

Subj: Comments of OSE's 8/26/16 draft of WM rule Date: 9/7/2016 7:29:05 P.M.
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Dear All:

I am attaching my redline of the latest version of the WM rules and regs ("the rule") distributed by the OSE on August 26, 2016. The attached redline includes some of the additions or deletions I submitted with my redline on December 4, 2015. I don't know to what extent my comments, deletions, insertions, etcetera, were taken into account because we never discussed them in any detail except with respect to my insistence that the rule contain a provision that in the event of a conflict between the SA and the rule, the SA controls.

The provisions of the OSE's August 26, 2016 version beginning with "19.25.110 Priority Administration" on page 22 through 25 is largely new, at least to me (e.g. "direct flow administration, storage water administration, depletion limit administration," and I have not sorted it all out at this point. However my view is that the SA itself sets out the "alternative administration" (agreed to at least between the settlement parties) which is intended to govern administration of water rights in the Pojoaque basin, period. To the extent not inconsistent therewith, the other forms of "priority administration" set forth in the latest rule may be employed to "fill the gaps," and perhaps apply to non-settlement parties. Neither the WM nor the OSE is at liberty to ignore the SA and apply whatever type of administration he, she, or it chooses if such conflicts with the "alternative administration" set forth in the SA.

Finally, along the same lines, if the OSE is not willing to agree that in the event of a conflict between the SA and this, as yet un-promulgated rule, the SA controls, I see no choice but to file a Motion for Clarification with the court. Although, as a sole practitioner, I am certainly not looking forward to serving all of those who I would have to serve by mail with such a motion, I feel it is my duty to my clients to have this clarified now and not have to fight about it later in federal court. As I stated in my cover letter with my December 4, 2015 redline:

"Specifically, in my opinion, even though the OSE may have rule making authority and could make rules and regs governing the Pojoaque Basin absent the SA, nevertheless it is Section 5 of the SA that specifically called for their promulgation in accordance with, and to implement, the SA. Both the OSE and State are signatories to the SA which was approved by an act of Congress.

I think it beyond question that the SA agreement controls any ambiguity between it and the rules and regs and is binding on the OSE. Based upon the above, I have included the SA as authority for the proposed rules and regs and provided that in the event of ambiguity, the SA controls. I have included further references to the SA throughout the proposed rules and regs."

As for the current draft, I would like my proposed additions with references to the SA on pages 1 and 2 added (as well as all my others) but am adamant about my proposed additions to the "construction" paragraph at page 7. Based upon conversations I've had with legal representatives of the US, Pueblos, and County, only the OSE seems to see it differently. To the extent the SA does not control in the event of conflict between it and the rule, the objectors who objected because the rules and regs had not been done, may have had a valid objection. I hope we can finally put this issue to bed.

Larry White

RdT Association Exhibit B

