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

STATE OF NEW MEXICO ex rel. State Engineer, and 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.	)	**Pueblo Claims Subproceeding 2**

THE PUEBLO OF SANTA CLARA'S AND THE UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF THE MOTION TO STRIKE THE STATE OF NEW MEXICO'S RESPONSE TO CITY OF ESPAÑOLA'S MOTION FOR SUMMARY JUDGMENT ON THE ADJUDICATION OF PUEBLO/UNITED STATES GROUNDWATER CLAIMS

The Pueblo of Santa Clara ("Santa Clara") and the United States of America ("United States") hereby reply in support of their May 26, 2010 joint motion to strike (Doc. 2759) ("Motion to Strike") the May 3, 2010 *State of New Mexico's Response to City of Española's Motion for Summary Judgment on the Adjudication of Pueblo/United States Groundwater Claims* (Doc. 2744) ("State's Initial Brief"). Santa Clara and the United States assert that, rather than merely provide support for the *City of Española's Motion for Summary Judgment on the Adjudication of Pueblo/United States Groundwater Claims* (Doc. 2718) ("Española Motion"), the State's Initial Brief actually included new arguments and requested additional relief beyond that requested in the underlying motion filed by the City of Española ("Española"). As such, the State's Initial Brief constituted a substantive motion which included issues both beyond the scope of Subproceeding 2 and not ripe for determination, and was untimely filed.

In this reply, Santa Clara and the United States address arguments raised by the State of

New Mexico ("State") in its June 14, 2010 response in opposition to the Motion to Strike (Doc. 2766) ("State Rsp."), by Española in its June 14, 2010 response in opposition to the Motion to Strike (Doc. 2765) ("Española Rsp."), and by the Truchas Acequias in their June 14, 2010 response to the Motion to Strike (Doc. 2764) ("Truchas Aceq. Rsp."). In their responses, the Truchas Acequias mostly puzzle over the nature of the Motion to Strike while Española and the State set forth a more lengthy, but inaccurate, attempt at revisionist history regarding the underlying factual predicate for the Motion to Strike.

Notably, Española and the State continue to premise their responses on two utterly baseless assertions. They argue, incorrectly, that the United States and Ohkay Owingeh are seeking unlimited administrative authority over Ohkay Owingeh's adjudicated water rights, even though no such requests are made in the Pueblos Claims Subproceeding 2 complaints filed by the United States and Ohkay Owingeh. And they claim that Española's assertions about New Mexico's administrative authority somehow constituted a request for relief in the Española Motion. Española made no such request, however, and, even if such a request for relief had been properly included in the Española Motion, the question of scope and nature of administrative authority over adjudicated Pueblo water rights still would not be ripe for decision in Subproceeding 2.

I. THE COURT HAS AUTHORITY TO GRANT THE MOTION TO STRIKE INCLUDING THE ALTERNATIVE RELIEF REQUESTED

The State asserts that the Motion to Strike must be denied because there is no authority under which the Court may strike the State's Initial Brief. *See* State Rsp. at 2. This is based, however, upon the State's inaccurate contention that it has done no more than simply support the

relief requested in the Española Motion,[1] and has not engaged in requesting additional relief from the Court in an untimely manner. The fallacy of the State's contention is addressed in more detail in section II, *infra.* Santa Clara and the United States maintain that the State's Initial Brief is, effectively, a motion for summary judgment seeking new relief not before the Court in any motion timely filed, and that the Court thus has discretion to strike the document because it is untimely and contravenes the *Amended Order Setting Motions Deadlines, Briefing Schedule and Trial Date* (Doc. 2709) for Subproceeding 2.

