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

STATE OF NEW MEXICO ex rel. State Engineer and THE UNITED STATES OF AMERICA,	)	No. 68cv7488-BB-ACE
	)	No. 70cv8650-BB-ACE
Plaintiffs	)	Consolidated
v.	)	
JOHN ABBOTT et al.,	)	Rio Santa Cruz and Rio de Truchas Stream Systems
Defendants	)	Subproceeding II

REPLY TO THE JOINT RESPONSE OF THE UNITED STATES AND OHKAY OWINGEH AND TO RESPONSE OF THE STATE OF NEW MEXICO TO TRUCHAS ACEQUIAS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SAN JUAN AIRPORT CLAIMS

DEFENDANTS Acequia Madre de Truchas, Acequia del Llano, Acequia de La Posesion, Acequia del Llano de Abeyta, and Acequia de Los Llanitos (collectively "Truchas Acequias" or "La Acequia de la Sierra") reply to the *Joint Response of the United States and Ohkay Owingeh* ("*Joint Response*")(Doc. No. 2734) and to the *State of New Mexico's Response* ("*NM Response")*(Doc. No. 2740) to the *Truchas Acequias' Motion for Partial Summary Judgment Re: San Juan Airport Site Claims* (Doc. No. 2721).

The Truchas Acequias' motion is in two parts. The first part concerns the source of water for the Airport site claims. The State of New Mexico concurs in this part of the Truchas Acequias' motion. NM Response at pp. 1 - 2. Because the United States and Ohkay Owingeh (collectively "US/Pueblo") do not dispute any of the Truchas Acequias' material facts regarding the first part, namely, that the source of water for the Airport area claims is an "unnamed arroyo, tributary to the Rio Grande," the Court should grant summary judgment on this issue and specify

that, in the event the Court finds those claims to be valid water rights (after a trial on this issue), the source of water is not from either the Rio de Truchas or the Santa Cruz River stream systems. Second, the Truchas Acequias request judgment on whether the State's failure to amend the underlying complaint in this matter to include the unnamed arroyos, or to complete the hydrographic survey, both as ordered by the Court in 1995, is a jurisdictional bar to adjudication of any water rights from those unnamed arroyos on the Airport site, in the context of the requirements of New Mexico's comprehensive statutory adjudication scheme.

Part I. Source of Water for Airport Site Claims

A. Reply to the US/Pueblo "Response to Statement of Material Facts"

The Truchas Acequias clarify that the term "stream system" is not intended to have any significance that differs from the term "watershed," defined as a "region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water" by the Merriam Webster On-line Dictionary.[1]

1. With regard to US/Pueblo Additional Fact 1, the Truchas Acequias agree that the place of use and locations of the points of diversion for the Airport site claims are *probably* within the geographic scope of this adjudication, but assert that this fact is irrelevant to the question of the description of the source of water for those claims. The relevant fact regarding the source of water is the stream system or watershed in which the source is located. The US/Pueblo do not dispute that the source of water for the claims in question is from within a stream system that is tributary to the Rio Grande, a fact confirmed by Chris Banet in response to a question asking where water would drain from the Airport area above the Llano Ditch.

[1] www.merriam-webster.com/dictionary/watershed.

"Q. Where would that water flow?

A. The natural course would be into the Rio Grande."

See Exhibit to Joint Response (Doc. 2734-1) at p. 40, lines 23-24.

It is impossible to determine with absolute certainty that all claims are within the geographic scope of this adjudication. The only map filed with the Court showing the area included within the geographic scope of the adjudication is at a scale of 1:100,000, with no topographic detail, and on which one inch represents six thousand feet (1" = 6000 ft.). See Doc. No. 2279, filed October 4, 1999. The only written description is "another segment of lands north of the State's proposed northern boundary, but south of the Arroyo de Ranchitos."[2] *US Response of New Mexico's Motion to Amend the Complaint, etc.* (Doc. No. 2003), filed March 1, 1995, at p. 3, ¶3.

