

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 NAMBE,)
PUEBLO DE POJOAQUE,)
PUEBLO DE SAN ILDEFONSO,)
and PUEBLOS DE TESUQUE,)
)
Plaintiffs-in-Intervention.)

No. 66cv6639 WPJ/WPL
*Sub-file 34378

**AMENDED OBJECTION TO SETTLEMENT AGREEMENT AND PROPOSED
PARTIAL FINAL JUDGMENT AND DECREE ON THE WATER RIGHT OF THE
PUEBLOS OF TESUQUE, POJOAQUE, NAMBE AND SAN ILDEFONSO, AND
INTERIM ADMINISTRATIVE ORDER WITH REGARD TO WELLS RG-22469, RG-
27268 and RG-23468.**

The parties named below claim water rights in the Nambe-Pojoaque-Tesuque stream System and OBJECTS to the Settlement Agreement, proposed Partial Final Judgment and Decree on the water rights of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso and Interim Administrative Order for the reasons stated below:

Name: Barbara Garcia and Leroy Garcia
Address: 18057-B US 84/285
Santa Fe, N. M. 87506

Telephone: (505) 699-3359

Email: leroyg@cybermesa.com

Water rights file number(s) (e.g. OSE File No., Court Sub-file No.): *RG-34378 (incorrect)

*** Please note that the OSE File No. for this well is incorrect. The correct well number for the well identified on that map is RG-23468** (emphasis added). Defendants were mailed a packet that included a copy of the complaint, map and an Order to Show Cause (document Number 7861) filed on 3/18/13 that provided 21 days after service of that order to file an objection to the Order to Show Cause. The packet was addressed to Leroy Garcia and a separate and identical packet was addressed to Barbara Garcia (Defendants are husband and wife and respond herein jointly). The Sub-file number on those packets was listed as RG-34378. Leroy Garcia and Barbara Garcia admit that they are the owners of the well identified on the map contained in those packets but the correct well number for the well identified on those maps is RG-23468. Leroy and Barbara Garcia also own two other wells described below that should be accounted for and for which they also OBJECT to entry of the Order to Show cause described above (OSE records indicate that RG-34378 belongs to Evelyn E.M. King).

Well number(s) (e.g. RG-, DS-, PM-): RG-23468, RG-22649, RG-27268

Physical address or lot description of location of wells:

1. RG-23468: SW ¼ NE¼ of Section 07, Township 19N, Range 09E in Santa Fe County. Permit approved June 25, 1974.

2. RG-22649: SE¼ SW¼ NE¼ of Section 07, Township 19N, Range 09E in Santa Fe County. Priority 1937 adjudicated at 3 acre feet per annum for Domestic and/or stock purposes in *State of New Mexico ex rel., S.E. Reynolds v. USA* sub-file DS-96 on October 4, 1966. No original permit number but RG number issued at later date when windmill was taken down and replaced with a submersible pump.

3. RG-27268: NE¼ SW¼ NE¼ of Section 07, Township 19N, Range 09E in Santa Fe County. Drilled about 1938 permit issued to clean out well May 15, 1977 at which time a well number was issued.

STATE THE SPECIFIC LEGAL AND FACTUAL BASIS FOR YOUR OBJECTION:

See Objections to Partial Final Decree, Interim Administrative Order and Settlement Agreement attached hereto as "Attachment A".

STATE HOW YOUR WATER RIGHTS WILL BE INJURED OR HARMED IN A LEGALLY COGNIZABLE WAY BY THE SETTLEMENT AGREEMENT AND ENTRY OF THE PROPOSED DECREE AND INTERIM ORDER:

Defendants are harmed by the taking of 2.3 AFY of water from each of their wells or a total of 6.9 AFY of domestic well water without just compensation, which would result in damages in the form of the loss of trees, garden, landscaping, and potentially Defendant's ability to continue to rent a commercial property that is served by one of the wells; denial of Equal Protection of the Law based on ethnicity, race or national origin because the Order to Show Cause limits the rights of non-pueblo water users while expanding the rights of pueblo water users; denial of the protection of New Mexico state water laws; and the operation of ex post facto action by the State of New Mexico, and/or federal government whose acceptance of the Pueblo Settlement Agreement terms allowing reduction of Defendant's water rights would retrospectively deprive Defendants of their ability to put water to beneficial use -- a right expressly conferred to them by the State of New Mexico when they were issued water permits for their wells.

