section regarding real property [illegible] here described later. . . .

See Exhibit A-29, Translation by Dr. Stanley Hordes (emphasis added).

Unfortunately, however, the Special Master failed to recognize that *titulos* filed under the 1884 Act demonstrate possession preceding the filing of the *titulos*, and unreasonably dismissed language included in the *titulos* regarding possession and development by predecessors as "boilerplate." *See* SM Report at 7-8. In contravention of the clear intent of the bulk of the *titulos* filed with respect to property in Llano Abeyta, the Special Master apparently determined, consistently with Dr. Baxter, that the *titulos* suggested recent development of the Llano Abeyta area. *See* Baxter Deposition, July 11, 1996, at 48 (theorizing that the people who filed *titulos* were would-be landowners seeking to take possession of unoccupied land).

Such a conclusion not only cannot be reconciled with the language in the *titulos*, but also is belied by the existence of a statute enacted in 1878 that expressly allowed individuals to take possession of lands within the public domain. *See* Exhibit A-21, An Act With Reference to Rights of Possession to Real Estate, New Mexico Laws 1878 ("Any person who has taken or may hereafter take possession of any lands being a part of the public domain of the United States

. . . may make out a notice setting forth that he has taken possession of such land . . . .”). The 1878 statute, in stark contrast to the 1884 statute, appears to have been intended to allow individuals to obtain new rights to land.

Because a statute allowing individuals to take possession of land in the public domain existed at the time the *titulos* at issue were filed, there is no reasonable basis for assuming that individuals who submitted *titulos* referencing the 1884 Act actually meant to take possession of lands in the public domain. Rather, the existence of the 1878 statute provides strong evidence that those who submitted *titulos* citing the 1884 Act made a conscious decision to submit their *titulos* under that Act. Such individuals would have had no reason to cite the 1884 Act, to refer to their predecessors, or to note that they had lost or never had evidence of title, if they wanted to claim land within the public domain. If that had been their intent, they could have simply cited the 1878 statute, which allowed them to do just that. Thus, the existence of the 1878 statutes strongly supports a presumption that *titulos* filed under the 1884 Act were filed by owners seeking to obtain proper title to lands they had already cultivated when they had “lost or never had . . .legal evidence of title.”

Accordingly, far from demonstrating new possession of lands in the public domain, the *titulos* filed with respect to land in Llano Abeyta demonstrate longstanding occupancy and cultivation of that area. Quite simply, the *titulos* speak for themselves. The individuals who filed them were seeking to obtain proper title to lands that had long been possessed and cultivated by their predecessors. The *titulos* consequently provide further support for the fact that Llano Abeyta was cultivated many years before the priority date recommended by the Special Master.

c. The Special Master Ignored Deeds Reflecting Early Cultivation of Llano Abeyta.

As discussed in more detail below, Dr. Baxter's basic method in assigning the priorities accepted by the Special Master was to assign a ditch-wide priority date to each ditch based on "the earliest use that [he] was able to find." Baxter Deposition, July 11, 1996, at 19, 54. And in the case of other acequias, Dr. Baxter accepted the date of the first deed for property in the area as the priority date. *See, e.g. id.* at 31-32, 36.

But Dr. Baxter, and therefore the Special Master, ignored the significance of two deeds reflecting cultivation of Llano Abeyta long before the 1882 priority date recommended by the Special Master. In particular, neither the Special Master nor Dr. Baxter properly interpreted (1) a deed dated February 5, 1854, memorializing the sale of land by Ysidro Archuleta to Pedro Cordoba in Llano Abeyta ("1854 Cordoba Deed"), Exhibit 2 to Hordes Deposition, Volume III, March 12, 1997; or (2) an 1858 deed from Mariano Sanchez ("1858 Sanchez Deed"), Exhibit A-27, for property located just outside, but on the western boundary of, the Truchas Grant.