The area shown on the 1999 map extends beyond the San Juan Pueblo grant boundaries, and onto land either privately held or administered by the federal government. Notwithstanding that "[t]he State acknowledges . . . that the geographic scope of the Santa Cruz River and the Rio Chama suits in the vicinity needs to be precisely defined and located," *New Mexico's Memorandum in Response to the Special Master's Questions Regarding New Mexico's Motion to Declare Scope of Suits*, Doc No. 2013, at p. 4, there has never been a hydrographic survey map of the area, and there is no data documenting either the spring's existence or its location,

[2] In its *Response to NM Motion*, the United States incorrectly stated that the San Juan Airport site was "within the ambit of the State's 1968 Notice of Lis Pendens, as denoted by the map attached to the Notice as Exhibit B." Doc. No. 2003 at p. 3, para 3. A careful review of that map shows that it did not encompass any lands to the north and east of State Road 291, also known as El Llano Road. See Exhibits A, Notice of Lis Pendens map, and Exhibit B, road map, attached to this reply.

making determination of its inclusion within the geographic scope of the adjudication impossible.

This is of importance in this case, as US/Pueblo expert Kurt Anschuetz speculates that one source of water for the Airport area claims is a spring located outside the exterior boundary of the San Juan Pueblo Grant, but for which he had could provide no accurate location. See Exhibit C. There has not yet been a hydrographic survey of this area, which presumably would locate the alleged spring to determine whether it is within the geographic scope.

In regard to US/Pueblo Additional Fact 2, the Truchas Acequias dispute that the unnamed arroyos on the Airport site "are all tributary to the Llano Ditch." Response at p. 2, ¶ 2. The evidence relied upon by the US/Pueblo, Mr. Banet's statement that water falling on the Airport area lands would flow to the Llano Ditch, is merely a statement of topographic reality. Water generally runs downhill. The US/Pueblo provide no evidence, such as evidence of constructed works, that any water is actually diverted *into* the Llano Ditch. Evidence of a means of diversion is necessary to support a claim that the unnamed arroyos are "tributary" to the Llano Ditch. Even if floodwaters could be diverted into the Llano Ditch, that would not make the unnamed arroyos that are the source of water for the Airport site claims a part of the Santa Cruz River stream system. It would only mean that such floodwaters are an additional source of water for any water rights served by the Llano Ditch downstream of the diversion.[3]

[3] For instance, in its *Motion to Amend the Complaint and Declare the Scope of Subject Matter Jurisdictions of These Consolidated Adjudication Suits* (No. 1137), the State referred to a similar situation, in which an acequia that diverted from the Santa Cruz River filed a claim for flood waters from arroyos that crossed the acequia, but which were tributary to the Rio Grande. While finding that the court had jurisdiction over the subject matter to adjudicate flood water claims from the arroyos, the Special Master and the court denied the claim because there were no constructed works for "purpose of diverting, conveying or storing flood waters from any of the

That the Llano Ditch is downslope from the site of the Airport area claims is irrelevant to the issue of the source of water for those claims. The claims, which are located upslope from the ditch, are based on uses that occurred well over four hundred years ago, long before the construction of the Llano Ditch. How could aboriginal uses be tied to a "ditch tributary" when the ditch was not even constructed?

In regard to US/Pueblo Additional Fact 3, the Truchas Acequias assert that this fact is irrelevant to either the question of the source of water for the Airport site claims or to the jurisdictional question addressed in Part II of this Reply. Contrary to speculation by the US/Pueblo, the Truchas Acequias seek neither delay nor a stay of this entire subproceeding. Rather, the Acequias seek clarity from a confusing record—in researching the issue regarding the source of water, they questioned how these tributaries of the Rio Grande became folded into a suit seeking to determine the rights within the Rio de Truchas and Rio Santa Cruz. Because the US/Pueblo now claim a right to use any water rights adjudicated to them in this suit for any purpose after adjudication (see p. 9,below), the Truchas Acequias are concerned that the US/Pueblo will transform water rights, if any, based on sporadic uses from ephemeral streams in the Rio Grande stream systems into new depletions from the Santa Cruz or Truchas River stream system, which will impact the Truchas Acequias' source of water.[4] This concern could

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above major arroyos." *Motion to Amend the Complaint* at pp. 5-6, ¶¶ 10. In that case, the arroyos and the area in question were encompassed within the hydrographic survey map that was filed as an attachment to the Notice of Lis Pendens. In this case there has not been a hydrographic survey of the unnamed arroyos that provide the source of water for the Airport area rights.

