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

STATE OF NEW MEXICO, *ex rel.*	)	
STATE ENGINEER, *et al.*,	)	**No. 68Cv07488-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**

STATE OF NEW MEXICO'S RESPONSE IN SUPPORT OF TRUCHAS ACEQUIAS' MOTION TO DISMISS PUEBLO OF SAN JUAN'S ABORIGINAL TITLE CLAIMS

The State of New Mexico *ex rel.* State Engineer ("State") hereby responds to the *Truchas Acequias' Motion To Dismiss Pueblo Of San Juan's Aboriginal Title Claims* (Doc. No. 2750, filed May 3, 2010) (the "*Motion*"). The *Motion* seeks a determination by the Court that the Pueblo of San Juan's aboriginal title claims are against the United States (since is it the major landowner in both the Santa Cruz and Truchas watersheds) and that such claims are now barred because they are within the exclusive jurisdiction of the Indian Claims Commission and the deadline for filing has passed, so that they may not now be heard in any court. This Response provides additional support for the Acequias' position.

I. The Pueblo's Aboriginal Title Claims to Lands Owned By the United States Are Barred by the Principles and Policies Set Forth in *Navajo Tribe of Indians v. New Mexico.*

The Truchas Acequias' *Motion* relies heavily on *Navajo Tribe of Indians v. New Mexico,* 809 Fd. 2d 1455 (10th Cir.1987), the leading Tenth Circuit authority. In *Navajo Tribe,* the Tribe

was allotted land by executive order. Later executive orders restored unallotted land to the public domain. The Tribe sued for equitable title and profits and restitution of income from those lands. The Tenth Circuit determined that: 1) there was no error in the dismissal of the claim against the federal government because the claim accrued prior to 1946, was within the exclusive jurisdiction of the ICCA, and thus was time-barred under *§ 12* of the ICCA, 25 U.S.C.S. § 70k; and 2) there was no abuse of discretion in dismissing the State of New Mexico and private landowners under *Fed. R. Civ. P. 19(b)* because the federal government was an indispensable party subject to unavoidable prejudice, and thus, the tribe's action could not proceed in equity and in good conscience.

A. The Pueblo's Claims of Aboriginal Title Were Within the Exclusive Jurisdiction of the Indian Claims Commission.

There are two important elements of the Tenth Circuit's analysis leading to the conclusion that the Navajo Tribe's claim was barred due to failure to bring it before the ICC.

The first element is whether the substance of the claim was of the type intended by Congress to be resolved by passage of the ICCA. As to this element, *Navajo Tribe* teaches that the intent of Congress was that the jurisdiction of the ICC was to be "sweeping, including even claims 'based upon fair and honorable dealings' which did not otherwise constitute recognized actions at law or equity." *Navajo Tribe,* at 1465. This jurisdiction was to be "as broad as possible" because "Congress recognized that 'Indian claims against the Federal Government are, by and large, about as varied in their nature and origin as are the claims of any other citizens or corporations which have had dealings with the Government.' H.R. Rep. No. 1466, 79th Cong., 2d Sess. 1350 (1945)." *Id.*, at 1464-65. Given Congress' clear intent, the *Navajo Tribe* Court concluded that the Tribe's claim of unextinguished aboriginal title was well within the

extraordinarily broad jurisdiction of the ICC, and that it therefore need not be concerned with the Tribe's technical arguments attempting to distinguish its claims from others found to be cognizable by the ICC. *Id.*, at 1464. Similarly, there can be no serious doubt that the Pueblo's claim of aboriginal title is one that fits into this extremely wide jurisdictional net.

