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

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

TRUCHAS ACEQUIAS' SUR-REPLY TO OHKAY OWINGEH'S REPLY TO SANTA CRUZ ACEQUIAS' & STATE OF NEW MEXICO'S RESPONSES CONCURRING IN TRUCHAS ACEQUIAS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Truchas Acequias file this sur-reply to Ohkay Owingeh's reply of July 8, 2010 [Doc. 2782] to the responses of the State of New Mexico [Doc. 2751], the Santa Cruz Acequias [Doc. 2736] and the Santa Cruz Irrigiation District [Doc. 2738] supporting the Truchas Acequias' motion for partial summary judgment regarding Ohkay Owingeh's aboriginal title to lands outside its exterior grant boundaries [Doc. 2719]. The Truchas Acequias were granted leave to file this sur-reply pursuant to the Special Master's order of July 7, 2010 [Doc. 2779]. The Truchas Acequias would show that it is Ohkay Owingeh, rather than the Truchas Acequias, the State of New Mexico, the Santa Cruz Acequias, and the Santa Cruz Irrigation District (hereinafter "Defendants"), who miscomprehends the facts and the law applicable to the Pueblo's claims of aboriginal title. The Pueblos' claims are ever-moving targets that change with the evidence and arguments offered against them, and, as currently framed, are inconsistent

with the Pueblo's trial pleadings. They are speculative at best and should be denied, consistent with the Truchas Acequias' motion for partial summary judgment.

At pages 2 – 3 of its Reply, Ohkay Owingeh argues that the parties confuse proof of aboriginal title with the concept of cultural affiliation under NAGPRA, that evidence of other Pueblos' presence in the adjudication area does not bar Ohkay Owingeh's claims anywhere in the area, and that the existence of a common trail across the Pueblo's claimed territory is not inconsistent with the concept of exclusive use and occupancy. These arguments are a mischaracterization of Defendants' pleadings and position, and ignore substantial evidence offered by Defendants.

In his reports in this case, Michael Adler, an expert retained by both the Truchas Acequias and the Santa Cruz Acequias, explains at some length the relationship between NAGPRA and cultural affiliation, on the one hand, and proof of aboriginal title, on the other hand. In his Santa Cruz report, for example, Dr. Adler explains:

> Cultural affiliation is a major issue because several of the expert reports submitted as part of this case assume cultural affiliation between Ohkay Owingeh and archaeological sites, features and other resources in the Santa Cruz basin. . . . Simply put, an argument of cultural affiliation requires a finding of 'shared group identity' between present-day groups and one or more identifiable groups in the past. The expert reports by Marshall and Walt (2007), Ford (2007) and Eiselt (2008) assume cultural affiliation, but do not provide archaeological evidence in support of there being past identifiable groups directly lined to the modern Pueblo.

Doc. 2736-1 at p. 38. Later, he explains further:

> This report also critiques recent assertions that the archaeological remains found in the study area are culturally affiliated with the present day Pueblo communities such as Ohkay Owingeh, Nambe and others. Cultural affiliation . . . requires the identification of both present and past group identity through a variety of lines of evidence. The standard lines of evidence as defined in . . . NAGPRA include geography, biology, archaeology, anthropology, linguistics, kinship, folklore, oral

> tradition, and history. While significant amounts of archaeological research have been conducted by a range of experts associated with this case, thus far no one has shown any clear lines of archaeological evidence that ties one or more of the present day Pueblo communities to the archaeological sites or remains in the study area.

Doc. 2736-1 at p. 44. Dr. Adler's report (including the passages on cultural affiliation and NAGPRA) was attached in part to both the Santa Cruz Acequias' response supporting the Truchas Acequias' motion for partial summary judgment at issue here—*see* Doc. 2736-1, *and* the Truchas Acequias' response to Ohkay Owingeh's own motion for partial summary judgment on the issue of aboriginal title—*see* Doc. 2748-9. For whatever reason, Ohkay Owingeh has simply chosen to ignore this evidence. At the same time, it goes to great lengths to attempt to discredit other aspects of Dr. Adler's testimony in this case, *see* Reply at pp. 4 – 7, yet Dr. Adler's conclusion concerning Ohkay Owingeh's claims is unequivocal:

> In summation, archaeological evidence for prehistoric human strategies of land use are wide-spread across the Santa Cruz River basin and adjoining areas. These remains, as well as the evidence for historic use of this region, *remain ambiguous* on the questions of cultural identity, active use of irrigation canal technology, and to whom associated water rights, if any, should be conferred based on these criteria.

Doc. 2736-1 at p. 45 (emphasis added).