[4] The Truchas Acequias share the concerns expressed by the City of Espanola in its Motion for Summary Judgment (Doc. No. 2720) and by the State of New Mexico in its Response to City of Espanola Motion for Summary Judgment (Doc. No. 2744) regarding future administration of Pueblo rights.

not be foreseen at the time the orders concerning the geographic scope of the adjudication were entered.

B. Reply to the US/Pueblo "Argument"

1. The "source of water" is a specific element of a water right.

In a water adjudication suit, water rights "are interrelated and require specific determinations of priority dates, quantity of water that may be diverted and put to beneficial use, place of diversion and perhaps other matters." ***New Mexico ex rel Reynolds v. Molybdenum Corp.,*** 570 F. 2d 1364, 1367 (10 Cir. 1978). One of the required specific determinations necessary for the adjudication of a water right is the source of water for that right.

Although the present suit is a consolidation of two separate stream systems, it does not mean that a water right adjudicated in one stream entitles the claimant to use water from the other stream system, unless such right is specifically granted. For instance, within the Rio de Truchas adjudication, the Partial Final Decree lists at least three specific sources of water, the Rio de Truchas, the Canada de la Jara and the Rio de Cebolla, for specific water rights. See *Partial Final Decree of the Rio de Truchas Section*, (Doc. No. 615), filed May 2, 1974, "Addendum Lands Irrigated by Private Acequias" at p. 1. The reason that the two adjudication suits were consolidated is that many water rights in the Rio de Truchas stream system have as a source of water, water from the North Fork of the Rio Quemado, which is a tributary to the Santa Cruz River. Water rights are described specifically so as to place limits on their uses; a water right is a right to use water from a specific source for a specific purpose with a specific point of diversion.

Adjudication suits often encompass more than one stream system. For instance, the Red River adjudication determined not only the rights within the Red River stream system, but also water rights from the Latir stream system. Each subfile order limits the water right to the source; a person adjudicated a water right with the Red River stream system may not divert water from the Latir stream system to satisfy his adjudicated use. The Acequias simply request that the source of water for the Airport claims, if any, be specified as being from the Rio Grande stream system, as opposed to being from the Santa Cruz or Truchas River stream system.

2. It is undisputed that the source of water for the Airport site claims are unnamed arroyos that are tributary to the Rio Grande.

The Truchas motion concerns only the US/Pueblo water rights claims that are located on the San Juan Airport site, namely, 163.33 acre-feet of surface water for range pasture irrigation, 27.86 acre-feet of water to irrigate "traditional agricultural features," and the entire surface water flow of several unnamed arroyos to fill and refill impoundments to use for "any purpose." According to the US/Pueblo, the location of these uses and the points of diversion for these claims are located on the San Juan Airport site.[5] The US/Pueblo offer no evidence to dispute that the unnamed arroyos that are presumably the source of water for these claims are tributary to the Rio Grande.

Instead, the US/Pueblo imply that these Rio Grande tributaries, each of which is a discrete stream system with its own specific watershed, become part of the Santa Cruz River stream system, "taking into account artificial modifications to that regime caused by human activity." *Joint Response* at p. 6. To bolster this concept, the US/Pueblo states:

[5] As noted above, Dr. Anschuetz speculates that one source of water could be located off-site.

> Similarly, the Rio Santa Cruz, via the Llano Ditch, is a *major source of water* for many, though not all, of the irrigation uses on which lands within the watercourse basins in which the Airport Area Rights are located.

Joint Response at p. 7 (emphasis added). However, the Airport area claims fall within the "not all" category, for which the Llano Ditch (and Santa Cruz River) can not and could not physically be a source of water. The Llano Ditch was not even constructed at the time during which the claimed "irrigation" rights were used.