This Objection must be received by the Court no later than July 13, 2015 to be effective. Attorneys must file electronically.

Signature of Objecting party

If this Objection is filed by an attorney on behalf of the party, the attorney must enter an appearance and sign this objection:

By: /s/ Andrea La Cruz-Crawford electronically
Signature of Attorney

ATTORNEY'S NAME AND ADDRESS: Andrea La Cruz-Crawford

DBA THE STREEPER FIRM

P.O. Box 31058, Santa Fe, NM 87594

TELEPHONE NUMBER: 505-577-9692

EMAIL ADDRESS: andrea@streeperfirm.com

Attorney for: Leroy Garcia and Barbara Garcia
Name of Parties

ATTACHMENT "A"

Objections to Partial Final Decree, Interim Administrative Order And Settlement Agreement

1. By the terms of the settlement agreement (See Section 3), the beneficial use of 1.0 AFY of groundwater granted by permits issued after 1956 by the New Mexico State Engineer, are reduced to 0.5 AFY without just compensation, arbitrarily and in violation of the Domestic Well Statute (Sect 72-12.1.1; N.M.A.C. 19.27.5).
2. Defendants are unsure which of their three wells the Order to Show Cause is referring to or whether it was meant to refer to all wells owned by Defendants due to the failure of the State Engineer to disclose the proper well number with the Order to Show Cause and the failure of the State Engineer to properly apprise the Defendants of how many of their wells the Order was meant to apply to.
3. Defendants objects to the transfer of their domestic well water rights to the county water utility upon entry of the partial final decree (Sec. 8.1) because they were not given any opportunity to negotiate their rights in a fair hearing or with regard to this settlement, and were not offered any compensation from the State for the taking of their water for the regional water system. This violates Article II Section 20 of the New Mexico State Constitution, the United States Constitution's Fifth Amendment Takings Clause and constitutes Inverse Condemnation because their right to use water is being taken for public use in the regional water system, no monetary compensation has been offered by the government entities for the taking, and the State of New Mexico and / or federal government has failed to initiate condemnation proceedings against Defendants and other non-pueblo water users and the Pueblo has no right to seek condemnation of water rights outside their jurisdiction.
4. Any condemnation of water rights is a per se violation of the terms of the Federal Claims Resolution Act, Title VI signed by President Obama in 2010 relating to this particular litigation because that statute clearly prohibits ANY condemnation of water rights for the regional water system (emphasis added). Specifically, Section 611 (c)(2) states:

"WATER RIGHTS. – The secretary shall not condemn water rights for purposes of the Regional Water System".
5. Section 3.19 of the settlement agreement provides that any well owner who does not respond to the order to show cause is a "settlement party". A "settlement party" is one who agrees with the settlement agreement. (Sec. 1.6.35). A person's failure to respond to an order to show cause when they have not yet been served with a copy of the complaint in the case; or where service was improper deprives them of due process. Service upon Leroy Garcia and Barbara Garcia was improper because the wrong well

number was listed in their notice and there is no other way for them to identify correctly which of their three wells the Order to Show Cause's reduction in water use rights is being applied to. Defendants object.

6. Defendants object that they were not included in negotiation of the settlement agreement that affects their rights to use water and do not understand why the Pueblo Settlement Agreement would seek to adjudicate rights that were not their own other than in an apparent attempt to deprive non-pueblo users of their rights to due process and equal protection of law.