Trial courts have inherent authority to manage their own dockets and the progress of the proceedings before them. Whether to grant or deny a motion to extend a court-ordered deadline or a motion to strike an untimely-filed motion is a decision committed to a trial court's sound discretion and is subject to review only for abuse of discretion. *See Merrill Scott & Assoc., Ltd. v. Concilium Ins. Services*, 253 Fed.Appx. 756, 763, 2007 WL 3253671 (10th Cir. 2007) (district court did not abuse its discretion in striking motion for summary judgment as untimely when motion was filed three months past the deadline (*citing with approval Arakaki v. Lingle*, 477 F.3d 1048, 1069 (9th Cir. 2007)(district court did not abuse discretion in striking counter motion for exceeding the deadline set by the court for summary judgment motions and for improperly including "numerous issues not raised in the motion which it purportedly countered"))); *see also Curran v. AMI Fireplace Co., Inc.*, 163 Fed.Appx. 714, 718, 2006 WL 137405 (10th Cir. 2006)

[1] It appears the State assumes that response memoranda supporting motions for summary judgment (by parties other than the movant) are routine matters. In fact, the Local Rules for the District Court of New Mexico do not contemplate memoranda in support of motions for summary judgment being filed by parties other than the movant. D.N.M. LR-Civ. 56.1(b)(stating that the moving party must file a written memorandum in support of the motion and that a "party opposing the motion must file a written memorandum" but containing no provisions for other parties to file memoranda supporting the motion).

(because district court properly concluded that response to summary judgment motion was untimely, district court "acted well within its discretion in striking that response"). To be sure, Fed.R.Civ.P. 6(b) is clear that courts can extend deadlines either *sua sponte*, in certain circumstances, or upon request of a party, but the Court did not do so here and no such request for leave to extend the deadline for substantive pre-trial motions was sought by the State. The Federal Rules also clearly provide that the governing scheduling order "may be modified only for good cause and with the judge's consent," Fed.R.Civ.P. 16(b)(4), and that the court has discretion to "issue any just orders" for "fail[ure] to obey a scheduling or other pretrial order." Fed.R.Civ.P. 16(f)(1)(C). Thus, there is ample authority for the relief requested by Santa Clara and the United States.

However, rather than concede that the additional relief it requested in its response to the Española Motion constituted a new and untimely motion for summary judgment, the State would have the Court deny Santa Clara's and the United States' Motion to Strike based upon case law regarding motions pursuant to Fed.R.Civ.P. 12(f). *See* State Rsp. at 2-3. The Truchas Acequias take a different tack and posit, without citation to any authority, that the Court should either deny the additional relief requested, or not address the new arguments to the extent the State either requested such relief beyond that requested in the Española Motion or made arguments beyond the scope of those made by Española. *See* Truchas Aceq. Rsp. at 3.[2]

While there is support for the proposition that motions to strike filed pursuant to

[2] Española bases its arguments for denial of the Motion to Strike primarily upon its assertions that the State did not include any new arguments and did not request additional relief in the State's Initial Brief. *See* Española Rsp. at 1-2. Those issues are discussed in section II, *infra*.

Fed.R.Civ.P. 12(f) are limited to pleadings only (*i.e.*, complaints, answers, and, in some instances, a reply to an answer), Santa Clara and the United States underscore here that the Motion to Strike was not based on Rule 12(f). There is no need to look to Rule 12(f) because the Court retains discretion to strike an untimely motion (which is, in essence, what the State's Initial Brief constituted) and Fed.R.Civ.P. 7(b) provides general authority for motions not otherwise specifically provided for in the rules. Moreover, case law regarding motions to strike that are filed pursuant to Rule 12(f) do not uniformly mandate solely those outcomes advocated by the State or the Truchas Acequias. The Court has discretion to grant the alternative relief sought by Santa Clara and the United States in their Motion to Strike -- namely, the opportunity to file a substantive brief responding to the new arguments. *Cf. Baloch v. Norton*, 517 F.Supp.2d 345, 349 n.2 (D.D.C. 2007) *aff'd*, 550 F.3d 1191 (D.C. Cir. 2008) (on motion to strike a reply brief for raising new arguments, court has discretion to either grant leave to file a sur-reply or to disregard those arguments in resolving the underlying motion); *cf. Headrick v. Rockwell Int'l Corp*., 24 F.3d 1272, 1278 (10th Cir. 1994) (when new arguments are filed in the context of a reply brief, the court should have the benefit of a response to those "late-blooming" arguments).

