

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. CIV-7488 SC
)	No. CIV-8650 SC
Plaintiffs,)	
)	Consolidated
vs.)	
)	Santa Cruz River
JOHN ABBOTT, et al.,)	Rio de Truchas
)	
Defendants.)	
_____)	

RESPONSE TO ACEQUIA DEL LLANO DE ABEYTA'S
OBJECTIONS TO SPECIAL MASTER REPORT [DOC. NO. 2728] AND
MOTION FOR ADOPTION OF REPORT AS ORDER OF THE COURT

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I. Introduction

Acequia de la Sierra¹ (hereafter “Sierra”) hereby responds to the Objections which Acequia del Llano de Abeyta (hereafter “Abeyta”) has filed to the Special Master’s Report on the relative priority dates of the five principal acequias in the Truchas area, which Report essentially adopts the carefully considered findings and conclusions of the Court’s appointed expert historian – Dr. John Baxter. Sierra also moves the Court to enter an Order adopting the Special Master’s Report and respectfully submits that this matter may – and should – be resolved by this Court without the taking of further evidence in light of the voluminous evidentiary record already created in this case.

In its Objections, Abeyta continues its quixotic effort to upend an arrangement that has existed for over 150 years whereby Abeyta receives water from the Truchas irrigation system only at those times when there is excess water in the system that is not being used by Sierra. This long-settled arrangement reflects that fact that the three acequias which form Sierra irrigate farmlands that were brought into cultivation before the farmlands which are irrigated by Abeyta. Historically, the inhabitants of the Truchas area – including those with farm tracts irrigated by Abeyta – have referred to Abeyta’s status as “sobrante”² Effectively, the Special Master proposes that Abeyta’s “sobrante”

¹ Sierra was formed in 1989 by the three “upper acequias” in the Truchas area – Acequia Madre, Acequia de los Llanos, and Acequia de la Posesion – to formalize the long-standing arrangement that these three acequias have had to share in the maintenance of the trans-basin diversion which brings all the water that would otherwise flow in the North Fork of the Rio Quemado into the Rio de Truchas. This trans-mountain diversion was constructed before 1752 by the original inhabitants of Truchas because the natural flow of the Rio de Truchas was inadequate to supply the demand for irrigation, stock, and domestic water at the time of the original settlement. Throughout this brief, references to “Sierra” refer to all three upper acequias collectively. A depiction of the principal acequias in the Truchas area irrigation system appears as Figure 2 to Sierra’s responsive memorandum before the Special Master [Docket No. 2203].

² In Spanish, the verb “sobrar” means “to be left over” or “to remain.” Abeyta’s “sobrante” status refers to the fact that Abeyta has historically been entitled to use only the water which is left over – or remains – after the superior irrigation demands of Sierra are satisfied.

status be formalized in this adjudication by assigning it a priority date which is junior to the priority date of each of the three acequias which constitute Sierra.³ Apparently not satisfied with its long-recognized limited and junior right to water, Abeyta endeavors to use this general stream adjudication as a water-grab and to bootstrap its right to water into parity with that of Acequia Madre, the senior-most of the Sierra acequias. However, Abeyta's efforts in this regard have been found wanting by the Special Master and by the Court's expert historian, and are inconsistent with the historical record as well as the substantial amount of deposition testimony that was taken in this case. Sierra respectfully submits that Abeyta's Objections should be overruled, and moves this Court to enter an Order that is consistent in all respects with the Special Master's Report.⁴

II. Procedural posture of the instant dispute

Adjudication of the instant dispute consumed a huge amount of attorney time extending over a period of more than three years from 1995 and well into 1998. During that time, attorneys for the parties heard the testimony of three expert witnesses (the Court's expert historian and two historians hired by Abeyta) over a period of eight days, deposed 17 lay deponents, and jointly perused a vast historical record dating back to 1752. At the conclusion of discovery, the parties filed voluminous

³ As discussed below, Abeyta's retained historian – Dr. Stan Hordes – freely indulged in speculation and hypothesis as he concocted implausible theories unsupported by the historical record in an effort to justify and buttress the desired result of his client in this matter. However, when asked to explain the historical recognition of Abeyta's "sobrante" status, Dr. Hordes was only able to note his perplexity – admitting that he had "no idea" as to why this arrangement is referenced repeatedly in the historical record and attributing Abeyta's "sobrante" status to "perplexing forces." Hordes Depo. Vol 1 at 136-37.

⁴ Sierra notes that in proceedings before the Special Master, both of the lower acequias – Abeyta and Acequia de los Llanitos – urged that they be assigned a priority day equal to the 1752 priority date of the Acequia Madre. This position was not adopted by the Special Master who recommends a priority date of 1882 for Abeyta and a priority date of 1874 for Acequia de los Llanitos. Notably, Acequia de los Llanitos has elected not to object to the Special Master's report.

opening and response briefs in which they set forth their competing views of the relevant factual issues in excruciating detail. Sierra's two briefs totaled 164 pages and Abeyta's two briefs totaled 149 pages. The State of New Mexico (hereafter "State") was more restrained in its briefing – filing a total of only 23 pages – and explained to the Special Master that it concurred in the findings and conclusions rendered by the Court's expert historian, Dr. John Baxter, in his "Irrigation at Las Truchas: Revised Report with Addendum."⁵ State's Brief-in-Chief [Docket No. 2193] at 5.

In her Report, the Special Master applied her significant expertise in the relevant subject matter and synthesized the enormous volume of adduced material into a set of recommendations which largely track Dr. Baxter's findings and conclusions. As this Court recognized in the Zuni River general stream adjudication, United States v. State of New Mexico, Civil No. 01-0072-BB, Special Masters play a critical role in water rights adjudications in New Mexico:

The complex issues addressed require specialized legal, hydrologic, agricultural, and other technical knowledge generally acquired over several years, the totality of which are not usually possessed by a district judge. The resources and effort required by an adjudication result in several years of extensive judicial supervision to sort out, schedule and make factual determinations across a gamut of issues for the multitude of defendants The facts required and the law applied vary with the type of defendant and the history of the parcel of land. Agricultural practices and hydrologic principles must be understood and correctly applied. In this District's experience, water rights cases require tremendous coordinated attention, consistency and case management well beyond that which a judge with an extremely heavy case load could provide The exceptional conditions present in water rights adjudications generally . . . therefore lend themselves to the appointment of a special master.

