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.	68cv07488-BB-ACE Rio Santa Cruz Adjudication 70cv08650-BB-ACE Rio de Truchas Adjudication (Consolidated) Pueblo Claims Subproceeding 2

CITY OF ESPANOLA'S REPLY TO THE RESPONSE OF THE PUEBLO OF OHKAY OWINGEH AND TO THE RESPONSE OF THE PUEBLO OF SANTA CLARA AND THE UNITED STATES TO THE CITY OF ESPANOLA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On March 1, 2010, the City of Espanola ("City") filed a motion requesting summary judgment that Paragraph No. 4 of the claims of the United States and Paragraph No. 5 of the claims of Ohkay Owingeh (" ¶4 and ¶5 claims") as set forth in their respective Subproceeding Complaints should be denied as a matter of law. The City's motion had two components: that the ¶4 and ¶5 claims did not satisfy the pleading requirements for adjudication of a water right; and as uses arising from prospective transfers of surface rights to groundwater within the Rio Grande Underground Water Basin, they were subject to the administrative jurisdiction of the New Mexico State Engineer[1]. The City's motion was prompted by concerns that its RG-3067 well field would be impaired by

[1] The Rio Grande Underground Water Basin was declared by the New Mexico State Engineer on November 29, 1956. The Engineer asserted jurisdiction over groundwater development in the basin at that time. *See* Exhibit A to the State's Response to City of Espanola's Motion for Summary Judgment. The exhibit is a map of the Rio Grande Underground Water Basin within Rio Arriba, Mora, Santa Fe and San Miguel Counties. Espanola's well field of its R6-3067 wells is located within the basin in Rio Arriba County. *See* Exhibit No. 1 to Espanola's Motion for Summary Judgment.

unregulated transfers of surface water to groundwater by the United States and Ohkay Owingeh. The basis for the City's motion was that there was no disputed issue of fact that ¶4 and ¶5 applied to unexercised claims for which no groundwater points of diversion, amounts, purposes or place of use were identified. *See* Espanola Memorandum in Support of Motion for Summary Judgment ("Espanola Memorandum"), Undisputed Facts, ¶¶ 5, 6. With the exception of 38.0 acre-feet of domestic water use and use in a pumice plant, the Pueblo of Ohkay Owingeh uses no groundwater, and has used none in the past. *See* United States' Subproceeding Complaint, Table No. 2. Any surface to groundwater transfers would therefore create new stresses on the aquifer and require regulation within the comprehensive statutory framework for administrative transfers under state law. *See* Espanola Memorandum at 16-17; State's Response at 20-21.

In their Joint Response the Pueblo of Santa Clara and the United States assert that Espanola relies on "superseded" orders which require the specification of water rights claims, and that state laws have no applicability to Pueblo water rights because Pueblo water rights may be used for "any purpose" as a matter of federal law. These arguments are based on the fallacy that a Pueblo water right may be adjudicated to unspecified and unexercised future uses of groundwater.

Ohkay Owingeh filed a short statement in opposition to the City's motion, adopting the grounds set forth by the Pueblo of Santa Clara and the United States, relying on analytically unclear language in *State of New Mexico ex rel. Reynolds v. Aamodt,* 618 F. Supp. 993 (D.N.M. 1985) ("*Aamodt II*"**).** The Respondents have confused the distinction between adjudication and administration of water rights; the difference between Pueblo water rights and *Winters* reserved rights; and have ignored the need for regulation in administrating transfers of surface water to groundwater to protect existing uses.

The State of New Mexico filed a Response in support of the City's motion, *i.e.,* that changes from surface to groundwater were required to be made under State jurisdiction. The State requested that the Court grant the City's motion "denying the subject claims and affirming that administration of water rights decreed by this Court, specifically including any change of the point of diversion of surface water rights to groundwater, are matters of water rights administration to be handled under New Mexico law." State's Response at 2.

Without the regulatory protection sought by Espanola's Motion for Summary Judgment and the State's Response, the groundwater rights of other parties are at risk. Espanola's motion should be granted. There are no genuine issues of fact that the United States and Ohkay Owingeh have not satisfied the requirements for obtaining adjudication of the ¶4 and ¶5 claims.