Given the wide-ranging nature and scope of the additional ruling sought by the State regarding the Court's post-decree administration authority, Santa Clara and the United States urge that, if the State's Initial Brief is not stricken, such briefing be scheduled to allow additional parties to the case who are not parties to Subproceeding 2 to participate. This request was made to ensure all parties have notice and an opportunity to be heard on the issue of post-decree administration authority, which directly affects the water rights of all parties to this case. The State and Española cast many aspersions upon this request and those specific arguments raised by

the State and Española are addressed in more detail in section V, *infra.* However, those arguments in no way negate the fact that the Court retains the discretion to allow the additional briefing requested by Santa Clara and the United States, in the event the Court chooses not to strike the State's Initial Brief as being a motion untimely filed pursuant to the governing scheduling order for Subproceeding 2.[3]

II. THE STATE IMPERMISSIBLY REQUESTED ADDITIONAL RELIEF BEYOND THAT REQUESTED IN THE ESPAÑOLA MOTION

Española and the State both insist that the State's Initial Brief requested no additional relief above and beyond that sought by Española. Yet, as described in more detail below, their denials are contradicted on the face of the Española Motion and are belied by the careful wording choices employed by both Española and the State in their responses. Both parties impute to Española claims for relief that Española did not, in fact, include in its motion for summary judgment.

D.N.M.LR-Civ. 56 specifies that the moving party seeking summary judgment must file both a motion and a memorandum in support of the motion. However, it is the motion itself that must set forth the specific judgment relief the movant requests as a matter of law. *See* Fed.R. Civ.P. 7(b)(1)("A request for a court order must be made by motion. The motion must:. . .(C) state the relief sought."). In the Española Motion, Española specifically requested that the Court

[3] The State concedes that the Court has such discretion, although it admonishes the Court not to exercise that discretion unless the Court reaches specific conclusions that the State deems unreasonable. *See* State Rsp. at 19. Nonetheless, the State also admits that it would be fair to allow Santa Clara and the United States "to respond on the issue of the role of New Mexico courts in administering United States and Pueblo water rights within New Mexico's comprehensive system of administration," *id*. at 13, but only if the State is allowed to reply, and only if such fairness extends to Santa Clara and the United States but not other affected parties. *See id.* at 13 and 18.

"enter [an] order dismissing ¶ 5 of the Subproceeding [2] Complaint of the Pueblo of San Juan and ¶ 4 of the United States' Subproceeding [2] Complaint with prejudice." Española Motion at 2. The Española Motion alleged multiple grounds for the relief it requested, but the only relief requested was the dismissal of the two claims in the Subproceeding 2 complaints.[4]

The State's Initial Brief, however, included a request that the Court "Rule that the Strong Congressional Policy of [the] McCarran [Amendment] Controls[, Requiring the] Administration [of Pueblo Water Rights under] New Mexico Law" (*see* State's Initial Brief at 28, with additions primarily as provided in the State's Rsp. at 6, n.2) and argued throughout that the Court could and should rule as a matter of law regarding the scope of the McCarran Amendment on the State's post-decree administration authority based upon the undisputed facts presented in the Española Motion.[5] *See*, *e.g.*, State's Initial Brief at 11-12.

The State and Española doggedly insist that the State did not request relief in addition to that which was contained in the Española Motion. Yet, at the same time, the State tacitly acknowledges that Española did not affirmatively request a ruling by the Court regarding post-decree administration. While the State cites the Española Motion for the assertion made therein by Española that "[a]ny change in use to groundwater must be made upon application to the New Mexico State Engineer as required by state law. . .," *see* State Rsp. at 5 (*citing* Española Motion

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[4] Española raised additional arguments in the *Memorandum in Support of City of Española's Motion for Summary Judgment on the Adjudication of Pueblo/United States Groundwater Claims* (Doc. 2720) ("Española SJ Memorandum") but it is Española's motion that must contain the request for relief. Fed.R.Civ.P. 7(b)(1).

[5] In fact, most of Española's allegedly undisputed "facts" are inaccurate legal contentions. *See Response of the Pueblo of Santa Clara and the United States of America to City of Española's Motion for (Partial) Summary Judgment on the Adjudication of Pueblo/United States Groundwater Claims* (Doc. 2741) ("Santa Clara/US Rsp. to Española") at 3.

at 2), the best the State can do is argue that "[t]his legal assertion regarding administration was *relied on* by the City when it prayed for dismissal." *Id*. (emphasis added). The State does not, and cannot, directly claim that this "legal assertion" or "argument" was part of the prayer for relief made by Española. *See id.; see also* Española Motion at 2 (wherefore clause).

