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 OHKAY OWINGEH'S RESPONSE TO TRUCHAS ACEQUIAS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE PUBELO OF SAN JUAN'S ABORIGINAL TITLE TO LANDS OUTSIDE ITS EXTERIOR GRANT BOUNDARIES.

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 *Ohkay Owingeh's Response to Truchas Acequias' Motion for Partial Summary Judgment Regarding the Pueblo of San Juan's Aboriginal Title* ("Response")(Doc. No. 2743).

Ohkay Owingeh ("Pueblo") offers no evidence that disputes the material facts set out in the Truchas Acequias' motion, including the dispositive fact that Ohkay Owingeh did not exclusively use and occupy the area for which it claims aboriginal title. Instead, the Pueblo implies that it does not have to prove exclusive use and occupancy of those areas, because there are three exceptions to the requirement of exclusivity. However, the Pueblo does not specify which exception applies or explain how it applies to a particular area, nor does it offer any evidence that supports its claim of an exception. While complaining that many of the Acequias'

facts are "overstatements" of what it is claiming, the Pueblo does not identify specific and definable areas within either the Rio de Truchas or the Santa Cruz River basins to which it claims aboriginal title, and does not explain why it must not show that it occupied and used such areas to the exclusion of others continuously and for a long time.

Because the Pueblo does not dispute the material facts that show it did not have exclusive use and occupancy, and it does not explain why or show how the use of these areas by other tribes was either pursuant to joint and amicable permission or with permission, the Court should grant the Truchas Acequias' Motion for Partial Summary Judgment on the Pueblo's claim for aboriginal title to land and water rights.

Reply to Pueblo's Response to Statement of Material Facts

Ohkway Owingeh takes issue with all of the Truchas Acequias' summary judgment evidence, but it does not actually dispute any of the material facts relied on by the Acequias or offer specific evidence of its own to rebut those facts.

Facts 1 and 2. Ohkay Owingeh contends that Facts 1 and 2 are incomplete and taken out of context, but a comparison of the language offered by the Truchas Acequias and that offered by the Pueblo reveals few if any differences (and certainly no differences of any consequence). Ohkay Owingeh does not dispute the facts presented by the Truchas Acequias, and as it points out with respect to Material Fact 3, the pleadings speak for themselves. The Pueblo's observations do not create disputed issues of material fact or otherwise raise issues sufficient to defeat summary judgment.

Fact 3. Again, Ohkay Owingeh does not dispute the facts asserted, arguing only that the Truchas Acequias quote imprecisely from its prayer for relief,[1] and offering the common-sense observation that the pleadings speak for themselves. The Pueblo's observations do not create disputed issues of material fact or otherwise raise issues sufficient to defeat summary judgment.

Fact 4. In its own motion for summary judgment on the issue of aboriginal title, Ohkay Owingeh explains that it is "seeking a decree that it holds aboriginal water rights based on aboriginal title to lands outside of the exterior boundaries of what is know as the San Juan Pueblo Grant," citing to its complaint in this case. Motion [Doc. 2717] at p. 3. In pursuit of that decree, the Pueblo retained an expert hydrologist, Mark Miller, to quantify the amounts of water used (and now claimed) by the Pueblo within the watersheds in question—the Rio de Truchas and the Rio Santa Cruz.

On August 6, 2007, Mr. Miller produced a report in this case entitled "Hydrologic Assessment of Ohkay Owingeh Aboriginal Water Rights Within the Geographic Scope of New Mexico v. Abbott" (Report). Figure 1 in that Report, attached to this Reply as Exhibit A, "shows the extent of the Rio de Truchas and Rio Santa Cruz watersheds" as well as the "aboriginal agricultural lands farmed by Ohkay Owingeh." Report at p. 1. In connection with the agricultural lands, Mr. Miller asserts, among other things:

- Through the use of various irrigation techniques, Ohkay Owingeh modified large areas of its core homeland; the Pueblo actively put water to beneficial use within the Rio

[1] The Truchas Acequias' Material Fact 3 inadvertently omitted the word "prior" in the last phrase of the quoted language, which should read: " . . . and those rights have never been extinguished by the United States or any other prior sovereign."

de Truchas and Rio Santa Cruz watersheds during pre-Columbian time, establishing the basis of the Pueblo's water rights. Report at pp. 1, 3.

- To quantify the water put to beneficial use by Ohkay Owingeh for agricultural production, water use was calculated based on the location of agricultural fields and the amounts of water available in the agricultural areas that can be captured for agricultural use. Report at p. 4.

- The hydrologists relied on the archaeological data available from studies in the Rio de Truchas and Rio Santa Cruz watersheds to identify the areas of agricultural fields and the locations of small habitations and larger pueblos used during the timeframe of interest. Report at p. 4.

