

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

STATE OF NEW MEXICO, <i>ex rel.</i> STATE))	
ENGINEER,))	
Plaintiff,))	
v.))	
R. LEE AAMODT, et al.,))	No. 66cv6639 MV/WPL
Defendants,))	
and))	
UNITED STATES OF AMERICA,))	
PUEBLO DE NAMBÉ,))	
PUEBLO DE POJOAQUE,))	
PUEBLO DE SAN ILDEFONSO,))	
and PUEBLO DE TESUQUE,))	
Plaintiffs-in-Intervention.))	

**CERTAIN NON-PUEBLO DEFENDANTS’ RESPONSE TO
US/PUEBLOS AND STATE MEMORANDA IN SUPPORT OF ENTRY OF
PARTIAL FINAL JUDGMENT AND DECREE**

On behalf of the members of the Rio Pojoaque Acequia and Water Well Association who have accepted the Settlement Agreement, undersigned counsel submitted a Memorandum in Support of Entry of Partial Final Judgment and Decree Incorporating Settlement Agreement and Adjudicating Pueblos’ Water Rights on November 6, 2014, Doc. 9912 (“Certain Non-Pueblo Defendants’ Memorandum”). The memorandum set forth the proper legal framework for this Court’s consideration of entry of the Partial Final Judgment and Decree. On the same date, the Pueblos and the United States, on behalf of the Pueblos, submitted a Memorandum of Points and Authorities in Support of Entry of Partial Judgment and Decree, Doc. 9910 (“US/Pueblos Memorandum”), and the State of New Mexico, County of Santa Fe and City of Santa Fe

submitted a Joint Memorandum in Support of Settlement, Doc. 9913 (“State Memorandum”). The following responds to the US/Pueblos and State Memoranda to demonstrate that under the proper legal framework, a sufficient showing has been made that the Settlement Agreement to be incorporated into the Proposed Partial Final Judgment and Decree is fair and reasonable. Accordingly, unless the non-settling parties who have objected to the Settlement Agreement show that the incorporation of the Agreement will adversely affect their legal rights or interests, the Court should approve the Proposed Partial Final Judgment and Decree in so far as it incorporates the Settlement Agreement by and among the Settling Parties.

INTRODUCTION

As Certain Non-Pueblo Defendants have shown, Doc. 9912, in this proceeding the Court must decide two questions: *first*, whether to approve and enter the Proposed Partial Final Judgment and Decree (Doc. 7970-3) (“PFJD”), in so far as it incorporates the Settlement Agreement dated April 19, 2012 (Doc. 7970-1) (“Settlement Agreement” or “Agreement”) by and among the Settling Parties as defined therein; and *second*, whether to enter the PFJD in so far as it adjudicates the Pueblos’ water rights as to all parties to this adjudication, including the non-settling parties who object to the adjudication of Pueblos’ water rights as set forth in the PFJD.¹ With respect to the first question, the Court may enter the PFJD in so far as it incorporates the Settlement Agreement by and among the Settling Parties, provided the Agreement is fair and reasonable, and provided further, that the Agreement does not adversely affect the legal rights or interests of the non-settling parties. Certain Non-Pueblo Defendants’ Memorandum, Doc. 9912 at 3-8. In this regard, the non-settling parties who object to such court approval have the burden to show that the Settlement Agreement will adversely affect their legal

¹ This memorandum does not take up the second question, as it was not addressed by the US/Pueblos or the State Memoranda.

rights or interests. *Id.* The objectors' submission on this issue is due January 5, 2015. With respect to whether the Settlement Agreement is fair and reasonable, however, for the reasons set forth below, the memoranda filed by the Pueblos and the United States, and by the State, the County and the City demonstrate that the Settlement Agreement satisfies all of the requirements for this Court's approval under that standard.

ARGUMENT

The PFJD Approving the Settlement Agreement Is Fair and Reasonable.

Before the Court may enter the PFJD in so far as it incorporates the Settlement Agreement by and among the Settling Parties, it must first determine that the Agreement is fair and reasonable. This test requires judicial assessment of the following factors: (i) whether the Settlement Agreement is tainted by improper collusion or corruption of some kind, (ii) whether the Agreement reflects a resolution of the actual claims in the complaint, (iii) whether the terms of the Agreement are clear, and (iv) the basic legality of the Settlement Agreement. *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294-95 (2nd Cir. 2014). In addition, when a consent decree provides for injunctive relief, the public interest must not be disserved by the proposed injunction. *Id.* at 296. As shown in the US/Pueblos Memorandum and the State Memorandum, each of these requirements has been met. Both the facts of record and the law fully support the conclusion that the Settlement Agreement is fair and reasonable.