Española likewise parses its words carefully (and tellingly) when arguing that the State's Initial Brief did not advance a request for a ruling from the Court above and beyond that requested in the Española Motion. Española makes a stilted yet revealing argument about what the relief it requested in its motion was "predicated on," rather than discussing what that requested relief was. *See* Española Rsp. at 1. Española's response also contains an artful discussion to the effect that the State was merely "amplifying" or "expanding" upon the same sorts of issues of concern to Española through the lens of a water administrator instead of through the lens of a water user, *see id.* at 2, 4, and 6, and was supporting Española's "contention" that any change by Ohkay Owingeh in point of diversion from surface to ground water must be made by application to the New Mexico State Engineer. *See id.* at 8. However, nowhere in Española's response to the Motion to Strike does Española assert that its motion affirmatively requested a ruling from the Court regarding the nature and scope of post-decree administration or a declaratory judgment regarding the applicable law or venue[6] for post-adjudication administration of Pueblo water rights. There is, in fact, no mention of the McCarran Amendment in the Española Motion and what little mention is explicitly made by Española in its

[6] The State has gone so far as to question which court has jurisdiction to administer Pueblo water rights and maintains that state district courts, not this Court, should have jurisdiction over any disputes regarding the administration of all rights to be adjudicated by this Court in this case. *See* State's Initial Brief at 14-15, 20, 24-25. Nothing of this sort was so much as mentioned in passing in the Española Motion, or even the Española SJ Memorandum.

memorandum brief fills, at best, one page of its 20 and ½ pages (not counting signature blocks). *See* Española SJ Memorandum at 19-20. This is in stark contrast to the State's Initial Brief, where the McCarran Amendment is explicitly invoked on 19 of its 27 and ½ pages (again, not counting signature blocks) and is woven inextricably throughout the arguments in the entire brief.

In fact, the State admits that "the central question" it wants the Court to answer is "whether there shall be state administration, as mandated by Congress through the McCarran Amendment," *see* State Rsp. at 12 (emphasis omitted), and asserts that an affirmative ruling on the scope of the McCarran Amendment is somehow a necessary predicate to ruling on the relief Española requested. *See id.* ("[*I*]*f* Congress has mandated administration of United States and Pueblo water rights within comprehensive state water rights administration systems, *then* the City is entitled to summary judgment that the subject claims are incorrect as a matter of law. . . .") (emphasis added). Yet, the relief sought by Española would be wholly granted by an order that dismissed the two challenged paragraphs without any reference to, or discussion of, the post-decree administration issues for which the State has requested rulings.[7]

Despite Española's and the State's attempts to revise history, the record reveals that only the State, and not Española, requested a ruling as a matter of law regarding what the McCarran Amendment does or does not require as to the application of New Mexico law (or the jurisdiction of state courts) to the administration of Pueblo water rights. The State, however, made this request too late (two months after the applicable deadline) and thus impermissibly under the

[7] For example, an order dismissing the challenged paragraphs for failing to "comply with the requirements of the March 22, 1968 Complaint," Española Motion at 1, though it would be erroneous as a matter of law, *see* Santa Clara/US Rsp. to Española at 6-7, would grant all relief sought by the Española Motion based upon one of the alternative grounds asserted therein.

governing scheduling order for Subproceeding 2.

III. THE ADDITIONAL RELIEF REQUESTED BY THE STATE IS OUTSIDE THE SCOPE OF SUBPROCEEDING 2

The State, Española, and the Truchas Acequias all argue, albeit in slightly different ways, that the United States and Ohkay Owingeh have "opened the door" to a ruling now regarding the nature and scope of post-decree administration of Ohkay Owingeh's past and present use water rights to be adjudicated in this Subproceeding, because the Subproceeding 2 complaints filed by Ohkay Owingeh and the United States, as Trustee for Ohkay Owingeh, include claims that Ohkay Owingeh should be able to use the water rights it is adjudicated "for any purpose."[8] *See* State Rsp. at 8-10; *see also* Española Rsp. at 9; *see also* Truchas Aceq. Rsp. at 2. However, as noted on page 5 of the Motion to Strike, the words "administrative authority" are nowhere to be found in either the *United States' Subproceeding Complaint* (Doc. 2463) ("U.S. Subproceeding 2 complaint") or the *Subproceeding Complaint of Pueblo of San Juan* (Doc. 2467) ("Ohkay Owingeh Subproceeding 2 complaint"). Undeterred by a reminder of the actual contents of the documents in question, the State and Española continue to assert that the Subproceeding 2 complaints allege "unlimited administrative authority," State Rsp. at 5, "extreme post-decree administrative authority," *id.* at 9, and "unlimited power." *Id.* at 15; *see also* Española Rsp. at 2-3. But the insistent repetition of these assertions fails to make them true.

