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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

STATE OF NEW MEXICO, *ex rel.* STATE)
ENGINEER,)
)
Plaintiff,)
)
v.)
)
R. LEE AAMODT, et al.,)
)
Defendants,)
)
and)
)
UNITED STATES OF AMERICA,)
PUEBLO DE NAMBÉ,)
PUEBLO DE POJOAQUE,)
PUEBLO DE SAN ILDEFONSO,)
and PUEBLO DE TESUQUE,)
)
Plaintiffs-in-Intervention.)

No. 66cv6639 WJ/WPL

**THE RIO de TESUQUE ASSOCIATION, INC.'S MEMORANDUM
IN SUPPORT OF SETTLEMENT AGREEMENT AND ENTRY
OF A PARTIAL FINAL DECREE ON THE PUEBLOS' RIGHTS**

The Rio de Tesuque Association, Inc. (hereafter "the Association") is an association of the Acequia Madre, Acequia Chiquita, Acequia del Rio Tesuque, Acequia del Medio, Acequia del Cajon Grande, Mitchell and Cy More Ditches. Each of the association ditches are political subdivisions of the State of New Mexico and constitute the majority of the community ditches diverting water from the Rio Tesuque. At its annual meeting held October 14, 2014, the Association's board of directors instructed the undersigned to file this memorandum in support of the Settlement Agreement dated April 19, 2012 (hereafter "Settlement") and in support of the entry of the proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of

Tesuque, Pojoaque, Nambe and San Ildefonso (hereafter “Partial Final Decree”). Because of the economic constraints of the Association, this memorandum will not address each of the numerous objections filed by the numerous parties, but rather will demonstrate that the Settlement and entry of the Partial Final Decree are in the best interests of its member community ditches and, in turn, each of those community ditch’s members. Rather than injuring adjudicated individual surface rights on the Association’s member ditches in a “legally cognizable way,” only under the Settlement are those rights and current uses protected. As such both the Settlement and the Partial Final Decree, contrary to the objections of many of the objectors, are fair, adequate, reasonable, in the public interest and consistent with the applicable law.

As the starting point of analysis, the Association will set forth a brief history of this adjudication and the claims asserted by the US/Pueblos. Although the US/Pueblos’ initial claims that the Pueblos had “prior and paramount” water rights has been rejected by this Court, in the absence of settlement, the US/Pueblos will undoubtedly appeal such rejection to the Tenth Circuit and regardless of how the Tenth Circuit rules, the aggrieved parties will seek certiorari to the Supreme Court. Obviously, absent settlement, this adjudication may go on indefinitely.

How both the non-Pueblo acequia rights and the Pueblos’ rights extrapolated from this Court’s prior rulings would be administered are compared below to the administration of those rights under the Settlement and Partial Final Decree. The focus of this memorandum is on the administration of rights on the Rio Tesuque which is a separately administrable stream system within the Pojoaque Basin which flows from south to north and is chronically water short.

A. Brief History of the Aamodt Litigation and Claims Asserted by the US/Pueblos Therein

Aamodt was filed by the State of New Mexico in 1966 in order to adjudicate water rights in the Rio Tesuque-Nambe-Pojoaque stream systems. The United States intervened as a Plaintiff and asserted claims of prior and paramount water rights on behalf of the Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso. In 1974, pursuant to motions for partial summary judgment directed toward the claims of prior and paramount water rights asserted on behalf of the Pueblos, this Court ruled that the Pueblos' rights were governed by New Mexico state law. The US/Pueblos appealed that ruling to the Tenth Circuit Court of Appeals. In 1976 the Tenth Circuit held that the Pueblos' rights were not governed by New Mexico state law and remanded the case to for a determination of what law did govern Pueblo water rights and a determination of the Pueblos' water rights thereunder¹.

After remand from the Tenth Circuit, proceedings ensued primarily between the State and the US/Pueblos before Special Master Ed Yudin. Defendants were temporarily excused from participating in those proceedings without prejudice to their rights to challenge any adverse determinations at a later date. The US/Pueblos claimed they were entitled to first priority to the amount of water necessary to irrigate their "practically irrigable acreage" (PIA) under the Winters doctrine, which they claimed amounted to over 12,000 acres (3,702 acres for Tesuque Pueblo). In his November 23, 1982 Recommended Findings, Special Master Yudin found and concluded that the four Pueblos had first priority to irrigate all of their PIA, which he found to be 10,045 acres (2,750 acres for Tesuque Pueblo), minus 10% for roads, etcetera. This amounted to approximately 10 times what other evidence showed the Pueblos had historically used and far exceeded the average stream flows in the respective drainages.

¹*State v. Aamodt*, 537 F.2d 1102 (10th Cir 1976)

There were three significant developments in 1983. First certain defendants challenged the US/Pueblos claims that the Pueblos had Winters rights quantified by PIA with first priority. On June 10, 1983 the court entered a Memorandum Opinion and Order expressing the opinion that the Pueblos did not have "Winters" rights. Second, the US/Pueblos filed *interse* challenges to the quantity adjudicated to defendants in 535 sub-files, which challenges were stayed pending a determination of the Pueblos' rights. Third, in support of their objections to Special Master Yudin's findings, defendants did extensive briefing on the legal issues and had almost 3 additional weeks of trial on Spanish and Mexican Law in October 1983.

