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 REPLY TO THE SANTA CRUZ ACEQUIAS' & STATE OF NEW MEXICO'S RESPONSES (Docs. #2736 & 2751) CONCURRING IN TRUCHAS ACEQUIAS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PUEBLO OF SAN JUAN'S ABORIGINAL TITLE TO LANDS OUTSIDE ITS EXTERIOR GRANT BOUNDARIES (Doc. #2719)

Ohkay Owingeh (formerly the Pueblo of San Juan and hereafter referred to as "the Pueblo") hereby replies to two briefs filed on May 3, 2010, concurring in the Truchas Acequias' Motion for Partial Summary Judgment Regarding San Juan Pueblo of San Juan's Aboriginal Title to Lands Outside its Exterior Grant Boundaries. Doc. #2719. The two briefs were filed by the Santa Cruz Acequias (Doc. #2736) and the Office of State Engineer (Doc. #2751) as "Responses" to said motion, but they supported the relief which had been sought by the Truchas Acequias' motion, namely a judgment adverse to certain of Ohkay Owingeh's aboriginal water right claims.[1] The Pueblo moved for leave to file this Reply. Doc. #2763. That motion was granted on July 7, 2010. Doc. #2779.

[1] The Santa Cruz Irrigation District also filed a one-page "Concurrence" (Doc. #2738) in the Truchas Acequias' motion. It contained no argument.

This Reply thus supplements the Pueblo's Response in Opposition to the Truchas Acequias' Motion for Partial Summary Judgment. Doc. #2743 (hereinafter referred to as the "Pueblo Response".)

BACKGROUND

The Truchas Acequias' Motion for Partial Summary Judgment seeks a ruling that Ohkay Owingeh cannot prove aboriginal title to the lands within the geographical area of this general stream adjudication. The initial motion offered very little evidence in support of the relief sought, and confused proof of aboriginal title with the concept of "cultural affiliation" under the Native American Graves Protection & Repatriation Act (NAGPRA). Pueblo Response, pp. 8-11. Movants argued, in effect, that evidence of other Tewa Pueblos' presence in the adjudication area bars Ohkay Owingeh's claim *anywhere* in the area. With respect to the Pueblo's aboriginal claims which lie within the Santa Cruz stream system, the Truchas Acequias ignored Ohkay Owingeh's Response to their own Interrogatory wherein the Pueblo stated that it was claiming aboriginal title only to "lands in the northern and eastern portions of the Rio Santa Cruz Basin." Pueblo Response, p. 7. In other words, Ohkay Owingeh is not claiming water rights based on aboriginal title to the entire Rio Santa Cruz Basin.

Movants also argued that the existence of a common trail across the Pueblo's territory is inconsistent with the concept of exclusive use and occupancy by a single Pueblo. Pueblo Response, pp. 14-17. That position is contrary to judicial precedent on the subject of aboriginal title, and the motion on its face demonstrated that there are genuine issues of material fact with respect to the Pueblo's water right claims in large

portions of the Rio Santa Cruz Basin.[2] The other parties' two supporting briefs repeat these conceptual errors, and it is not necessary for the Pueblo to address them again here.

The Response Brief of the Santa Cruz Acequias addresses only that portion of Ohkay Owingeh's claim of aboriginal rights which lies within the Rio Santa Cruz Basin. The State Engineer's brief, on the other hand, purports to offer evidence and argument to defeat the Pueblo's claims in both the Rio Santa Cruz and Rio de Truchas Basins. The two briefs are addressed separately below, in that order. Both briefs assert that Ohkay Owingeh cannot prove aboriginal title, which can be shown by actual, exclusive and continuous use and occupancy for a long period of time, what the Supreme Court has called a tribe's "ancestral home." United States *ex rel.* Walapai Tribe v. Santa Fe Pac. RR. Co., 314 U.S. 339, 345 (1941).