Given this background, it is surprising that Ohkay Owingeh contends that the Truchas Acequias misapprehend the Pueblo's aboriginal claim and that Miller Figure 10 [Doc. 2724-2], which reflects essentially the same irrigated acreage along the Rio Santa Cruz as is reflected in Miller Figure 1, does not accurately reflect "the territory within the Rio Santa Cruz for which the Pueblo of San Juan claims aboriginal use and occupancy, and aboriginal water rights emanating from such use and occupancy . . . ." Response at pp. 2 – 3.

True, Miller Figure 10 does not reflect *all* of the Rio Santa Cruz watershed, but it does reflect *all* of the irrigated acreage on which Ohkay Owingeh now bases its claim for water rights in the basin. Surely Ohkay Owingeh does not contend that the water rights associated with the agricultural lands farmed by Ohkay Owingeh, as reflected on both Miller Figures 1 and 10, are based on claims of aboriginal title to entirely different areas of the Rio Santa Cruz watershed.

Ohkay Owingeh does not dispute the facts offered by the Truchas Acequias, and its observations do not create disputed issues of material fact or otherwise raise issues sufficient to defeat summary judgment.

Facts 5 and 6. The Pueblo again attempts to distinguish between evidence related to the "study area" and evidence related to its aboriginal homeland—that is, Ohkay Owingeh argues, the pueblo ruins and other cultural sites discussed by Marshall and Walt in their report in this case, as well as by Harrington in his 1916 study, may relate to the study area, but they do not necessarily relate to the Pueblo's aboriginal homeland.

If the Pueblo's contention here is that the Truchas Acequias' motion for summary judgment focuses on evidence and areas that are not part of its claims of aboriginal title, but merely part of 'the study area", then it should amend its complaint to specifically define and delineate the areas that *are* included within its claims, because, as Ohkay Owingeh itself acknowledges in its Response, its claims currently encompass "lands comprising *most or all* of the stream systems of the Rio Santa Cruz, Rio de Truchas [and other lands] within the geographic scope of this general stream adjudication." Response at p. 5. The study area *is* most or all of the stream systems of the Rio Santa Cruz and the Rio de Truchas; as Miller explains at page 1 of his Report: "Figure 1 shows the extent of the Rio de Truchas and Rio Santa Cruz watersheds, which comprise the study area for this hydrologic assessment."[2]

[2] The Pueblo should also amend its discovery responses, because when asked to provide the factual basis for its claim to exclusive use and occupancy of "most or all" of the stream systems in question, Ohkay Owingeh referred specifically to "the reports and testimony of its experts, and materials cited therein"—Doc. 2743-3, p. 3—the very same evidence the Pueblo now claims is not relevant to its aboriginal title claims.

Either the evidence in question is relevant to the Pueblo's claims or it is not. If it is appropriate for presentation in Ohkay Owingeh's overall case, it is appropriate for summary judgment consideration; otherwise, it should be disregarded in all instances as irrelevant.

Fact 7. Ohkay Owingeh states at p. 4 of its Response: "Ohkay Owingeh is claiming aboriginal title to lands in the northern and eastern portions of the Rio Santa Cruz Basin." It never explains what acreage in the basin this claim is meant to encompass; at the same time, none of the eastern portion of the watershed, and only a part of the northern portion of the watershed, contains agricultural areas on which Ohkay Owingeh bases its water rights claims. See Miller Figure 1, attached as Exhibit A to this reply. And while it may be true that "[e]vidence of habitation of other Pueblo people in one part of the Basin does not defeat a claim of aboriginal title in another part of the Basin," Response at p. 6, it must be equally true that evidence of habitation or use by Ohkay Owingeh in one part of a basin cannot create a claim of aboriginal title by Ohkay Owingeh in another part of a basin.

Ohkay Owingeh does not explain on what basis it claims water rights in areas acknowledged by it to have been used and occupied by other tribes, notably the Pueblos of Santa Clara and Nambé. *See* Response at p. 4, and map prepared by Sunday Eiselt, cited with approval at page 7 of the Pueblo's Response and attached as Exhibit 4 [Doc. 2743-4] to that Response. Certainly a portion of the water rights claimed by Ohkay Owingeh, *see* Miller Exhibit I attached as Exhibit A to this reply, is on lands admitted by Ohkay Owingeh to be claimed by the Pueblos

of Santa Clara and Nambé or non-specific Tewa people, as reflected on Exhibit 4 attached to Ohkay Owingeh's Response.[3]