7. The settlement agreement and the proposed regional water system are based on a preliminary design prepared in 2008 by HKM and paid for by the Pueblos. (Settlement Act Sec. 602(9)). A detailed design has not been made available to Defendants or approved. Defendants are unable to determine if it is feasible to install the water system to their property lines or whether the regional water system will be able to gain the easements and access needed to install those lines. If construction costs exceed the preliminary estimate, the county tax payers, including Defendant, may be required to pay more taxes to cover the increase in costs. (See N.M. Constitution, Article IX, Sec. 10 – restrictions on county indebtedness).

8. The connection fund (Sect. 3.1.7.3) has not been funded. Defendants are unable to determine if they will be required to pay the connection cost; and at what cost.

9. The Settlement agreement violates the rights of non-pueblo water users to be protected by State laws regarding impairment. Under the Settlement Agreement, it is permissible for the Pueblos to impair other non-pueblo water user's rights. Assuming the non-pueblo water user is able to prove the Pueblos impairment or damage to their water rights, the impairment is to be compensated for from an impairment fund, provided there is money in the fund (Sec. 5.5). Defendant highlights here that that fund is not funded or paid for by the Pueblos or federal government as trustees of the pueblo but instead by the State of New Mexico i.e. taxpayers (2.4.3, 5.5) in other words – the settlement agreement not only allows the Pueblos to violate non-pueblo water users rights against impairment under New Mexico water law, it also requires non-pueblo water users to pay taxes to create the impairment fund i.e. non-pueblo water users must compensate the impairment of their rights with their own tax dollars.

10. The agreement provides financial incentive to the pueblos to use more water than they need and will create a situation where they can become the administrators of water in this region with the only existing future basin rights, under their right to lease their water they will be able to sell leases to the highest bidder and take water from non-pueblo water users to meet those demands without recourse for harmed non-pueblo water users. The Pueblos may continue the impairment even if the non-pueblo water user is unable to receive compensation from the impairment fund. Therefore, if the impairment fund is without funds, the non-pueblo water user has no adequate remedy

for the impairment and non-pueblo water users are not given enforcement rights (Dkt # 7970-3, p. 12, Par 4).

11. The proposed partial final decree (Dkt # 7970-3, p. 12, Par 4) provides the Pueblos a right of enforcement of the Pueblos' water rights but does not provide a private right of enforcement of non-pueblo water rights, which violates Equal Protection.

12. Defendants object to entry of a partial final decree until such time as the Environmental Impact Statement required by the Settlement Act (Sec. 616) is filed.

13. The Pueblos and the USA enjoy sovereign immunity that is not expressly waived in the settlement agreement and therefore there is no right of private enforcement for impairment to water rights on non-pueblo users.

14. Defendant objects to entry of a partial final decree until all easements for the regional water system lines have been identified and acquired.

15. The Joint Powers Agreement and the Water Master Rules for the District Water Master and the Water Master Rules for the N-P-T Water Master, including but not limited to the rules required by Section 5 of the settlement agreement, have not been presented or approved. The operating agreement (Settlement Act Sect. 602(11), the cost sharing and integration agreement (Settlement Act, Sect. 602(5), and the joint powers agreement have not been provided to Defendants or approved. Defendant objects to being presented with an agreement for acceptance that has significant information regarding the organization and administration of the regional water system that has not been provided.

16. Defendants object to the entry of the final decree before all funding, agreements, rules, and reports have been provided and approved. The order to show cause should be stayed until such time as all such information regarding the regional water system is provided and another opportunity to object should be provided at that time.

17. Entry of the settlement agreement with "blank lines", as proposed, is a deprivation of property without standards as required by substantive Due Process.

