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	)	
	)	**NO. 66cv6639 WJ/WPL**
UNITED STATES OF AMERICA, PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE,	)	
Plaintiffs-in-Intervention.	)	

STATE'S RESPONSE TO THE RIO DE TESUQUE ASSOCIATION, INC.'S MOTION FOR CLARIFICATION [DOC. 11208]

The State of New Mexico ("the State") hereby responds in opposition to the Rio de Tesuque Association, Inc.'s ("the Association") *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* (Doc. 11208, December 23, 2016). The motion should be denied.

INTRODUCTION

The Association seeks an order requiring the State Engineer to include language in draft rules to be promulgated by him governing administration of water rights in the Nambe, Pojoaque, Tesuque Basin (the "NPT Basin"). Specifically, the Association asks that the State Engineer be ordered to include a provision that should a conflict arise in the interpretation of the

rules to be promulgated by the State Engineer between the Settlement Agreement terms and the rules itself, that the Settlement Agreement would control. The Association's request arises from a provision in the Settlement Agreement approved by the Court in the *Partial Final Judgment and Decree of the Water Rights of the Nambe, Pojoaque, San Ildefonso, and Tesuque,* (Doc. 10547 and 10547-1, March 23, 2016), where the signatories agreed to the following provision:

> 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.

Doc. 10547-1 at § 5.3. In compliance with this section, counsel for the State Engineer has spent over three years drafting rules to implement the Settlement Agreement and the State Engineer's authority to administer water rights under section 72-2-9.1 (active water resource management) and 72-2-9 of the New Mexico statutes. NMSA 1978, §§ 72-2-9, 72-2-9.1. Counsel for the State Engineer has been meeting with counsel for Settlement Parties, the U.S. and the Pueblos to discuss the drafts since 2015.

Section 5.3 of the Settlement Agreement also provides that "[t]he State Engineer shall then promulgate the proposed rules pursuant to NMSA 1978, § 72-2-8, prior to entry of the Final Decree." Doc. 10547-1 at § 5.3. The rules have not yet been promulgated or been noticed for public comment, as required by New Mexico law. *See* NMSA 1978, § 72-2-8.

A. The Association Improperly Seeks an Advisory Opinion Because There is No Case or Controversy for the Court to Review

The Association seeks an advisory opinion and this Court has no jurisdiction to review the request or provide the relief requested. The Association seeks a determination 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 with the Pojoaque Basin, . . . the Settlement Agreement controls." Doc. 11208 at 6. While the State has agreed under section 5.3 of the Settlement Agreement to consult with "counsel for the other Settlement Parties," and that "the counsel for the State Engineer, the United States and 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," no such set of rules has yet been determined. *See, e.g.,* Motion at 1 (Doc. 11208) (referring to "the, as yet to be promulgated, rules and regulations governing the Pojoaque Basin"). The counsel for Settlement Parties are still in discussions regarding the drafting of the proposed rule. No rules have yet been proposed for promulgation under NMSA 1978, § 72-2-8.

This Court cannot address a matter until an actual controversy has arisen. *See, e.g., Columbian Fin. Corp. v. Bacinsure, Inc.*, 650 F.3d 1372,1376 (10th Cir. 2011). Article III of the United States Constitution "has long been interpreted as forbidding federal courts from rendering advisory opinions." *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). Without conceding that this Court would be the proper court to hear such a matter, an actual dispute could only occur, if at all, once a rule has been promulgated, and a party has an injury caused by the application of the rule in conflict with issues governed by the Settlement Agreement. "It is not the role of federal courts to resolve abstract issues of law. Rather, they are to review disputes arising out of specific facts when the resolution of the dispute will have practical consequences to the conduct of the parties." *Id.* There are no practical consequences to the Association of a draft rule governing administration of water rights and accompanying discussions. This is particularly true here, where the Association and its member Acequias own no water rights and are not Settling Parties.