The record of this entire case reveals that the United States has never asked the Court to "recognize in [any] Pueblo unlimited administrative authority over whatever water rights this

[8] Ohkay Owingeh's Subproceeding 2 Complaint also alleges that its use of its water rights is not limited to the adjudicated location or source of water. *See Subproceeding Complaint of Pueblo of San Juan* (Doc. 2467) at 2.

Court may ultimately decree to the Pueblo." State's Initial Brief at 1; *cf*. State Rsp. at 5. Indeed, on the record of every water rights adjudication in the State of New Mexico, the United States has never asked any court to enter such an absurd ruling.[9] If there were any plausible reason for believing that any party had requested such relief, the United States would affirmatively oppose the granting of such relief. However, there is no reason to believe any such claim for relief has been made in this case, much less in Subproceeding 2. Instead, the claims that the State and Española impute to the United States and Ohkay Owingeh are merely a gross mischaracterization of the two paragraphs at issue in the Subproceeding 2 complaints, and the State's and Española's arguments evade directly relevant precedent.

Decades ago, the United States Supreme Court clearly signaled that tribal water rights are not restricted to those purposes or places of use which served as the basis for the quantification of the tribal water right. In *Arizona v. California*, 373 U.S. 546, 600-601 (1963) ("*Arizona I"*), the Court affirmed the methodology of the Special Master it appointed for quantifying certain reserved water rights of the Colorado River tribes at issue. The methodology, known as "Practicably Irrigable Acreage," was based upon agricultural purposes associated with the tribes' reservations. The Special Master, in his report establishing this quantification standard, stated that the uses of the water reserved for those Indian reservations were not limited to agricultural purposes or related uses because the "decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow." Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-66 (December 5, 1960)

[9] Among other problems, "unlimited" authority in any one Pueblo would be inconsistent with the United States' role as Trustee both for the benefit of that Pueblo and for the benefit of neighboring Pueblos.

(*quoted in Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981)). In *Arizona I*, the Court's decision did not squarely address the issue of whether the water rights quantified according to this standard could only be used for agricultural purposes. However, in a later opinion in the case, *Arizona v. California*, 439 U.S. 419, 422 (1979) ("*Arizona II"*), the Court, in approving a stipulation recognizing non-agricultural uses of the tribes' reserved rights, stated that using this agricultural-based quantification standard to adjudicate the water rights of the tribes in no way restricted the subsequent usage of those water rights to irrigation "or other agricultural application" so long as the quantified amounts were not exceeded.

This principle – that tribal water rights are not limited under federal law to solely those places and purposes of use that served as the basis for the quantification of those water rights -- has been held applicable to the adjudication of the water rights of the Pueblo Indians who reside in the Pojoaque River Basin, just south of the Santa Cruz and Truchas Basins at issue in this adjudication. *See* Memorandum Op. and Order, *New Mexico v. Aamodt*, No. 6639 (D.N.M.)(Dec. 1, 1986) (Doc. 2879) at 2-3 (allowing, independent of state law and procedures, Tesuque Pueblo to use its aboriginal water rights, which were quantified primarily based upon surface water irrigation, at a groundwater point of diversion for a mobile home park it took over on its lands)[10]; *see also* Memorandum Op. and Order re: Special Master's Report on Nambé Reserved Rights, *Aamodt* (July 10, 2001) (Doc. 5916)("[T]he Pueblos may use the water they are adjudicated in any fashion they choose.").