THE SANTA CRUZ ACEQUIAS' RESPONSE AND CONCURRENCE

The Santa Cruz Acequias' Response, Doc. #2736 (SCA Resp.), contains an "Additional Statement of Material Facts" (SCA Resp. at p. 3), with two new paragraphs purporting to be accurate factual statements inconsistent with Ohkay Owingeh's aboriginal claims within the Rio Santa Cruz stream system. The statement in the first

[2] Ohkay Owingeh has filed a motion for partial summary judgment that it possessed aboriginal title to lands within the Rio de Truchas stream system at the commencement of Spanish colonization in 1598. Doc. #2717. The subject matter of that motion thus overlaps the subject matter of the Truchas Acequias' motion. It is the Pueblo's position that there is no disputed issue of genuine material fact which would prevent this Court from granting the Pueblo's more narrow motion. Obviously, to the extent that the Acequias' Motion for Partial Summary Judgment, and the other parties' Responses in support of that motion, purport to present evidence demonstrating that the Pueblo has no claim to the Truchas Basin lands, it is Ohkay Owingeh's position that such "evidence" utterly fails to demonstrate that the Pueblo did not hold aboriginal title to the lands within the Rio de Truchas Basin in 1598.

paragraph is inaccurate, and is not supported by the evidence proffered with the brief. The statement in the second paragraph is immaterial to proof of aboriginal title.

The first paragraph states:

> 1. The archaeological evidence does not tie the prehistoric occupation of the Rio Santa Cruz Basin or stream system to Ohkay Owingeh, and those prehistoric sites may be culturally affiliated with one or more other present day Pueblo communities. See excerpts from "A Report on Archaeological Research in the Santa Cruz Basin" by Dr. Michael Adler, dated February 17, 2009, attached hereto as Exhibit A, pp. 37-39, 44-45.

That broad statement is an inaccurate representation of the statements in Dr. Adler's report. For example, the Adler report states: "There is *no unequivocal evidence* for Ancestral Pueblo occupation of the Santa Cruz River Basin for about 150 years, between AD 1450-1600." SCA Resp., at p. 5 (emphasis added), *quoting* from pp. 43-44 of Exhibit A. The same page of the Santa Cruz Acequias' brief also contains the following statement: "Dr. Adler concludes that the absence of ceramics after 1350 'does argue for a significant decrease and even absence of Puebloan occupation in the Santa Cruz basin during the later 15th and 16th centuries.' (Adler, Exhibit A, pp. 18, 24.)" However, Dr. Adler's report does not state that there is an "absence of ceramics"; it states only that there is a "dearth of middle and late Classic decorated ceramics in the ceramic samples from the Santa Cruz sites …." *See* p. 18 of Exhibit A. Dr. Adler's report also points to "a lack of agreement" among archaeologists as to the time periods which should be attributed to certain ceramics found in the area. *Id.* Moreover, the elliptical quote above which the Santa Cruz Acequias use (on page 5 of their Response) from the Adler report, stating that the "absence of ceramics" suggests the "absence of Puebloan occupation", is extremely misleading. The unquoted first clause in that sentence reads: "Though

ceramics are certainly not the only line of evidence on which we should depend ….” Thus, Dr. Adler was pointing to only one line of archaeological evidence; his report spoke only to a “dearth” not an “absence” of relevant ceramics; and he conceded that there is disagreement among archaeologists with regard to the dating of that ceramic evidence. So, the overstated and inaccurate point made in “Additional Material Fact” Paragraph 1 is hardly of the undisputed nature necessary to carry a motion for summary judgment.