1. The 1854 Cordoba Deed Evidences The Existence Of Water Use, Cultivation And A Ditch System Within Llano Abeyta Earlier Than The Priority Date Recommended By The Special Master.

The 1854 Cordoba Deed reflects that the land purchased by Cordoba had been owned by Juan Jose Tafoya, and was bordered on the north and south by land already owned by Mr. Cordoba, on the west by property owned by Antonio Jose Varela, and on the east by property owned by Blas Quintana. It describes the tract as "subject to the acequia de los Garcias," placing

it in a portion of Llano Abeyta still known as the Rancho de los Garcias.[1] Hordes Revised Report at 5-6; Baxter Revised Report at 19; Baxter Deposition, April 30, 1997, at 15-16, 84.

The reference to the property being bordered by an acequia is conclusive evidence that, by 1854, Llano Abeyta was being irrigated, and had been for some time. Indeed, based on this deed, Dr. Baxter assigned an 1854 priority date for the Acequia de los Garcias.[2] But this deed also reflects cultivation of Llano Abeyta years before 1854. Longstanding cultivation in the area is demonstrated by the references in the deed to other landowners. In particular, the deed reflects that the land conveyed had been owned by Juan Jose Tafoya and refers to property owned by Blas Quintana.

Juan Jose Tafoya's name appears in several grant documents and other related documents in the early 1830s. *See* Revised Hordes Report at 6-7. Mr. Tafoya was baptized on April 14, 1762 Hordes Deposition, March 12, 1997, at 391. Moreover, Mr. Tafoya's uncle was one of the original 1754 grantees. *Id.* at 392. Thus, there is good reason to believe that the land conveyed by the 1854 Cordoba Deed had been in Mr. Tafoya's family since the time of the original distribution of private farmland in 1754. *Id.; see also id.* at 393 (noting that it would be unlikely for there to be formal documentation of a familial transfer).

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[1] Current residents of Llano Abeyta just north of the Canada del Agua still refer to the area in which they live as the Rancho de los Garcias. *See* Hordes Revised Report at 6; Deposition of Jose Lauro Montoya, May 30, 1995, at 3, 16. And this is consistent with an 1875 deed concerning land located in Llanitos, south of the Canada del Agua, which describes the northern boundary of the tract as the rights ("derechos") of the Rancho de los Garcias, placing the Rancho de Los Garcias just to the north of Llanitos. *See* Hordes Revised Report at 5-6. There are also references in Abeyta's records to the Rancho de los Garcias. In fact, "Acequia del Llano de Abeyta" and "Acequia de Rancho de los Garcias" are used together in the acequia records until about 1940 and appear to be interchangeable. *See* Hordes Deposition, March 12, 1997, at 388.

[2] As discussed in more detail below, Dr. Baxter improperly assigned a separate priority for the Acequia de los Garcias, a lateral of the Acequia del Llano de Abeyta, and at a minimum, Abeyta should be given that 1854 priority date.

The reference in the 1854 Cordoba Deed to neighboring land owned by Blas Quintana similarly suggests cultivation of Llano Abeyta years before 1854. Blas Quintana was baptized on February 5, 1769, and died in 1842 at the age of 73. *See* Baxter Deposition, April 30, 1997. It is likely that he would have acquired his interest in the neighboring land adjacent to the 1854 Cordoba Deed property when he was young enough to cultivate it, perhaps around the turn of the century. And at a minimum, land adjacent to the tract transferred to by the 1854 Cordoba Deed was owned by Quintana no later than 1842, when Mr. Quintana died.

Finally, Antonio Jose Barela, another of the adjacent landowners mentioned in the 1854 Cordoba Deed, was the grandson of Reymundo Cordova. Hordes Deposition, March 12, 1997, at 393. This is significant because, in 1759, Reymundo Cordova was listed as a replacement for one of the original Truchas grantees. *See id.* at 393-94; Revised Hordes Report at 7-8. Being directly related to a replacement grantee, Mr. Barela very well could have inherited his land from the replacement grantee.