In general, in order to believe Ohkay Owingeh's claims of exclusive use and occupancy of even portions of the Rio Santa Cruz watershed, one must also believe the notion that there existed distinct, clearly-defined and precisely-located boundaries between the aboriginal homelands of the different tribes. Yet the summary judgment record is replete with evidence to the contrary—instead of distinct, clearly-defined and precisely-located boundaries, there was substantial overlap between and among the areas claimed by the different tribes. *See* pp. 10 -11, below, and the expert conclusions of David White, Richard Ford, and Kurt Anschuetz. As Dr. Eiselt explained in her deposition testimony, archaeologists working in this area are generally hesitant to assign individual prehistoric sites to specific modern-day pueblos, given the complex dynamics of demographic change over time. *See* Truchas Acequias' Response to Ohkay Owingeh's Motion for Partial Summary Judgment [Doc. 2745] at p. 27.

Whatever areas or portions of the Santa Cruz basin Ohkay Owingeh claims as its aboriginal homelands, it presents no evidence defining or delineating the areas in question or of the Pueblo's exclusive and continuous use of those areas. The Pueblo's allegations do not create disputed issues of material fact or otherwise raise issues sufficient to defeat summary judgment in the Acequias' favor.

[3] A comparison of Marshall and Walt Figure I-6 with Exhibit 4 attached to Ohkay Owingeh's Response also reveals that the majority of traditional cultural sites identified by Marshall and Walt on Figure I-6 fall south of the Rio Chiquito and Rio Quenmado, that is, not in the tribal area assigned to San Juan Pueblo, but in the area designated "Tewa (non-specific)" or assigned to Nambé Pueblo, on Figure 4.

Fact 8. Ohkay Owingeh does not dispute evidence of the existence of the San Juan-Picuris Trail, but argues that evidence of the trail supports rather than rebuts the Pueblo's claims of aboriginal title. The Truchas Acequias address the San Juan-Picuris Trail and nearby areas at length in their Response to Ohkay Owingeh's Motion for Partial Summary Judgment [Doc. 2745] at pp. 13 -16, which they incorporate by reference here.

It is Ohkay Owingeh rather than the Acequias who "wildly extrapolate from the existence of the San Juan-Picuris Trail." There is no evidence, merely speculation, that Picuris' use of the trail through the Truchas drainage was permissive and at the sufferance of San Juan, rather than the other way around. Why is it not as likely that San Juan used the trail at the sufferance of Picuris, or that the area was shared and used jointly by a number of tribes, as one would logically conclude from the statements of David White, Richard Ford and Kurt Anschuetz? See pp. 10 - 11, below. Neither Harrington, in his 1916 "The Ethnogeography of the Tewa Indians," nor Kurt Anschuetz, in his 2001 Homelands Study Report, mentions the trial at all, other than in passing; it is mentioned only in connection with "Great Stone Woman," who is said to have fled "over the old trail to Picuris."

Ohkay Owingeh has only the testimony of its own retained experts to support its claims concerning the Truchas basin, evidence that need not be accepted by the fact finder even if uncontradicted. See *Truchas Acequias' Response to Ohkay Owingeh's Motion for Partial Summary Judgment* [Doc. 2745].

Fact 9. To rebut the Truchas Acequias' Material Fact 9 concerning use and occupancy of the Rio de Truchas Basin by other Indian tribes, including the Pueblo of Picuris, Ohkay Owingeh attaches the declaration of Henry Walt [Doc. 2743-7], which states that the 2005 report authored

in part by him and relied on by the Acequias is in error. On the basis of interview notes made by him in 2002, Dr. Walt explains that he confused "Truchas" for "Las Trampas," and misidentified the area in question on maps submitted with the report. Dr. Walt states in his declaration that he is aware of no ethnological evidence establishing that the Truchas Basin lies within Picuris aboriginal territory.

Dr. Walt's declaration is dated April 30, 2010, well beyond the close of discovery in this case. The Truchas Acequias have recently requested relevant underlying documents from Dr. Walt, but they have not had an opportunity to conduct discovery on his change in position. Based solely on the materials attached to his declaration, the change advocated by Dr. Walt is not self-evident—the interview notes concerning the location in question mention the "Truchas River" and "Truchas" more often than "Las Trampas," raising the question whether Mr. Mermejo, the interviewee, indeed intended to exclude the Truchas area from his answer; the attached maps reference the area in question (Knudsen #27) as lying much closer to the Truchas River than Las Trampas; and the maps already contain an entirely different designation (Knudsen #26) for Las Trampas.[4]

At the same time, Dr. Walt's declaration and the resulting inference that there somehow existed a distinct, clearly-defined and precisely-located boundary between the Picuris aboriginal homeland, extending south of Las Trampas (but not to the Truchas), and the San Juan/Ohkay Owingeh aboriginal homeland, extending north to and beyond the Truchas (but not to Las

[4] In addressing Dr. Walt's declaration, the Truchas Acequias do not imply that Dr. Walt is lying or otherwise misrepresents the fact that a mistake was made. They do contend that without discovery and answers to the questions raised, neither they nor the court can determine the weight that should be given his declaration, especially when evaluated in the context of other sections of the 2005 report, as noted below.