Yet, the State, without any substantive argument about these directly relevant cases, wholly dismisses this precedent. In its response to the Motion to Strike, the State does not even

[10] This opinion is discussed in more detail in Santa Clara/US Rsp. to Española at 14.

acknowledge the on-point district court *Aamodt* rulings and remains generally dismissive of the Tenth Circuit Court of Appeals' ruling in *Aamodt* that Pueblo water rights are governed by federal, not state, law,[11] because the "question regarding Pueblo water rights before the *Aamodt I* court was strictly related to the adjudication of the rights, not their administration." *See* State Rsp. at 7, n.3. This is, of course, ironic, since the issue before the Court now in Subproceeding 2 *is* the adjudication of part of Ohkay Owingeh's water rights, not their administration. The State does briefly acknowledge Supreme Court precedent in *Arizona II*, but seems to imply, once again, that it was wrongly decided or not germane because it was not focused on the post-adjudication administration question the State believes must be answered now before the rights are even quantified. *See* State Rsp. at 15-16; *see also* State's Initial Brief at 4 ("It is true that *Arizona v. California* . . . stated that the reserved rights in question there, once quantified, may be used for other purposes - but it did not address whether those changes can be made without regard to adverse effects on non-Indian users."). In its response to the Motion to Strike, Española makes no mention at all of *Arizona II* or the directly-relevant *Aamodt* rulings applying the same principle to Pueblo aboriginal rights.

The United States is not seeking to do more through Pueblo Claims Subproceeding 2 than Subproceeding 2 allows. The Court has been clear that Subproceeding 2 "shall consist of the adjudication of any Pueblo Claims based on past or present uses of diverted water on lands of the Pueblo of San Juan [now known as Ohkay Owingeh]" *Scheduling Order on Pueblo Claims* (Doc. 2215) at 5, sec.2.2. Contrary to the State's and Española's assertions, the United States and Ohkay Owingeh through their Subproceeding 2 complaints are not seeking a ruling establishing

[11] *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976).

"unlimited" or "unfettered" or "unqualified" or "absolute" or "extreme post-decree administrative authority" for Ohkay Owingeh's water rights "without regard to potential effects on other users." State Rsp. at 5, 8-10, and 15 (repeated use of "unlimited"); *id.* at 9 ("extreme post decree administrative authority"); Española Rsp. at 2 ("unfettered"); *id*. at 3 (use of "absolute" and "unqualified" (*citing* State's Initial Brief at 6)). Rather, the United States and Ohkay Owingeh,[12] in accordance with the principle established in *Arizona II* and echoed by the *Aamodt* and other lower federal courts, is simply seeking to ensure that Ohkay Owingeh is not locked into only those specific uses of its water rights which served as the basis for the quantification of those rights. *See* U.S. Subproceeding 2 Complaint at 10-11 (prayer for relief includes claims that the rights adjudicated not be confined to only those uses that served as the basis for the adjudication); *accord* Ohkay Owingeh Subproceeding 2 Complaint at 5-6. Santa Clara and the United States reiterate that there is no request anywhere in the Subproceeding 2 complaints for a determination on the scope of administrative authority. And, as discussed in section IV below, the larger issues regarding what law is applicable, or which court has jurisdiction, for the administration of all of the Pueblos' water rights once they are decreed are simply not ripe for decision in or through Subproceeding 2.

IV. THE ADDITIONAL RELIEF REQUESTED BY THE STATE IS NOT RIPE FOR DECISION

Both Española and the State insist that a ruling that the McCarran Amendment requires the administration of Pueblo water rights under New Mexico law is ripe for decision even

[12] Santa Clara and the United States take no position in this reply regarding other assertions contained in Ohkay Owingeh's Subproceeding 2 Complaint as to its claims to water rights outside of its current landholdings and its allegations of exclusive use and occupancy of areas throughout the Santa Cruz and Truchas Basins.

though, as discussed *supra*, there is no request for such a ruling properly before the Court. *See* State Rsp. at 13-15; *see also* Española Rsp. at 8-10. In their arguments regarding ripeness, both parties place great reliance on *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003)("*2003 Minnow*"), an opinion that the Tenth Circuit Court of Appeals has vacated because the appeal became moot. *Rio Grande Silvery Minnow v. Keys*, 355. F3d 1215 (10th Cir. 2004).[13] Even though the *2003 Minnow* case is technically no longer applicable law, it is noteworthy that the panel decision that was vacated supports the United States' and Santa Clara's position.