The amount of land conveyed likewise reflects longstanding cultivation of the area. The tract conveyed by the 1854 Cordoba Deed was only about 1.25 acres, and was entirely surrounded by property owned by others. If cultivation in the area had only recently begun, one would expect to see new claims to large portions of land—not a transfer of ownership of a small piece of property, entirely surrounded by property owned by others. Indeed, Dr. Baxter has testified that irrigated tracts of this size are consistent with longstanding occupation and cultivation, and with those distributed in the 1754 allocation. *See* Baxter Deposition, April 30, 1997, at 38. This was quite clearly not the first cultivation of the area.

Accordingly, the 1854 Cordoba Deed is highly significant. It provides strong evidence of early cultivation of Llano Abeyta, and its reference to other land and owners is evidence that

plots in Llano Abeyta were distributed in 1754. At a minimum, it reflects water use and cultivation in the area no later than approximately 1800 when Juan Jose Tafoya and Blas Quintana would have owned and developed the land referenced in Deed (given that they were baptized in the 1760s). And the deed certainly reflects cultivation of Llano Abeyta no later than 1854, given that it reflects the existence the Acequia de los Garcias in the Llano Abeyta.

2. The 1858 Sanchez Deed Evidences The Existence Of A Ditch System Running Completely Through Llano Abeyta Or Llanitos And To The Western Boundary Of The Truchas Grant, Reflecting An Earlier Priority Date For Abeyta Than That Recommended By The Special Master.

Another highly significant deed is one prepared by Mariano Sanchez in 1858 ("1858 Sanchez Deed"). While the tract of land described in the deed lies just outside the Truchas Grant, it nevertheless describes irrigated land in the Truchas Area. The 1858 Sanchez Deed describes the tract as located in the Cañada Ancha, and bounded on the east by the road from Chimayo to Picuris ("el Camino que ba de Chimayo para Picuris")—the western boundary of the Truchas grant. *See* Revised Baxter Report at 17; *see also* Exhibit A-27. This tract is located along the western boundary of the grant (to the west of the boundary). *See* Deposition of Perry Trujillo, January 22, 1997, pp. 32-36, and exhibit 2 thereto.

The 1858 Sanchez Deed is important because it states the tract was irrigated with water from "las Truchas." *See* Revised Baxter Report at 17; Baxter Deposition, September 16, 1996, at 231. Given its location, the tract most likely received water from either the Abeyta or Llanitos ditch systems, or both. *See id.* at 313-14 (agreeing irrigation of the tract through Abyeta or Llanitos was a possibility). This reflects that ditch water reached as far as the far western end of the Truchas grant in 1858- and ran through Abeyta and Llanitos —decades before the priority date for Abeyta recommended by Dr. Baxter and the Special Master.

III. ABEYTA SHOULD ALTERNATIVLEY BE ASSIGNED A PRIORITY DATE OF 1800.

For the reasons discussed above, the Special Master erred in concluding that lands in Llano Abeyta were not distributed in 1754. In the event the Court disagrees, however, it should nonetheless decline to accept the 1882 priority date the Special Master assigned to Abeyta. That date was improperly recommended by Dr. Baxter. Dr. Baxter not only disregarded significant evidence concerning earlier cultivation of Abyeta, but also treated Abeyta less leniently than other acequias.

Of particular concern, Dr. Baxter did not give sufficient weight to the 1854 Cordoba Deed discussed above. Dr. Baxter claims to have assigned a ditch-wide priority date to each ditch based on "the earliest use that [he] was able to find." Baxter Deposition, July 11, 1996, at 19; *see also id.* at 54 ("I gave the same priority to every ditch based on the earliest reference, and had not tried to designate individual tracts separately from the ditch."). While he did so for other acequias, Dr. Baxter did not assign a priority date to Abeyta based on the earliest evidence of cultivation.