Order of June 6, 2001 [Docket No. 61] at 6-7. Furthermore, this Court found in that case that Special Master Vickie L. Gabin is an "excellent and experienced" Special Master. Id. at 1-2.

In her resolution of the disputed issues the Special Master "relied heavily on Dr. Baxter's

⁵ A copy of Dr. Baxter's Report is attached hereto as Exhibit 1, and is cited to in this memorandum brief as "Baxter."

Report, his interpretations of relevant documents, and his statements during depositions to inform the basis of [her] findings,” stating that she found his conclusions “thoughtful and grounded in evidence.” Special Master Report at 5-6. The Special Master’s deference to the findings and conclusions of the Court’s expert historian is consistent with the approach taken by Special Master Zinn in the Rio Pueblo de Taos/Rio Hondo general stream adjudication. State ex rel. State Engineer v. Abeyta, Civil Nos. 7896/7939 (consolidated). In that case, Special Master Zinn found that Dr. Baxter’s historical methodology for ascertaining relative priority dates of acequias is a “conservative approach [and] a sound basis for expert opinion and for fact finding.” Special Master Zinn’s Report of July 23, 1993 at 74-75. In its brief-in-chief before Special Master Gabin in this matter, the State likewise endorsed Dr. Baxter’s conservative historical methodology:

The state is persuaded that the opinion of the court appointed historian is the most reliable basis for establishing priority dates for each of the acequias. Since Dr. Baxter was appointed by the court, he represents the interest of no particular party, therefore his opinions should be presumed impartial.

State’s Brief-in-Chief at 4, 5, 11, see also State’s Response Brief at 5 (“the court historian’s objective and conservative approach is the best and most equitable basis for the adjudication of priority dates for the Truchas area ditches”). In contrast, the State acknowledged before Special Master Gabin that Abeyta’s retained historians utilized a “deductive rationalization” approach that requires “speculating on the other infinite number of possible scenarios that one could hypothesize about where documentation is less than definitive.”⁶ Id. at 11.

Finally, the fact that the State agreed with the findings and conclusions of Dr. Baxter merits

⁶ Furthermore, and as further explained below, Sierra demonstrated before Special Master Gabin that Dr. Stan Hordes – Abeyta’s principal retained historian – provided testimony on the core factual issue in this case that was directly at odds with testimony that he provided almost contemporaneously in the Gallinas River general stream adjudication, where he also acted as a retained historian, and that his theories otherwise lacks indicia of impartiality and credibility.

special consideration by this Court in its resolution of Abeyta's Objections. As the State argued to Special Master Gabin, "the state, as a party, is not a partisan, therefore, it has no interest in the awarding or denying the acequias a particular priority. 'The burden of proving a priority entitlement earlier than the state proposed rests with the claimant.'" State's Brief-in-Chief at 4 quoting Special Master Zinn's Report of July 23, 1993. As demonstrated below, Abeyta has not – and cannot – carried the burden of demonstrating that the speculative conjectures of its retained historian are more credible and reliable than Dr. Baxter's contrary conservative opinions which have been endorsed by the State. For all of the above reasons, and within the framework of its de novo review, this Court should refuse to adopt the Special Master's recommendations only if it finds evidence that Abeyta's retained historian presented an opinion of the relative priority dates that is more credible and plausible than the opinion presented by the Court's objective and unbiased expert historian. Sierra respectfully submits that no such evidence can be found in the record, and that the recommendations contained in the Special Master's Report should therefore be adopted.

III. History of settlement and irrigation in the Truchas area

As noted above, the Special Master and the State have both endorsed Dr. Baxter's conservative methodology and his findings and conclusions in this matter. Accordingly, just as the State did in its brief-in-chief before Special Master Gabin, Sierra relies heavily on Dr. Baxter's expert report in this very condensed iteration of its factual presentation.⁷

⁷ For a far more comprehensive and detailed exposition of the facts relative to the resolution of this dispute – complete with mapped depictions of the parties' respective positions – Sierra respectfully directs the Court to its Opening Memorandum and its Responsive Memorandum in the Special Master's proceedings. [Docket Nos. 2191, 2203.] In its response brief before the Special Master, the State explicitly endorsed Sierra's factual exposition. See State's Response Brief at 6 n. 4 ("[t]he State believes that the brief filed by Acequia de la Sierra provides all of the additional factual support, which is substantial, that can be adduced from the record and it supports Dr. Baxter's conclusions").

A. The original settlement of the Truchas land grant

The Truchas land grant – known formally at the time of its conveyance as Nuestra Senora del Rosario San Fernando y Santiago – was given to fourteen families in 1754. Baxter at 1, 37. These families had begun planting and ditch-digging for irrigation purposes in the Truchas area – including the construction of the trans-basin diversion from the North Fork of the Rio Quemado into the Rio de Truchas – in 1752. Id. The original grant documents provide two justifications for the grant. First, the settlers needed arable land. Second, and perhaps more importantly, a settlement in the Truchas area served as a defensive fortification for the more populous settled areas to the west – including present day Chimayo and Espanola – which were subject to frequent Indian raids emanating from the east. Baxter at 1, 4. Dr. Baxter highlights the defensive nature of the original Truchas settlement and notes (1) that the original grant documents required the settlers to “lay out a defensive plaza” for their houses and (2) that “although many New Mexicans [at the time] lived on dispersed ranches, the people of Truchas resided in two plazas, fortified against Comanche incursions, as ordered by Governor Velez” at the time of the grant. Id.