Trampas), is at odds which other sections of the 2005 report, including specifically Dr. Walt's own contribution to that report. At page 49 of the report, in the chapter authored by him, "A Picuris Sense of Place: Picuris-Tiwa Place Names," Dr. Walt cites with approval to a report by David White, "An Evaluation of Picuris Pueblo Traditional Cultural Properties in the Rio Pueblo Drainage, Taos and Mora Counties, New Mexico," prepared for the Pueblo in 1995. Dr. Walt writes:

> According to David White, the Picuris aboriginal landscape extends a minimum of 200 miles in all directions from the village, although sites beyond the radius remain important to the people of Picuris. . . . The Picuris people have named places that reach south to Sandia Peak, "Tiwa name—*qip'iantla*—Sandia Mountains" and beyond . . . .

Given that the Truchas watershed is located approximately 10 to 15 miles south of Picuris Pueblo's present-day location (and well north of Sandia Peak), one can hardly conclude that the Truchas watershed is *not* part and parcel of the Picuris aboriginal landscape, regardless of whether the term made the basis of Dr. Walt's declaration refers to Las Trampas or Truchas. This is all the more true when Mr. White's statement is considered in conjunction with statements made previously by other experts in this case (working on behalf of Ohkay Owingeh), notably Richard Ford and Kurt Anschuetz. As pointed out in the Truchas Acequias' Response to Ohkay Owingeh's Motion for Partial Summary Judgment [Doc. 2745], in his 1968 doctoral dissertation, following several years of living at San Juan Pueblo, Dr. Ford noted: "In fact, the mountain territory of San Juan overlaps not only with that of all the other Tewa, but also with the northern Tiwa, Jemez, Apaches, Navaho and Keresan tribes." Response at p. 15. Dr. Anschuetz concluded similarly in 1999: "[T]he mountains convey the great expanse of the cultural landscapes claimed as the traditional worlds of each of the Tewa Pueblo communities. Clearly,

it is to be understood each Tewa Pueblo's claimed space overlaps with all other Tewa communities." Response at p. 29. All three experts specifically dispute the notion of distinct, bright-line boundaries between the various tribes' aboriginal homelands and specifically find overlap between the claimed homelands of the tribes in question.

Importantly, Dr. Walt's declaration, rather than disputing the dispositive fact that Ohkay Owingeh did not occupy and use the Truchas drainage to the exclusion of others, confirms that the Pueblo's use was only one of many, and that other tribes wandered freely through the drainage. Dr. Walt's declaration offers no evidence that such use and occupancy by other tribes either was through "joint and amicable" ownership or was permissive.[5]

Reply to Ohkay Owingeh's Legal Argument Regarding Aboriginal Title

I. In order to prove aboriginal title, a tribal claimant must show that it had exclusive use and occupancy of a definable territory.

Aboriginal title "denotes an interest that an Indian tribe had possession of land based solely on rights acquired by the Indians as original inhabitants of the land and not upon a statute, treaty, or grant by the sovereign." ***Uintah Utes of Utah v. United States***, 28 Fed.Cl. 768, 784 (1993). In order to prove that it currently possesses aboriginal title to specific lands, the Pueblo must show: a) *actual* and *continuous* use and occupancy of the land; b) *exclusive* use of the land and resources; and 3) the actual, continuous use and occupancy of the land and resources was for a long time prior to cessation of the use of that land. ***United States v. Pueblo of San Ildefonso***, 513 F.2d 1383, 1394 (Ct.Cl.1975). The area claimed must be "definable," capable of being

[5] At best, Dr. Walt's declaration raises a question of fact to be determined at trial. *See, e.g.,* ***Tippens v. Celotex Corp.***, 805 F.2d 949 (11th Cir. 1986), and ***Franks v. Nimmo***, 796 F.2d 1230, 1236 - 38 (10th Cir. 1986).

described with some specificity. "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." ***United States v. Santa Fe Pacific R.Co***., 314 U.S. 339, 345 (1941). The failure to satisfy any one of the elements defeated the claim of aboriginal title. ***Uintah Utes***, 28 Fed.Cl. at 787.