In 1985 this Court rejected Special Master Yudin's findings and conclusions and indicated that the Pueblos' had first or "aboriginal" priority to irrigate only those lands which had been irrigated by them between 1846 and 1924.² This Court quantified those rights in 1987 at 1094 acres (241.5 acres for Tesuque Pueblo) based on all acreage irrigated by the Pueblos between 1846 and 1924³. This quantification was referred to thereafter as the Pueblos "Historically Irrigated Acreage" (HIA). On February 26, 1987 this Court ruled that defendants would have to prove their priorities on a "tract by tract" basis and were not entitled to "ditch wide" priorities previously offered by the State. In another opinion entered on February 26, 1987, this Court ruled that in addition to their HIA, the Pueblos had "replacement" rights acquired with "compensation" funds pursuant to the 1924 Pueblo Lands Act; "reserved" rights on their "reservation" lands; rights otherwise "acquired" under state law but which did not have first

²*State v. Aamodt*, 618 F. Supp 993 (D.C.N.M. 1985).

³Amended Findings of Fact and Conclusions of Law, filed September 9, 1987

priority; and domestic and livestock rights⁴. Between 1987 and 2000 extensive briefing and hearings occurred both before the Special Master and the Court pertaining to the Pueblos' rights in those various categories. To date, the only actual "quantification" of the Pueblos' rights found by the Court is for their HIA.

Extrapolating from this Court's April 14, 2000 Opinion with respect to the Pueblos "replacement rights" which also have a "first" priority, the Pueblos claim entitlement to an additional 700 - 750 acres (108.73 acres for Tesuque Pueblo) which would be a likely result under the Court's April 14, 2000 Opinion. The January 21, 2001 Opinion held that for domestic and livestock rights, the Pueblos had first priority for their historical use between 1848 and 1924. Estimates of such use, set forth below, were based upon population figures for the Pueblos and a per capita per day use.

B. Administration Based Upon Current Court Rulings

In order to compare results of administration of Pueblo versus non-Pueblo rights under the current Court rulings with administration under the Settlement, it is necessary to convert the acreage of the Pueblos' first priority rights to consumptive use amounts.⁵ Consumptive use (CU) equals the number of acres multiplied by the consumptive irrigation requirement (CIR) of 1.84 acre feet per acre per year ($CU = \text{acres} \times 1.84$). The following table sets out the projection of the Pueblos' first priority rights based upon current Court rulings. Not included are amounts for the Pueblos' livestock uses, other "acquired" rights, and possible "reserved rights" on the Nambe reservation.

⁴February 26, 1987 Memorandum Opinion and Order

⁵For "irrigation water requirements," see footnote 6 below.

Projected Pueblo First Priority Right Based upon Current Court Rulings				
	Historically Irrigated Acreage (CU)	Replacement Rights Acreage (CU)	Domestic (no livestock component) (CU)	Total Consumptive Use (CU)
All 4 Pueblos	2011.2 AFY CU (1094 acres)	1346.2 AFY CU (@732 acres)	72.9 AFY CU	3430.3 AFY CU (no livestock)
Tesuque Pueblo	444.4 AFY CU (241.5 acres)	200 AFY CU (108.7 acres)	20.8 AFY CU	665.2 AFY CU (no livestock)

Hence if a partial final decree on the Pueblos' rights were entered based on the current Court rulings and affirmed on appeal, Tesuque Pueblo could call priority against the upstream non-Pueblo defendants with adjudicated rights for water sufficient to irrigate a total of 350.2 acres (241.5 acres of HIA + 108.7 acres of "replacement rights"). The diversion amount from the Rio Tesuque necessary to irrigate 350.2 acres is 1628.43 AFY (350.2 acres X 4.65).⁶ Attached hereto as Exhibit A is a document prepared by the Office of the State Engineer showing the Pueblo and non-pueblo irrigation water rights in the Pojoaque Basin, based upon the Pueblos' HIA and the Special Master's report on the Pueblos' "replacement rights" prior to the Court's April 14, 2000 Opinion. Under the reasoning of the 2000 Opinion, the Pueblos "replacement rights" significantly increased (for Tesuque Pueblo that increase was from 15.91 acres under the Special Maser's report to 108.73 acres). As shown on page 2 of Exhibit A, even using the

⁶See, Order entered August 18, 1994 adjudicating water requirements for non-Pueblo sub-files. A prior order held the Pueblo and non-Pueblo irrigation requirements were the same. Section 5.1.3 of the Settlement Agreement adopts those water requirements for all parties as follows: "For agricultural uses, the diversion amount shall not exceed 4.65 AFY per acre diverted by the ditch at the point of diversion from the surface source of water, 3.35 AFY per acre delivered at the farm headgate or well head, or a consumptive irrigation requirement of 1.84 AFY per acre, whichever is less."

smaller figure of 257.41 acres with a total diversion requirement of 1,196.96 AFY from the Rio Tesuque, such is greater than the average annual supply on the Rio Tesuque. Consequently, without the Settlement, there would be no water in the Rio Tesuque available to the upstream non-Pueblos members of the Association's community ditches. In addition, without the Settlement, each ditch member of the Association's ditches may have to prove the priority for his/her tract if challenged by the Pueblos. Furthermore the owners of the sub-files who were challenged in 1983 by the US/Pueblos' *interse* challenges, may likely have to litigate those challenges and some of their current adjudicated acreage may be lost.