18. The settlement agreement states at Section 4 that settlement parties will be protected from a priority call as consideration for the acceptance of the agreement. (Sec. 1.6.33) Such a proposition assumes that the Pueblo's will eventually make a priority call against Defendant regardless of whether or when they might be entitled to do so under New Mexico law and that the OSE will be able to enforce a priority call. Further, the Brief in Support of the Settlement Agreement filed by the Pueblos asserts that the Pueblos are not subject to New Mexico law and are sovereign nations. Therefore, it would follow that permitting the Pueblos to make a priority call if they claim no applicability of New Mexico water law to them under their sovereign power allows them to pick and choose when the laws of the State of New Mexico will apply to them – a

privilege not enjoyed by non-pueblo water users and in violation of Equal Protection. This essentially gives them the opportunity to “opt out” of New Mexico water law when they desire to do so and to “opt back in” when it benefits them as against non-pueblo users.

19. Defendants object to the idea that new uses of water (“future water rights”) by the Pueblos are senior to those of all non-pueblo water users.

20. The Settlement Agreement denies the protection afforded by the New Mexico Legislature to domestic well owners by declaring a minimum amount of water used for household uses that is immune from priority call. (Sect. 72-12-1.1; NMAC 19.27.5.9). Defendant objects to the denial of protection afforded by the state water code and related rules and regulations. (NMAC 19.27.5). This also deprives non-pueblo users of their ability to make a priority call as against one another and lumps all their rights together as though they are the same when in fact they are not. Many water users have early priority dates spanning back to the 1600’s who will suffer significant impairment under the agreement. Defendants Leroy and Barbara Garcia will also be subject to such impairment especially with regard to their wells drilled in 1937 and 1938; but also with regard to their 1975 well, which was drilled prior to hundreds if not thousands of other wells.

21. The effective dates of the settlement agreement are not contingent on substantial completion of the county water system, which may result in inadequate information being relied upon when entering into the settlement agreement. (Sec. 8.1)

22. The settlement agreement is too vague and ambiguous regarding the lawfulness of removal of water from the Pojoaque Basin by a lessee of Pueblo water rights. Compare Section 2.1.5 with Sect. 8.1. and Sec. 2.3.4 and NMSA 1978 § 72-6-3 (2003)

23. Defendant objects to the application of different water laws to the Pueblos and the non-pueblo users as a violation of the McCarran Amendment, (Title 43 USC §666 - waives sovereignty in water adjudication cases such as the *Aamodt* case), and a denial of Equal Protection of the Law.

24. Defendant objects to the use of the federal reserve doctrine to determine the Pueblo’s water rights as a violation of the McCarran Amendment, (Title 43 USC §666 waives sovereignty in water adjudication cases such as the *Aamodt* case).

25. The settlement agreement is not clear and unequivocal that the USA as trustee for the Pueblos is bound by the agreement.

26. Defendant objects to entry of the partial final decree without providing an *inter se* proceeding involving the Pueblos as required by Due Process. The state engineer is without authority to award “future” water rights to the Pueblos while requiring

Defendants to prove historical use to establish water rights. This is a further violation of principles of Equal Protection.

27. The settlement agreement protects the Pueblos' surface water rights from forfeiture but does not protect non-pueblo water users from forfeiture (Sec. 2.10.2). The implementation of the Settlement Agreement will threaten the survival of the acequia system by eliminating the acequia's ability to protect their water rights from more junior users.

28. Defendant objects to the arbitrary restriction against outdoor use of a domestic well for irrigation of non-commercial trees, gardens or lawns as a deprivation of procedural and substantive Due Process of Law and as a violation of the rights conferred to Defendants when their permits were issued by virtue of ex post facto rule-making in the settlement agreement.

29. Defendant reserves the right to supplement these objections at any time prior to the entry of a partial final decree.

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, I caused the foregoing objection to the Order to Show Cause to be filed electronically through the CM/ECF system which caused parties on the electronic service list to be served as described in the Notice of Electronic Filing.

/s/ Andrea La Cruz-Crawford electronically

Andrea La Cruz-Crawford