Almost contemporaneously with the conveyance of the grant, each of the original settlers was given 300 varas (a measure of approximately 33 inches) of cultivable land and a residential building site in the original defensive plaza. Id. at 1-2. In his historical analysis, Dr. Baxter paid particular attention to the 1754 distribution of cultivable lands as this issue has dispositive importance to the core factual issue in this dispute. The original grant documents reference three roads. One of the three roads – described as the “camino real que va para Picuris” – described the western boundary of the grant. Another of the three roads – described simply as the “camino real” – lies about 2 miles to the east of the “camino real que va a Picuris” and described the western boundary of the 1754

distribution of farm tracts. Dr. Baxter explains that the farm tract distribution began at the “camino real”: the King’s representative “began the allocation at the camino real and proceeded eastward, marking off tracts of 150 varas for each of the fourteen settlers as he proceeded eastward. After completing the first allotment, he repeated the process, giving each grantee an additional 150 varas.” Id. at 2. In this manner, the lands distributed in the first 150 vara allotment to each settler were centered on the original defensive plaza and formed a contiguous block of land of which each settler could cultivate a part in close proximity to the relative security of the communal defensive residential plaza. Id. at 2, 38. The lands distributed in the second 150 vara allotment to each settler laid immediately to the east, and were further removed from the defensive plaza. Id. Dr. Baxter states that “the first measurement would have flanked the plaza on the east and west sides, creating a consolidated area for crop production close to the protection of the house blocks” and that “[a]n arrangement of that kind would have provided for efficient use of the acequias and maximum protection from Indian attacks.” Id. at 38. The originally granted lands were irrigated by the Acequia Madre as depicted on Figure 1 to Sierra’s responsive memorandum [Docket No. 2203].

In 1759, six of the original settling families were replaced by six newcomers. The 1759 documents which evidence this transfer of ownership show that the more distant lands conveyed in the original 1754 distribution – those in the second 150 vara allotment – remained uncultivated at that time. Id. at 3. The original settlers’ failure to bring the second allotment of cultivable lands into cultivation by 1759 can be explained by a number of historical conditions. Most likely, the block of land in the first 150 vara allotment – which was centered on the defensive plaza – was adequate to provide for the needs of the nascent population and the frequency of Indian attacks made the settlers reluctant to unnecessarily farm lands that were further from their homes. See for example

Baxter at 4 (discussing the fact that the threat of Indian attacks persisted at least into the 1770s).

B. Truchas expands to the east

According to Dr. Baxter, Truchas “experienced significant population growth” in the fifty years preceding Mexican independence in 1821. Id. at 5. By 1822, the fourteen original settling families of Truchas had grown to 73 households in number and “[t]o provide for an increasing number of hungry dependents, families attempted to bring new croplands into production.” Id. at 5-6. The new lands brought into cultivation laid to the east of the lands allotted in 1754, and were irrigated by acequias which took their water from points of diversion on the Rio de Truchas which were upstream from the point of diversion for the Acequia which was utilized to bring irrigation water to the lands allocated in 1754.

The first of the new eastern and upstream lands brought into cultivation by residents of the Truchas area were requested in a petition of 1829 which was initially denied by the local government because of a shortage of irrigation water. Id. at 6, 25-26. Later that same year, however, the request was renewed and approved, and 1,566 varas of land were allotted in a distribution of 24 separate plots that was documented and celebrated in an act of possession with the ordinary ceremonial formalities. These lands are irrigated by the acequia that is now known as Acequia del Llano. Id.

Still further upstream on the Rio de Truchas from the points of diversion of the Acequia Madre and the Acequia del Llano is the point of diversion for the Acequia de la Posesion. Dr. Baxter was unable to locate a contemporaneous record for the distribution of lands irrigated by the Acequia de la Posesion, but opines that the name of the acequia suggests “a possession ceremony, similar to those conducted in 1754 [for the lands distributed to the original settlers] and in 1829 [for the lands irrigated by the Acequia del Llano].” Id. at 26. Based upon deed records from the 1860s and 1870s

and other historical evidence, Dr. Baxter concludes that the lands irrigated by the Acequia de la Posesion were distributed and brought into cultivation in 1852. Id.

After the Acequia Madre, Acequia del Llano, and Acequia de la Posesion were established, “the continual struggle for limited resources [and particularly water] caused Truchas residents to adopt measures discouraging excessive growth at home.” Id. at 9. In particular, in 1865 the residents of Truchas requested that the Territorial legislature prohibit further expansion of cultivated lands eastward and upstream of the lands irrigated by the three acequias then in existence. According to Dr. Baxter, the legislature complied by passing a Special Act that “prohibited all persons from taking possession of additional farmlands or building houses on the Rio Truchas above those fields already under cultivation.” Id. at 10. Thus, by 1865, the eastward expansion of Truchas had come to a close and farmers who had lands irrigated by the three upper ditches had succeeded in securing a source of water for themselves by impeding further upstream settlement that would inevitably lead to a reduction of the supply available to downstream irrigators.

C. Truchas expands to the west

As would be expected, the Territorial legislature’s prohibition of further eastward settlement in Truchas addressed the water supply concern of farmers on the three upper acequias, but did nothing to address the fact that population expansion in the Truchas area continued unabated and necessitated the settlement and cultivation of new farmlands. To address this issue, not only in Truchas but throughout the Territory, the Territorial legislature enacted two laws. The first, enacted in 1878, provided a means whereby persons occupying small tracts of public domain – but without clear title – could establish rights in the property by the filing of a notice of possession with the County Clerk. The second, enacted in 1884, likewise provided a mechanism whereby individuals

who had acquired real estate “by purchase or otherwise” – but who lacked clear title – could establish rights to their real estate by filing a notice before December 31, 1889 in which they described the subject property, the length of occupation, and the basis for the claim. Id. at 10-11, 38.

In his report, Dr. Baxter notes that 31 individuals⁸ availed themselves of these new laws to file claims – known at the time as “titulos,” or titles – for lands that are located in the area now irrigated by Abeyta between 1887 and 1889, most under the 1884 law:

Many of the claimants seem to have used the 1884 legislation to gain ownership of property that had been previously unoccupied. Since the Truchas grant had not yet been confirmed by the Court of Private Land Claims, vacant lands within its boundaries were legally part of the public domain. Of those seeking to possess property [in the area now irrigated by Abeyta], several stated that they had obtained title con derecho de mi trabajo (by right of my work); others simply claimed by right of possession. Almost all of them filed titulos during 1887, asserting that they had been in occupation for periods ranging from five months to five years, improving and cultivating the land.

Id. at 11. Most of the claimants on the Abeyta land stated in their notices that they had arrived in 1885, although a few stated that they had arrived earlier. “Not all those holding tracts [in the area now irrigated by Abeyta] filed titulos, but the documents suggest that the area covered by those persons who did and their neighbors, who were named in the statements of possession [required by the new laws], must have included almost all of the arable lands on the plain.”⁹ Id.