In the *2003 Minnow* case, the Tenth Circuit specifically noted that there was an already well-developed factual record in that case, accumulated over a twelve-year period, that lent the case to being ready for a decision on a now purely legal issue. 333 F.3d at 1121. The opinion also made clear that one of the factors that tipped the balance for ripeness was the fact that underlying case involved the potential extinction of an endangered species under a law that has been interpreted by the Supreme Court as admitting no exception regarding preservation of endangered species. *Id.* Those factors outweighed the risk of a premature decision. *See id.* at 1120-21. Such factors do not exist here.

Española simply asserts that the challenged claims in the two Subproceeding 2 complaints would pose "an immediate threat to the City's existing rights from groundwater" if the claims are recognized in the adjudication decree. *See* Española Rsp. at 9. Yet, there is no

[13] Recently, the Tenth Circuit Court of Appeals even vacated the underlying district court opinion that served as the basis for the mooted appeal in *2003 Minnow*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096 (10th Cir. 2010).

factual record of an existing threat to Española's (probably junior) water uses[14] by Ohkay Owingeh, and it is entirely unclear at this juncture what the nature of that threat would be: we have no facts at issue regarding the location or uses or even relative priority dates that might be at issue. It is therefore difficult to conceive how, in the current adjudication of a subset of Ohkay Owingeh water rights, issuing a decision regarding the nature and scope of applicable law for post-decree administration of Pueblo water rights "would be of practical assistance in setting the underlying controversy to rest." *Cf. 2003 Minnow* at 1121 (internal citation omitted). The issue has not been substantively briefed by all the parties[15] and would have sweeping ramifications far beyond the scope of Subproceeding 2 (especially for all five of the Pueblos in this case and the United States as their Trustee). Furthermore, there is no developed factual record showing a need for immediate action. It is thus inappropriate to decide questions affecting the administration of all rights in this case within the limited context of Subproceeding 2.

V. ADDITIONAL BRIEFING SHOULD BE ALLOWED IF THE COURT CHOOSES NOT TO STRIKE THE STATE'S INITIAL BRIEF

In their Motion to Strike, the United States and Santa Clara included a request for alternative relief if the Court chooses not to strike the State's Initial Brief. In that event, the

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[14] Española's water rights in this case have not yet been adjudicated and some of the amounts under permit to Española have not yet been put to use. Thus, at best, they currently are inchoate rights.

[15] Despite the State's claims to the contrary, the United States and Santa Clara have not "been heard" already on the issue of the nature and extent of the McCarran Amendment's scope related to future administration of Pueblo water rights. *See* State Rsp. at 10-11. The United States and Santa Clara did address the fact that McCarran Amendment does not substantively alter federal law standards for the adjudication of tribal water rights, and addressed those arguments because Española's Motion is seeking to dismiss claims for the adjudication of Ohkay Owingeh's rights (*see* Santa Clara /US Rsp. to Española at 10-11), but that is a separate matter from briefing that would be necessary regarding post-decree administration authority.

United States and Santa Clara requested that the Court notice a scheduling conference in the main case so that all parties have the opportunity to participate in briefing the issues raised by the State regarding post-decree administration. Española argues that this request for alternative relief is "disingenuous," Española Rsp. at 10, and the State claims it to be unjustified for being illogical, impractical, and unfair. *See* State Rsp. at 17-18.

Española bases its argument on the fact that the past and present diversion-based water uses of the Pueblos of Nambé and San Ildefonso which were the subject of Pueblo Claims Subproceeding I were settled, and on an assumption that the settlement agreement terms somehow evinced a lack of further interest by those Pueblos in groundwater administration issues. *See* Española Rsp. at 11-12. More important to Española, it appears, is the fact that the Subproceeding I settlement agreement did not implicate any issues of concern to Española regarding its own use of groundwater. *See id*. Thus, Española argues that neither the Pueblo of Nambé nor the Pueblo of San Ildefonso (and, by parity of reasoning, the Pueblo of Pojoaque because no past and present uses of diverted water were claimed for it during Subproceeding I) could possibly have an interest in the question of what the nature and scope of post-adjudication administration authority is for Pueblo water rights in this adjudication.