Ohkay Owingeh similarly ignores the pleadings and evidence with respect to the extent of its claims in the adjudication area. While its interrogatory response to the Truchas Acequias may have stated that its aboriginal territory includes "all the lands within the Rio de Truchas Basin, and lands in the northern and eastern portions of the Rio Santa Cruz Basin," its Complaint alleges (and continues to allege) that Ohkay Owingeh "holds rights of exclusive use and occupancy . . . since time immemorial throughout *most or all* of the stream systems of the Rio Santa Cruz and the Rio de Truchas." Doc. 2467 at paragraph 2 (emphasis added). The Pueblo

has never defined or delineated the lands claimed by it in the "northern and eastern portions" of the Santa Cruz basin,[1] its evidence encompasses areas throughout the entire basin,[2] and its water rights claims are all located in the western/northwestern portion of the basin.[3] If indeed "Ohkay Owingeh is not claiming water rights based on aboriginal title to the entire Rio Santa Cruz Basin," *see* Reply at p. 2, then its claims fail for lack of clarity and specificity. *See* ***United States v. Santa Fe Pacific Railroad Co.,*** 314 U.S. 339, 345 (1941) ("Indian title" requires *definable* territory occupied exclusively by tribe in question), and ***United States v. Pueblo of San Ildefonso***, 513 F.2d 1383, 1390 (Ct.Cl. 1975) (to determine end of aboriginal title, authorized settlement is one of various factors to be considered in determining when *specific* lands were taken).[4]

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[1] According to its own experts, the Santa Cruz basin encompasses at least 116,700 acres. See Miller report at p. 15. Compare Marshall and Walt report at p.i—Santa Cruz watershed encompasses 309,120 acres. Ohkay Owingeh has never specified which of these acres comprise its aboriginal homeland, or so much as clarified what constitutes the "northern and eastern portions" of the basin.

[2] See, for example, Marshall and Walt Exhibit I-6 [Doc. 2724-3] and footnote 3 to Reply to Ohkay Owingeh's Response to Truchas Acequias' Motion for Partial Summary Judgment [Doc. 2784].

[3] See, for example, Miller Exhibits 1 [Doc. 2784-1] and 10 [Doc. 2724-2]—all of Ohkay Owingeh's claimed Santa Cruz basin water uses and water rights are located in the western/northwestern portion of the basin. Other than the obvious dilemna it poses with respect to the Pueblo of Santa Clara, which claims portions of the western Santa Cruz basin as its aboriginal homeland, one has to wonder whether Ohkay Owingeh claims lands in the northern and *western* portions of the Rio Santa Cruz Basin as its aboriginal homeland.

[4] Ohkay Owingeh's claims in the Rio de Truchas basin must also fail, because the Pueblo makes a similar retreat with respect to its claims there. In its Reply in Support of Its Motion for Partial Summary Judgment That It Possessed Aboriginal Title to the Rio de Truchas Basin in 1958 [Doc. 2781], Ohkay Owingeh writes:

> All of the lands in the Truchas Basin where Ohkay Owingeh is claiming that water resources were put to use are far below this [shared clay source] site. . . .Thus, any purported evidence of lack of *exclusive* use and occupancy by Ohkay Owingeh in the high country does not rebut the proposition that the lands in the

The Truchas Acequias have already replied at length to the Pueblo's contentions concerning the San Juan Picuris Trail and will not repeat their arguments here. See Response to Ohkay Owingeh's Motion for Partial Summary Judgment [Doc. 2745] at pp. 13 – 16, and Reply to Ohkay Owingeh's Response to Truchas Acequias' Motion for Partial Summary Judgment [Doc. 2784] at p. 8. Suffice it to say, Ohkay Owingeh's conclusions about the trail, beyond its mere existence, are nothing more than conjecture and speculation. As the existence of any passageway used by other people and tribes logically would, the trail rebuts rather than supports the Pueblo's claims of exclusive use and occupancy.

At pages 6 – 12 of its Reply, Ohkay Owingeh refers to various cases to support assertions of broad legal principles. However, the Pueblo does not explain how the facts in those cases resemble any of the facts in this case, or indeed, how the "judicial precedent on the subject of aboriginal title" contained within those cases is applicable to the Pueblo's claims of aboriginal title here.