ARGUMENT

POINT I

THE RESPONDENTS HAVE NOT ADDUCED FACTS TO DEFEAT SUMMARY JUDGMENT

In a statement on "Standard of Review," the United States and Pueblo of Santa Clara assert that the City's motion could be treated either as a motion for summary judgment or could be viewed by the Court as a motion for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12 (b) (6) "[s]ince it is not supported in any *material* respect by matters outside the pleadings…." (Emphasis added). Joint Response at 6. The United States and Pueblo then state that as a motion for judgment on the pleadings pursuant to Fed. R.Civ.P. 12(c), the applicable law is the same as that governing a motion to dismiss under Fed. R.Civ.P 12(b) (6).

Law governing motions to dismiss or judgment on the pleadings is not applicable to the City's summary judgment motion. Espanola moved for summary judgment under Fed R. Civ. P. 56,

that the ¶4 or ¶5 claims do not comply with "the criteria for quantifying Pueblo water rights." The City sought summary judgment that:

> Any change in use to groundwater must be made upon application to the New Mexico State Engineer required by state law, NMSA 1978, 72-12-1 *et. sec*. So that interested parties may appear to protect their rights.

The law is settled that "whether under Rule 12 (b) (6) or (c), when the court considers matters outside the pleadings, it must treat the motion as one for summary judgment under Rule 56." 2 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE 12.38 (3d ed, 2010); *see e.g., Latecoere International Inc. v. United States Department of the Navy* 19 F. 3d 1342, 1356 (11th Cir. 1994); *Nichols v. United States*, 796 F. 2d 361, 364 (10th Cir. 1986). Failure to convert to summary judgment is grounds for reversal. *See GFF v. Associated Wholesale Grocers, Inc.* 130 F. 3rd 1381, 1384 (10th Cir. 1997).

In its Memorandum in Support of its Motion, the City identified as undisputed issues of fact that it has a State Engineer permitted right to divert 2,780.26 acre-feet of groundwater per annum from its RG-3067 *et al*. permits, attached as Exhibit No. 1, and owns 1000 acre-feet of imported San Juan Chama water as set forth in Exhibit No. 2, its contract with the Bureau of Reclamation. Permit No. RG-3067-S-15 is the latest supplemental well permit governing the City's use of groundwater from the Rio Grande Underground Water Basin. Condition of Approval No. 5 states:

> 5. When the total combined diversion of water from wells RG-3067-S-15 exceeds 780.26 acre-feet, or if annual consumptive use exceeds 390.13 acre-feet, the resulting depletion to the Rio Grande and its tributaries from the appropriation of water under this and previous permits shall be offset by means of water imported from the San Juan River, including appropriate carriage losses as determined by the State Engineer, as set forth in Contract No. 8-07-53-WO190 dated February 16, 1978, between the United States of America and the City of Espanola. This permit is subject to the terms and provisions of the above contract.

The relevance of these exhibits is two-fold. First, Exhibit No.1 identifies Espanola's water rights, used for municipal supply. It is this resource which is at risk in unregulated transfers of surface water to groundwater because without the administrative process provided by state law, there is no other legal process in place to protect them from the adverse effects of surface to groundwater transfers. Condition of Appeal No. 5 contains the City's "offset" requirement regarding impacts on surface flows of the Rio Grande. As imported, non-native Colorado River water released from Heroin Reservoir, the San Juan-Chama water ameliorates the effects of Espanola's pumpage on the Rio Grande and leakance to the wells, ensuring that Espanola is diverting from the aquifer. Second, Exhibits Nos. 1 and 2 set forth the State's administrative process for managing Espanola's water rights, which is dependent upon the permits issued through the State's administrative process, and which would be affected by stresses on the aquifer which the State cannot regulate.

Fed. R. Civ. P. 56 (e) provides that when a motion for summary judgment is made:

> an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against the party.

This principle was amplified in a series of cases in 1986 expanding on the authority of district courts to enter summary judgment, when the Supreme Court adopted two principles relevant to this summary judgment motion, *i.e.,* that a summary judgment motion may be based on the absence of proof to support an adverse party's claims at trial, and that a responding party must adduce facts to show the existence of a genuine issue and defeat a summary judgment motion, commensurate with its burden of proof.