Much of the jurisprudence regarding aboriginal title, including the cases that the Pueblo relies upon in its *Response*, derives from the proceedings of the Indian Claims Commission ("ICC"), which was the quasi-judicial body created by Congress to hear and determine *all* tribal claims against the United States that accrued before August 13, 1946[6]. ***Navajo Tribe of Indians v. New Mexico***, 809 Fd. 2d 1455, 1460 (10th Cir.1987). Under the rules of procedure for the ICC, a tribal claimant alleging aboriginal title had to prove each component of the requirement for a showing of actual and continuous, exclusive use for a long time by substantial evidence. ***Sac and Fox Tribe v. US,*** 315 F.2d 896, 903, (Ct.Cl. 1963). The kinds of evidence used by tribal claimants to support aboriginal title claims included "statements, records and quotations from explorers, general, governors, historians, an others who visited or lived in the area" during the time of use, ***Sac and Fox Tribe v. US***, 383 F. 2d 991, 994 (1967), *cert. denied* 389 U.S. 900 (1967), as well as reliance on consultants. Because claims of aboriginal title could date back several hundred years,

> " '. . . it is extremely difficult to establish facts after the lapse of time . . . In attempting to establish boundaries and occupancy on the basis of fragmentary facts and often uninformed opinions and the work of ethnologists who must of

[6] It should be noted that the cases relied upon by the Pueblo emanate from cases filed with the Indian Claims Commission, in which the only remedy was monetary compensation by the United States. See ***Navajo Tribe of Indians v. New Mexico***, 809 Fr. 2d 1455 (10th Cir.1987). In this case, although it is unclear on what legal basis it does so, rather than compensation, Ohkay Owingeh seeks a substantial award of water rights from two stream systems that are known for shortages of water supply, which award would have negative consequences on other water users.

> necessity base their conclusion upon much the same information, it becomes necessary to take a *common sense approach*.' "

Lummi Tribe of Indians v. United States, 181 Ct. Cl. 753, 759, citing ***Upper Chehalis Tribe et al. v. United States***, 140, Ct.Cl. 192, 196 , 155 F. Supp. 226 (1957) (emphasis added). In this case, because the Pueblo fails to articulate material facts regarding its claims, common sense would demand that the claims be denied.

"Generally, mixed and non-exclusive use and occupancy of an area precludes the establishment of any aboriginal title by any of the users of the subject property . . ." ***Strong v. United States***, 518 F.2d 556, 561 (Ct.Cl.1975). In other words, a tribal claimant cannot prove that it established aboriginal title if other tribes wandered freely over the area; it must show a specific, *definable* territory occupied exclusively by the tribe. See ***United States v. Santa Fe Pacific R.Co***., 314 U.S. 339, 345 (1941) (there must be "definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes) . . .").

Rather than disputing that it cannot show exclusive use, the Pueblo argues that it does not have to show "a total absence of other tribes from the claim area in question," because "courts have viewed the exclusive use requirement as subject to three exceptions" *Response* at p. 8. However, the Pueblo offers absolutely no evidence that it is entitled to any of these limited exceptions. As shown below, the cases relied upon by the Pueblo do not support its claim of an exception. Those cases, like all aboriginal title cases, are very fact-specific. Without a showing of facts that are supported by evidence showing that the admitted uses by other tribes or pueblos was either due to "joint and amicable ownership" or that the uses were permissive only, the Pueblo can not claim to fall under an exception to the rule of a showing of exclusive use and occupancy

II. The Pueblo has not defined its claimed area.

Many of the ICC cases regarding aboriginal title concern the question of delineating the definable boundaries of a tribe's aboriginal title. The kinds of evidence offered in support of such delineations included contemporary "reports, studies, maps, and findings of prior students, travellers and officials." ***Spokane Tribe of Indians et al. v. United States***, 163 Ct. Cl. 58, 62. As with other components of aboriginal title, boundary locations must be supported by substantial evidence in the record. ***Id.*** at 70.

Notwithstanding its complaints that the Truchas Acequias "overstate" the Pueblo's claims, Response at pp. 2-4, the Pueblo does not clarify where its claims are located, or even attempt to describe any definable territory with specific boundaries. More importantly, while the Pueblo claims that "there is substantial evidence of exclusive use and occupancy of the northern and eastern portions of the Santa Cruz River Basin," *Response* at p. 7, it doesn't identify that evidence or offer it as summary judgment evidence to dispute the Truchas Acequias' material facts.

In order to analyze whether any of the Pueblo's claimed area is subject to an exception to the "exclusive use and occupancy" requirement, one must first know exactly which areas are those for which it claims "exclusive use and occupancy," which areas are those for which it claims it uses and occupies under "joint and amicable" ownership with another tribe or pueblo, and which areas are those for which it claims other tribes and pueblos uses are only by Ohkay Owingeh's permission. The Pueblo makes no attempt to clarify these questions, and offers no evidence that supports any claimed exceptions. Without such clarification, it cannot dispute the

dispositive fact in this case, namely, that it did not use and occupy either the Truchas or the Santa Cruz watersheds exclusively.