The Pueblo asserts that "the existence of a common trail" is not inconsistent with the "concept of exclusive use and occupancy by a single Pueblo." Reply at p. 2, referring to its Response at pp. 14-17 for the proposition that "use of a territory by neighboring tribes, with the permission and at the sufferance of the resident tribe, does not defeat aboriginal title." *Response in Opposition* at p. 15. The problem is that the Pueblo does not identify any facts to support this claim—it admits the use of the Truchas drainage by Picuris Pueblo, but it offers no proof that San Juan Pueblo occupied the Truchas drainage dominantly or that Picuris Pueblo's admitted use

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> lower Truchas Basin where the people of Ohkay Owingeh have utilized water resources are within the Pueblo's aboriginal territory.

Reply in Support at p. 17.

and occupancy of the drainage was only with the permission of and at the sufferance of Ohkay Owingeh.

On page 5 of its Reply, Ohkay Owingeh asserts for the first time in the pleadings record that its aboriginal title "may be proved from evidence of intermittent and seasonal contacts." Reply at p. 5. In so doing, it relies on ***United States v. Seminole Indians***, 180 Ct. Cl. 375, 385 (1967), a case previously relied upon by the Pueblo to support its assertion that use of its undefined claimed area was "dominant, notwithstanding the presence of other tribes." *Response in Opposition* at p. 9. Here again, the Pueblo does not identify any evidence in this case that is similar to evidence in that case; nor does it explain how any "intermittent and seasonal contacts" with its undefined claimed area squares with its previous assertion that its use and occupancy of the area was supposedly "dominant."

On page 8 of its Reply, the Pueblo relies upon ***United States v. Pueblo of San Ildefonso***, 513 F. 2d 1383, 1390 (1975), for its assertion that "the fact of Spanish settlement is no bar to the Pueblo's aboriginal claims to any part of the Rio Santa Cruz Basin."[5] The ***San Ildefonso*** court wrote, however:

> The first point to be made, of course, is that there are no fine spun or precise formulas for determining the end of aboriginal ownership. Unquestionably, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorized settlement is only one of various factor s to be considered when *specific lands* were "taken."

[5]In its Response to the Truchas Acequias' motion, the Pueblo cited this case for the proposition that it may have used and occupied its claimed aboriginal lands "jointly and amicably" with other tribes that it admits used and occupied those lands. See Response [Doc. 2743] at p. 8. As noted by the Truchas Acequias in their Reply [Doc. 2784], the Pueblo did not identify any evidence to show that its use with the other tribes was either joint or amicable. In fact, it appeared to assert that any other tribe's use was "permissive," making its own use dominant.

513 F.2d at 1390 (emphasis added).[6] The Pueblo correctly notes that the more relevant question may be whether actions by the Spanish Crown or Mexican Republic extinguished its title, assuming it can first prove that the Pueblo had aboriginal title prior to the arrival of the Spanish, as asserted in Ohkay Owingeh's motion for summary judgment [Doc. 2717].

Raymond Chavez's affidavit, discussed at page 8 of Ohkay Owingeh's reply, is offered in support of the Truchas Acequias' motion for summary judgment [Doc. 2719], which asserts that the Pueblo cannot prove that it *ever* occupied and used the claimed areas and thus does not have a cognizable claim under American federal law. *See* motion at pp. 5-6. The Pueblo fails to identify any specific evidence that disputes Mr. Chavez's affidavit and the fact that he, his family and ancestors have used the lands and waters of the Santa Cruz basin at will, without encountering any members of the Pueblo. The Chavez family's use and occupancy of the claimed area undercuts the Pueblo's unsubstantiated claims of its dominant use of the area.

The Pueblo next cites two nineteenth century Supreme Court cases to imply that it necessarily has water rights attendant to its claimed aboriginal lands. The cited cases do not support that proposition. In ***Mitchel v. United States***, 34 U.S. 711, the Supreme Court held that non-Indian appellants' title to certain land in east Florida, which title was derived from grants made by the Creek and Seminole Indians and ratified by the local authorities of Spain before the cession of Florida by Spain to the United States, was valid. In so finding, the court explained that the Indian's "right of occupancy is considered as sacred as the fee simple of the whites," and

[6] The ***San Ildefonso*** court's statement highlights the need for "specificity" in aboriginal title claims, for such claims rise or fall on specific facts. That case involved claims asserted by the Pueblos of San Ildefonso, Santo Domingo and Santa Clara with the Indian Claims Commission pursuant to Section 2 of the Indian Claims Commission Act to recover compensation for extinguishment of aboriginal title to certain lands by the United States.

that under Spanish law, that Indians had the right to possession or occupation to certain lands, until "they abandoned them, made a cession to the government, or an authorized sale to the individuals." ***Id*** at 746.