First, the Court heightened the standard for defeating summary judgment in *Celotex v. Catrett*, 477 U.S. 317 (1986). It held that "where the nonmoving party will bear the burden of proof

at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" 477 U.S. at 324. Summary judgment may be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. The Court termed this situation "a complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial." 475 U.S. at 322-23. Rule 56 (e) therefore requires the nonmoving party to go beyond the pleadings and "designate 'specific facts showing a genuine issue for trial.'" 477 U.S. at 324. In responding to a motion for summary judgment on an issue it bears the burden of proof at trial, the non moving party, in this case the United States and the Pueblos, are accordingly required to produce facts showing that there is a disputed issue of fact to avoid summary judgment.

Secondly in *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 257 (1986), the Court addressed the quantum of evidence that the responding party must adduce in responding to an issue on which it bears the burden of proof at trial. The Court held that the nonmoving party must provide evidence sufficient to obtain a verdict in his favor. He cannot "rest upon mere allegation or denials of his pleading…." 477 at 256.

The Responses filed by Ohkay Owingeh and by the Pueblo of Santa Clara and the United States contained only the contentions and argument of counsel. No factual evidence was submitted to raise issues of fact. Instead, the respondents relied solely on their pleading (Subfile Complaint) and their contentions of how it should be construed. This was not sufficient to avoid summary judgment.

POINT II

THE RESPONDENTS HAVE CONFUSED PUEBLO WATER RIGHTS WITH RESERVED *WINTERS* RIGHTS

In section D of their response, Santa Clara and the United States veer away from the argument made in Espanola's Memorandum and foray into the realm of hydrologic connections between surface and groundwater, where they confuse law applicable to Pueblo water rights with *Winters* reserved rights. *See Winters v. United* States, 207 U.S. 564 (1908) Espanola is well aware of the hydrologic connection between surface and ground water and made no such claims to the contrary in its Memorandum. Rather, Espanola sought to inform this court of the significant differences between *Winters* rights and aboriginal rights and their respective relationship to groundwater. *See* Espanola Memorandum at 15-16.

In *Aamodt II*, Judge Mechem applied the *Winters* doctrine of federally reserved water rights to groundwater, citing *Cappaert v. United States* 426 U.S. 128 (1976), in the Pueblo of Nambe which contains both Pueblo and *Winters* reserved rights. It is not clear whether he intended for the groundwater component to apply only to the *Winters* reserved rights. *See Aamodt II*, 618 F. Supp at 1010 citing *Cappaert v. United States, supra*. *Cappaert* is a federally reserved, surface water rights case, not a Pueblo aboriginal rights case.

In the area of water law, aboriginal rights usually arise indirectly from aboriginal land use for hunting and fishing. In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), for example, the Indians received an aboriginal or time immemorial priority for hunting and fishing purposes. Pueblo water rights derive from actual, historical uses of water originating aboriginally. It is important to distinguish aboriginal case law from reserved rights law. The two are not the same.

The doctrine of federal reserved rights was announced in the 1908 case of *Winters v. United States*, 207 U.S. 564 (1908). The Court held that when the United States withdrew lands from the

public domain in order to establish the Fort Belknap Reservation, it impliedly withdrew from the unappropriated waters of the Milk River sufficient water to satisfy the purposes for which the land was withdrawn. The Court concluded that "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." 207 U.S. at 577. A useful summary appears in *Cappaert v. United States*, *supra*:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonavigable streams. *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 522-523 (1971); *Arizona v. California*, 373 U.S. 546, 601 (1963); *FPC v. Oregon*, 349 U.S. 435 (1955); *United States v. Powers*, 305 U.S. 527 (1939); *Winters v. United States*, 207 U.S. 564 (1908).

426 U.S. at 138. The key attributes of the *Winters* reserved rights are that it applies only to unappropriated water made at the time of the reservation of land from the public domain, and is limited to the purposes for which the reservation was made. Water reserved at the time of a reservation of land from the public domain takes a priority date as of the time of the reservation. *See Cappaert v. United States*, 426 U.S. 128 (1976), and cases cited therein. The Montana Supreme Court stated the distinction this way:

> The date of priority of an Indian reserved water right depends upon the nature and purpose of the right. If the use for which water was reserved is a use that did not exist prior to creation of the Indian reservation, the priority date is the date the reservation was created. A different rule applies to tribal uses that existed before creation of the reservation. Where the existence of a preexisting tribal use is

> confirmed by treaty, the courts characterize the priority date as time in immemorial.

State ex rel. Greely v. Confederated Salish and Kootenari Tribes of Flathead Reservation, 712 P.2d 754 (Mont. 1985).