A. The Settlement Agreement Is Not Tainted by Improper Collusion or Corruption.

There is no evidence that the Settlement Agreement to be incorporated in the PFJD is tainted by improper collusion or corruption. Indeed, the opposite is the case, as this Court has found: "The numerous oral and written status reports from the Settlement Parties over the past several years support the Settlement Parties' contention that the settlement agreement is the

product of good faith arms-length negotiations.” *State of New Mexico ex rel. State Engineer v. Aamodt*, 582 F. Supp. 2d 1313, 1317 (D.N.M. 2007) (“*Aamodt III*”); *id.* at 1320 (“Based upon the previous proceedings in this adjudication, the nature of the water rights claims of the various parties, the identity of the parties involved with the settlement, and the numerous settlement negotiation status reports, the Court concludes that the negotiations were conducted at ‘arms length,’ meaning that the negotiations were conducted by unrelated parties, each acting in their own self interest.”). In this regard, the US/Pueblos Memorandum summarizes the history of the negotiations leading up to the Settlement Agreement before the Court. Doc. 9910 at 22-26. As that summary shows, this Court “closely supervised the status of the settlement negotiations” for the seven years preceding its order of May 27, 2007. *Aamodt III*, 582 F. Supp. 2d at 1319. In addition, after the entry of the Court’s 2007 order, Congress authorized the settlement of this action by statute passed in 2010. 124 Stat. 3149. Thereafter, the Settling Parties modified the Agreement to conform to the authorizing legislation in meetings open to the public. There is not a hint that the Settlement Agreement is the product of any improper collusion or corruption.

B. The Settlement Agreement Resolves Actual Claims in the Complaint Among the Settling Parties.

There is no question that the Settlement Agreement to be incorporated into the PFJD resolves actual claims in this action by and among the Settling Parties. The US/Pueblos Memorandum recounts both the history of this litigation, Doc. 9910 at 14-21, and the terms of the Settlement Agreement, *id.* at 3-11. As their memorandum makes clear, “the Settlement Agreement defines the Pueblo water rights,” Doc. 9910 at 3, which is the subject matter of the Pueblos’ claims in this action. As important, the Settlement Agreement “is intended to be binding upon the Settlement Parties (that is, on all persons or entities who sign the Agreement, *see* Settlement Agreement, § 1.6.35), and to resolve their objections to each other’s water rights.”

Settlement Agreement, § 1.1.3. The Agreement therefore resolves actual claims subject to the complaint in this case.

C. The Terms of Settlement Agreement Are Clear.

Because it defines the key terms and outlines the agreed upon administration and enforcement mechanisms, the Settlement Agreement to be incorporated into the PFJD does not lack any necessary clarity. *See* Settlement Agreement § 1.6, §§ 5.1-5.9, and § 1.5; *United States v. IBM Corp.*, 2014 WL 3057960, at *3 (S.D.N.Y. July 7, 2014) (consent decree defining key terms and outlining enforcement mechanisms is “sufficiently specific”). In this regard, the Settlement Agreement provides that it is to be given a neutral construction based on the four-corners of the instrument, Settlement Agreement § 1.3, and further provides that the Court “shall retain continuing jurisdiction to interpret and enforce the terms, provisions and conditions of the Agreement.” *Id.* at § 1.5. The Court is therefore in a position to resolve any future claims that may raise a question of clarity. As such, the Settlement Agreement is consistent with the norm for incorporation of settlement agreements in a consent decree. *EEOC v. Product Fabricators, Inc.*, 666 F.3d 1170, 1173 (8th Cir. 2012) (“Continuing jurisdiction is the norm (and often the motivation) for consent decrees.”). As the Supreme Court has specifically noted, “[p]ublic law settlements are often complicated documents designed to be carried out over a period of years, . . . so any purely out-of-court settlement would suffer the decisive handicap of not being subject to continuing oversight and interpretation by the court.” *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 524 n.13 (1986) (internal quotations and citations omitted).

