

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

STATE OF NEW MEXICO, <i>ex rel.</i> STATE	)	
ENGINEER,	)	
	)	
Plaintiff,	)	CASE NO. 6:66-cv-6639 WJ/WPL
	)	
v.	)	
	)	
R. LEE AAMODT, <i>et al.</i> ,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA	)	
PUEBLO DE NAMBÉ,	)	
PUEBLO DE POJOAQUE	)	
PUEBLO DE SAN ILDEFONSO,	)	
and PUEBLO DE TESUQUE,	)	
	)	
Plaintiffs-in-Intervention.	)	
_____	)	

**UNITED STATES' AND PUEBLOS' RESPONSE TO MOTION FOR CLARIFICATION**

The United States and the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (collectively “United States and Pueblos”) file this response to the *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* (Dec. 23, 2016) (Doc. 11208) (“Clarification Motion”). The United States and Pueblos request the Court, in the exercise of its supervisory powers, to appoint a settlement judge to assist the parties on the issues that have arisen in the drafting of the rules required to implement the *Settlement Agreement* (Apr. 19, 2012) (“Settlement Agreement”).

In the Clarification Motion, the Rio de Tesuque Association, Inc. (“Association”) seeks “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.” Clarification Motion at 2. In response, the United States and Pueblos state:

1. Throughout the settlement process, the Court has “closely supervised” the status and progress of the discussions and resulting Settlement Agreement. *New Mexico v. Aamodt*, 582 F. Supp. 2d 1313, 1319 (D.N.M. 2007). As part of that oversight, the Court appointed a settlement judge to assist the settling parties in addressing the difficult issues requiring resolution in the settlement process. Ultimately the Court approved the Settlement Agreement. *Memorandum Opinion and Order Approving Settlement Agreement* at 23-24 (Mar. 21, 2016) (Doc. 10543) (“Order”).
2. The Settlement Agreement requires counsel for the State Engineer, the United States and Pueblos to agree on the proposed rules prior to their promulgation “[i]n consultation with counsel for the other Settlement Parties.” Settlement Agreement § 5.3. In these circumstances, it is appropriate for the Association to inform the Court that it has not been able to resolve an issue related to the implementation of the Settlement Agreement and to seek the Court’s assistance.
3. The United States and Pueblos agree with the Association that the State Engineer cannot alter or amend the terms of the Settlement Agreement by the promulgation of rules pursuant to NMSA 1978 § 72-2-8. The court-approved Settlement Agreement provides for the proper integration of the Pueblos’ federal law rights with the other parties’ state

law rights and there is no basis or justification for the promulgation of rules that conflict with the Settlement Agreement. *See generally* Order at 14-22. As a result, to the extent there is any ambiguity in the rules, the rules must be interpreted consistently with the Settlement Agreement.

4. While the United States and Pueblos agree with the Clarification Motion's primary assertions as to the relationship between the Settlement Agreement and the rules required to implement the Settlement Agreement, the United States and Pueblos submit that those fundamental principles govern in any event whether expressly stated in the rules or not.
5. Given that the State Engineer has not sought to promulgate the draft rules and no actual controversy has arisen over the application of the draft rules to issues governed by the Settlement Agreement, the Association's request for clarification may be challenged as asking the Court for an advisory opinion. *See Columbian Fin. Corp. v. Bancinsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011) ("Article III has long been interpreted as forbidding federal courts from rendering advisory opinions." (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968))).
6. To date, the State Engineer, United States and Pueblos have not been able to agree on all aspects of the draft rules. In particular, it has proven difficult to define the scope of the Court's continuing jurisdiction over the Settlement Agreement and Final Decree. The United States and Pueblos do not seek guidance from the Court on this issue at this time but may do so in the future.
7. In light of the differences that have arisen among the settling parties regarding the proposed rules and the risk that the Clarification Motion is requesting an advisory

opinion, the United States and Pueblos ask the Court, in the exercise of its supervisory powers and as the initial step in resolving the outstanding issues, to appoint a settlement judge to assist the parties on the issues that have arisen in the drafting of the rules. The United States and Pueblos commit to working with the other settling parties to promptly provide a recommendation to the Court on such an appointment.

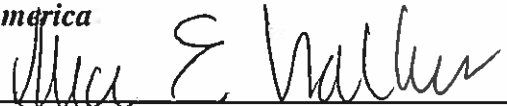
Respectfully submitted on this 6 day of January, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 6<sup>th</sup>, 2017, the **UNITED STATES' AND PUEBLOS' RESPONSE TO MOTION FOR CLARIFICATION** was filed electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I further certify that, on January 6<sup>th</sup>, 2017, copies of the foregoing **UNITED STATES' AND PUEBLOS' RESPONSE TO MOTION FOR CLARIFICATION** were mailed, by first-class U.S. mail, to the following non-CM/ECF participants:

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