Water identified as having an aboriginal priority is quantified to uses which were perfected in aboriginal times, which does not include groundwater. A Pueblo's aboriginal water rights are quantified by historical, customary, and actual uses. *Aamodt II* at 999. The quantity of water to which the Pueblo is entitled to under its past uses is based on uses to which the water was historically applied for domestic and irrigation purposes, identified as "historically irrigated acreage." The *Aamodt* court concluded that as to aboriginal irrigation uses, the Pueblos had a prior right to all water necessary to irrigate their farmlands, but that the expanding nature of this right was cut off by the Pueblo Lands Act of 1924. 43 Stat. 636, as amended by Act of May 31, 1933, Ch. 45, 48 Stat. 108. ("Pueblo Lands Act of 1924"). This includes the expansion of its use to groundwater sources.

There is no analytically sound way in which to graft *Winters* law into a Pueblo rights case. The Pueblo of Ohkay Owingeh was not reserved from the federal domain. It is not a federal reservation. The *Winters* tradition does not apply to it. *Winters* rights like those in *Cappaert* are legally restricted to water unappropriated at the time of reservation, with priorities as of the date of reservation from the public domain. They are junior to pre-existing appropriations are not based on aboriginal uses.

POINT III

THERE IS NO FEDERAL RIGHT TO TRANSFER WATER FROM SURFACE TO GROUNDWATER USES

Adjudication of the ¶4 and ¶5 claims

The Pueblo of Santa Clara and the United States failed to establish the basis for an adjudication of groundwater rights. The ¶4 and ¶5 groundwater claims asserted in this Subproceeding by the Unites States and Ohkay Owingeh are factually deficient for obtaining adjudication of water rights or to defeat summary judgment. The United States and Ohkay Owingeh failed to set forth any of the required elements which merits dismissal of their claims. *See* NMSA 1978, § 72-4-19 (1907), Complaint of March 12, 1968, at ¶ II, Wherefore Clause ¶¶ 2, 3, or the Pretrial Order of March 24, 1986, ¶7, and the Special Master's Supplement to the Pretrial Order of May 20, 1987, ¶¶ 2,3. In the phraseology of the *Catrett* Court there has been "a complete failure of proof" on this issue by the Respondents. 477 U.S. at 323.

The ¶4 and ¶5 claims do not include any identification of priority, amount, purpose, periods, place of use, or point of diversion. *See* NMSA 1978, § 72-4-19 (1907), Complaint of March 12, 1968, at ¶ II, Wherefore Clause ¶¶ 2, 3, or the Pretrial Order of March 24, 1986, ¶7, and the Special Master's Supplement to the Pretrial Order of May 20, 1987, ¶¶ 2,3. The purpose of a stream system adjudication is to determine the nature and extent of each party's water rights. In this case certain basic elements were required to be part of a parties claimed water right. *See* Complaint of the State of New Mexico dated March 22, 1968, *State of New Mexico ex rel. State Engineer v. John Abbott, et al.,* United States District Court, No. 07488, Pretrial Order of March 24, 1986, ¶ 7, and Special Master's Supplement to the Pretrial Order of May 20, 1987, ¶¶ 2,3. These elements included: the date the water right was initiated; the lands to which it is appurtenant; the source of water; the purpose of use; the amount of water put to beneficial use; and the point and means of diversion. *Id.* The court required the United States to identify "each of the elements of the water rights claimed" on behalf of the Pueblo. *Id.* This requirement was followed in the Subproceeding complaints of both the United States and Ohkay Owingeh wherein they set forth and identified each

of the elements of the water rights claimed. The fact that the later scheduling order on Pueblo Claims requires that a Subproceeding complaint contain "a short and plain statement of each claim" does not change the nature of this Court's definition of what constitutes a claim. Scheduling Order on Pueblo Claims of December 17, 1998. Espanola was joined in this matter to protect its interests as they relate to the claims of the United States and the Pueblos. The lack of specificity in the ¶¶ 4 and 5 claims make it impossible for Espanola to identify the nature of such claims, to know how such claims might impact its permitted water rights, and to protect its interests. The United States and Ohkay Owingeh failure to state the elements of their groundwater claim prejudices Espanola in this matter.