The fact that certain matters contemplated by the Settlement Agreement, such as a joint powers agreement to govern the Regional Water Authority, Water Master rules, an operating agreement for the Regional Water System, an environmental impact statement and record of decision for the Regional Water System, and acquisition of rights-of-way, *see* US/Pueblos

Memorandum, Doc. 9910 at 65-68 and State Memorandum, Doc. 9913 at 60-65, involve future performance does not create any uncertainty sufficient to prevent incorporation of the Settlement Agreement in the PFJD. Rather, each of these matters is subject to distinct legal requirements which implicate discrete rights and remedies to govern its actualization. *See e.g.* NMSA 1978, § 11-1-1 *et seq.*, Joint Powers Agreements Act; *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, 306 P.3d 457 (explaining the State Engineer's broad authority to regulate domestic wells) and NMAC § 19.27.5 (State Engineer domestic well regulations); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508 (NEPA environmental impact statements); NMSA 1978, § 4-37-1, § 4-36-8, § 4-36-10, § 3-27-1 (A) and (B), § 72-4-2, and § 72-4-3 (authority of county to own and operate water system, including power of eminent domain to acquire rights-of-way). In addition, incorporation of the Settlement Agreement in the PFJD does not impose any obligation on non-settling parties with respect to any of these matters. *Firefighters*, 478 U.S. at 529 (“a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree”). Accordingly, the non-settling parties may exercise all of their legal rights and remedies with respect to any matter subject to future performance.

D. The Settlement Agreement to Be Incorporated into the PFJD Meets the Test of Basic Legality.

In *Firefighters*, 478 U.S. 501, 525-26 (1986), the Supreme Court established four requirements for a consent decree to meet the test of basic legality. First, the court must have subject matter jurisdiction over the underlying dispute. *Id.* at 525 (“a consent decree must spring from and serve to resolve a dispute within the court’s subject matter jurisdiction”). Here, there is no dispute over the Court’s subject matter jurisdiction. Second, the decree must “com[e] within the general scope of the case made by the pleadings.” *Id.* (internal quotations and citation omitted). Here, the Settlement Agreement easily satisfies this requirement because, as shown in

Section B, above, the Agreement resolves the Pueblos' actual water rights claims in the complaint.

Third, the decree "must further the objectives of the law upon which the complaint was based." *Id.* (citations omitted). Since the Tenth Circuit's decision in this case in 1976, it has been clear that the Pueblos' water rights are to be determined under federal, not state law. *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976) ("*Aamodt I*") ("the United States [] has not placed [the Pueblos'] water rights under New Mexico law."). Thus, in *Aamodt I*, the court concluded that whatever the Pueblos' rights may have been under the prior sovereigns, Spain and Mexico, they were validated following the cession in 1848 of New Mexico to the United States by an act of Congress passed in 1858. *Id.* After remand of that decision, this Court concluded in 1985 that the Pueblos' water rights, validated by the 1858 Act, are derived under the federal Indian law doctrine aboriginal title, as modified by Spanish and Mexican law, and subsequently were fixed by another act of Congress, the 1924 Pueblo Lands Act. *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) ("*Aamodt II*"). What the Settlement Agreement now before the Court indisputably does is to further the objectives of establishing the priority and quantity of the Pueblos' water rights through a compromise that is consistent with the law of this case as set out in *Aamodt I* and *Aamodt II*. US/Pueblos Memorandum, Doc. 9910 at 14-21.

Fourth, a settlement agreement to be incorporated in a consent decree may not require or sanction the parties to engage in unlawful action. Thus, in *Firefighters*, the Supreme Court made clear that a consent decree cannot authorize the parties "to take action that conflicts with or violates" the underlying applicable law. 478 U.S. at 526. At the same time, however, the Court held that "a federal court is not necessarily barred from entering a consent decree merely because

the decree provides broader relief than the court could have awarded after a trial,” so long as the decree “is not otherwise shown to be unlawful.” *Id.* at 525-26. Here, the Settlement Agreement fits precisely within the contours of the Court’s holding in *Firefighters*. Both the US/Pueblos Memorandum and the State Memorandum have clearly shown that the Settlement Agreement neither conflicts with, nor violates, any underlying applicable provisions of law. US/Pueblos Memorandum, Doc. 9910 at 48-59; State Memorandum, Doc. 9913 at 5-60.