The Truchas Acequias' motion does not extend to the 60.65 acres of post-1900 Irrigation water rights served by either the Santa Cruz Ditch or the Llano Ditch claimed by both the US/Pueblo. See *US Complaint* at p. 2-3, ¶ 7, Table III; *Pueblo of San Juan Complaint* p.3, ¶ 9. It is clear that the source of water for those water rights, if any, is the Santa Cruz River, and it is possible that the unnamed arroyos could be "an additional source of water" for irrigation of tracts that are irrigated from the Acequia del Llano, if it is proven at trial that there are constructed works to divert water from the unnamed arroyos into either the Llano Ditch or the Santa Cruz Ditch. However, the US/Pueblo offer no evidence of such works with their motion.

3. Because of the nature of the US/Pueblo claims, it is necessary to be specific as to the source of water for the Airport site claims.

At best, the water rights on the San Juan Airport site are ephemeral; they originate far from the headwaters of either the Rio Santa Cruz or the Rio Truchas. Any groundwater underlying the airport site is far from the streambed of either the Rio Truchas or the Santa Cruz River, but is scarcely more than a mile from the Rio Grande, a river of much greater volume than either the Truchas or Santa Cruz.

The US/Pueblo claims include a right to use the water for any purpose after adjudication, notwithstanding the ephemeral and tenuous nature of the source of water that the rights are

based upon. For example, the United States asserts that "Once the Pueblo of San Juan's water rights are quantified decree, the Pueblo has the right, under federal law to **use such rights for any purpose**." *United States' Subproceeding Complaint* (Doc. No. 2462.) at p. 2, ¶4 (emphasis added). The Pueblo claims are even more far-reaching, claiming it has the right "to exercise its water rights and to use such rights for any purpose, and to divert water, **in exercise of those rights, from any water source on its lands, including groundwater."** *Subproceeding Complaint of Pueblo of San Juan* (Doc. No. 2467) at p. 2, ¶5. (emphasis added). Whether the Pueblo may exercise its rights in this manner may or may not be determined in this suit. However, specificity as to the source of water for any water rights is vital not only for administration purposes, but for purposes of protecting other water users from negative impacts should the Pueblo seek to transform emphemeral uses into new groundwater depletions.

D. The Truchas Acequias do not ask this Court to treat water rights from unnamed arroyos on Airport Site, if any, differently than water rights from other non-perennial watercourses within the geographic scope of the lawsuit situated outside the Santa Cruz River basin.

Contrary to the US/Pueblo's assertion, the Truchas Acequias are not requesting that this court adjudicate the rights from the unnamed arroyos any differently than those from other non-perennial watercourses. Nor are the Acequias advocating that water rights from the unnamed arroyos on the Airport site not be adjudicated in this case[6]. The Truchas Acequia seek a very specific judgment in regard to very discrete claims, namely, that *if* the US/Pueblo Airport Site

[6] As discussed in Part 2 below, the Truchas Acequias' motion asks the court to determine whether it has yet gained subject matter jurisdiction to adjudicate these water rights, given an amended complaint that was ordered to be filed has not yet been filed, and the original Lis Pendens filed in 1968 has not been amended to include the lands within the stream systems of the unnamed arroyos.

claims are found to be valid, the source of water be specified as an "unnamed arroyo, tributary to the Rio Grande," not a tributary of either the Rio de Truchas or the Santa Cruz River.

Contrary to the US/Pueblo, the Truchas Acequias are unable to find "similarly situated rights already adjudicated in this case." *Joint Response* at p. 1. There have been rights adjudicated in Subproceeding I, where the place of use and the source of the water are from unnamed arroyos that are tributary to either the Rio Grande directly or to another arroyo that is tributary to the Rio Grande. Those water rights were determined by Settlement Agreements. For each water right, the source of water is very clearly and specifically defined, which is what the Truchas Acequias' seek in their motion for partial summary judgment.