The United States and the Pueblos claimed that "Espanola's Reliance on Pleadings and Superseded orders as Authority for its Motion is Misplaced." *See* Joint Response 6-7. Secondly, it is argued that the ¶¶ 4 and 5 claims are not for future uses of water. *Id* at 12. The first argument fails to account for the evidentiary requirements for establishing a primary groundwater right. The second argument relies on the fallacy that Pueblo water rights have an inherent right to be used at locations and purposes of use other than for those established prior to the Pueblo Land Act of 1924.

Administration of the ¶4 and ¶5 claims

In Subpart C of their Joint Response, the Pueblo of Santa Clara and the United States assert that Pueblo water rights may be used for "any purpose" as a matter of federal law and that this does not transform those claims into claims for "future uses." The Respondents state "[i]t has long been established that once adjudicated (that is, confirmed by a final decree, and assigned a quantity and priority date), Indian water rights may be used by a tribe however and whenever it chooses within" its own lands." This principle was first established in the leading Indian water rights adjudication, *Arizona v. California*, 373 U.S. 546 (1963)." *See* Joint Response at 12. The Respondents claim

that this "principle" emanates from the Special Master Report in that case issued by Simon Rifkind in 1960. They state: "[m]uch of the substance of the ruling in that case was contained in the 433-page report of Special Master Simon Rifkind." *Id.* at 12-13. However, instead of quoting Special Master Rifkind's report, the Respondents instead paraphrased a quotation taken from *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981). They state: "the Ninth Circuit Court of Appeals specifically noted the Special Master's [Rifkind's] ruling that 'water reserved for Indian Reservations may . . . be used for purposes other than agricultural and related uses .' 647 F.2d at 48 (quoting Report of Simon H. Rifkind, Special Master, to the Supreme Court, at 265-66, December 5, 1960." Joint Response at 13.[2] This argument is misplaced. Special Master Rifkind did not make the statements attributed to him.

The Supreme Court's decision in *Arizona v. California*, *supra*, resulted from an original suit brought by the State of Arizona against the State of California and other basin states to construe how much water was apportioned to lower basin states by the Colorado River Compact.[3] The United States was a party and asserted claims for the reserved rights for the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations in Arizona, California and Nevada. These fell into the portion of the opinion described as "Claims of the United States." 373 U.S. at 595-601.

[2] Respondents represent that the Ninth Circuit Court of Appeals "specifically noted" Special Master Rifkind's ruling that "water reserved for Indian Reservations may . . . be used for purposes other than agricultural and related uses,"' citing 647 F.2d at 48 (quoting report of Simon H. Rifkind, Special Master, to the Supreme Court, at 265-66, December 5, 1960). *See* Joint Response at 13. This is a mischaracterization. The Ninth Circuit quoted Rifkind that the means of quantification "does not necessarily mean…that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses," while not quoting his concerns regarding changes in consumptive use resulting from such transfers and the more important passage where he states that the issue "is not before me."

[3] *Arizona v. California* was an interstate case within the Supreme Court's original jurisdiction. The principal issue was to construe the apportionment provisions of the Colorado River Compact, 45 Stat. 1057, 1064, signed in 1922 at the Bishop's Lodge Resort in Santa Fe, as related to the Lower Basin States. The Colorado River Compact divided the Colorado River Basin into an Upper Basin (generally Colorado, New Mexico, Wyoming and Utah) and a Lower Basin (California, Arizona, Nevada). Each basin was apportioned 7,500,000 acre feet per year of surface water stored in Lake Mead in Nevada, with the Lower Basin able to increase its share under certain circumstances. The Upper Basin apportioned its share among its states in the Upper Colorado River Basin Compact, 63 Stat. 31 (1949). The Lower Basin made no such agreement among themselves. In *Arizona v. California, supra*, the United States Supreme Court determined that the Lower Basin's share had been apportioned by the Boulder Canyon Project Act, 45 Stat. 1057, 1064.

Special Master Rifkind's discussion of the awards to the tribes is found at pages 254 – 294 of his Report. Contrary to Respondent's assertion, he was explicit that the awards of water were only made for the purposes for which the reservations had been created, not for what he termed "change in character of use" of the rights, *i.e*. transfers of the kind proposed in ¶ 4 and ¶5.

Special Master Rifkind addressed the standard for quantification of water rights for the tribes, *i.e.*, practicably irrigable acres, not whether there could be any "change in character of use." What he said was as follows:

> The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. *The question of change in the character of use is not before me. I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.* (Emphasis added).