E. Incorporation of the Settlement Agreement in the PFJD Will Not Disserve the Public Interest.

If a consent decree provides for injunctive relief, the Court “must also consider the public interest in deciding whether to grant the injunction.” *Citigroup Global Markets, Inc.*, 752 F.3d at 295. The Court “must assure itself ‘the public interest would not be disserved’ by issuance of a permanent injunction.” *Id.* at 296 (citing *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006)). Here, the PFJD provides that “[e]ach Pueblo, and its successors, representatives, lessees, and assigns, are permanently enjoined from any diversion, impoundment, or use of the public waters of the Pojoaque Basin except in strict accordance with this Partial Final Judgment and Decree, Settlement Agreement, and other orders entered by this Court in this action.”² PFJD at § 3.E.2. The inclusion of that injunction in the PFJD certainly does not disserve the public interest. Indeed, both state and federal law provide for injunctive relief to prohibit the diversion of water without a valid right to do so. NMSA 1978, § 72-5-39, § 72-12-15, and *United States v. Cappaert*, 426 U.S. 128, 141 (1976) (affirming district court injunction limiting groundwater diversions adversely affecting the use of senior federal reserved water rights). It is therefore not contrary to the public interest for the PFJD to enjoin the Pueblos’ use of water except in accordance with the Settlement Agreement.

² Certain Non-Pueblo Defendants’ Memorandum inadvertently and mistakenly stated that the proposed PFJD does not provide for injunctive relief. Doc. 9912 at 4. That mistake is corrected here.

F. Consideration of Other Factors Confirm That the Settlement Agreement is Fair and Reasonable.

In *Citigroup*, the court recognized the foregoing as minimum requirements necessary for a settlement to satisfy the fairness and reasonableness for incorporation of the agreement in a consent decree. But the court also noted that “depending on the decree a district court may need to make additional inquiry[.]” *Citigroup*, 752 F.3d at 295. In this case, the Court has cited *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984), as listing factors to consider with respect to court approval of a settlement. *Aamodt III*, 582 F. Supp. 2d at 1317. Although *Jones* involved the settlement of a shareholder’s derivative suit, not approval of a settlement agreement to be incorporated in a consent decree, the decision has been cited in this district in circumstances involving the latter situation, which also is the case here. *See Wildearth Guardians v. United States Forest Service*, 778 F. Supp. 2d 1143, 1148 (D.N.M. 2011); *cf United States v. State of Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) (stating generally that the court has “the duty to decide whether the [consent] decree is fair, adequate, and reasonable before it is approved”). Accordingly, the Court may, in the exercise of its discretion, consider the *Jones* factors in deciding whether the Settlement Agreement is fair and reasonable. To the extent it chooses to do so, the US/Pueblos Memorandum establishes that the Settlement Agreement satisfies each of those factors as well. US/Pueblos Memorandum, Doc. 9910 at 28-36.

Finally, as Certain Non-Pueblo Defendants’ Memorandum pointed out, where, as here, many, but not all parties, in multi-party litigation have entered into a settlement agreement to be incorporated in a consent decree, the Court’s review of the agreement for fairness and reasonableness is in part “intended to protect those who did not participate in negotiating the compromise[.]” *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). Of course, doing so is subject to the sound exercise of the Court’s discretion, which here is subject to a significant

cautionary note. Here, both the United States and the State of New Mexico are parties to the Settlement Agreement to be incorporated in the PFJD. *See* Settlement Agreement, signature pages at 49ff. As a result, “sound policy would strongly lead [the Court] to decline . . . to assess the wisdom of the Government’s judgment in negotiating and accepting the . . . consent decree at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.” *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961). In sum, the facts of record and controlling principles of law establish that the Settlement Agreement is fair and reasonable.

Dated this 5th day of January, 2015.

Respectfully submitted,

HOLLAND & HART LLP

/s/ Mark F. Sheridan

Mark F. Sheridan

Post Office Box 2208

Santa Fe, New Mexico 87504-2208

(505) 988-4421

**ATTORNEYS FOR J. DAVID ORTIZ, ET AL.
MEMBERS OF THE RIO POJOAQUE ACEQUIA &
WATER WELL ASSOCIATION, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I filed the foregoing electronically through the CM/ELF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and to the following person(s) by United States Mail:

