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

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| STATE OF NEW MEXICO, *ex rel*. STATE ENGINEER,<br><br>Plaintiff,<br><br>v.<br><br>R. LEE AAMODT, et al.,<br><br>Defendants,<br><br>and<br><br>UNITED STATES OF AMERICA,<br>PUEBLO DE NAMBÉ,<br>PUEBLO DE POJOAQUE,<br>PUEBLO DE SAN ILDEFONSO,<br>and PUEBLO DE TESUQUE,<br><br>Plaintiffs-in-Intervention. | ) | No. 66cv6639 WJ/WPL |

**REPLY TO STATE'S [DOC. 11270] AND US/PUEBLOS' [DOC. 11218] RESPONSES TO MOTION FOR CLARIFICATION [DOC 11208]**

Comes now the Rio de Tesuque Association, Inc. (hereafter "the Association")[1], and replies to the *Untied States' and Pueblos' Response to Motion for Clarification* [Doc. 11218] (*US/Pueblos' Response*) and the *State's Reponse to the .... Motion for Clarification* [Doc. 11270] (*State's Response*). As noted, the Association seeks clarification and a determination that in the event of a conflict between the Settlement Agreement and the rules and regulations to be

[1] 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.

promulgated by the State Engineer to govern the Pojoaque Basin (referred to by the State as the "Rule"), the Settlement Agreement controls.

**PART I - REPLY TO *US/PUEBLOS' RESPONSE***

The US/Pueblos note that because the State Engineer has not yet sought to promulgate the draft rules, "the Association's request for clarification may be challenged as asking the Court for an advisory opinion." Citing Columbian Fin. Corp. v. Bacinsure, Inc., 650 F.3d 1372,1376 (10th Cir. 2011) (Columbian Financial). *US/Pueblos' Response* at 3, emphasis by the Association. The Association will address Columbian Fin. Corp under Part II in addressing the *State's Response*. It is significant to note that on the merits of the *Association's Motion for Clarification*, contrary to the position taken by the State: "The United States and the 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 Section 72-2-8;" and that "there is no basis or justification for the promulgation of rules that conflict with the Settlement Agreement." *US/Pueblos' Response* at 2-3. Further, "While the [US/Pueblos] agree with the Clarification Motion's primary assertions as to the relationship between the Settlement and the rules ... [the US/Pueblos] submit that those fundamental principles govern in any event whether expressly stated in the rules of not." *Id*. Although the Association agrees with this statement, for the reasons set forth under Part II, *infra*., the Association submits that in the best interests of the settlement of this litigation, now in its 52nd year, the Court should exercise its sound judicial discretion and address this issue now. Finally, whether the Court grants the *Association's Motion* or not, the Association concurs with the US/Pueblos request for a settlement judge to assist the parties on issues that have arisen in the drafting of the rules.

## PART II - REPLY TO THE STATE'S RESPONSE

In its *Response*, the State first contends that this Court lacks jurisdiction to address the substance of the *Association's Motion* because, it claims, the Association is merely seeking an "advisory opinion." It then contends that the Association is not a "settlement party" and has no basis for seeking relief. Finally, the State contends that any rules it promulgates will have the force of state law and should a conflict arise, the Settlement Agreement could be amended to comply therewith.[2] ("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." *State's Response* at 9.). The Association will first address the merits of its *motion*. Second, it will address the State's jurisdictional argument and, lastly, it will address the State's contentions that it is not a "settlement party" and has no basis for seeking relief or "consulting" in the promulgation of the "Rule."

### A. The State Cannot Enforce a Rule That Conflicts with the Settlement Agreement

The State asserts that the Association's request arises from Section 5.3 of the Settlement Agreement. *State's Response* at 2. To the contrary, the Association's request arises under Section 5.2 which sets forth very clear parameters on the exercise of the State's authority to promulgate rules to govern administration in the Pojoaque Basin. Those parameters are: "the State Engineer shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in this Agreement and Final Decree." Further under Section 5.2.1.1, "and shall exercise

[2]The State requests that should this Court consider the merits of the *Association's Motion* "the parties be given the opportunity for additional briefing." *Id*. At 8. The Association opposes that request. The Association filed its motion setting forth the grounds upon which it sought relief. It was up to the State to determine how it wished to respond. It should not now be allowed a "second bite" at the apple. Such would only result in further delay.