The second element that the *Navajo Tribe* Court emphasizes in its analysis is that this broad exclusive jurisdiction of the ICC was not in any way limited by the fact that Congress expressly chose to limit the available remedy to a monetary compensation award:

> It is significant that the Court ordered monetary compensation "as for" a taking because of non-Indian settlement of the lands, even though it recognized the Indians' fee title. That decision, like the early decision that the Indian Claims Commission was only empowered to award money damages, supra, goes to the heart of the Tribe's argument in this case. The Tribe, even if it had timely filed its claim under the ICCA, could not have quieted title in these lands or maintained an action in ejectment. However, its assertion of present title *could* have been heard before the Commission, just as the Yankton Sioux Tribe's claim was heard under an ICCA-precursor jurisdictional act. The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid. This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although *any* and *all* accrued claims could be heard before the Commission, land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards.
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> *Navajo Tribe,* at 1467.
>
> ...It is well within Congress' power to provide a forum in which all Indian claims could be heard but to restrict the remedy available for such claims. As we interpret section 2 of the ICCA, the underlying substantive claim -- not the character of relief requested by the Tribe -- must determine the Commission's jurisdiction. If the character of the relief sought were determinative, the ICCA's express policy of finality could be undermined by any Indian tribe that, having failed to pursue its remedy under the ICCA, now prefers the return of its lands to money damages.

Navajo Tribe, at 1467-8.

The Pueblo of San Juan's claim of "aboriginal or Indian title" in this case is a claim of right to exclusive use and occupancy . Subproceeding Complaint of Pueblo of San Juan, ¶ 2, Doc. 2467, filed 4/1/05, at 1. The Pueblo's aboriginal water rights claims are premised upon this claimed present unextinguished aboriginal title. *Id.*, ¶¶ 12, 13, at 4. This is true even if the Pueblo claims that it is seeking water rights recognition rather than return of possession. The Tenth Circuit's analysis in *Navajo Tribe* as quoted above establishes with certainty that the fact that the ICC could only award a limited remedy (viz., monetary damages), in no way defeased that body of its broad general and exclusive jurisdiction over any claim of aboriginal title against the United States that the Pueblo of San Juan could have made before August 13, 1946.

B. The Pueblo's Aboriginal Title Claims Are Inherently and Unavoidably Adverse to the Ownership Interests Claimed by the United States.

The Court in *Navajo Tribe* also considered whether the substance of the claim was adverse to the United States. It found that the Tribe's assertion of its title was inherently inconsistent with previous United States actions, including issuance of patents and grants to the subject lands:

> In sum, the underlying claim in this case -- that the Tribe has present, legal title to the lands granted under Executive Orders Number 709 and 744 and confirmed in the Act of May 29, 1908 -- accrued in 1908 and 1911 when Executive Orders Number 1000 and 1284 were issued, respectively, or at least when the Tribe learned of the President's actions. These latter Executive Orders, and the subsequent land patents issued to New Mexico and the other defendants' predecessors in interest, whether valid or not, were inconsistent with the Indians' claim of title to these lands. The Tribe simply cannot pretend that the issuance of both the Executive Orders and land patents never occurred, so that no claim against the United States arose before it decided to bring suit in 1982. Had a forum been available to it, the Tribe could have sued the United States in 1908 and 1911 for ostensibly restoring lands to the public domain and thereafter granting patents in such lands that, in fact, may have belonged to the Tribe.

Navajo Tribe, at 1470-1. Exactly the same situation obtains in this case. The United States, as the *Motion* points out, is the owner of the bulk of lands within the geographic scope of this adjudication and upon which the Pueblo claims unextinguished aboriginal title. The Pueblo's claims of present title are inherently in conflict with the United States' claimed ownership, and the conclusion must be, following *Navajo Tribe*, that these are claims that could have been made against the United States before the ICC.

Further, the specific nature of the Pueblo's claim of unextinguished aboriginal title - a claim of right to present occupancy and use of the same lands owned and occupied by the United States - presents additional evidence of the extent to which the Pueblo's claims are in direct conflict with United States ownership.

