

**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

**MOTION FOR CLARIFICATION ON THE BINDING EFFECT OF THE  
SETTLEMENT AGREEMENT ON RULES AND REGULATIONS TO BE  
PROMULGATED BY THE STATE ENGINEER  
AND  
MEMORANDUM IN SUPPORT THEREOF**

Comes now the Rio de Tesuque Association, Inc. (hereafter “the Association”), an association of the Acequia Madre, Acequia Chiquita, Acequia del Rio Tesuque, Acequia del Medio, Acequia del Cajon Grande, Mitchell and Cy More Community Ditches within the Pojoaque Basin, and hereby moves this Court for clarification on the binding effect of the Settlement Agreement on the State Engineer and the State of New Mexico. The Association asserts that in the event of a conflict between the Settlement Agreement and the, as yet to be promulgated, rules and regulations governing the Pojoaque Basin, the Settlement Agreement

controls. The State Engineer has continually failed to acknowledge this proposition and appears to take the position that when the rules and regulations are promulgated they will become state law and supersede the Settlement Agreement in the event of a conflict. The Association hereby moves this Court for clarification and a determination that in the event of a conflict between the Settlement Agreement and the rules and regulations to be promulgated by the State Engineer to govern the Pojoaque Basin, the Settlement Agreement controls.

A determination of this issue at this time is critical to the decision of non-pueblo water users in the Pojoaque Basin to accept the Settlement Agreement and become settlement parties, or not.

As grounds for this motion and in support thereof, the Association states:

1. On March 21, 2016 this Court entered its Memorandum Opinion and Order Approving Settlement Agreement (Doc. 10543) wherein it overruled numerous objections and approved the Settlement Agreement (Doc. 7970-1, Doc. 10547-1).

2. As relevant to the current motion, Section 5.3 of the Settlement Agreement provides, in part:

In consultation with counsel for the other Settlement Parties, counsel for the State Engineer, the United States, and the Pueblos shall agree on a set of rules to be proposed for adoption by the State Engineer to govern his responsibilities in his various capacities set forth in Section 5.2 of this Agreement and the Interim Administrative Order.

3. With respect to his responsibilities under the Settlement Agreement, Section 5.2 provides, in relevant part:

Pursuant to his statutory authorities, the State Engineer shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in this Agreement and the Final Decree.

4. Section 5.2.1 General Provisions, provides, in relevant part:

**5.2.1.1** The State Engineer has the authority, pursuant to state law, to curtail non-Pueblo surface and groundwater diversions and shall exercise his authority as necessary in order to ensure compliance with the terms of, and the delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree.

**5.2.1.2** The Water Master shall have the authority to curtail Pueblo surface and groundwater diversion in order to ensure compliance with the terms of, and the delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree.

The Settlement Agreement was signed, on behalf of the State of New Mexico, by the New Mexico Governor, Attorney General, State Engineer and the chief counsel for the State Engineer.

5. On August 20, 2015 the State Engineer circulated its proposed rules and regulations for comment from counsel for other Settlement Parties, the United States, and the Pueblos. It was agreed that the City and County of Santa Fe would be the first group to provide comments. The State Engineer's draft, with comments from the County and City comments, were then to go to the US/Pueblos for their comments who were then to provide the document with comments to counsel for the non-Pueblo proponents of the settlement for their comments.

6. Both the combined comments by the City and County and those of the Pueblos noted the need for provisions in the proposed rules and regulations that in the event of conflicts between the Settlement Agreement and the rules and regulations, the Settlement Agreement would control.

7. At a meeting held November 4, 2015 to discuss the City, County and Pueblo comments on the proposed rules and regulations, the State Engineer took the position that its authority to promulgate rules and regulations came from state law and appeared to suggest that

any rule promulgated pursuant thereto controlled over the Settlement Agreement, at least with respect to non-Pueblo water rights in the Pojoaque Basin.

8. The Association provided its comments and proposed revisions to draft rules and regulations on or about December 4, 2015. A copy of the undersigned's e-mail sent with the proposed revisions is attached hereto as RdT Exhibit A. As relevant to the current motion, the Association made it clear that in its view the Settlement Agreement controlled in the event of conflict between it and any rules and regulations promulgated by the State Engineer. See highlighted paragraph 3 in RdT Exhibit A.