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. Section 5.2.1.1. Likewise, with respect to his duties as Water Master with respect to the Pueblos' water rights; "in order to ensure compliance with the terms of, and the delivery of water in accordance with, this Agreement." Section 5.1.2.2. (Emphasis the Association's). *See*, *also*, discussion in the Court's *Memorandum Opinion and Order,* entered March 21, 2016, [Doc. 10543] (*March 21, 2016 Opinion)* at 18-19. A rule or regulation that is in conflict[3] with the Settlement Agreement is, by definition, "not in compliance with" or "in accordance with" the Settlement Agreement contrary to what the State agreed to in the Settlement Agreement. Such a rule would be a breach of the Settlement Agreement by the State and contrary to both the Aamodt Litigation Settlement Act (Act), 124 Stat. 3134 and this Court's March 21, 2016 Opinion. Furthermore, enforcement thereof would be prohibited by Article 2, Sec. 19 of the New Mexico Constitution, and Article I, Section 10 of the U.S. Constitution.

The Aamodt Litigation Settlement Act (Act), 124 Stat. 3134, Sec. 602(22), to the extent not in conflict therewith, "authorized, ratified, and confirmed the [January 19, 2006] Settlement Agreement." The provisions referred to above in the April 19, 2012 Settlement Agreement, [Doc. 7970-1] approved by the Court in its *March 21, 2016 Opinion*, are identical to those in the January 19, 2006 Settlement Agreement authorized and confirmed in the Act. In overruling objections that objectors could not properly assess the Settlement Agreement because numerous documents referred to therein, including the Water Master Rules, were not complete, this Court

[3]Webster's definition as an intransitive verb: "to be different, opposed, or contradictory: to fail to be in agreement or accord."

held "The objections now before the Court similarly fail to show that those documents are necessary for determining whether the Settlement Agreement is fair, adequate, reasonable, in the public interest or consistent with applicable law." *Id*. at 8-9. The Association submits that inherent in the Court's conclusion that the Settlement Agreement was "fair, adequate, reasonable, in the public interest or consistent with applicable law," is the proposition that rules promulgated by the State would not conflict with the Settlement Agreement in any material way.

The State contends that the Association has not provided any authority for the proposition that the Settlement Agreement is equivalent to federal law and any violation of the Settlement Agreement by the State "is a dispute between the parties to the Settlement Agreement and not a violation of federal law." *State's Response* at 8. The Settlement Agreement constitutes the basis for the entry of the Partial Final Decree on the Pueblos' water rights determined under federal law and sets forth how both the Pueblos' water rights and non-pueblo water rights within the Pojoaque Basin will be administered *interse*. That Settlement Agreement was sanctioned by Congress and approved by this Court. Under the circumstances the Association does assert that the Settlement Agreement has the force of federal law, is binding on the State, and any rules in conflict therewith are contrary thereto.

Furthermore, in addition to the provisions of the Settlement Agreement referred to above having the sanctions of both Congress and this Court, the State is also barred from enforcing a rule which is in conflict with the Settlement Agreement and which deprives any non-Pueblo water right owner of any of the protections provided such owner under the Settlement Agreement, under the "contract clause" of both the New Mexico and U.S. Constitutions. Article 2, Sec. 19 of the New Mexico Constitution provides: "No ex post facto law, bill of attainder, nor

law impairing the obligation of contracts shall be enacted by the legislature." Also see U.S. Constitution, Article I, Section 10. In Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949), the New Mexico Supreme Court affirmed the lower court's decree enforcing the performance of an oral contract to devise property. Subsequent to the oral contract, in 1947 the legislature passed an act barring any claim against an estate for the breach of such a contract unless the contract was in writing and signed by the decedent (1947 Act). Subsequently, the plaintiff filed the action to enforce the oral contract. The defendant moved to dismiss on the basis of the 1947 act which the lower court denied. In affirming the lower court's decree, the New Mexico Supreme Court held:

> The 1947 Act which the defendant invokes here is not a limitation statute, ***299** but by its terms bars the present action if we give it effect. It is clearly violative of our constitutional provision above quoted [the Contract Clause], so far as contracts which had been performed prior to its effective dates are concerned. It cannot be used as a bar to this action.

In reaching its conclusion, the Court cited 1 Cooley's Constitutional Limitations, 8th Ed., p. 583:

> The obligation of a contract,' it is said, 'consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

And further, citing Baker v. Tulsa Building & Loan Association, 179 Okl. 432, 66 P.2d 45, 46:

> A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once created, and has become absolute, it is protected from the invasion of the Legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right.'