Elmer Lee Waite
55 Banana Lane
Santa Fe, NM 87506

Stella M. Garduno
2 CR 119 N
Santa Fe, NM 87506

N. Stephanie Sena
65B County Road 84
Santa Fe, NM 87506

Mary G.B. Waite
55 Banana Lane
Santa Fe, NM 87506

Juanita Misere
64 Summer Road
Santa Fe, NM 87506

Tranquilino Vigil
19 Short Road
Santa Fe, NM 87506

Ramona Gonzales
17 Camino del Ojito
Santa Fe, NM 87506

Cecilia G. Popp
28 Harriet's Road
Santa Fe, NM 87506

Loyola E. Gomez
430 County Road 84
Santa Fe, NM 87506

Serota LLC
2218 Old Arroyo Chamiso
Santa Fe, NM 87505

Jose Isaudro Salazar
01 State Road 503
Santa Fe, NM 87506

Josie G. Martinez
22B North Shining Sun
Santa Fe, NM 87506

Paul F. Romero
Rt. 4 Box 20
Santa Fe, NM 87506

Seferino Valdez
5 Kokopelli Dr
Santa Fe, NM 87506

Louie J. Romero
34 Callejon de Atanacio
Santa Fe, NM 87506

Aniver R. Roybal
27 Mi Ranchito
Santa Fe, NM 87506

Esquipula N. Valdez
05 Caminito Valdez
Santa Fe, NM 87506

Pedro N. Romero
06 Nuestro Callejon
Santa Fe, NM 87506

Larry D. Roybal Sr.
4609 Aquamarine
Rio Rancho, NM 87124

Ruby Valdez
5 Kokopelli Dr
Santa Fe, NM 87506

Mary Ortiz
41 Camino Chupadero
Santa Fe, NM 87506

Robert C. Dick
P.O. Box 236
Tesuque, NM 87574

Seferino & Ruby Valdez
5 Kokopelli Dr
Santa Fe, NM 87506

Marie Noelle Meyer
7 Tod's Driftway
Old Greenwich, CT 6870

Felice Garduno
4 CR 119N
Santa Fe, NM 87506

Mary Berkeley
125 B County Rd 84
Santa Fe, NM 87506

Pedro I. Garcia
15 Camino Catalina
Santa Fe, NM 87506

Phillip I. Lujan
13A Feather Catcher
Santa Fe, NM 87506

Mabel Bustos
1834 Sunset Gardens Rd SW
Albuquerque, NM 87105

Roberta R. Fine
258 B CR 84
Santa Fe, NM 87506

Audelia Roybal
366 CR 84
Santa Fe, NM 87506

George Valdez
11 Caminito Valdez
Santa Fe, NM 87506

Kathryn S. Brotheron
28 County Road 89-D
Santa Fe, NM 87506

Roy Heilbron Sr.
1524A Bishops Lodge Road
Santa Fe, NM 87506

Oralia Quintana
387-A County Road 84
Santa Fe, NM 87506

Colleen Ortiz
340 A County Road 84
Santa Fe, NM 87506

Jose A. Valdez
282 A State Road 503
Santa Fe, NM 87506

Christen B. & Howell Howell
P.O. Box 636
Los Alamos, NM 87544

Ruth Roybal
P.O. Box 515
Tesuque, NM 87574

Dan Valencia
84C County Road 84B
Santa Fe, NM 87506

Amy Louise Roybal
22 AB Jose Alfredo Lane
Santa Fe, NM 87506

Gabriel A. Herrera
77AB Feather Catcher Road
Santa Fe, NM 87506

Joseph R. Vigil
02 Ricardos Ct.
Santa Fe, NM 87506

Jose Alfredo Roybal
22 AB Jose Alfredo Lane
Santa Fe, NM 87506

David R. Herrera
99 Feather Road
Santa Fe, NM 87506

DeZevallos 2012 Family Trust
9219 Katy Frwy. #120
Houston, TX 77024

Rosalita Trujillo
9 Calle Tia Louisa
Santa Fe, NM 87506

Jerome T. & Susan R. Wolff
8 Molino Viejo
Santa Fe, NM 87506

Filia Valdez Duran
280 State Road 503
Santa Fe, NM 87506

Robert Valencia
Rt 5 Box 304
Santa Fe, NM 87506

Alexandra Doty
110 CR 84
Santa Fe, NM 87506

Mariano Garcia
11 Callejon Valdez
Santa Fe, NM 87506

Ephraim Valencia
84B County Road 84B
Santa Fe, NM 87506

Jose L. Lopez
245 State Road 503
Santa Fe, NM 87506

Ignacio Carreno
105-A County Road 84C
Santa Fe, NM 87506

Isauro Valencia
84C County Road 84B
Santa Fe, NM 87506

Ernesto R. Lujan
5 Calle de Vecinos
Santa Fe, NM 87506

Christina D. Lopez
County Road 84C 1
Ricardos Ct.
Santa Fe, NM 87506

David Roybal
10 Aaron y Veronica Road
Santa Fe, NM 87506

Eric Matthew Romero
Rt. 4 Box 20
Santa Fe, NM 87506

Louise L. Jimenez
10 Sombra de Jose
Santa Fe, NM 87506

s/ Mark F. Sheridan

Mark Sheridan