Report of Special Master Simon Rifkind, Arizona v. California at 265. He sounded a cautionary note on transfers which "might consume substantially more water than agricultural uses." *Id.*

Respondents go on to state that the Supreme Court "expressly affirmed this aspect of the report in a supplemental decree entered in *Arizona v. California* at 439 U.S. 419, 422 (1979)." *See* Joint Response at 13. The passage cited follows the Table where the unit diversion quantities for the five tribes were listed. 439 U.S. at 422. Apart from the fact that the tribal water rights at issue were reserved *Winters* rights, not Pueblo water rights like Ohkay Owingeh's, the passage did not refer to

changes from surface to groundwater. The paragraph states: "[i]f all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application, the total consumptive use, as that term is defined under Art. I (A) of said Decree, for said Reservation shall not exceed the consumptive use that would have resulted if the diversions listed in subparagraph (i) of paragraphs (1) through (5) of Art. II (D) of said Decree and the equivalent portions of any supplement thereto had been used to irrigation…" [4] Paragraphs (1) through (5) of Art. II (D) of the Decree each refer to water from the "mainstream" or (ii) "the quantity of mainstream water necessary to supply the consumptive use required . . . ." *Arizona v. California,* 376 U.S. 340, 344 (1964). Moreover, the Decree goes on to provide that "consumptive uses from the mainstream for the benefit of the above-named federal establishments, shall…be satisfied only out of water available, as provided in subdivision (B) of this Article…". 376 U.S. at 346. Subdivision (B) pertains to releases of surface water from Lake Mead. In other words, the passage quoted by the Respondents refers to the use of surface water, not surface to groundwater transfers, the subject of Espanola's motion.

POINT IV

OHKAY OWINGEH'S RESPONSE DOES NOT ACCURATELY ADDRESS THE HOLDINGS IN *AAMODT II*

Ohkay Owingeh filed a supplemental response to that of Santa Clara and the United States entitled Response in opposition to City of Espanola's Motion for Summary Judgment on the Adjudication of Pueblo/United States Groundwater Claims ("Ohkay Owingeh's Response"). In its first two pages of its argument, Ohkay Owingeh pontificates on the existence of "broad legal propositions" in Espanola's Memorandum but identifies no legal issue or "proposition" that it

[4] The Decree in *Arizona v. California*, 376 U.S. 340 (1964) defines "consumptive use" as "diversion from the stream less return flow, a definition applicable to surface water.

actually opposes. Therefore, because Ohkay Owingeh has offered no insight into what exactly it considers "broad legal propositions", Espanola cannot respond to these unsupported assertions.

However, Espanola can respond to the two issues actually identified in Ohkay Owingeh's Response. Ohkay Owingeh sets out its argument in two sections entitled "Rulings in *Aamodt II*" and "Pueblo Lands act of 1924". Although both sections address the rulings in *Aamodt II* Espanola will respond to each of Ohkay Owingeh's assertions in turn.

Rulings in *Aamodt II*

Ohkay Owingeh confuses the two separate elements of a water right, purpose of use and source of water, in an effort to discredit Espanola's argument. On page 4 of its Response, Ohkay Owingeh states " that the Indian Pueblo's had aboriginal rights 'to use all of the water of the…stream system' for domestic and irrigation purposes". Ohkay Owingeh's claim that this reference is "not stated as a restriction of the manner in which the Pueblos historically used water" is directly contradicted by the holding at 618 F. Supp. 993, 1010:

> The Pueblos have the prior right to use all of the water of the stream system necessary for *their domestic uses and that necessary to irrigate their lands*, saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act, supra. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 1010 (D.N.M. 1985) (*Aamodt II*)(emphasis added)

This paragraph of *Aamodt II* is Judge Mechem's holding in regards to the Pueblo Water Rights Section of the opinion, not a "recognition" as Ohkay Owingeh would lead this court to believe. Further, Ohkay Owingeh misinterprets Espanola's rationale for citing to this holding in *Aamodt II.* Espanola cites to this paragraph in *Aamodt II* in its Memorandum to directly contradict both Ohkay Owingeh's claim in ¶ 5 of its Subproceeding Complaint stating that it may "exercise its water rights and . . . use such rights *for any purpose*" and the United States' claim in ¶ 4 of its Subproceeding Complaint that "[o]nce the Pueblo of San Juan's water rights are quantified by

judicial decree, the Pueblo has the right, under federal law, to use such rights *for any purpose*". Under the holdings in *Aamodt II*, and as originally stated in Espanola's Motion for Summary Judgment, the "Pueblos have the prior right to use all of the water of the stream system necessary for *their domestic uses and that necessary to irrigate their lands…". Aamodt II* at 1010. (emphasis added).[5]