In its *Motion for Partial Summary Judgment* (Doc. No. 2717, filed March 1, 2010) , at 8, the Pueblo relies on *Shoshone Tribe v. United States*, 304 U.S. 111 (1938) for the proposition that its aboriginal title entitles the Pueblo to occupancy and use of the land's resources including timber and minerals. Much of the United States' land is Forest Service or Bureau of Land Management property, and these agencies are also engaged in the production, use, and management of the land's resources. That is an obvious and fundamental conflict, and one that has been recognized by the courts. In *U.S. v. Gemmill*, 533 F.2d 1145 (9th Cir. 1976), e.g., the Ninth Circuit found that Bureau of Land Management and Forest Service ownership and use were so in conflict with the claim of aboriginal title that the only possible conclusion was that aboriginal title had been extinguished, citing a Pueblo Court of Claims case in agreement:

> At trial, the government introduced uncontroverted documentary evidence from the Bureau of Land Management showing that in the early 1900's the claimed land was included in national forest reserves which later became the Shasta Trinity and Lassen National Forests. The continuous use of the land to the present time for the purposes of

> conservation and recreation, after the Indians had been forcibly expelled, leaves little doubt that Indian title was extinguished. The Court of Claims has recently held that the designation of land as a forest reserve is itself effective to extinguish Indian title. (*US v. San Ildefonso Pueblo*, Ct. Cl. 1975)

Gemmil, at 1148-49. If "designation as a forest reserve is itself effective to extinguish Indian title," then it must certainly be true that the Pueblo's aboriginal title claims as to all lands now owned by the United States Bureau of Land Management or Forest Service are unavoidably "adverse" for purposes of the *Navajo Tribe* analysis of ICC preclusion. Therefore, even if this Court were to conclude that the Pueblo's claims as to these United States lands were somehow not barred by the ICCA, *Gimmel* and *San Ildefonso* force the conclusion that all Indian title claims were nevertheless extinguished on any such United States lands.

Thus, as to the Pueblo's aboriginal title claims on lands owned by the United States, *Navajo Tribe* is controlling authority for dismissal based on the failure of the Pueblo to timely bring those claims before the ICC, which had exclusive jurisdiction over them, and strongly supports the Acequias' *Motion* for dismissal.

II. Recent Case Law Strongly Supports the Principles and Policies Set Forth in *Navajo Tribe of Indians v. New Mexico.*

In *Wyandotte Nation v. Unified Government Of Wyandotte County/Kansas City, 222 F.R.D. 490* (D. Kan. 2004), the court reconsidered the effect of *Navajo Tribe* in the context of an action where the Nation sought to assert its aboriginal title on lands which were the subject of an 1855 treaty, but which, according to them, had not extinguished their Indian title. Originally, the United States, as patentor of the lands to the City, was in the action as a named defendant, but the Nation and the United States entered a perfunctory Stipulation of Dismissal with Prejudice of all claims against the United States. The court treated the two elements of the *Navajo Tribe* analysis

noted above in concluding that the Wyandotte Nation's claims would have been time-barred if brought against the United States and that the claims should be dismissed even in the absence of the United States.

The *Wyandotte* court considered a possible argument that because the Nation claimed that its aboriginal title had never been extinguished, it followed that the claim was outside the intended purview of the ICCA. The court found that argument to be foreclosed by the discussion and consclusions of *Navajo Tribe* and that "...such claims, when made against the United States, are precisely the type of claims that were intended to be addressed by the ICCA." *Wyandotte*, at 502. The court also cited *Navajo Tribe* for the principle that Congress made a "fundamental policy choice" when it restricted compensation for Indian title claims to monetary awards only and that land titles could not be affected by such claims. *Id.*, at 502, ftnt. 10. The Pueblo of Ohkay Owingeh similarly claims unextinguished aboriginal title to lands owned by the United States. According to *Wyandotte* and *Navajo Tribe*, those claims were within the extremely broad jurisdiction of the ICC, where the Pueblo would have been limited to a monetary award and not an award of present use and occupancy, and the Pueblo's claims are now time-barred and must be dismissed.

A second recent case of particular interest is *Paiute-Shoshone Indians v. City of Los Angeles*, 2007 U.S. Dist. LEXIS 10590 (E.D.CA 2007). In *Paiute-Shoshone*, the Tribe brought an ejectment action to recover lands in the Owens Valley that the United States had conveyed to Los Angeles in 1941. The City's principal authority in its defense was *Navajo Tribe*. The court noted that in *Navajo Tribe* the claims made by the Tribe against the United States were time-

barred under the ICCA, that the US was an indispensable party, and that the claims against the remaining defendants could not go forward.