But what is most important to understand about Dr. Adler’s opinion is that he did not use the term “occupation” in the same sense as courts use the word “occupancy” of a territory, as in “aboriginal use and occupancy.” His report theorizes that there was a “relocation” of Puebloan people from the Santa Cruz uplands to the Rio Grande prior to the coming of the Spanish. Exhibit A, p. 44. At his deposition Dr. Adler said: “I use the term occupation very specifically to characterize multi-year permanent occupation of the area.” *See* attached Exhibit 1a, p. 56, lines 8-10. He also agreed that it would be “fair to say” that the people inhabiting the villages on the east side of the Rio Grande continued to use the tributary drainages for hunting and gathering and other activities. *Id.* In other words, the Pueblo’s position that the people of Ohkay Owingeh continued to use and occupy these upland areas—even after the migration to permanent villages along the east bank of the Rio Grande, is not defeated by the opinion stated in Dr. Adler’s report. Without conceding the accuracy of Dr. Adler’s opinions regarding “occupation”, we submit that Ohkay Owingeh aboriginal title may be proved from evidence of intermittent and seasonal contacts; and that the evidence proffered from Dr. Adler’s report does not

demonstrate that aboriginal use and occupancy of portions of the Rio Santa Cruz Basin cannot be proved. For example, the U.S. Court of Claims has held that the Seminoles could prove aboriginal title to the entire Florida peninsula:

> And since the "use and occupancy" essential to the recognition of Indian title does not demand actual possession of the land, but may derive through intermittent contacts, Spokane Tribe of Indians v. United States, 163 Ct.C1. 58, 66 (1963), which define some general boundaries of the occupied land, Upper Chehalis Tribe v. United States, 14 Ct. Cl. 192, 155 F.Supp. 226 (1957), the Commission's determination that the Seminoles occupied all of Florida may not be regarded as legally defective.

United States v. Seminole Indians, 180 Ct.C1. 375, 385 (1967) (emphasis in original).

Finally, the reference to "archaeological evidence" in the "Additional Statement of Material Facts" obscures the fact that evidence of aboriginal use and occupancy can be shown from other evidence, not merely the ceramic archaeological evidence discussed in Dr. Adler's report. Dr. Adler agreed with this proposition at his deposition:

> Q You've referred to pottery and architecture. Do you consider, within what we've referred to as archeological evidence, to include shrines and marked trails?
>
> A Oh, yes. Archeology includes any material remains of human behavior and human modifications of the landscape in the past.
>
> Q Is there any evidence of this kind of modification that links the adjudication area, which is the Rio de Truchas and Santa Cruz Basins, to Ohkay Owingeh?
>
> A There are linkages that I would -- in my opinion, relate the archeological remains in those two drainages in the adjudication to, among others, Tewa speaking peoples in the area. But to say only Ohkay Owingeh, I think, would be overly restrictive.
>
> Q Are there any particular shrines or trails that one could link specifically to Ohkay Owingeh, as opposed to other Tewa pueblos?
>
> A Without having worked with the actual traditional elders of Ohkay Owingeh or other pueblos, I couldn't answer that.

Q So it is possible?

A It is possible.

Exhibit 1a, pp. 44-45. In fact, the Pueblo's expert witness, Dr. Richard I. Ford, who was the chairman of Dr. Adler's dissertation committee at the University of Michigan (Exhibit 1a, p. 9, lines 1-4), has worked for decades with elders at Ohkay Owingeh, and has documented the Pueblo's longstanding linkages to the lands within the adjudication area. Rather than attach his entire expert report, "Traditional Agriculture and Herding in Ohkay Owingeh", which has been disclosed to the parties, we attach only the cover page as Exhibit 2a, and also refer this Court to Ohkay Owingeh Exhibit A, attached to its Motion for Partial Summary Judgment, which consists of 43 pages of excerpts from Dr. Ford's report. Doc. #2717-3. Thus, Paragraph 1 of the Santa Cruz Acequias' Statement of Additional Material Facts—even if it were accurate, which it definitely is not—wholly fails to demonstrate that Ohkay Owingeh has no basis for claiming aboriginal title within the Rio Santa Cruz Basin.