IV. Based upon his review of the settlement history of the Truchas area and documents

⁸ Dr. Baxter reviewed every titulo filed in Rio Arriba County and found that 70 such titulos were filed with the clerk. Of those, 31 were for lands that are now served by Abeyta. Elsewhere in the Truchas grant, only seven titulos were filed. Most of the other titulos filed in Rio Arriba County were for lands within the Tierra Amarilla land grant. Id. at 39.

⁹ With respect to the lands now irrigated by the second of the two lower downstream ditches west of Truchas – Acequia de los Llanitos – Dr. Baxter found no evidence of a “land rush” to occupy previously unoccupied lands as had occurred in the Abeyta area in the late 1880s. Based upon his examination of deed records, Dr. Baxter opines that the Llanitos area was settled earlier – in or around 1874. Id. at 29-30.

evidencing the conveyance and ownership of lands, Dr. Baxter assigned priority dates for the five principal acequias

Consistent with his conservative historical methodology, Dr. Baxter fulfilled his charge from this Court to assign priority dates to acequias in the Truchas area by assessing the above described settlement history of the Truchas area and other credible documentary evidence. Id. at 22-30.

Dr. Baxter concludes that Acequia Madre “is undoubtedly the oldest” and was built by the original settlers of the Truchas area two years prior to the time of the original land grant conveyance. He assigns this acequia a priority date of 1752. Id. at 22-23. Of the other four principal acequias in the Truchas area, next in time is the Acequia del Llano which “is generally regarded as the second oldest acequia” in the area. Id. at 25. Dr. Baxter opines that at least some of the settlers who received lands east of the original settlement in the ceremonial act of possession of 1829 must have begun irrigation at that time. For this reason, Dr. Baxter assigns a priority date of 1829 to the Acequia del Llano. Id. at 25-26. Based upon the historical record, Dr. Baxter opines that the Acequia de la Posesion – the furthest east and upstream of the three upper acequias – is the most junior of the three upper acequias and he assigns a 1852 priority date to the acequia. With respect to the two lower acequias which lay to the west and downstream of the original Truchas settlement, Dr. Baxter’s expert opinion is that the area served by Acequia los Llanitos was settled before the area served by the Abeyta acequia and assigns those two acequias priority dates of 1874 and 1882 respectively.

V. Dr. Baxter’s assigned priority dates are corroborated by other evidentiary materials in the historical record

As noted above, in its briefs before the Special Master the State contrasted the very different historical methodologies utilized by Dr. Baxter, the Court’s expert historian, and by Dr. Hordes,

Abeyta's principal retained historian. Dr. Baxter adhered to a "conservative" approach in which his findings and conclusions were based on affirmative evidence in the historical record. On the other hand, Dr. Hordes adopted a "deductive rationalization" approach in which he first identified his desired result – a priority date for Abeyta equal to that of the priority date for Acequia Madre – and then engaged in speculation and hypothesis as to how that early priority date might conceivably be justified. State's Brief-in-Chief at 4-5, 11. Sierra herewith briefly discusses just a few of the more salient and persuasive historical facts which Dr. Baxter used to corroborate his analysis of the relative priority dates.

A. The *Esquipula Rodriguez* litigation of 1887

The precise factual issue currently before the Court – the relative priority dates of the three upper acequias and the two lower acequias – was previously litigated in 1887 in Territory of New Mexico ex rel. Esquipula Rodriguez v. Jose Dolores Lopez, Rio Arriba County Civil Case No. 367, where the court determined as a matter of fact that the farmers of the lands now irrigated by the lower acequias had only the right to use the "sobrante" waters that remained after the farmers on the upper three ditches had exercised their superior rights. In brief, the dispute in Rodriguez arose when Rodriguez – who had recently begun to squat on a 25 acre tract of land previously utilized as communal pasture laying immediately to the west of the "camino real" where the 1754 land distribution began – sought to force the mayordomo of the Acequia Madre¹⁰ to allow him to work on the acequia alongside the farmers with water rights under the Acequia Madre and thereby perfect a right to the use of the water that was equal to the rights of those farmers who owned farm tracts

¹⁰ At the time of this lawsuit, and until 1899, the three upper ditches were all part of the Acequia Madre. It was not until the very end of the 19th century that each of the three upper acequias was constituted as its own separate corporate body. Baxter at 13-15.

irrigated by the three upper acequias.¹¹

In response, the mayordomo claimed that Rodriguez held no rights to water because his lands were “new lands” – brought into cultivation within the few years prior to the commencement of the lawsuit – that had recently received irrigation water through the Acequia Madre only because abundant precipitation had created an unusual condition in which there was excess water in the system. The mayordomo went on to explain that while the older farm tracts to the east of the road were small tracts which averaged three acres in size, Rodriguez’s newly occupied and developed tract to the west of the road was 25 acres in size and that the irrigators with superior rights to the east of the road would starve for want of water if Rodriguez were to acquire an equal water right.

In its decision, the court rejected Rodriguez’s claim to a water right equal to that of the irrigators on the east side of the road and held that the farmers to the west of the road had a right only to “the surplus waters of the acequia.” In so holding, the court made the following findings of fact which confirm Dr. Baxter’s findings and conclusions, the Special Master’s recommendations, and Sierra’s position: (1) the land to the west of the road, now irrigated by Abeyta, “was occupied and cultivated by [Rodriguez] for about four years past,” (2) “[w]hen there was a surplus of water in the acequia it was used by Rodriguez [and others] to irrigate their lands situated below said road,” (3) “the owners of the land above said road have used the waters of these acequias for irrigating their lands and for domestic and other purposes . . . exclusive of all other persons and without question,” and, finally, (4) “the waters of the aequia have never at any time been distributed by the mayordomo to irrigate the lands below said road or for any other purpose nor was he ever called on to do so until

¹¹ During the proceedings in Rodriguez, the road which demarcated the western boundary of the originally allotted lands was referred to as the “Trampas Road.” A sketch diagram of the area was entered into evidence in the judicial proceedings, and appears in Dr. Baxter’s report following page 12.

a short time before the commencement of this proceeding.” Accordingly, the precise factual issue now before this Court for resolution was adjudicated in favor of Sierra – and against Abeyta – almost 125 years ago. Sierra respectfully submits that the same result should obtain in this case.