C. Administration under the Settlement and Partial Final Decree

Under the Settlement, the Pueblos' total first priority right is 3660 AFY CU with Tesuque Pueblo having a total first priority right of 719 AFY CU.⁷ Under the Settlement the Pueblos' can only make a priority call against defendants' adjudicated rights entitled to Section 4 Protection to the extent of Pueblos' "Existing basin use rights." The total "existing basin use rights" for the 4 Pueblos is 1391 AFY CU and for Tesuque is 345 AFY CU, or between one-third to one-half of the Pueblos' total first priority right. Under the Settlement Tesuque Pueblo can only make a priority call against adjudicated non-Pueblo rights on the Rio Tesuque for the irrigation of 71 acres⁸, rather than for 350.2 acres Tesuque Pueblo would be entitled to under the current Court rulings. All of the non-pueblo surface right owners with adjudicated rights have initial "Section 4 Protection" under the Settlement. That protection may be lost if the non-Pueblo water right is

⁷These amounts represent the Pueblos' HIA as found by the Court and compromised amounts for the Pueblos' "replacement rights," other "acquired rights," and livestock rights.

⁸Settlement Agreement, Section 4.1.2

not beneficially used for more than five consecutive years after the enforcement date of the Settlement without justification or is transferred to a new point of diversion or purpose or place of use, with certain exceptions. Although certain objectors have objected to the Settlement on the basis that one may lose Section 4 Protection absent “notice” of non-use as required under New Mexico’s forfeiture statute, under the Settlement the water right is not “forfeited,” it only loses priority protection which protection it would not even have without the Settlement. Without the Settlement all non-Pueblos surface rights would be subject to the entire Pueblo first priority right. The chart below summarizes priority administration under the Settlement.

Priority administration under Settlement against non-Pueblo rights with “Section 4 Protection”				
	Pueblo Existing Basin Uses(CU)	Future Basin First Priority Right (CU)	Total Compromised First Priority Right(CU)	Non-Pueblos’ Existing Uses with Section 4 Protection
All 4 Pueblos	1391 AFY	2269 AFY	3660 AFY	
Tesuque Pueblo	345 AFY	374 AFY	719 AFY	
Priority Administration under Settlement	First Priority	Third Priority	All 4 Pueblos 1391 AFY - 1 st 2269 AFY - 3 rd Tesuque Pueblo 345 AFY - 1 st 374 AFY - 3 rd	Second Priority for Existing Surface Uses with Section 4 protection

Therefore, without the Settlement, the Pueblos could call first priority against non-Pueblo adjudicated surface rights for 3430 AFY; with the Settlement the amount is limited to 1391 AFY. On the Rio Tesuque, without the Settlement Tesuque Pueblo could call priority against adjudicated non-Pueblo surface rights for the water necessary to irrigate 350.2 acres; with the

Settlement Tesuque Pueblo can only call priority against adjudicated non-Pueblo surface rights entitled to Section 4 Protection for the water necessary to irrigate 71 acres.

In addition to being in the best interests of the Association's member ditches and each of those individual ditch's members and resolving the conflict over the use of water existing in the Pojoaque Basin for centuries with finality and certainty, additional benefits under the Settlement include the dismissal, with prejudice, of the US/Pueblos' 1983 *interse* challenges; the preclusion of the filing of additional interse challenges by the Pueblos; the importation of approximately 4000 AFY of water into the Pojoaque Basin, with approximately 2500 AFY for the use and benefit of the Pueblos. The water imported into the Pojoaque Basin will also, over time, increase the supply within the basin and lessen impacts of the current rate of withdrawal of groundwater on the aquifer.

For the reasons set forth above, the Association supports the Settlement, submits that the Settlement is in the best interests of its member community ditches and their members, and that the Settlement is fair, adequate, reasonable, in the public interest, consistent with applicable law, and it should be adopted.

Respectfully submitted this 6th day of November, 2014.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2014, I filed the foregoing electronically through the CM/ECF system, which caused to be served all those signed up on the CM/ECF system in this cause to be served by electronic means.

AND I FURTHER CERTIFY that on the 6th day of November, 2014, I served the foregoing on the non-CM/ECF participants listed in the *Notification of Filing List of Parties That Have Filed a Notice of Hardship* filed by Plaintiff State of New Mexico on November 5, 2014 (Dkt. 9907) by first class mail, postage prepaid.

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