III. The Pueblo does not show that it fits into any limited exceptions to the requirement that it show 'exclusive use and occupancy' in order to prove aboriginal title.

The law on aboriginal title clearly provides that in order to prove aboriginal title a tribe must show exclusive use and occupancy of its claimed areas. The Truchas Acequias attached evidence to their motion for summary judgment that shows on its face that the Pueblo did not use and occupy either the Truchas or Santa Cruz watershed to the exclusion of others. While the Pueblo asserts that "Movants have offered no evidence which would defeat Ohkay Owingeh's claims to every segment of the Santa Cruz Basin," *Response* at 9, it does not really explain why the Truchas evidence does not defeat the Pueblo's claim. Instead, while admitting that other tribes used and occupied portions of both the Truchas and the Santa Cruz, the Pueblo glibly and without any evidence characterizes such uses as exceptions to the exclusivity requirement. Without evidence, the Pueblo's argument fails.

A. The Pueblo offers no evidence of "joint and amicable possession."

The Pueblo implies that it does not need to show exclusivity because courts have found "joint and amicable possession" as an exception to this fundamental requirement. The court has found: "Actually, this 'exception' merely creates a method of analysis of 'exclusivity' in *certain rare* situations." ***Strong v. United States***, 518 F.2d 556, 561 (Ct.Cl.1975)(emphasis added). The question of whether uses by other tribes are limited exceptions to the requirement of exclusivity, like the other components, is a fact question to be determined in light of the totality of the circumstances. See ***Iowa Tribe et al. v. United States,*** 195 Ct. Cl. 365 at 379 ("The Court has acknowledged the general possibility that two or more tribes might acquire aboriginal title by

inhabiting certain territory in 'joint and amicable possession' . . ., but we have never purported to define the specific circumstances in which that could or would occur"). "To qualify for treatment under 'joint and amicable' occupancy, the relationship of the Indian groups must be extremely close." ***Strong***, 518 F.2d at 561.

The Pueblo cites ***United States v. Pueblo of San Ildefonso***, 513 F.2d 1383, 1394 (Ct.Cl. 1975) for the proposition that Ohkay Owingeh need not show exclusivity, implying without any clear statements or any evidence of such, that the uses by Picuris, Nambé and Santa Clara Pueblos, among others, were in accordance with "joint and amicable possession" of certain unspecified areas with those other tribes. In ***San Ildefonso***, the ICC had determined that the Pueblo of San Filipe held joint aboriginal title to a certain 8600 acre tract of land with the Pueblo of Santo Domingo, but that the United States had extinguished the Santa Domingo half interest with issuance of an executive order in 1902. On appeal, the Court of Claims affirmed, noting that the evidence of joint use included certain historical facts, which were supported by substantial evidence in the record. The evidence in that included a joint petition by the two pueblos to the Spanish Governor seeking a land grant of land lying in between the two pueblos from the Spanish Crown; a document granting the petition, which specifically provided that certain areas "shall be common to both of the aforesaid Pueblos, equally and without any preference;" evidence that the two pueblos jointly petitioned the Court of Private Land Claims to confirm title to the land, and evidence that that court unanimously held that the joint grant was genuine. Therefore, there was "ample evidence in the record," 513 F.2d at 1395, which provided a "substantial objective basis for the Indians' belief that they jointly owned the disputed land." ***Id***. at 1396. The court found that the "factual picture which has emerged here adds up to

significantly more than mere use and occupancy of a particular area by two or more tribes at the same time." ***Id.***

In this case, unlike in ***San Ildefonso***, there is no evidence that Ohkay Owingeh ever jointly owned or possessed any part of either the Santa Cruz or the Truchas with another tribe. The evidence shows that the Pueblo shared the use of the land. "The mere fact that two or more different tribes shared the use of the land is insufficient to establish joint Indian title to the property." ***Strong***, 518 F.2d at 568.

The facts in this case are more similar to those in ***Strong*** than to those in ***San Ildefonso***. In ***Strong,*** several tribes acknowledged that none of them had had exclusive use and occupancy of a certain area, but argued that the tribes were a "confederacy" that held joint ownership of a specific area. The court found that the evidence did not support such a finding. In fact, rather than supporting any confederacy, the court found that no such relationship existed among the tribal claimants in that case, because the evidence showed, rather than cooperation among the tribes , that there was a "lack of any need for inter-tribal warfare over the property rights of the various tribes" because the area was too large for such warfare to be necessary. 518 F. 2d at 562.

In this case, the Pueblo offers no evidence to show that it owned any portion of its claimed area jointly with another tribe. Without such evidence, and with its admission of shared use, its claim for aboriginal title fails.