Pueblo Lands Act of 1924

Ohkay Owingeh again removes the very language in *Aamodt II* upon which Espanola relies. Ohkay Owingeh states the following portion of paragraph 5 on page 1010 in *Aamodt II;*

> The Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, *saving and excepting the land ownership and appurtenant water right terminated by the operation of the 1924 Pueblo lands Act…*

Response of Ohkay Owingeh at 6.

However, and most importantly the final line of paragraph 5 on page 1010 in *Aamodt II* states;

> The Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act, supra. *The acreage to which this priority applies is all acreage irrigated by the Pueblos between 1846 and 1924*. Acreage under irrigation in 1846 was protected by federal law including the Treaty of Guadalupe Hidalgo, supra, and the 1851 Trade and Intercourse Act, supra. The Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need. Acreage brought under irrigation between 1846 and 1924 was thus also protected by federal law. The 1924 Act, which gave non-Pueblos within the Pueblo four-square-leagues their first legal water rights, also *fixed the measure of Pueblo water rights to acreage irrigated as of that date*. *Aamodt II* at 1010, (emphasis added).

[5] Ohkay Owingeh's statements regarding the exercise of aboriginal water rights from groundwater sources are addressed in Point II in response to the more complete argument contained in the Joint Response of the United States and Santa Clara.

The passage above is clear. Pueblos have aboriginal rights for domestic and irrigations uses, on all lands that were irrigated between 1846 and 1924, and the 1924 act fixed the measure of Pueblo water rights to irrigated acreage as of June 7, 1924. Ohkay Owingeh's cite again conveniently omits the very language of the opinion upon which Espanola relied.

Ohkay Owingeh makes an additional claim that the Pueblo Lands Act "did not operate to terminate Pueblo aboriginal rights outside of the patented lands". In support if this they cite to Section 2 of the Pueblo Lands Act which again, when read in its entirety, directly contradicts the edited language included in Ohkay Owingeh's Response. The Pueblo Lands Act applies to "the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise." Pueblo Lands Act of 1924, Section 2. Therefore, the Pueblo Lands Act does not apply only to the 17,544.77 acres of land to which a patent was granted in 1864 by the surveyor general, but rather includes any additional lands granted by the United States and any lands acquired by the Pueblo. *See* acts of Congress approved Dec. 22, 1858 (XI, 374), and June 21, 1860 (XII, 71: see Gen. Land Off. Rep. for 1876, P. 242, and for 1880, p. 658). When read in its entirety, the language in *Aamodt II* is clear in that Ohkay Owingeh has an aboriginal priority only on those lands irrigated in 1924.

According to the holdings in *Aamodt II* , Ohkay Owingeh has the right to use water for irrigation and domestic uses and its aboriginal rights were fixed as to that acreage actually irrigated in 1924.

POINT V

FEDERAL LAW PROVIDES FOR THE UNIFIED ADMINISTRATION OF STATE AND FEDERAL WATER RIGHTS UNDER STATE LAW

The United States and Pueblo of Santa Clara contend that state laws cited by Espanola "have no applicability to Pueblo water rights." *See* Joint Response at 8-11. Respondents have presented the Court with an incomplete analysis which confuses adjudication with administration. Quantification of tribal rights pursuant to federal law is an exception to Congressional deference to the acquisition of water rights pursuant to state law *See generally United States v. New Mexico,* 438 U.S. 696 (1978); *California v. United States*, 438 U.S. 645 (1978). *See* Espanola Memorandum at 18. Administration of tribal rights, once quantified, is subject to no such exception. Two traditions of federal law have committed the administration of Pueblo water rights of state law: the Homestead Laws and the McCarran Act, 43 U.S.C. 666 (1988) where policies are applicable here.