For example, in assigning an 1874 priority date for Llanitos, Dr. Baxter relied on an 1874 deed of Dionicio Dominguez—the earliest deed he found for property in Llanitos. Baxter Deposition, July 11, 1996, at 31-32, 36. Yet, inexplicably, when it came to Llano Abeyta, Dr. Baxter did not assign a priority date based on the earliest deed available (the1854 Cordoba Deed). Instead, he assigned separate and different priority dates for the Acequia de los Garcias and Abeyta, even though the Acequia de los Garcias is a lateral of, and runs from, the Acequia del Llano de Abeyta. *See* Revised Baxter Report at 28; Revised Hordes Report at 5-6. This unequal and unjustified treatment was then augmented when the Special Master accepted the priority dates recommended by Dr. Baxter but did not assign a priority date to the Acequia de los

Garcias, or recognize that, at a minimum, the priority date Dr. Baxter assigned to the Acequia de los Garcias should be afforded to Abeyta.

Dr. Baxter's disparate and more-lenient treatment of other acequias can also be seen in his analysis of the *titulos de propeidad.* As discussed above, dismissing the language concerning development by predecessors as "boilerplate," Dr. Baxter assumed that the *titulos de propeidad* filed with respect to lands in Llano Abeyta reflected that those lands were not cultivated until around the time of filing of the *titulos*, and then assigned Abeyta a priority date consistent with appropriation around the time the *titulos* were filed. Yet, Dr. Baxter did not give *titulos* filed with respect to lands outside of Llano Abeyta the same significance. *See* Baxter Deposition, July 11, 1996, at 14. To the contrary, Dr. Baxter assigned priority dates to other acequias that were earlier than the dates on *titulos* filed with respect to lands in those areas. *See* Baxter Deposition, July 11, 1996, at 17-19 (discussing a *titulo* for lands near Acequia de la Posecion filed in 1887, claiming five years of prior possession, and a *titulo* claiming possession no earlier than 1882, but admitting that he had assigned an 1852 priority date to the Acequia de la Posecion); *id.* at 19 (*titulo* had been filed for land in Acequia del Llano claiming occupation since 1883, but Baxter assigned a priority date of 1829 to Acequia del Llano); *id.* at 63 (although the Llano Quemado "is not mentioned in the records until October 29, 1883" Dr. Baxter assigned it a priority date of 1829).

In contrast, in the case of Abeyta, Dr. Baxter relied on the dates of the *titulos* over other available evidence demonstrating earlier cultivation. For example, affidavits submitted by Nicolas Martinez and Patricio Cruz in 1973 at the ages of 96 and 88, indicate that their fathers had irrigated from the acequia as young men. Baxter Deposition, September 16, 1996, at 169-70. But Baxter claims these affidavits are inconsistent with the *titulos* filed by the fathers of the two

men in 1887, in which they claimed occupation of their properties for only four and two years, respectively. *Id.* at 170. This acceptance of the language of the *titulos* over other evidence is in direct conflict with Dr. Baxter's treatment of other acequias, for which he accepted other evidence over the language included in *titulos*. *See* Baxter Deposition, September 16, 1996, at 267.

Accordingly, the Court should not accept the priority date recommended by Dr. Baxter, and accepted by the Special Master even if it concludes that Llano Abeyta was not cultivated beginning in 1752. Instead, the Court should assign a priority date consistent with the 1854 Cordoba and 1858 Sanchez Deeds. Given that those deeds reflect longstanding settlement of Llano Abeyta by the 1850s and the existence of an actual "acequia" at that time, and in light of the approximate ages of the individuals identified in the Cordoba deed, Abeyta submits that its priority date should be no later than 1800.