206 P.2d 1154, 1156, emphasis the Association's. A state can no more impair by legislation the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. Woodruff v. Trapnall, U.S.Ark.1850, 51 U.S. 190, 10 How. 190, 13 L.Ed. 383. See, also, Green v. Biddle, 1823, 21 U.S. 1, 8 Wheat. 1, 5 L.Ed. 547; Fletcher v. Peck, 1810, 10 U.S. 87, 6 Cranch 87, 3 L.Ed. 162.

Assuming, *arguendo*, that rules promulgated pursuant to the State Engineer's authority under state law constitute "state law" as contended by the State, nevertheless any such rule that deprives a water right owner of protections provided by the Settlement Agreement is in violation of the contact clause and its enforcement is prohibited by Article 2, Sec. 19 of the New Mexico Constitution, and Article I, Section 10 of the U.S. Constitution.

**B. This Court Has Jurisdiction to Address the Association's Motion on the Merits and Should Do So.**

Both the US/Pueblos and State claim that the Association is requesting an "advisory opinion" citing Columbian Fin. Corp. v. Bacinsure, Inc., 650 F.3d 1372,1376 (10th Cir. 2011) (Columbian Financial) and therefore the Court does not (State) or may not (US/Pueblos) have jurisdiction to address the issue. In Columbian Financial, the insureds brought a declaratory judgement action against the insurer seeking a declaration that the insureds' claim would be covered under BanInsure's "D&O" policy. The 10th Circuit determined that at the time the suit

was filed there was a "case and controversy" but by the time the district court entered a declaratory judgement, only one claim had been made which BankInshare stipulated was covered by the policy, and hence the "case and controversy" was moot and the district court was without jurisdiction at the time it entered its declaratory judgement. Likewise, Colorado Christian University v. Sebelius, 2013 WL 93188 (D. Colo. 2013) ( Colorado Christian), cited by the State at 4, was an action for declaratory and injunctive relief. The court granted defendants motion to dismiss on the grounds that it lacked jurisdiction because the case was not ripe.

The Association acknowledges that **if** it filed a complaint in another court initiating a new action seeking a declaratory judgment that the Settlement Agreement controlled, arguably the court where it was filed may lack jurisdiction under Columbian Financial and Colorado Christian. The Association, however, submits Columbian Financial and Colorado Christian, dealing with jurisdiction under the Declaratory Judgement Act, are inapposite. Here there is no question that this Court has had jurisdiction over this case since April 1966. As noted by the US/Pueblos "Throughout the settlement process the Court has 'closely supervised' the status and progress of the discussions and resulting Settlement Agreement." *US/Pueblos' Response* at 2. Furthermore, pursuant to Section 1.5 of the Settlement Agreement, concerning jurisdiction, "The final decree entered by the Decree Court shall incorporate by reference this Agreement and the Decree Court shall retain continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Agreement, the Interim Administrative Order, and the Final Decree." *Also See*, *March 21, 2016 Opinion* at 11, "Thus, this Court, ...will retain jurisdiction to enforce the provisions of the Settlement Agreement...." Hence there is no question that this Court has jurisdiction over the *Association's Motion* and is not barred from ruling on it by either

Columbian Financial or Colorado Christian. (A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it. U.S. v. Hardage, 982 F.2d 1491, 1496 (10th Cir. 1993); Farmer . Banco Popular of North America, 557 Fed. Appx.762 (10th Cir. 2014)).

Although neither Columbian Financial nor Colorado Christian require dismissal of the *Association's Motion*, the Association believes that discussions in Columbian Financial are relevant to the Court's decision to exercise its inherent power to manage the cases before it and grant the *Association's Motion for Clarification.* In Columbian Financial, noting that there is no formula to determine in every dispute whether the "case or controversy" requirement has been satisfied, the Tenth Circuit quoted with approval:

> The question comes down to" 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.' "

Id. at 1376. And further, quoting from other cases, "[t]he crucial question [in determining mootness] is whether granting a present determination of the issues offered will have some effect in the real world." Id. at 1382. The State, in arguing there is no actual dispute, quotes from Columbian Financial: "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." *State's Response* at 3. The State then claims: "There are no practical consequences to the Association of a draft rule governing administration of water rights and accompanying discussions." *Id*. The Association strongly disagrees with the State's assertion that there are no practical consequences. To the contrary,

there is a substantial controversy between the Association and the State and the factors set forth in Columbian Financial strongly tip the scales in favor of granting the *Association's Motion.*