9. Subsequent to various further telephonic conferences and in person meetings to discuss the proposed rules and regulations, the State Engineer provided a second draft on or about April 13, 2016 incorporating the comments and revisions proposed by the various parties which the State Engineer was willing to accept. The State Engineer continued to refuse to put in a provision advocated by the Association, as well as by the City, County, and Pueblos (other governmental entities) to the effect that in the event of a conflict between the Settlement Agreement and the rules and regulations, the Settlement Agreement would control.

10. On or about August 26, 2016 the State Engineer provided a further revised draft of its proposed rules and regulations. Although that draft provided that the Settlement Agreement "provide[s] the authority for the provisions of this rule that apply to the Pueblos of ...." the State Engineer continued to reject the notion that in the event of conflict between the Settlement Agreement and the rules and regulations with respect to the administration of non-Pueblo rights, the Settlement Agreement would control.

11. Prior to a meeting to discuss the latest draft scheduled for September 12, 2016, the Association sent its latest “redline” of the State Engineer’s August 26, 2016 version of the rules and regulations along with the e-mail attached hereto as RdT Exhibit B. Exhibit B provided, in part, “if the State Engineer is not willing to agree that in the event of a conflict between the SA (Settlement Agreement) and this, the as yet un-promulgated rule, the SA controls, I see no choice but to file a motion for clarification with the court.” See highlighted portions or RdT Ex. B.

12. To date, the State Engineer continues to refuse to acknowledge that in the event of conflict between the Settlement Agreement and the rules and regulations, the Settlement Agreement controls and to put such a provision in the rules and regulations.

13. In advising members of the Association to accept the settlement, the undersigned took at face value the provisions of Section 5 quoted under paragraphs 1 through 4 above and advised them that the Settlement Agreement provided them with protection they would not otherwise have under state law. If, indeed, the rules and regulations to be promulgated could change the protections of the settlement bargained for by those accepting it, those settlement parties would be deprived of the “benefit of their bargain.” As for those who have not yet made a decision to accept the settlement, (including those that objected and will be given an opportunity to accept the settlement), whether they can rely upon the protections provided by the Settlement Agreement from conflicting rules promulgated by the State Engineer is a very material consideration.

14. As authority for this motion, the Association relies upon the provisions of the Settlement Agreement set forth above; Congressional approval of the Settlement Agreement in the Aamodt Litigation Settlement Act, Pub. L. No. 111-291 §§ 601 *et seq.*, 124 Stat. 3134 (2010);

this Court's March 21, 2016 Memorandum Opinion and Order Approving Settlement Agreement (Doc. 10543); the Interim Administrative Order entered March 23, 2016 (Doc. 10548). The Interim Administrative Order provides that during the interim period the Pueblos' water rights shall be administered consistent with Section 5.2.1.2 of the Settlement Agreement and that the Non-Pueblos water rights "shall be governed by subfile orders entered in this case subject to all terms and conditions of the Settlement Agreement," and further "The State Engineer shall administer all state law water rights consistent with Section 5.2.1.1 of the Settlement Agreement."

WHEREFOR, the Association moves this Court for an order that in the event of conflict between the Settlement Agreement and any rules and regulations promulgated by the State Engineer to govern the administration of water rights within the Pojoaque Basin, whether such rules and regulations are promulgated pursuant to the Settlement Agreement or pursuant to the State Engineer's authority under state law, or both, the Settlement Agreement controls. Further, the Association moves this court for an order directing the State Engineer to include such a provision in the rules and regulations in order to minimize any further litigation on the issue.

Some weeks ago, the Association circulated a draft of this motion to the parties actively participating in the drafting of the rules and regulations as set forth under Section 5 of the Settlement Agreement and has since requested that they inform the undersigned whether they oppose, do not oppose, or concur in this motion. To date there have been no formal responses. The undersigned assumes that the State Engineer opposes this motion and that the other governmental entities will respond accordingly. Neither the "Pro Se" parties nor those

represented by Lorenzo Atencio or Blair Dunn have participated in the drafting of the rules and regulations and therefor their position on this motion has not been sought.

Respectfully submitted this 23<sup>rd</sup> day of December, 2016  
*Electronically Filed*

/s/Larry C. White  
Post Office Box 2248  
Santa Fe, NM 87504-2248  
(505) 982-2863

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 22<sup>nd</sup> th day of Decmeber,2016, 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.

/s/Larry C. White  
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