B. The “Tewa Basin Study” of 1935

During the depression years of the 1930s, the Department of the Interior commissioned studies of economic conditions in rural areas, including the Truchas area. Dr. Baxter characterizes the “Tewa Basin Study” as “probably the most comprehensive report of its kind executed in the state.” Id. at 21. The study plainly states what by 1935 was an obvious historical fact: “Abeyta . . . has the right to only the surplus water” in the Truchas irrigation system. The study also explained the three upper ditches’ historical arrangement for the sharing of the water in the system (the 1/2, 1/3, 1/6 arrangement which still exists today), and notes that “Abeyta, of course, got no water” in a year of scant precipitation.

C. The 1970 hydrographic survey by the New Mexico State Engineer

In his report, Dr. Baxter notes that the New Mexico State Engineer’s hydrographic survey of 1970 “reported that the two [lower] acequias are entitled to the surplus water (sobrante remaining after the upper ditches, the acequia madre, Llano, and Posecion, have satisfied their needs.” Baxter 27. He also notes that there is documentary evidence that “[t]his arrangement seems to have been recognized by landowners under the downstream ditches” and cites, in particular, to historical records maintained by Abeyta and the fact that farmers irrigating with water taken from Abeyta “mentioned the sobrante relationship frequently in the code of regulations for operating the acequia adopted during their annual meetings.”¹² Id.

¹² Sierra discussed the abundance of evidence regarding the historical recognition of Abeyta’s “sobrante” status at pp. 35-43 of its opening brief before the Special Master. Docket

D. The 1973 application before the New Mexico State Engineer filed by the owner of a farm tract irrigated by Abeyta¹³

In 1973, one of the largest land owners under the Abeyta applied to the State Engineer for permission to establish an additional point of diversion for his water rights. The applicant owned approximately 100 acres irrigated by Abeyta and because the flow of water in Abeyta was inadequate for his irrigation needs, in light of the acequia's junior sobrante status, he sought to augment his irrigation supply by pumping water directly from the Rio de Truchas which lay directly to the north of his property.

An administrative evidentiary hearing on the matter was held by the State Engineer because the application for an additional point of diversion was protested. The principal issue in controversy at the administrative hearing was the extent of irrigation water historically available from Abeyta. After presiding over a day-long hearing, the State Engineer issued findings that unequivocally recognized the junior downstream status of the Acequia del Llano de Abeyta. Most importantly, the State Engineer found as follows:

The heading of the Acequia El Llano de Abeyta is at the lower end of the Acequia Madre and lands under the Acequia El Llano de Abeyta receive water only when the flow in the Acequia Madre is greater than the demand for the lands under the Acequia Madre.

The lands under the Acequia El Llano de Abeyta have always experienced substantial water shortages and have a water supply that is sufficient to irrigate approximately 16 percent of the water rights acreage.

See Findings and Order, attached as part of Exhibit 3 to the deposition of Phillip Trujillo, Jr. Thus, the very matter now at issue in this adjudication -- the status of Abeyta's water rights relative to the

No. 2191.

¹³ In its briefs below, Sierra discusses the important testimony provided at the 1973 administrative hearing. Docket No. 2191 at 45-53, Docket No. 2203 at 11-12, 14, 16.

status of Sierra's water rights – was addressed and resolved by the State Engineer in 1973.

The testimony provided at the administrative hearing regarding irrigation practices in the Truchas area is especially illuminating of the question now before the Court. In its Opening Brief before the Special Master, Sierra discusses the extensive testimony provided by an employee of the State Engineer's Office and farmers who had worked lands under Abeyta beginning in the 1930s or earlier. These witnesses acknowledged Abeyta's sobrante status and the associated historical scarcity of water in the area, and one witness who was born in 1896 provided a "thumbnail" history of the area's settlement and irrigation history that dovetails precisely with Dr. Baxter's Report:

When the lands of Truchas were developed – when the place was taken over – they made acequias up to a certain point where there was a road they called the Camino de Picuris, and from there down there still weren't developed lands. That's the reason that when they later took over and developed those lands from the road on down, they were given only the excess water.

Exhibit F-2 at 19.

VI. Abeyta's theory in this case is not supported by the documentary evidence, is not plausible, and is based on biased testimony that is not credible

A. The testimony of Abeyta's retained historian is not credible

Unlike Dr. Baxter's historical approach, Abeyta's principal retained expert – Dr. Stan Hordes – took great liberties in his historical analysis to develop fabulous but implausible theories that simply find no support in the historical record and that are wholly and entirely inconsistent with common historical patterns of the mid-1700s. The State remarked in a brief before the Special Master that “[w]e are fortunate that the historical record for the last 111 years is as well documented as it is” and, as noted above, endorsed Dr. Baxter's reliance on that record as an “objective and conservative” approach. State Response Brief at 5, State Brief-in-Chief at 4-5, 11. In marked contrast, Dr. Hordes repeatedly testified that the state of the historical record left room for him to

speculate as to the development history of Truchas. Hordes Depo. Vol. 1 at 28-30, 32, 45, 50, 51, 70, 75, 91, 95, 97-98, 136. He admits that the theories he developed on Abeyta's behalf were based on "projecting," through "speculation," and through "inference" "based on a number of indications." Id. at 45, 51, Hordes Depo. Vol. 3 at 400. Clearly, the Court historian's "objective and conservative" approach should be given far more evidentiary weight in this matter than the "deductive rationalization" of a partisan.