Paragraph 2 of the Statement of Additional Material Facts (SCA Resp. at p. 3) states:

> 2. The territory, water and other natural resources within the Rio Santa Cruz Basin for which Ohkay Owingeh claims aboriginal use and occupancy, and aboriginal water rights emanating from such use and occupancy, was and has also been occupied and used for centuries by descendants of the original Spanish settlers. See affidavit of Raymond Chavez, attached hereto as Exhibit B.

The proposition that the Spanish long ago colonized and settled large portions of the Rio Santa Cruz Basin is indeed undisputed. But this proposition, standing alone, does not bar

Ohkay Owingeh's claim to aboriginal title to any part of the Basin, any more than does the lone affidavit of Mr. Chavez, which states that he has never seen or met any members of San Juan Pueblo in the hills and mountains of the Basin.

First, it should be noted that the Pueblo's water right claims are based on water use within the adjudication area since time immemorial, *i.e.*, prior to colonization. *See* the Pueblo's Subproceeding Complaint, ¶¶ 13-16. Hence, Spanish settlement cannot bar a claim based on earlier aboriginal use and occupancy. A more relevant question for trial may be whether Spanish settlement should be seen as having effected extinguishment of the Pueblo's aboriginal title. On that point the courts have held that non-Indian settlement is only one factor to consider in any consideration of extinguishment. In United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1390 (1975), the Claims Court held that in view of the federal policy of protecting Pueblo aboriginal occupancy, there would have to be "an express Congressional purpose to abolish Indian title over the whole of appellees' ancestral homelands …." Consequently, the fact of Spanish settlement is no bar to the Pueblo's aboriginal claims to any part of the Rio Santa Cruz Basin. And the single affidavit from Mr. Chavez is hardly weighty enough to bar the Pueblo's claim to any part of the Santa Cruz Basin, as many of the Tewa villages and cultural sites which were surveyed by the Pueblo's experts—especially the ones in the northern and eastern areas (*e.g.*, Zorro Pueblo, LA255, and Ojo Negro Pueblo, LA57)—lie far removed from any Spanish towns and villages. *See* Exhibit 3a, Detail from GIS map (Figure I.6) attached to expert report, "Eastern Homeland of San Juan Pueblo". In sum, the Santa Cruz Acequias' Response concurring in the Truchas Acequias' Motion for

Partial Summary Judgment fails to present evidence or legal argument in support of that motion.

THE STATE OF NEW MEXICO'S RESPONSE

The principal point made by the State in its Response brief is that Ohkay Owingeh cannot prove exclusive use and occupancy of any part of the adjudication area "because it is clear that the pan-Tewa historical presence in the Rio Santa Cruz and Rio de Truchas basins bars the conclusion that any Pueblo, including Ohkay Owingeh, could possess aboriginal title in the same." Doc. #2751, at p. 2 (hereinafter "NM Resp."). Neither the evidence nor the law supports that position.

The State's discussion begins with an erroneous characterization of the "Appropriate Legal Standard for Proof of 'Aboriginal Title'". NM Resp. at p. 3. It takes the proposition that aboriginal title is not "property" for purposes of the "just compensation" requirement in the Fifth Amendment, and insists that this must mean that it cannot give rise to a water right. But none of the cases cited by the State even mention aboriginal water use. The Supreme Court has held that aboriginal title is "considered as sacred as the fee title of the whites," Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835), and that "[t]his right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances." United States v. Cook, 86 U.S. 591, 593 (1874). Thus, aboriginal rights must necessarily include water rights. In United States v. Adair,

723 F.2d 1394 (9th Cir. 1983), cert. denied *sub nom* Oregon v. United States, 467 U.S. 1252 (1984), the court observed:

> The Supreme Court has specifically held that the Tribe had aboriginal title to timber on the Klamath Reservation. *United States v. Klamath and Moadac Tribes*, 304 U.S. 119, 122-23, 58 S. Ct. 799, 801, 82 L. Ed. 1219 (1938). The Tribe's title also included aboriginal hunting and fishing rights, *see Sac & Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145, 151 (8th Cir.), *cert. denied*, 439 U.S. 955, 99 S. Ct. 353, 58 L. Ed. 2d 346 (1978), and by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland.