> Therefore, where the US is an indispensable party to a case, a plaintiff may not avoid the exclusive remedy of the ICCA (damages) by seeking title or possession from third parties.

Paiute-Shoshone, at 40. The *Paiute-Shoshone* court also quoted with approval the reasoning of the New Mexico District Court which was adopted in *Navajo Tribe*:

> [A] tribe may not avoid the exclusivity bar of the ICCA by seeking title, possession and damages from successors in interest of the US, where suit against the federal government is barred.

Id. Applying *Navajo Tribe*, the court concluded, as in *Wyandotte*, that the United States cannot be joined because the claims were cognizable under the ICCA and are now time-barred, ultimately resulting in the dismissal of the claims even though the United States was not a party.

The principles and policies set forth in *Navajo Tribe* seem not to have been well understood in the New Mexico state court case of *State ex rel. Martinez v. Kerr-McGee Corp.*, 120 N.M. 118, 898 P.2d 1256 (Ct. App. 1995), a general stream adjudication involving the rights of Acoma and Laguna Pueblos. The New Mexico Court of Appeals recognized that Congress created the ICC to hear a broad class of claims against the United States, including those based on so broad a standard as a lack of "fair and honorable dealings," and those based on "failure to protect Indian land and water from non-Indian encroachment." *Id.*, 120 N.M. at 120. The Court also recognized that " a major portion of the litigation before the ICC consisted of tribal claims for the loss of aboriginal territory." *Id.*,. However, the court began to err when it stated that "[t]the ICC's jurisdiction was limited to monetary compensation for loss." As the above discussion of *Navajo Tribe* and subsequent cases makes clear, the ICC's limitation to monetary

compensaton is a limitation on the remedy afforded – not on the jurisdiction of the ICC over claims, which was extremely broad. Given this misunderstanding, it is then no surprise that the court found that because the Pueblos before the ICC "could not have quieted title to lands or asserted ownership of water rights against the government,".the claims would not have been within the "ICC's limited jurisdiction." *Id*.

This confusion of the ICC's jurisdiction over claims with its Congressionally-mandated limitation of remedies, is contrary to one of the most fundamental points of *Navajo Tribe*: that it is the substance of the claim, not the remedy, that determines whether a claim was within ICC jurisdiction, and that Indian title claims, whatever the requested remedy, were squarely within the jurisdiction of the ICC. However, the Court of Appeals in *Kerr-McGee* made no mention of *Navajo Tribe*. Given that lack, and the fact that the case's conclusions and reasoning are in direct conflict with *Navajo Tribe*, the State submits that the case cannot be relied upon and further, as a state court decision in this forum it has no precedential value.

In sum, the State believes that the better-reasoned recent cases since *Navajo Tribe* recognize the great weight that should be given to the Congressional policy underlying the ICCA of mandating a final date by which all Indian title claims that could have been brought against the United States pursuant to the ICCA and by prohibiting all such actions thereafter, in any court. That mandate requires dismissal of the Pueblo's claims by granting the Acequias' *Motion*.

III. Conclusions.

1. The Pueblo's claims of aboriginal title were within the exclusive jurisdiction of the Indian Claims Commission.
2. The Pueblo's aboriginal title claims are inherently adverse to the

ownership interests claimed by the United States.

3. The strong Congressional policy implemented in the ICCA was that the ICC was to finally resolve Indian title claims such as the Pueblo's.

4.. The policies of the ICCA as set forth in *Navajo Tribe* bar the Pueblo's claims against any present owner, including the United States.

Hence, according to the law as set forth in *Navajo Tribe* and subsequent cases, the Pueblo's aboriginal title claims to lands owned by the United States are barred and the Truchas Acequias' *Motion* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July 2010, I filed and served the foregoing document electronically through the CM/ECF system.

/s/ John Stroud