Furthermore, there is clear evidence in this matter that Dr. Hordes' testimony is simply not credible. As Abeyta states in its Objections, its principal argument herein is that the original distribution of lands to Truchas's initial settlers commenced at the western boundary of the land grant and not where Dr. Baxter suggests. Dr. Baxter notes in his report that Abeyta's theory of the case rests on the untenable assumption that the original farm tracts had "a dispersed placement" and were non-contiguous, and Hordes so testified in his deposition. Baxter at 36-37, see also Sierra opening brief [Docket No. 2191] at 18-21. However, in an almost contemporaneous judicial proceeding in which the settlement history of Las Vegas, New Mexico was at issue – the Gallinas River adjudication – Dr. Hordes, again acting as a retained "expert," specifically testified that colonial period settlements were typically cohesive because "frontier [settlements] were particularly subject to attacks by hostile Indians." Exhibit B-8 at 41-44 (excerpts of Dr. Hordes' deposition testimony in the Gallinas River case). Indeed, Hordes made specific reference to the settlement history of Truchas in his Gallinas River deposition and specifically testified that "Truchas . . . was built around a defensive plaza."¹⁴ Id. Thus, Dr. Hordes' testimony in this case – that the Truchas settlement adhered to a dispersed and non-contiguous pattern – is entirely at odds with and

¹⁴ The Gallinas River testimony of Abeyta's historian was given in September of 1996 and his testimony in this case was given in July and September of 1996 and April of 1997.

inconsistent with the testimony that he contemporaneously provided as a retained historian in the Gallinas River case.¹⁵

Furthermore, Dr. Hordes was questioned at his deposition as to whether or not he could identify even one other instance – other than the supposed case of Truchas – in which farm tracts were conveyed to settlers in a non-contiguous fashion during a land grant act of possession. Dr. Hordes admitted that he could not identify any other instance, and this candid testimony was consistent with his testimony in the Gallinas River adjudication but obviously at odds with his testimony as to the manner in which the Truchas farm tracts were initially conveyed. Hordes Depo. Vol. 2 at 291. It also bears noting that Dr. Baxter testified that a non-contiguous distribution of farm tracts in a land grant act of possession “would have been very unusual in colonial times . . . [b]ecause the general procedure was to have each tract contiguous.” Baxter Depo. Vol. 4 at 11. And unlike Dr. Hordes, Dr. Baxter could testify to one other instance of a non-contiguous distribution of lands, but he pointedly testified that in that particular instance – and in contrast to the case of Truchas – the land grant documents made an explicit and definite reference to the fact that there was a gap in the allocation and that the distribution of farm tracts was non-contiguous. Baxter Depo. Vol. 1 at 77.

Moreover, Dr. Hordes displayed an obvious uncertainty and vacillation during these proceedings as he endeavored to find evidentiary support to justify his novel and improbable theory of a non-contiguous land allocation in Truchas. In his first deposition, Dr. Hordes opined that the lands conveyed in the 1754 act of possession ran from the western boundary of the land grant to a point about ½ to ¾ of a mile to the east of the Truchas settlement. Hordes Depo. Vol 1 at 39.

¹⁵ Also bearing on Dr. Hordes’ credibility is an incident, discussed below at pp. 23-24, wherein he “flip-flopped” in his deposition testimony after unwittingly providing an honest answer to a question that was inconsistent with the historical “theory” that he had developed on behalf of Abeyta in this case.

However, in his second deposition Dr. Hordes opined that the conveyed lands extended to about 2 miles to the east of the original Truchas settlement. Hordes Depo. Vol. 2 at 221, 221. Even more, when Hordes was asked further questions as to his novel “theory of non-contiguity,” he could not offer any opinion as to where the gaps in the land allocation might have occurred or as to the size of the gaps between allocated farm tracts.¹⁶ Hordes Depo. Vol. 1 at 9-11.

In short, Dr. Hordes’ testimony in this matter is a far cry from the “well-reasoned expert testimony of a highly qualified historian” that Abeyta touts in its Objections. Abeyta Objections at 3. Instead, Dr. Hordes’ testimony bears all the hallmarks of the sorts of “expert opinion” that are unfortunately rendered by “hired guns” in litigation to promote the parochial self-interests of a party. The obviously biased and improbable theories propounded by Dr. Hordes stand in stark contrast to the objective and conservative opinions offered by the Court’s appointed historian, Dr. Baxter, in his effort to provide the Court with a fair and accurate exposition of Truchas’s settlement history and the relative priority dates of the five principal acequias in the Truchas area. Presumably, the credibility issues that so obviously flaw Dr. Hordes’ testimony played a significant part in the Special Master’s decision to discount his testimony, and to rely instead on the expert opinion of the Court’s historian in the formulation of her report.

B. Abeyta’s theory that the “Camino Real” did not exist in 1754 is inconsistent with the evidence in the historical record

As discussed above, Dr. Baxter explained that the western boundary of the Truchas land grant was a road identified as the “camino real que va para Picuris” in the original grant documents, and that this road travelled between Chimayo and Picuris. Dr. Baxter further explained that the initial

¹⁶ A visual depiction of Dr. Hordes’ improbable theory is provided on Figure 3 to Sierra’s responsive memorandum [Docket No. 2203].

allocation of farm tracts to Truchas's initial settlers commenced about 2 miles to the east at another road within the exterior boundaries of the Truchas land grant identified in the original grant documents simply as the "camino real" – translated to "public road" – and proceeded eastward, and that this road travelled between Pueblo Quemado (now known as Cordova) and Picuris. In its principal theory in its Objections, Abeyta (1) disputes the existence of the second more easterly road, (2) asserts that there was only one road to Picuris at the time of the grant and that this one road was the grant's western boundary, and (3) argues that the land allocation commenced at that road. Dr. Baxter specifically responded to and rejected this theory in proceedings before the Special Master. Baxter at 36-38. He states in his report:

In 1760, Bishop Tamaron visited Truchas during his historic inspection of New Mexico and probably used the road in question as he continued on to Picuris. Two years later, settlers at Las Truchas complained bitterly about conditions on the same road following the proposed changes in parochial jurisdiction that would have attached them to Picuris instead of Santa Cruz. The road existed in 1760, but I contend that it probably was in place no later than 1752. Grant documents indicate that the future settlers began planting and ditch-digging during that year. Explorations of the area must have taken place even earlier. Many of the prospective grantees resided at Pueblo Quemado, requiring travel from that place to Truchas, and from there on to Las Trampas, settled in 1751, and Picuris. A direct route would have avoided the long detour to Chimayo to reach the older thoroughfare [the "camino real que va para Picuris"].