723 F.2d at 1413. Indeed, the Klamath Tribe's aboriginal hunting and fishing rights discussed in Adair, which were the basis of the recognition of an aboriginal water right, were exercisable on federal, not tribal lands, namely a national forest and a wildlife refuge. *Id.*, at 1398. No court has ever held that the fact that the U.S. may extinguish aboriginal title without paying compensation to the affected tribe means that aboriginal use and occupancy rights do not include water rights.

The next part of the State's discussion makes the same error as the Santa Cruz Acequias, namely by treating Dr. Adler's report of Tewa migration from villages in these watersheds down to the Rio Grande during 1450-1600 as evidence that the area was not actually used and occupied the ancestors of the people of Ohkay Owingeh. NM Resp. at p. 4. That was not what Dr. Adler was saying, and it does not disprove the actual use and occupancy required for aboriginal title. Further, the State's brief then takes an illogical leap when it asserts that evidence that the Pueblo was not occupying and using the "entire watershed" means that the Pueblo's "claim of aboriginal title for the entire watershed must fail." *Id.* That is not how federal courts have treated claims of aboriginal use and

occupancy. *See* Pueblo Resp. at p. 6.[3] Then, on the very next page the State quotes from the expert report of its own archaeologist, Dr. Sunday Eiselt, who concluded that "The Truchas watershed is situated within an area associated exclusively with Ohkay Owingeh …." NM Resp. at p. 6. That statement *supports* the proposition that the Truchas Basin was subject to Ohkay Owingeh exclusive use and occupancy. Summary judgment may only be granted if there are no genuine material facts in dispute. The statement from Dr. Eiselt's report alone is sufficient to present a triable issue barring summary judgment.

But what is most flawed about the State's argument is its characterization of what it calls evidence of "pan-Tewa presence" of these watersheds. Essentially, the State has extrapolated from the expert reports and deposition testimony which it cites, where the experts refer to "Ancestral Tewa" presence in these areas, as resembling what one court described as a situation where multiple tribes "inhabited, controlled, or wandered over" the same area prior to Spanish colonization. NM Resp. at p. 7. That is not what the experts, including Dr. Adler, are saying in those reports. Rather, as stated elsewhere by Dr. Adler, the ceramic evidence found in this area does not differentiate among modern Tewa Pueblos. SCA Resp., Exhibit A at pp. 14-15. In other words, one cannot tell from one piece of pottery to the next (at least with respect to shards from the "Classic Period", ca. 1400-1600), whether it may be tied to Ohkay Owingeh or to another Tewa Pueblo, such as Nambé or Santa Clara. This is not evidence of multiple tribal occupations which would defeat a claim of aboriginal title based on exclusive use and occupancy. It is

[3] Further, as pointed out in the Pueblo's Response to the Truchas Acequias' motion, the Pueblo's Subproceeding Complaint and its Response to the Acequias' Interrogatory show that Ohkay Owingeh is *not* claiming aboriginal title to the entire adjudication area. Pueblo Response at pp. 6-7.

affirmative evidence that Tewa people *did* occupy these pre-Columbian villages. When that evidence is tied to ethnographic, geographic, and historical information supporting Ohkay Owingeh use and occupancy of these areas, it goes to *prove* the Pueblo's claim of aboriginal title; it does not defeat it. The State's own expert archaeologist, Dr. Eiselt, made this very point at her deposition, in response to questions from the attorney for the Truchas Acequias, whose Motion for Partial Summary Judgment is the subject of these briefs:

> Q. Okay. And is there any way to tie the people that presently live at San Juan Pueblo to people who may have had agricultural sites in the Santa Cruz drainage?
>
> A. To the degree that I believe that they're all Tewa-speaking people, I think yes, they are.
>
> Q. Okay. So is there any evidence that would allow a certain modern-day pueblo to claim any land or water rights from archaeological fields that existed 400 to 500 years ago?
>
> A. I think if they're maintaining consistent use or engagement with archaeological sites, shrines in a given area then, yes, I think they can claim affiliation to them.