One such water right concerns the "Nambé stock pond"—the settling parties[7] agreed that Nambé Pueblo has the right to maintain the pond for "the incidental use of any impounded water from the unnamed arroyos in which [it] is located for stock or wildlife." *Settlement Agreement Concerning Claims for Water Rights for the Pueblo of Nambé and the Pueblo of San Ildefonso* (No. 2374), March 15, 2002 at ¶3.2. The location is identified as "within the course of several small arroyos tributary to the Arroyo Seco." *Id.* at ¶3.1. The "right to maintain" specifically did not include "the right to divert water out of the impoundment or to divert water into the impoundment from any ground or surface water source." *Id.* at ¶3.2

Similarly, with regard to an impoundment located on "land owned by the San Ildefonso Pueblo within the geographic scope of this adjudication, specifically located within the course of an unnamed arroyo," *id.* at ¶4.1, the parties stipulated that the right to use the impoundment allows for "the incidental use of any impounded water from the unnamed arroyo in which [it] is

[7] The Truchas Acequias are a party to the settlement agreements described in this section.

located for stock and wildlife . . . ," *id.* at ¶4.2, and that the right specifically excluded "the right to divert ground or surface water into the impoundment from any source." *Id.* at ¶4.2

The *Subproceeding Complaint* for Subproceeding I also claimed a right for surface water for pre-Columbian irrigation, similar to the irrigation uses on the Airport site in this subproceeding. Those claims were for the diversion of surface water " to irrigate agricultural features . . .The total irrigated acreage within these features is 5.2212 acres and the Pueblo is entitled to divert and deplete for irrigation of these features 24.96 acre feet per year." *Subproceeding I Complaint* (Doc. No. 2226), filed April 1, 1999 at p. 4,¶11. These rights were not part of the 2002 Settlement agreement; after more than three years of negotiation, the parties stipulated that the water right attendant to these features was the "right to manipulate available sheet flow run-off" within the immediate area, and that the right did not include "the right to divert water from any channelized surface water source or underground source." Further, although the parties stipulated that the place of use could be changed to points within the San Ildefonso Pueblo, they also stipulated that if the place of use was changed, the source of water would be limited to "sheetflow runoff" at the new site. *Consent Order Concerning Certain Claims for Rights to Use Water on Pueblo of San Ildefonso Lands*, (Doc. No. 2497) at ¶ 3.2.

As the United States pointed out in regard to these settlement agreements, they "contain express disclaimers of any precedential effect," and should not be "construed to establish precedent or to resolve any question of law or fact" in this proceeding. *United States Reply in Support of Objections to Special Master's Procedural Order on the Determination of Irrigation Water Requirements*, (Doc. No. 2632), filed July 20, 2009 at p. 1-2. The Truchas Acequias do

not request special treatment or procedures, only that the source of water be specifically identified and limited for each water right adjudicated.

5. The Court should grant the first part of the Truchas Acequias' Motion for Partial Summary Judgment.

The US/Pueblo offer no evidence to dispute that the source of water for the Airport site claims are unnamed arroyos that are tributary to the Rio Grande and that are not part of either the Santa Cruz River or the Rio de Truchas stream systems. The Court should grant summary judgment as to the source of water for those claims, in the event that the Court finds, after a trial on the matter, that such claims constitute valid water rights claims.

Part II. Jurisdictional Issues

The US/Pueblo and the State of New Mexico both oppose that part of the Truchas Acequias' motion for partial summary judgment regarding this court's jurisdiction over the Airport site claims. Contrary to speculation by the US/Pueblo, the Truchas Acequias seek neither delay nor a stay of this entire subproceeding. The Acequias became aware of procedural gaps in the record when researching how tributaries of the Rio Grande become folded into a suit seeking to determine the rights within the Rio de Truchas and Rio Santa Cruz.