3. **ABEYTA DOES NOT MERELY HAVE SOBRANTE RIGHTS.**

Finally, Abeyta notes that much time and energy in this matter has been devoted to the question of whether the lower acequias (Abeyta and Llanitos) merely have "sobrante rights," entitling them to use only surplus water. *See* SM Report at 8-9. The Special Master correctly found "insufficient evidence of a sobrante relationship between the upper and lower acequias." SM Report at 2, ¶ 2. Abeyta is satisfied with this sound conclusion, and will not discuss at great length the issue of sobrante status. But the concept of sobrante status may have contributed to the Special Master's decision to assign later priority dates to Abeyta and Llanitos. Moreover, the absence of evidence supporting the alleged sobrante status, and the existence of evidence demonstrating early equal use of water in the entire Truchas system, further demonstrate that the Special Master's assignment of a late priority date to Abeyta was erroneous. Abeyta will

therefore briefly address the allegations that have been made regarding the concept of sobrante status.

a. Rodriguez Litigation

Although the Special Master found insufficient evidence of the alleged sobrante status, she nonetheless found that the 1887 Rodriguez litigation "affirms the subordinate status of the lower acequias." SM Report at 12. This conclusion is entirely unfounded. Of particular significance to these objections, the Rodriguez litigation has absolutely nothing to do with the rights of Abyeta. The litigation arose out of Mr. Rodriguez's attempt to force the majordomo to provide him with water from the Acequia Medio for new land he broke out west of the Trampas Road near the terminus of the Medio. *See* SM Report at 12. The court denied Rodriguez's petition for mandamus because Rodriguez made no showing of consent of the upstream users, but stated that this decision was not to affect the ability of Rodriguez or any other persons to "use the surplus water of the acequia as heretofore." *See* Exhibit A-IS, Judgment of Court dated June 23, 1889.

This statement has been improperly interpreted as some kind of determination that the lower acequias were entitled to receive only surplus waters. *See* SM Report at 12 ("this case affirms the subordinate status of the lower acequias"). Applying the court's broad statement to all such persons—including in particular water users in Llano Abeyta—is blatantly inconsistent with the doctrines of collateral estoppel and res judicata. Mr. Rodriguez did not seek to irrigate by way of the Abeyta irrigation system, and no individuals owning land in the Llano Abeyta participated in the litigation. *See* Exhibit A-15, Rio Arriba Territorial District Court Records, Civil Case No. 367. Rather, as the Special Master recognized, Mr. Rodriguez sought to irrigate from the Acequia del Medio." *See* SM Report at 11.

Because Abeyta was not a party to the *Rodriguez* case, and given that the Court did not necessarily decide issues concerning Abeyta in that case, the Rodriguez litigation cannot affect the rights of Abeyta. *See B. Willis C.P.A., Inc. v. BNSF Railway Corp.*, 531 F.3d 1282, 1301 (10th Cir. 2008) ("In accordance with the doctrine of issue preclusion (previously known as collateral estoppel), once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim."); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995) ("Res judicata generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or issues that could have been raised in the earlier action. A claim is barred by res judicata when the prior action involved identical claims and the same parties or their privies.") (internal citation omitted).

Moreover, the Cordoba and Sanchez deeds establish that a ditch system existed in Llano Abeyta at the time of the Rodriguez litigation. This would be inconsistent with the notion that the lower acequias had only sobrante status. And the existence of that ditch system indicates that, had the court intended to make a broad-sweeping ruling regarding the lower ditches in general, it would have expressly mentioned Llano Abeyta, or perhaps, the Acequia de los Garcias.

The Special Master therefore erred in concluding that the Rodriguez litigation demonstrated that the lower acequias have subordinate status. The Court should not consider the Rodriguez litigation when assigning priority dates to the lower acequias.

b. The Alleged Sobrante Status is of Recent Origin.

Also demonstrative of the complete irrelevance of the asserted subordinate status of the lower acequias is the fact that the concept of sobrante status is a relatively recent creation. Dr.

Hordes found no written evidence of the alleged sobrante custom between the upper and lower acequias prior to 1951. *See* Hordes Deposition, July 12, 1996 at 53-54. And even after 1951, acequia records do not consistently refer to the alleged sobrante status of the lower ditches. *See* SM Report at 14.