In ***United States v. Cook***, 86 U.S. 591 (1873), the court held that timber standing on lands occupied by the Indians could only be cut for the purpose of improving the lands. In that case, the Menomonee Indians of Wisconsin ceded some of their lands to the United States to be set aside as a home for New York Indians. In time, the New York Indians ceded the land back to the United States, except for about 65,000 acres that they reserved to themselves. Under the terms of the treaties in effect in that case, the Court found that "right of the Indians in the land from which the timbers were taken was that of occupancy alone. . . . The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber." *Id.* at 592 - 94. Thus, ***Cook*** does not in any way support the Pueblo's theory that any aboriginal title it may have would includes water rights. First, it is not an aboriginal title case; the New York Indians only occupied the lands after the lands had been ceded to the United States by a Wisconsin tribe, and then only under certain conditions. Second, a right to cut timber for the limited purpose of improving land cannot be conflated into water rights, as the Pueblo attempts to do.

In ***United States v. Adair,*** 723 F.2d 1394 (9th Cir.1983), cited at page 9 of Ohkay Owingeh's Reply, the federal lands on which the Klamath Tribe's aboriginal hunting and fishing rights were asserted had originally been reserved to the Klamath Indian Tribe pursuant to treaty, and were subsequently purchased from tribal members by the United States. Noting that most of the former reservation lands were still owned by the United States, the ***Adair*** court found that

the treaty had contained an implied reservation of water rights of the purposes of hunting and fishing, and that pursuant to the doctrine of federal reserved water rights, the Tribe was entitled to sufficient water rights for fishing and hunting on all lands within the former reservation boundary. However, the water rights themselves were strictly non-consumptive, for purposes of hunting and fishing. "[T[he entitlement consists of the right to prevent other appropriator from depleting the streams below a protected level." *Id*. at 1411.[7] Here, there is no treaty or reservation in which the Pueblo receives or reserves any water rights.

Although the Pueblo argues that the State is "clearly wrong" that evidence of pan-Tewa occupation automatically defeats the Pueblo's claim of aboriginal title, Reply at p. 12, fn. 4, the case that it appears to rely upon is not applicable. ***Sioux Tribe v. United States***, 500 F.2d 458 (Ct.Cl.1974), involved the "Docket 74 Sioux," a group of Sioux Indians who were descendants of the Teton Sioux Tribe, the Yanktonais Sioux Tribe and the Sioux of the Santee Reservation, and who brought their claims as one group. In the portion of the case cited by the Pueblo in footnote 4,[8] the United States had appealed a finding that the Teton and Yanktonais Sioux had aboriginal title to a certain area since neither tribe had shown that the land awarded had been exclusively used by one or the other. The court found that, unlike ***Iowa Tribe of Iowa v. United States***, 195 Ct. Cl. 365 (1971), which involved competing claims to the same area by two

[7] In ***Sac & Fox Tribe of the Mississippi in Iowa v. Licklider***, 576 F.2d 145, 151 (8th Cir. 1978), cited by the ***Adair*** court in reasoning that the Klamath Indians had reserved aboriginal hunting and fishing rights, the court found that the Sac & Fox Tribe of the Mississippi had "yielded up its aboriginal rights to hunt, fish and trap on the land" in an 1842 treaty. 576 F.2d at 153.

[8] ***Sioux Tribe*** involved appeals and cross-appeals of eight interlocutory orders of the Indian Claims Commission, most of which involved competing claims between the Docket 74 Sioux and a separate group, the Yankton Sioux. The two groups were adversarial, and most of the case concerns one tribe's appeal of an ICC award of either recognized or aboriginal title to certain lands to the other tribe. 500 F. 2d 458 at 459.

different tribes, the Teton and Yanktonais Sioux were "not antagonists competing for the same territory. The award here is to the Docket 74 Sioux who are the legitimate representatives of the Teton and Yankonais on whose behalf this action is asserted." 500 F. 2d at 472. In this case, although Ohkay Owingeh may be descendants of a "pan-Tewa" people who are also the ancestors of other Tewa Pueblos, Ohkay Owingeh has asserted its action solely on its own behalf, and in fact, has asserted at various times, that it was either dominant over other pueblos, or that other pueblos' uses of Ohkay Owingeh's claimed area was by permission only.

Ohkay Owingeh has offered no evidence and cited no law that disputes the facts and the law cited by the Truchas Acequias, and the Truchas Acequias request that their motion for partial summary judgment be granted.

Respectfully submitted,

Humphrey & Odé, P.C.

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I hereby certify that on the 22nd day of July 2010, I served a copy of this document electronically through the CM/ECF system.

s/

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Mary E. Humphrey