B. The Pueblo offers no evidence that its use was 'dominant,' notwithstanding the presence of other tribes, nor does it show that the admitted uses by Picuris, Santa Clara and Nambé Pueblos were permissive.

Notwithstanding that it asserts "joint and amicable" ownership with other pueblos on the one hand, the Pueblo also implies that uses by those other pueblos or tribes was by permission

only on the other hand, as Ohkay Owingeh dominated and controlled some or all of the same territory. Although the Pueblo characterizes its "dominant" use of the area as a different exception than "permissive" uses by another tribe of the same area, these two "exceptions" to the requirement of exclusivity are two sides of the same coin. The cases that Pueblo relies upon for either exception are not dispositive of the issue; the facts in each of those cases are vastly different from those in this case, where there are no clearly delineated areas and where there is no evidence of either Ohkay Owingeh's dominance or any other tribes' uses as permissive.

Any analysis of whether a tribe's use of the land was dominant and other tribes' uses permissive goes back to the fundamental requirement for a showing of exclusivity in the first place. As the ***San Ildefonso*** court succinctly stated:

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and *occupied the land to the exclusion of other Indian groups*. True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups.

United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct.Cl. 1975).

In this case, the Pueblo has admitted that the lands for which it claims aboriginal title have been inhabited and wandered over by other groups. However, it offers no evidence that it held physical control or dominion over the land, such that it could exclude others or control the activities of other tribes.

The Pueblo cites ***United States v. Seminole Indians***, 180 Ct. Cl. 375, 386 (1967) in support of its conjecture that its use of the area claimed was dominant to these other groups. In ***Seminole Indians*** , the Court of Claims affirmed the ICC finding that prior to the Spanish

cession of title to the United States that, with a few clearly defined exclusions, the Seminole Nation held aboriginal title to all of the present State of Florida. 180 Ct. Cl. at 377. The Seminole Nation was composed of Creek Indians who had formerly lived north of Florida and who had previously been "slave raiders," raiding the Florida peninsula to take the original natives captive to supply the plantation economy of Carolina to the north. Through time, these bands moved to Florida in the wake of the turmoil in Carolina and at the behest of Spain. The native inhabitants became assimilated into what became know as the Seminole Nation. Eventually, the evidence, including contemporary accounts by Spanish missionaries and English explorers, showed that the Europeans considered the Seminoles to be a "group falling outside the mainstream of the Creek Nation," ***id***. at 381, who "enjoyed an unrivaled position in the Florida peninsula." ***Id***. at 383. The issue, under the facts in that case, was not " whether the Seminoles were the excusive occupants of the land, but, rather, whether they availed themselves of their exclusive position." ***Id***. The court noted that in that case:

> Physical control or dominion over the land is the dispositive criterion. Thus, when consideration is given to the fact that the Seminoles hunted throughout the southern peninsula and that they also traveled this territory—much of which was covered by water—and, further that their emergence as a distinct Indian group was achieved through the amalgamation of many diverse elements. . . we believe there exists a reasonable basis for ... determination that Seminole title embraced the entire peninsula.

Id. at 386. Not only was this determination supported by substantial evidence in the record, it was uncontroverted evidence.

In this case, the Pueblo offers no evidence showing it ever had "physical control or dominion" over either the Truchas or Santa Cruz basins, or any evidence that the Pueblo "availed

themselves of their exclusive position." Absent such evidence, the material facts establishing a lack of exclusivity remain uncontroverted.

The Pueblo cites ***Wichita Indian Tribe v. United States***, 696 F.2d 1378 (Fed.Cir.1983),[7] for the proposition that any other tribe's use of the Pueblo's aboriginal claims was by permission of the Pueblo. Again, the Pueblo offer no evidence to support this proposition. The overall issue in ***Wichita Indian Tribe*** was whether the Wichita had lost its aboriginal title to all its land due to abandonment prior to the time that the United States assumed sovereignty over that land; there was no dispute that at one time in history, the Wichita tribe and several affiliated bands had previously held aboriginal title to the lands. 696 F.2d at 1379. The trial judge found that the tribe and its affiliated bands had lost title to all lands due to abandonment, and dismissed the tribe's claims against the United States. ***Id.*** at 1379. The Court of Appeals found that the trial court incorrectly concluded that a general abandonment "of perhaps *most* of the claimed lands in Oklahoma prevented them from recovering for the loss of *any* lands there." ***Id.*** at 1380 (emphasis in original). The appeals court agreed with the trial court that the area where the Osage, a long-standing Wichita enemy, hunted could not have been used exclusively by the Wichitas. "Lands continuously wandered over by adverse tribes cannot be claimed by any one of those tribes." ***Id***. at 1385. However, in regard to a small area in southern Oklahoma where the Wichita did not abandon two villages and adjacent cultivated tracts, the other tribes who used