However, Española ignores the fact that the settlement of the Subproceeding I claims only addressed a subset of the water rights that may be adjudicated to the Pueblos of Nambé and San Ildefonso (or the Pueblo of Pojoaque) in this case. *See, e.g., October 1, 2004 Supplemental Scheduling Order on Pueblo Claims* (Doc. 2447) at 5 (Pueblo Claims Subproceeding 5 to "consist of the adjudication of any Pueblo Claims based on an asserted entitlement to provide for future irrigation, municipal, household, industrial, and other domestic uses of water, whether

characterized as *Winters* rights using the PIA quantification standard or any other theory of law."). Given the far-reaching nature of the additional relief requested by the State, it only makes sense that, as a matter of due process, all parties who could be impacted by a ruling regarding the nature and scope of administrative authority over Pueblo (and other) water rights should have notice and an opportunity to participate in briefing on such an important matter. Because all five Pueblos in the *Abbott* adjudication may have additional water rights adjudicated to them in subsequent Pueblo Claims Subproceedings, it is essential that all the Pueblos in this case at least be given the opportunity to be heard.

Furthermore, the United States thus far has had no reason to expect that questions concerning the administration of water rights that the United States claims in its proprietary capacity, *e.g.*, on behalf of the United States' Forest Service and the Bureau of Land Management, would be decided in the context of this Pueblo Claims Subproceeding 2. The State's attempt to shoehorn such broad and untimely issues into this Subproceeding should be stricken. Otherwise, the United States should be given an opportunity to submit briefing on a schedule that would allow ample opportunity for consultations with all the affected agencies and policy level decisionmakers within the federal government concerning both the United States' proprietary claims and claims as Trustee for the benefit of the Pueblos. Likewise, unknown numbers of other parties who have water rights at stake in this case, but are not parties to this Subproceeding, should be given notice and an opportunity to be heard concerning the State's proposals regarding administration.

The State raises other concerns about the alternative relief requested by the United States and Santa Clara. The State first argues that, logically, if the Court finds that the State's Initial

Brief is, in effect, a new motion for summary judgment, then there would be no need for further briefing. *See* State Rsp. at 17. The United States and Santa Clara emphatically agree that no additional briefing is needed if the Court finds that the State's Initial Brief is a dispositive motion and then strikes it for being untimely filed, which is precisely why the request for a briefing schedule is posed as *alternative* relief.

Next, the State argues that "substantial delays" and a number of "difficult questions" would arise, as a practical matter, if the Court allowed the opportunity for all who may be implicated by the additional relief sought by the State to participate in briefing the issue of post-decree administration authority. *Id.* at 18. To this, the United States and Santa Clara reply that greater delays, difficulties, hardship, and prejudice would ensue if due process considerations are ignored for the briefing of an issue that is outside the scope of Subproceeding 2 and which implicates the rights of other parties who are not participating in Subproceeding 2. In any event, the State cannot be too concerned about delays since the State has indicated it has no objection to allowing the United States and Santa Clara to brief a favored issue of the State's, namely the issue of which court - state or federal - should have jurisdiction over administration of the final adjudication decree to be issued in this case. *See id.* at 13.

Finally, the State argues that it is unfair to allow additional briefing because the State relied upon the governing scheduling order and because it would "experience difficulty allocating additional resources for additional pre-trial processes including an expanding briefing obligation." *See id.* at 18. The State's cries of unfairness due to its reliance on the scheduling order is ironic since the underlying basis for the United States' and Santa Clara's Motion to Strike is that the State flouted the governing scheduling order in this case by filing what is *de*

facto an untimely dispositive motion. It is thus within the Court's discretion to either strike that motion or to allow additional briefing to occur. The State's concerns about resource constraints for additional briefing fare no better, since, again, the State has already agreed to, if not invited, additional briefing (albeit by Santa Clara and the United States only) regarding certain post-decree administration issues raised by the State. *See id.* at 13.

VI. CONCLUSION

For the reasons set forth in the Motion to Strike and those discussed herein, Santa Clara and the United States urge the Court to grant the Motion to Strike, or in the alternative, as requested in the Motion to Strike, to set a scheduling conference in the main case to establish a briefing schedule regarding the post-decree administration issues raised by the State.

Respectfully submitted,

/s/_electronically signed 07/15/10 JRA
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2010, I filed the foregoing 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.

/s/ electronically signed 07/15/10
Jessica R. Aberly