This Court has previously overruled objections in this case that were "speculative and premature" because the rules governing the State Engineer's responsibilities in administering non-Pueblo rights "had not yet been adopted." Doc. 10543 at 19 (overruling objections that the Settlement Agreement changed priority dates). Similarly, in the pending Rio Chama adjudication, this Court denied a request for clarification "on certain issues for the future Senior Priority Water call, if needed," under a partial final judgment and decree in that case. *State of New Mexico v. Aragon*, Case No. 69-7941-BB/LFG (August 15, 2013) (attached as Exhibit 1). The Court held that "any opinion the Court would provide in clarifying the priority call procedure would be advisory." *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

Draft language in a preliminary draft of a rule does not create practical consequences and this Court has no jurisdiction to address the Association's requests. *See, e.g., Colorado Christian University v. Sebelius*, 2013 WL 93188 (D. Colo. 2013) (finding that the court could not make findings on interim rule governing Patient Protection and Affordable Care Act until pending amendment was completed because the legal issues would "remain too abstract to resolve"). Accordingly, the Association's motion should be denied.

B. The Rio de Tesuque Association Is Not A Settlement Party and Has No Basis for Seeking Relief

The Rio de Tesuque Association ("Association") comprises a majority of community acequias or ditches in the NPT Basin ("Acequias"). *See* NMSA 1978, § 73-2A-3(B). While the Association's counsel participated in the negotiations of the Settlement Agreement, neither the Association nor its member Acequias signed the Settlement Agreement itself.[1] Neither the

[1] The original signatories to the Settlement Agreement document are the United States Department of the Interior, the Pueblo of Nambe, the Pueblo of Tesuque, the Pueblo of Pojoaque, the Pueblo of San Ildefonso, the County of Santa Fe, the City of Santa Fe, and the

Association itself, nor any of its member Acequias, own a water right or are a Settlement Party. A "Settlement Party" is defined in the Settlement Agreement as "all persons or entities that sign this Agreement or authorize a representative to sign this Agreement and their successors in interest." Doc. 10547-1 at § 1.6.35. Because the Association is not a Settlement Party, the State has no obligation to consult with the Association regarding the drafting of proposed rules under section 5.3 of the Settlement Agreement.

Even if the Association were a Settlement Party, there is only a requirement for consultation, not agreement, regarding the provisions of the proposed rule under section 5.2. The Association does not assert that the State has filed to consult regarding the draft rules.

C. The State Engineer's Authority to Promulgate Rules Governing Administration of Water Rights Derives from State Statute and the Rules Will Govern the Water Rights of Settlement Parties and All Other Water Rights in the NPT Basin

The State Engineer has independent state statutory authority to promulgate rules, as referenced in both the Settlement Agreement and the Court's March 21, 2016 Order approving the Settlement Agreement. *See, e.g.,* Doc. 10543 at 19 (citing to section 5.3 of the Settlement Agreement); Doc. 10547-1 at § 5.2.1 (recognizing the State Engineer's authority to curtail non-Pueblo surface and groundwater diversions pursuant to state law), § 5.3 (recognizing the State Engineer's authority to promulgate proposed rules pursuant to NMSA 1978 § 72-2-8); NMSA 1978 § 72-2-8(A) ("The state engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him"). The rules will go through the full public process required by New Mexico law for promulgation. *See* NMSA 1978, § 72-7-8 (requiring public inspection, publication, and a hearing on proposed rules).

State of New Mexico (signed by the Governor, State Engineer, and Attorney General). Doc. 10547-1.

Once promulgated, the rules will have the force of state law. "Where an agency has the authority to act, its rules and regulations have the binding effect of statutes and may accordingly alter the common law." *City of Albuquerque v. New Mexico Public Regulation Com'n,* 2003-NMSC-028, ¶¶ 19, 25 ("The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law"). "The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him. We have long recognized the State Engineer's authority to do so." *State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 8; *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039; *see also* NMSA 1978 § 72-2-8 ("Any regulation . . . issued by the state engineer is presumed to be in proper implementation of the provisions of the water laws administered by him.")

The Settlement Agreement only binds the parties to the Settlement Agreement and cannot override New Mexico law. As law, the rules will control the administration of water rights in the NPT Basin. The proposed rule will address not only administration of the water rights of Settling Parties, but will also address administration for all water rights in the NPT Basin under the State Engineer's authority to adopt rules governing administration of a basin. NMSA 1978, §§ 72-2-8; 72-1-9; 72-2-9.1

D. There is no Inherent Conflict Between the Settlement Agreement and New Mexico State Law

The Association appears to assert that the State cannot act consistent with the Settlement Agreement and New Mexico water law at the same time. To the contrary, the State is not proposing rules that conflict with the Settlement Agreement or with New Mexico law. The purpose of section 5.2 of the Settlement Agreement was to include the input of the other Settlement Parties in the drafting to promote consistency between the rules and the Settlement

Agreement and to implement its terms. The rules are the mechanism through which the provisions of the Settlement Agreement for administration will be implemented, and made applicable to everyone in the basin. To the extent that the Association proposes that the Settlement Agreement promises that a Settlement Party is exempt from state law, the Association is wrong.