[7] The Wichita Tribe originally brought their claims before the ICC pursuant to a special jurisdictional act (Pub.L. No. 95-247; 92 Stat. 158) to allow them to file, as they had not brought claims within the required time set forth in the Indian Claims Commission Act. That special jurisdictional act also grouped the affiliated Wichita, Keechi, Tawakonie and Waco bands as the "Wichita Indian Tribe," which proceeded as a single claimant. The case was later transferred, along with all other pending ICC cases, to the Court of Claims for final disposition. 696 F.2d at 1379.

or visited were allies of the Wichitas. The circuit court stated: "*If* the Comanches and Kiowas entered Wichita territory mainly to trade with them and considered this land to be that of the Wichitas, there visiting tribes should be considered guests of the Wichitas, and their presence would not affect the Wichita's aboriginal title." ***Id.*** (emphasis added). Because the evidence regarding the Comanches and Kiowas presence as either guests or adversaries was not specific enough to justify a finding of adversity and non-exclusivity, thereby defeating aboriginal title, or guest status and permissive use, which would not defeat the claim, the Court of Appeals remanded the case to the court of claims for specific findings.

In this case, the Pueblo presents no evidence that defines the area for which it implies it gave permissive use to other tribes. It does not explain what uses, by whom or how these uses were by permission only. Having admitted that other tribes used and occupied the lands for which it claims aboriginal title, the Pueblo cannot defeat a lack of exclusivity by claiming those uses were "permissive," when in fact there is no evidence to support such a claim.

The facts in this case do not bear any resemblance to the facts in any of the cases cited by the Pueblo. If anything, the facts in this case are more similar to those in ***Six Nations, etc., et al. v. United States***, 173 Ct. Cl. 899 (1965), in which the court determined that the tribal claimants:

> . . . had no settlements in the area or nearby; that other Indians lived intermittently in the triangle (and the vicinity) and passed through the area and that the use of the tract by the Six Nations (if there was any) was, at most, as a transitory passageway in common with these other tribes.

173 Ct. Cl. at 910-911. The Pueblo offers no evidence that shows it physically controlled or had dominion over either the Santa Cruz or Truchas drainage, or that the admitted uses by other tribes were by solely by permission.

III. Conclusion

The Pueblo offers no evidence to dispute the Truchas Acequias' facts that show it did not exclusively occupy and use either most or all of the Santa Cruz River Basin or the Rio de Truchas Basin. Instead, it implies, without specific argument or any evidentiary basis, that it does not have to show exclusivity, as it falls within one or all of the three exceptions to the general requirement to show exclusive use and occupancy. Without specific evidence to support these speculative musings, however, the Pueblo cannot establish that is entitled to any such presumption. The undisputed material facts show that the Pueblo did not have and does not have exclusive use and occupancy of the lands for which it now claims aboriginal title.[8] Because the Pueblo does not dispute the Truchas Acequias' material facts and does not offer evidence to support its claims that it does not have to show exclusive use and occupancy, the court should grant the Truchas Acequias' motion for summary judgment that the Pueblo does not have aboriginal title to the lands for which it claims "aboriginal" water rights.

[8] Further, even if the Pueblo could show that it had aboriginal title to a specific area at any one point in time, the inquiry regarding the current validity of that title does not end. The Pueblo must also show that the title was not extinguished by the act of any of the three successive sovereigns (King of Spain, Republic of Mexico and United States). ***United States v. Santa Fe Pacific Railroad Co***., 314 U.S. 339, 347 (1941)(Extinguishment can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominions adverse to the right of occupancy, or otherwise . . ."); see also ***Lipan Apache Tribe st al. v. United States***, 180 Ct.Cl. 487 (1967); ***Yankton Sioux Tribe v. State of South Dakota***, 796 F.2d 241 (8th Cir.1986); and that the Pueblo had not abandoned its aboriginal title to a specific area. ***Quapaw Tribe v United States***, 28 Ct. Cl. 45, 120 F. Supp.283 (1954); ***Uintah Utes of Utah v. United States***, 28 Fed.Cl. 768 (1993); ***Wichita Indian Tribe v. United States***, 696 F.2d 1378 (Fed.Cir.1983). The Truchas Acequias assert that the latter two inquiries are not necessary; the Pueblo can not show that its use and occupation of areas within the Rio de Truchas and the Santa Cruz River basins was exclusive.

Respectfully submitted,

/s/ Mary E. Humphrey
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CERTIFICATE OF SERVICE

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

/s/ Mary E. Humphrey