A. Reply to US/Pueblo

There is no question that this Court has jurisdiction over the United States claims, pursuant to 28 USC §1345, provided that those claims have properly arisen in the context of New Mexico's water adjudication statutes. The subject matter jurisdiction that is the basis of the Acequias' motion is that referred to in both *New Mexico's Motion to Amend the Complaint and Declare the Scope of Subject Matter Jurisdictions of These Consolidated Adjudication Suits* (Doc. No. 1137) and in the United States' response to that motion. (Doc. No. 2003). The

Acequias' argument is that, absent joinder of all the claimants to water rights within the stream systems of the unnamed arroyos, that this Court *may* not have subject matter jurisdiction due a failure to join indispensable parties.

This case is quite different from ***New Mexico ex rel Reynolds v. Molybdenum Corp.,*** 570 F. 2d 1364, 1367 (10 Cir. 1978), which involved a private party's challenge to federal court jurisdiction over a subfile proceeding between the State and a private defendant within the context of the general adjudication of the Red River,[8] when no federal parties or claims existed. The Court found that it had jurisdiction pursuant to 28 U.S.C. § 1345[9], and ancillary jurisdiction over the other non-federal parties because of the comprehensive nature of New Mexico's general adjudication statutes. The Court found that the general requirement for individual jurisdictional amounts to invoke federal jurisdiction had no application. "Although here we have no transaction or occurrence, we have a situation affecting hundreds of water users and the determination of the right of each is not only incidental to, but also inextricably intertwined with, the determination of the rights of all." ***Id.*** at 1367.

The ***Molybdenum*** court found that "the function of a general adjudication proceeding is to determine individual rights and their relationship to the rights of other claimants to use the waters of the river." ***New Mexico ex rel Reynolds v. Molybdenum Corp.*** 570 F. 2d 1364, 1367 (10 Cir. 1978). In order to meet that goal, the adjudication statutes provide:

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[8] As noted above, that suit also adjudicated water rights in stream systems other than the Red River, including West Latir Creek and other Rio Grande tributaries.

[9] 28 U.S.C. § 1345 provides that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

> In any suit for the determination of a right to use the waters of *any stream system*, all those whose claim to the use of such waters are of record and all other claimants . . . shall be made parties. . . .

NMSA 1978, §72-4-15 (1907 as amended)(emphasis added). "In a New Mexico water rights adjudication, a water rights claimant is an *indispensable,* rather than nominal, party." ***United States v. Bluewater-Toltec Irr. District,*** 580 F. Supp. 1434 (1984-D.N.M.)(emphasis added), affirmed ***United States v. Bluewater-Toltec Irr. District***, 806 F.2d 986 (10th Cir. 1986).

The US/Pueblo correctly note that the United States invoked this Court's jurisdiction pursuant to 28 U.S.C. 1345 in its Complaint-in-Intervention. However, that pleading was limited to an adjudication of rights "in and to the use of the waters of the Santa Cruz River and its tributaries, determined and declared." *Complaint in Intervention* (No. 11), filed April 29, 1968, at p. 1, Paragraph I.[10] Notably, the United States did not request that the Court declare its rights to the use of waters from unnamed arroyos that are tributaries of the Rio Grande. In fact, in its 1995 *Response to New Mexico's Motion to Amend the Complaint and Declare the Scope of the Subject Matter Jurisdiction* (Docket No. 2003), the United States opposed including "any water rights based on the irrigation of lands with water from the Rio Grande." (Doc. No. 2003) at p. 4. Neither the *Subproceeding Complaint* of the United States nor that of the Pueblo of San Juan explicitly seeks an adjudication of water rights from a tributary of the Rio Grande. The United States *Subproceeding Complaint* is limited to an "adjudication of water rights based on present and past uses of diverted water on the lands of the Pueblo of San Juan," p. 1. The

[10] In its prayer for relief, the United States asked that "the Court enter such further orders . . . for an adjudication of the parties rights to the use of waters of the Santa Cruz River and its tributaries." *Complaint in Intervention* at p. 6, Paragraph 7.

Subproceeding Complaint of the Pueblo of San Juan does specify that the Pueblo claims water rights from "minor stream systems within the geographical scope of this adjudication."