Also demonstrating recent invention of the idea of subordinate status is ample evidence demonstrating that, in recent years, irrigation activity in the Llano Abeyta area did not depend on the amount of precipitation. SM Report at 16. Perhaps most significantly, photographs taken in 1935 reflect significant cultivation of Llano Abeyta. *See* Deposition of Perry Trujillo, January 22, 1997, exhibits 14-15; Exhibit A-38. These photographs reflect that even the extreme western end of the Llano de Abeyta was well-cultivated. And 1935 was not a year of excessive rainfall. 14.95 inches of precipitation were recorded in 1935. *See* Exhibit A-42, Climatological Summary, p. 284. This is less than the annual average precipitation for Truchas (which is about 16 inches per year). *See* Exhibit A-41, Climatological Data New Mexico, January 1952, p. 210, Truchas.

Later photographs are similarly telling. Photographs taken in 1976 and 1982 show a progressive deterioration in the condition of cultivated land in the Llano de Abeyta, and decreasing quantities of cultivated land. *See* Exhibits A-39, A-41. A comparison between the upper and lower acequias in the aerial photograph taken in 1982 is particularly striking. Much of the Llano de Abeyta appears in that photograph to have been uncultivated.

In reviewing this evidence, the Special Master declared that "[t]he decrease in irrigated acreage over the years in the Abeyta area is obvious," but failed to give it sufficient weight. *See* SM Report at 16. The photographs reflect a recent attempt by the upper acequias to deny Abeyta access to water—not a longstanding sobrante status or lesser priority for the lower acequias.

Moreover, the evidence of early irrigation is consistent with the notion that all the acequias should be treated equally, and should share the same priority date.

The records of the Acequia del Llano de Abeyta likewise demonstrate that the alleged sobrante status or lower priority of the lower ditches is of recent origin. The acequia record books list well over one hundred parciantes in the Llano de Abeyta in 1933. *See* Exhibit A-43, Record Book of Acequia Llano Abeyta 1927 to 1946, pp. 46, 49. Furthermore, the irrigation schedule for the year 1945 reflects irrigation from April through June, simultaneous irrigation by multiple people, and several rounds of irrigation in June. *See* Exhibit A-45, Majordomo's Record Book, pp. 168, 173-75. And precipitation that year was below average. *See* Exhibit A-35, Climatological Summary, Penasco R.S, 1945 (annual precipitation at Penasco Ranger Station was 13.19 inches in 1945, and average was 15.19). Also consistent with ample irrigation, Abeyta's records reflect 95 participants in the annual cleaning of the acequia on April 26, 1948. *See* Exhibit A-45 at 199-200. In contrast, by the early 1990s, there was far less participation in the annual cleaning. *See* Exhibit A-44, Record Book of Acequia Llano de Abeyta, 1946 to 1993 at 151-52 (showing 10 to 15 persons participating in annual ditch cleaning in years between 1990-1992).

In sum, it is clear that, until relatively recently, the lower acequias were not treated as having the lowest priority or only sobrante rights. The Special Master correctly found insufficient evidence of a sobrante status. Furthermore, the available evidence clearly demonstrates that the rights of the lower ditches are equal to those of the upper ditches.

IV. CONCLUSION

For the foregoing reasons, the Court should reject the 1882 priority date recommended for Abeyta by the Special Master. The clear weight of the available historical evidence reflects that

Abeyta was settled in 1752, and that lands in Llano Abeyta were allocated in 1754. Abeyta should consequently be given a priority date of 1752. In the alternative, based on deeds from the 1850s reflecting longstanding cultivation of Llano Abeyta, the Court should assign Abeyta a priority date no later than 1800.

Respectfully submitted,

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BY: */s/ Juan L. Flores*
JUAN L. FLORES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the parties listed on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

/s/ Juan L. Flores
JUAN L. FLORES

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