Baxter at 37, see also Baxter Depo. Vol. 2 at 200-01.¹⁷

Other historical evidence supports a finding that the "camino real" existed as early as the mid-1700s, and was a different road than the "camino real que va para Picuris" which formed the western boundary of the land grant. For example, a 1776 account of New Mexico's mission prepared by Fray Francisco Atanasio Dominguez specifically states that there were two roads

¹⁷ Figure 4 to Sierra's responsive memorandum [Docket No. 2203] provides a visual depiction of the relative placement of the two roads.

between Santa Fe and Picuris, and describes the more easterly of the two roads as “[g]oing north from Santa Fe via Tesuque, Nambe, Cundiyo, Quemado, and Truchas, all of which . . . are along the aforesaid Sierra Madre [now Sangre de Cristo range].” See Exhibit A-18 at 92. The road described in the 1776 account bypassed Chimayo altogether – which was to the east on the “camino real que va para Picuris” which formed the land grant’s western boundary – as it traversed the base of the Sangre de Cristos in a north-south direction. Further clear evidence of the existence of a network of roads in the Truchas area in the mid-1700s is a 1772 document in which the residents of Truchas state that hostile Indians are threatening to attack along three roads into Truchas.¹⁸

Finally in this regard, two late-nineteenth century English translations of the land grant documents confirm the fact that the “camino real que va para Picuris” and the “camino real” referenced in the original documents are two separate and unique roads. See Abeyta’s Opening Brief [Docket No. 2190] at 9-10. One of those translations translates the “camino real que va para Picuris” into the “highway leading to Picuris,” and translates the “camino real” as the “high road.” This translation apparently emphasizes the fact that the “camino real” laid higher in elevation – and to the east – than the lower and more westerly “highway leading to Picuris.” Importantly, these two translations were rendered in a historical context in which there was considerable conflict in the Truchas area over the rights to the use of land and water – including the Esquipula Rodriguez case described above – and the translations are therefore likely to have been very deliberate and careful with the descriptions of the roads that demarcated the land grant’s western boundary and the beginning point of the initial land distribution. These translations unequivocally indicate that the

¹⁸ In his deposition testimony, Dr. Baxter referred to still other historical documents that provide good evidence of the existence of a public road in the existence of the “Camino Real” – where the 1754 land allocation began – in the mid 1700s. Baxter Depo. Vol. 4 at 8-9.

two roads mentioned in the original land grant documents – the “camino real que va para Picuris” and the “camino real” – were two separate and unique roads.

C. Abeyta’s novel theory as to a non-contiguous distribution of farm tracts in 1754 is inconsistent with historical patterns and entirely implausible

A necessary corollary of Abeyta’ case theory is that farm tracts were distributed in a non-contiguous fashion at the time the land grant was conveyed, but there is absolutely no evidence of non-contiguity in the grant documents. Rather, the textual indications in the original grant documents are that the allocation of farmlands proceeded from west to east along the Acequia Madre without gaps.¹⁹ Dr. Baxter testified at his deposition that a non-contiguous distribution of farmlands "would have been very unusual in colonial times . . . [b]ecause the general procedure was to have each tract contiguous." Baxter Depo. Vol. 4 at 11, Vol. 3 at 172. Furthermore, Dr. Hordes could not identify even one other instance in which farm tracts were allocated to settlers in a non-contiguous fashion in a land grant act of possession. Hordes Depo. Vol. 2 at 291.

Another implausible corollary of Abeyta’s theory is that many easily irrigable farm tracts lay fallow for 100 years and more in an area undergoing severe population pressure, even though they were immediately adjacent to an irrigation ditch. While Dr. Hordes developed various inconsistent theories during proceedings before the Special Master, the theory ultimately selected by Abeyta requires a finding that the Acequia Madre was approximately five miles long at the time of the land grant (measured from its headgate on the Rio de Truchas to its end at the western boundary of the grant), but that only 2.2 miles of irrigated farm tracts were allocated along this stretch and farmed

¹⁹ In its Objections, Abeyta attempts to capitalize on one simple typographical error made by the Special Master in her report. Objections at p. 5. This is absurd, given the fact that the Special Master’s Report, as a whole, evidences her clear understanding of Truchas’s settlement pattern.

over the next 100+ years.²⁰ According to Abeyta, the remainder of the irrigable farm land – which represented more than half of the land along the Acequia Madre as Dr. Hordes theorizes it existed in 1754 – lay fallow for up to 125 years. Thus, despite the fact that irrigation of the tracts was made possible by the construction of the Acequia Madre in the 1752, Abeyta's theory requires the Court to conclude that some tracts along the Acequia Madre and its two principal laterals – the Acequia del Llano and the Acequia de la Posesion – lay fallow and uncultivated until the mid-1880s. Hordes Depo. Vol. 1 at 47-48, Hordes Depo. Vol. 2 at 269.

Dr. Baxter concludes that these long fallow periods for easily irrigable lands under the upper three ditches are, historically, very unlikely. When asked at his deposition whether it is at all likely "that lands that were irrigable by an existing acequia would be left unirrigated and fallow . . . for a period of 75 years" after construction of the Acequia Madre, Dr. Baxter flatly stated "I don't think that's likely, no." Baxter Depo. Vol. 3 at 177. Dr. Baxter concludes that the early settlers would not have constructed an irrigation ditch approximately five miles in length in order to irrigate only approximately 2.2 miles of farmland as such an arrangement would be an extremely inefficient use of the settlers' labor and lands. Baxter Depo. Vol. 4 at 11-12, Baxter Report at 38. Dr. Baxter further states that dispersed irrigation of this type along a needlessly long ditch was exceptionally unlikely because of security concerns in the Truchas area in the mid-1700s when the farm tracts were originally conveyed. Id.

Even Dr. Hordes, who willingly speculates and theorizes as to any number of implausible events, seemed uneasy testifying as to these long fallow periods. For example, he agreed in his deposition that "if there are arable lands adjacent to a ditch . . . those lands are generally farmed and

²⁰ The 2.2 miles is obtained by multiplying 15 original settlers by the 300 varas of land that each original settler was allocated at the time of the grant.

cultivated." Hordes Depo. Vol. 1 at 88. However, when it was subsequently pointed out to him that his theories as to the development of Truchas require a finding that a significant portion of the farmlands adjacent to the Acequia Madre were left fallow and unfarmed for 75 years or more, he altered his testimony:

Q Can you -- does it seem logical to you that a group of men would build a ditch that was five and two-thirds miles long when they only intended to use 2.26 miles of it?

A Yes.

Hordes Vol. II at p. 267-69. However, Dr. Hordes was obligated to admit that he knows of no other place in New Mexico where irrigable farmlands adjacent to a ditch were left fallow for such a lengthy period of time. *Id.* at 268.