Whether these subproceeding complaints are sufficient to confer subject matter jurisdiction over the unnamed arroyos, absent notice to other claimants, is the gist of Acequias' motion. In this case, notwithstanding court orders, a hydrographic survey of the unnamed arroyos that are the source of water for the Airport site claims has not been conducted and no amended complaint has been filed[11]. The original Notice of Lis Pendens has not been amended. The Notice of Lis Pendens included a map showing the scope of the adjudication of the Santa Cruz River. See Exhibit A, attached. Notably, that map did not include the Airport site or the headwaters of the unnamed arroyos that are the source of water for the Airport Site Claims, which are located to the east of the very distinctive shape of State Road 291 (also known as El Llano Road). See Exhibits A and B, attached.

The Truchas Acequias acknowledge that this area can be surveyed and that any persons or entities that claim water rights within the area can be joined at some point. The question is whether the US/Pueblo claims can be adjudicated before this has occurred, given the fact that the Tenth Circuit in ***United States v. Bluewater-Toltec Irr. District***, 806 F.2d 986 (10th Cir. 1986) by affirming and adopting the District Court's opinion in ***United States v. Bluewater-Toltec Irr. District,*** 580 F. Supp. 1434 (1984-D.N.M.), has declared any persons and entities claiming water rights within the area as "indispensable."

B. Reply to State of New Mexico

[11] The Acequias' acknowledge that the Pueblo claims subproceedings are binding only on those parties served with the initial subproceeding complaints.

As the Truchas Acequias point out above, the State of New Mexico does not oppose the Acequias' motion insofar as it requests judgment that the source of water for the San Juan Airport site claims be specifically identified as from a tributary to the Rio Grande that is not a part of either the Santa Cruz River or the Rio de Truchas stream systems. See p. 1, above. The State does oppose, however, the Acequias' motion insofar as it contends that the Court lacks subject matter jurisdiction over those claims due to various procedural deficiencies. This reply is intended to address that opposition.

As a preliminary matter, the State contends that the Acequias' request that consideration of the San Juan Airport area claims be deferred "until certain jurisdiction[al] thresholds have been fulfilled" is not properly the basis of a motion for summary judgment. Response at p. 2. The State also contends that facts that merely enumerate the procedural history of a case are not "material facts" for purposes of summary judgment. *Id.* See also Response at pp. 5 – 7.

While it is true that matters of abatement are typically raised by motions filed pursuant to Rule 12(b), it is also true that summary judgment can be sought on the basis of the pleadings alone; "if this is done [the motion] functionally is the same as a motion to dismiss for failure to state a claim or for a judgment on the pleadings." Wright & Miller, § 2713 at pp. 222 – 23. Wright & Miller also point out:

> In view of the purpose of the rules to secure the just, speedy, and inexpensive determination of every action, the courts naturally are reluctant to refrain from properly disposing of a motion merely because its form is incorrect.

Id. at p. 224. Accordingly, labels on motions are, more often than not, treated as irrelevant; as one court pointed out, the courts are not constrained by the "tyranny of labels." ***Aetna Cas. &***

Sur. Co. v. William M. Mercer, 173 F.R.D. 235 (D.C. Ill. 1997). With respect to subject-matter jurisdiction in particular, Wright & Miller point out:

> [T]he label attached to the motion should not prevent the court from deciding a summary judgment motion challenging the court's subject-matter jurisdiction as a suggestion that the court dismiss the action on that ground.

Wright & Miller, § 2713 at p. 241.

That said, the Truchas Acequias wish to reiterate that, given the current posture of the Subproceeding II proceedings, they do not seek dismissal of the San Juan Airport area claims. Their principal concern at this juncture is to emphasize that hydrographic surveys are a necessary component of and serve a valuable purpose in the adjudication process, and that court orders concerning the amendment of pleadings and the completion of hydrographic surveys should be complied with within reasonable timeframes, where deadlines are not otherwise provided. Although the State writes that "[t]he expanded area of the adjudication will be fully surveyed and an amended complaint will be filed pursuant to the Court's Order," Response at p. 17, the State has done neither in the almost fifteen years since entry of the order requiring a survey and amended pleading, nor does the State now indicate when they will be done. The Truchas Acequias can only hope that they will not be prejudiced by the delay, either in the pending proceedings or upon *inter se*, because already the evidence indicates that a hydrographic survey of the area in question might help resolve questions raised in connection with the San Juan Airport site claims.[12] An alternative to dismissing the San Juan Airport site claims is to allow the