Deposition of Dr. Sunday Eiselt (July 22, 2009), attached hereto as Exhibit 4a, at p. 99. Ohkay Owingeh has long been recognized as the "mother pueblo" of the Tewa people, and there may well be common ancestry of the people at modern Pueblos.[4] Indeed, Dr. Eiselt's report refers to the prominent role of Ohkay Owingeh as the "mother pueblo" and compares it to the large archaeological site in the northern Santa Cruz Basin known as

[4] If the State's point about "pan-Tewa" occupation is that evidence of shared ancestry automatically defeats a claim of aboriginal title, it is clearly wrong. Otherwise, no Sioux, Chippewa, Apache, or Tewa tribal group could ever establish aboriginal title. *See, e.g.*, Sioux Tribe v. United States, 500 F.2d 458, 472 (Ct.Cl. 1974), where the court declined the government's invitation to find that the overlapping territories of the Teton and Yanktonnais Sioux would defeat their claims of exclusive use and occupancy, since these were not "antagonistic" or "competing" tribes, because they were related to one another.

Pueblo Quemado (LA158), and concludes: "Pueblo Quemado therefore likely contributed to a large segment of the Ohkay Owingeh population, and probably represents a major ancestral pueblo for this village." Eiselt Report, at p. 33, attached as Exhibit 5a.

Dr. Adler's report is hardly a basis for denying the Pueblo's claim for relief, as it states ambiguously, "Thus far there are no unambiguous lines of evidence that tie one or more of the present-day Pueblo communities to the archaeological sites and remains in the area." NM Resp. at p. 5. That statement simply questions the strength of the Pueblo's expert evidence. It does not offer contrary evidence to dispute the Pueblo's claim. Moreover, as noted above, Dr. Adler's report focused primarily on the ceramic archaeological evidence. Dr. Eiselt commented at her deposition that Dr. Adler's apparent lack of confidence in the ethnographic evidence was not a view which coincided with her own. *See* the Pueblo's Reply in Support of its Motion for Partial Summary Judgment, at page 26 and Exhibit DD. Doc. #2781. And the Pueblo's own experts certainly don't agree with Dr. Adler on that score. *See* Pueblo Resp. at pp. 16-17, & Exhibit 7, ¶¶ 15-18, Doc. #2743-7.

Thus, the evidence proffered by the State does not show that the entire Abbott adjudication area was wandered over by many distinct tribes. On the contrary, it shows a substantial Tewa presence throughout both Basins. And other evidence links the Truchas Basin and portions of the Santa Cruz Basin to Ohkay Owingeh. Consequently, the State's Response in support of the Truchas Acequias' Motion for Partial Summary Judgment fails to demonstrate that that motion should be granted.

CONCLUSION

For the reasons stated in this Reply, when considered along with Ohkay Owingeh's Response (Doc. #2743) in opposition to the Truchas Acequias' Motion for Partial Summary Judgment Regarding the Pueblo of San Juan's Aboriginal Title to Lands Outside its Exterior Grant Boundaries (Doc. #2719), that Motion should be denied.

Dated: July 8, 2010

Respectfully submitted,

__/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2010, I filed the foregoing Reply to the Santa Cruz Acequias' and State of New Mexico's Responses in Support of the Truchas Acequias' Motion for Partial Summary Judgment Regarding Aboriginal Title electronically through the CM/ECF system, which caused CM/ECF participants to be served electronically pursuant to Local Rule Civ. 5.6.

/s/
Tim Vollmann