The New Mexico Court of Appeals has recognized that the State Engineer has authority to implement alternative forms of administration, other than through priority calls. *State ex rel Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 39. In *Lewis*, the Court stated, "although priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means." *State ex rel Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 39. Pointing to Colorado law as authority, the New Mexico Court of Appeals stated that alternative administration or "augmentation plans for substitute or replacement water" are not prohibited, as long as the plans do not "result in material injury to senior appropriators." *Id.* at ¶ 40, 41. The alternative provisions of the Settlement Agreement are not contrary to state law, and the protections do not need to rely on the Settlement Agreement as their sole and primary source of authority. *See, e.g., Tri-State*, 2012-NMSC-039. Rather the Settlement Agreement and the rules to be promulgated will be consistent and in accordance with New Mexico water law. The State Engineer could not, and did not, negotiate away his statutory authority to promulgate rules to govern the administration of water rights, nor do the terms of the Settlement Agreement require him to so.

The U.S. Supreme Court has held that a federal court cannot approve relief that would

require a violation of substantive state law. *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986). The District Court for the District of New Mexico has found that a federal consent judgment "cannot approve relief that would require a violation of substantive [state] law." *Duran v. Carruthers*, 678 F. Supp 839, 852 (DNM 1988).

The Settlement Agreement is legally binding on the parties to the settlement agreement. *Local No. 93*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"). The Association has not provided any authority for the proposition that the Settlement Agreement is equivalent to federal law. The force that binds the parties to the Settlement Agreement is the agreement itself. *Id.* at 522 ("it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree"). Any alleged violation by the State of the Settlement Agreement is a dispute between the parties to the Settlement Agreement, not a violation of federal law.

E. The Settlement Agreement Contemplates Modification of Administration Provisions In The Event of Conflict Between the Settlement Agreement and Applicable Law

Should the Court consider the Association's motion on the merits, the State requests that the parties be given the opportunity for additional briefing. The Association's argument that the Settlement Agreement would preempt State law is without merit for many reasons. One of these reasons the Association's assertion fails is based on section 5.9 of the Settlement Agreement entitled "Modification of Administration Provisions," which states in relevant part:

> The Settlement Parties have negotiated the provisions of Section 5[Administration] in a good faith attempt to avoid future disputes about administration of water rights in the Pojoaque Basin, but recognize that experience gained through implementation, and presently unanticipated considerations of law, science, sound judicial case management, may require

> those provisions to be amended. **Accordingly, the Settlement Parties agree that the remaining provisions of this Agreement shall remain in full force and effect notwithstanding a declaration by any court that Section 5, or any provisions thereof, is invalid or contrary to law.** The Settlement Parties further agree to meet to negotiate recommendations to the Decree Court for modifications to Section 5 within 90 days of any such judicial declaration invalidating a provision of Section 5 . . . .

Doc. 10547-1 at § 5.9 (emphasis added). Clearly, the Settlement Parties contemplated that should a conflict arise, the Settlement Agreement could be amended to comply with the law; not that the Settlement Agreement would trump state law.

E. The United States' and Pueblos' Proposal For A Settlement Judge

The United States and the Pueblos have proposed the appointment of a "settlement judge" to "assist the parties on the issues that have arisen in the drafting of the rules." Doc. 11218 at 4 (January 6, 2017). This proposal has not been discussed with the State. The State's resources and budget are severely limited, and the cost of such an endeavor may be beyond the reach of the State. The State questions whether such an appointment is within the scope of the Court's supervisory powers, where the issue raised by the Association encroaches upon a state rulemaking process. However, the State would need further information from the United States and the Pueblos regarding their proposal before formulating an opinion about the efficacy of such a proposal.

CONCLUSION

The Association's motion should be denied for the foregoing reasons.

Submitted by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 17, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

/s/ *Kelly Brooks Smith*
Kelly Brooks Smith