[12] For example, in response to questions concerning the source of water for various diversion structures alleged by them to be located at the San Juan Ariport area, the United States' experts mentioned "possible" springs, not otherwise known, specified or identified, in areas both on and off the Pueblo grant boundaries. Absent a hydrographic survey, the existence and location of these springs is nothing more than pure conjecture. See also pp. 4 and 7, fn. 5, above.

other Ohkay Owingeh claims to proceed, while the procedural deficiencies in connection with the Airport site claims are addressed and resolved.

Material Facts

The State admits the majority of the Acequias' summary judgment facts and makes various refinements to others, but the refinements do not affect the Acequias' entitlement to summary judgment.

Arguments

At page 7 of its Response, the State argues that "New Mexico law simply does not support the rigid application of the adjudication statutes urged by the Acequias in support of their jurisdictional argument," citing *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 99 N.M. 699, 701, 663 P.2d 358, 360 (1963) for allowing flexibility in adjudication procedures. Response at pp. 8 -9.

Pecos Valley does not address, however, the issue raised in this case. The issue addressed in *Pecos Valley* was whether an administration of water rights prior to the filing of a final decree violated the plaintiffs' due process rights; the court held there was no denial of due process because the procedure adopted by the court afforded the parties adequate opportunities to establish and contest priorities. The issue here is whether the court has jurisdiction to proceed with the Airport site claims in the absence of indispensable parties. See pp. 12 - 16, above. Although the failure to join indispensable parties is no longer considered a jurisdictional defect under New Mexico law, at a minimum the court must conduct a balancing test under the rules to determine whether the case should proceed absent joinder. *C.E. Alexander & Sons v. DEC Int'l,*

Inc., 112 N.M. 89, 811 P.2d 899 (1991). The court has undertaken no such test or analysis in this proceeding.

Nor is the issue of jurisdiction merely an instance of elevating form over substance, as the State contends at page 16 of its Response. To begin with, the investigation of the Pueblo's claims that was completed prior to the claims filing deadline was an investigation of "water uses on Pueblo lands," Motion at p. 7, not of waters or uses on *non*-Pueblo lands. As indicated above, non-Pueblo lands have already been implicated by the Pueblo's claims on Pueblo lands. It is therefore possible that the Truchas Acequias, or any of the other current parties to this proceeding for that matter, all of whom will be bound by any judgment entered, can be prejudiced by the lack of a complete hydrographic survey as ordered by the court.

In addition, *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 ( ), relied upon by the State, Response at pp. 16 - 18, is, like *Pecos Valley*, distinguishable from the facts of this case. As the State points out, the issue in *Sharp* was whether an adjudication might properly proceed "township by township, as hydrographic surveys [were] completed," rather than only after completion of a survey of the entire stream system. The court upheld the step-by-step approach as a reasonable and practical way of completing the adjudication. The issue here is whether an adjudication proceeds properly in the complete absence of a (supplemental) hydrographic survey, especially when areas implicated and affected by the water rights claims made have not been investigated or surveyed, and potentially affected persons or entities have not been determined. The Truchas Acequias contend that an adjudication does not proceed properly under these circumstances, at least in the absence of adequate consideration and review by the court, which has already ordered that an amended complaint be filed and a supplemental

hydrographic survey be completed. If the State and other parties deem that filing and investigation to be unnecessary at this point, then the proper response is a motion requesting relief from or amendment of the order, not its complete disregard.

The Truchas Acequias request that their motion for summary judgment be granted.

Respectfully submitted,

/s/ Mary E. Humphrey
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2010, I filed and served the foregoing document electronically through the CM/ECF system.

/s/ Mary E. Humphrey