Applying the principles set forth in Columbian Financial to the case at bar, there is a specific dispute between the State and the Association concerning whether, in the event of conflict, the Rule or the Settlement Agreement controls. As demonstrated in Exhibit A to the *Association's Motion for Clarification*, this dispute goes back to December 2015 and, as demonstrated by the State's Response, continues to the present.[4] Despite over a year of meetings on the State's proposed rules, they are far from ready for promulgation, at least partly due to the current dispute between the Association and the State. Among other conditions, the Aamodt Settlement Act requires the approval of the final decree by September 15, 2017. Id., Sec. 623. The Settlement Agreement contemplates the promulgation of the Rule pursuant to Section 5, prior to the entry of a final decree. Consequently "time is of the essence."

Further, the decision of non-pueblo water users in the Pojoaque Basin to accept the Settlement Agreement and become settlement parties, or not, is very real and immanent. Whether the protections provided to non-Pueblo water rights by the Settlement Agreement can be changed by the State upon enactment of the "rule" to govern the Pojoaque basin, is a very material consideration. As to what happens in the event of a conflict between the Settlement Agreement and the Rule, the State Engineer, relying on Section 5.9 of the Settlement Agreement, asserts: "Clearly, the Settlement Parties contemplated that should a conflict arise, the Settlement Agreement

[4]See, e.g., *State's Response* at 8-9 suggesting the Settlement Agreement would be amended to conform to the rule.

could be amended to comply with the law; not that the Settlement Agreement would trump state law." *State's Response* at 9. What the parties, including the State, did not contemplate when Section 5 of the Settlement Agreement was negotiated, was that the protections provided non-Pueblo water right owners in the Settlement Agreement, could be eradicated at the whim of the State Engineer by the subsequent promulgation of the very rules it agreed to promulgate "in order to ensure compliance with the terms of, and the delivery of water in accordance with, this Agreement."

**C. The Association Represent's "Settling Parties" and Appropriately Filed the *Motion for Clarification*[5]**

In September of 2000, the parties began mediation in an attempt to reach a settlement. The undersigned was retained by the Association to negotiate on its behalf. The Association is comprised of the community ditches in Tesuque, joined as defendants in this case, each of which is comprised of "parciantes" (surface water right owners) served by the ditch. These negotiations led to the January 19, 2006 Settlement Agreement which, in addition to being executed by governmental entities, was also executed by numerous parciantes of the community ditches of the Association. See, e.g., filings of signature pages on May 9, 2006. The Association then authorized the undersigned to make two trips to Washington DC in 2006 and 2007 to lobby in support of legislation to approve the settlement. As noted by the Court, on November 6, 2014, *The Rio de Tesuque Association, Inc.'s Memorandum in Support of Settlement Agreement and*

[5]The Association submits that the undersigned's representation of the interests of the Association's community ditches which are named defendants in the case, gives it sufficient "standing" to "consult" on the promulgation of the Rule. To the extent it does not, however, the undersigned substituted his appearance for Marguerite B. Cutler on November 18, 1992 who filed her Acceptance of the Settlement Agreement November 10, 2016 [Doc. 11008].

*Entry of a Partial Final Decree on the Pueblos' Rights* [Doc. 9911], was filed in support of the settlement. *March 21, 2016 Opinion* at 3-4. The Association's instruction to the undersigned to support the settlement represented the will of the majority of the parciantes under each of the community ditches. When the time is appropriate, the undersigned assumes most of those parciantes will file the acceptance of the settlement and make a well election.

**CONCLUSION**

The Association agrees with the State that the Settlement Agreement provides for permissible alternative administration under State ex rel Office of State Engineer v. Lewis, 2007-NMCA-008 and is consistent with state law. To the extent that rules promulgated pursuant to the State Engineer's authority conflict with the Settlement Agreement's alternative administration and the protections provided to non-Pueblo water rights within the Pojoaque Basin thereunder, the alternative administrative provisions of the Settlement Agreement control. For the foregoing reasons and those set forth in its motion, the *Association's Motion for Clarification* should be granted.

Respectfully submitted this 2nd day of February, 2017
***Electronically Filed***
***/s/Larry C. White***
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Santa Fe, NM 87504-2248
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 2nd th day of February, 2017, 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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