D. Abeyta's ancillary arguments are similiary unavailing

In its Objections, Abeyta sets forth a number of ancillary arguments which are all inconsistent with the evidence in the record and which fail to support its position. First, Abeyta makes the extraordinary and improbable argument that the "titulos" filed in the late 1880s support a finding that the land claimed in each of these titulos was occupied for a longer period of time than actually stated by the person filing the titulo. Abeyta's "reasoning" is that since the 1884 law allowed for the filing of claims to previously occupied lands for which evidence of title was lost or non-existent, the filing of a titulo under that law evidences a long-term occupation of those lands – back to the original date of the land grant – even when the claimants themselves stated that the subject land had only been occupied for a period ranging from five months to five years. In proceedings before the Special Master, Abeyta preposterously argued that the short periods of occupation actually stated by the claimants were simply inaccurate and that Dr. Hordes understands the basis for the land claims better than the 1880s claimants themselves. Abeyta's Opening Brief at 44. Dr. Baxter specifically

considered and rejected this theory. Baxter at 39-40. First, Dr. Baxter states that "if the . . . landowners had been occupying the property claimed for a longer period of time [than represented in their titulos], they would have said so." Baxter Depo. Vol. 3 at 267. Second, Dr. Baxter examined titulos filed for land elsewhere in New Mexico, and determined that "boilerplate" generic claims as to possession by unnamed predecessors in some titulos were common in titulos throughout New Mexico in this period, but did not actually evidence any real ownership, use, or occupation of lands by predecessors.²¹ Baxter Depo. Vol. 4 at 17-20.

Second, Abeyta makes an argument based on aerial photographs dating back to 1935 which is fatally and obviously flawed. "Most significantly," according to Abeyta, 1935 aerial photographs show that even the western portion of Abeyta was "well-cultivated" in 1935 which was not a year with abundant precipitation. Objections at 25. However, Abeyta fails to note the fact that the photographs were almost certainly taken in the late spring or very early summer of 1935 before the irrigation season had even begun on the lands under the upper three acequias, as evidenced by the fact that the photographs show almost no cultivation under the upper three ditches. The conditions observed in the 1935 photographs are just what one would expect in light of the significant testimony by the owners of farm tracts in the Truchas area that in a normal year there is adequate irrigation water available in Abeyta into the late spring or early summer, at which point farming begins along

²¹ Furthermore, the fact that almost all of the titulos in the Truchas area were filed for lands under Abeyta disproves Abeyta's argument. If, as Dr. Hordes speculates, the purpose of filing a titulo in the 1880s was merely to acquire good title to lands that were conveyed at the time of the land grant or in one of the subsequent acts of possession for lands served by Acequia del Llano and Acequia del la Posesion, then one would expect the 1880s titulos to be evenly distributed geographically throughout the Truchas area. However, we do not see that even geographic distribution. Rather, the titulos were obviously concentrated on the Abeyta lands, corroborating one of Dr. Baxter's basic conclusions – that the lands under the Abeyta were left uncultivated until the 1880s.

the senior upper ditches and there is little or no “sobrante” water left for the farmers on the lower two acequias.²² Moreover, precipitation records for that time show that the snowpack that had developed in the winter of 1934-35 in the relevant watershed upstream of Truchas was above average, assuring a relatively abundant year of water throughout the Truchas area.²³ Exhibit A-42.

Third, Abeyta fabricates an argument that the lands under the Abeyta are more suitable for farming than the lands under the upper three acequias for topographic reasons. This argument is entirely at odds with reality, as demonstrated by the hydrographic survey maps and aerial photographs. The Abeyta irrigation system actually consists of three separate acequias, each of which services a narrow strip of farm tracts that trend in a generally northwest-southeast direction. See Hydrographic Survey Map Sheet 5. Thus, even if Abeyta's far-fetched theory were correct, and the Acequia Madre extended all the way to the western boundary of the Truchas land grant in 1754, the original settlers would have only been able to use the Acequia Madre to irrigate one of the three narrow strips of farmlands under the Abeyta. On the other hand, the lands irrigated by the Acequia Madre on the east side of the “camino real” form a large contiguous block that is considerably larger than any of the farmland strips under the Abeyta. Exhibit A-37. It is extraordinarily unlikely that the original settlers of Truchas would have extended the Acequia Madre all the way to the western boundary of the grant in 1754 when the largest contiguous block of farmland that could be irrigated off of one irrigation ditch lays along the Acequia Madre to the east of the “camino real,” and not

²² For a discussion of this considerable testimony, see pages 47-83 of Sierra's opening memorandum before the Special Master. Docket No. 2191.

²³ In proceedings before the Special Master, Acequia del Llano de Abeyta argued that 1935 was a year of below average precipitation. However, this fact is irrelevant to the availability of irrigation water in Truchas in the irrigation season of 1935 which is largely a function of the snowpack that had accumulated over the winter of 1934-35.

under Abeyta.

Fourth, Abeyta relies in its Objections on Dr. Hordes' idle speculation as to the significance of land ownership in the mid-1800s by individuals who had – or might have had – a familial relationship with one of Truchas's original settlers, theorizing without any evidentiary support whatsoever that lands owned in the mid-1800s must have descended to the owner through inheritance from one of the original settlers. In his deposition, Dr. Baxter discussed the improbability of Dr. Hordes' speculations along these lines. For example, Dr. Baxter stated that one of Dr. Hordes' "theories" along these lines entirely overlooked the fact that there were three individuals with the same name in the Truchas area in the 1750s (Cristobal Martin) and would have required the the historically unjustified and improbable finding that a 14 year old boy received an allotment of land in the original grant. Baxter Depo. Vol. 4 at 90, Baxter Depo. Vol. 2 at 114-15.

VII. Conclusion

The unbiased and objective findings and conclusions rendered by the Court's expert historian, Dr. John Baxter, are supported by the extensive historical record in this case and are entirely consistent with historical settlement patterns in the Truchas area and throughout northern New Mexico. On the other hand, the partisan theories developed by Abeyta's retained historian, Dr. Stan Hordes, are simply not credible; rather, they are based on the liberal use of speculation, projection, and inference and are clearly intended to justify an improbable result which simply finds no direct support in the record. For this reason, Sierra respectfully submits that Abeyta's Objections should be overruled and moves this Court to enter an Order consistent in all respects with the Special Master's Report in this matter.