The Homestead Laws and the Desert Land Act of 1877 severed the non-navigable waters from the public domain, vesting their ownership and administration in the western states and territories. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1953). These effects of these laws was to give to New Mexico State Engineer jurisdiction over groundwater lying within underground water basins "declared" by him with reasonably ascertainable boundaries, because the State's Groundwater Code was declaratory of existing law. *See Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); NMSA 1978, § 72-12-1 (2003).

The objective of the McCarran Amendment, 43 U.S.C. 666 (1998), was to provide for the unified administration of state and federal water rights. Post-decree administration was committed to the states under the principles of the McCarran Amendment, 43 USC § 666 (1988).

> Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water of course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Once adjudicated, the rights are incorporated into a decree, which becomes the operative document for administration in times of shortage or to change the uses as proposed by ¶4 and ¶5.

Because ¶¶ 4 and 5 seek the right to change water adjudicated to the Pueblo from surface sources to other purposes of use or to groundwater, an administrative transfer process occurs. *Lindsey v. McClure*, 136 F.2d 65, 70 (10th Cir. 1943), stands for the proposition that inherent in a water right is the right to change place of diversion, storage, or use "if the rights of other water users will not be injured thereby." The purpose of the administration issue raised by Espanola and joined by the State was to ensure that ¶¶ 4 and 5 would not be used to transfer rights from surface to groundwater without regard to the existing water rights of other users like Espanola. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) rejected the arguments of the United States and Tribes that the McCarran Amendment was limited in scope and did not encompass Indian reserved rights. *United States v. Idaho*, 508 U.S. 1, 8 (1993), held that ". . . the critical language of the second sentence of the McCarran Amendment submits the United States generally to State adjective law, as well as to State substantive law of water rights . . . ." In *In re the general Adjudication of all Rights to use Water in the Big Horn River System*, 835 P.2d 273, 278 (1992) the Supreme Court of the State of Wyoming concluded: "[t]he Tribes do not have the unfettered right to use their quantified right of future project water for any purpose they desire . . . ." The *Big Horn* court made the point urged by the City of Espanola, *i.e.*, that "the Tribes, like any other appropriator, must comply with Wyoming water law to change the use of their reserved from agricultural purposes to any other beneficial use and that the State Engineer may not be removed as the administrator of on-reservation water rights, because he has "general supervision of the waters of the state." *Id.* at 279, 282.

Espanola concurs in the State of New Mexico's Response to its Motion for Summary Judgment, and its contentions that the policies of the McCarran Amendment are applicable to its

motion. In its Memorandum, Espanola cited to *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) for the Ninth Circuit's caution against the "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." 726 F.2d at 1365. Such confusion could be avoided in this case through the application of state administrative law and procedure to proposed transfers from surface to groundwater within the Rio Grande Underground Water Basin.

State law contains a process that is expressly designed to ensure that any changes in purpose and place of use or point of diversion are made upon application to the State Engineer, followed by public notice, so that interested parties can appear in transfer proceedings to ensure that their water rights are not impaired by the proposed transfer." *See* NMSA 1978, §72-5-23 (1985) and §72-5-24 (1985) and under the Groundwater Code at § 72-12-7 (1985). There are three criteria: whether the proposed change impairs the existing rights of other, whether it is contrary to the conservation of water in New Mexico and whether it is detrimental to the public interest. *Id.* The State Engineer is not required to approve or deny an application but may approve an application subject to the conditions of approval designed to prevent the impairment of other rights. *See City of Roswell v. Barry*, 80 N.M. 110, 452 P.2d 179 (1969). The burden of proof of negating impairment remains on the party seeking the transfer. *See, e.g., In re City of Roswell*, 86 N.M. 249, 522 P.2d 796 (1974); *Heine v. Reynolds*, 69 N.M. 398, 367 P.2d 709 (1962).

CONCLUSION

No right to divert groundwater to supplement aboriginal water rights exists under the law of Pueblo water rights. Changes to groundwater from rights quantified to the United States and Pueblo of Ohkay Owingeh from surface sources must be conducted under the comprehensive procedures established for administering water rights by the State of New Mexico.

For the foregoing reasons, Espanola's Motion for Summary Judgment should be granted by this Court.

Respectfully submitted,

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By Electronically signed
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2010, the *City of Espanola's Reply to the Response of the Pueblo of Ohkay Owingeh and to the Response of the Pueblo of Santa Clara and the United States to the City of Espanola's Motion for Summary Judgment* was filed electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

By Electronically signed 7/8/10
Seth R. Fullerton