

**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

**RESPONSE TO JOINT MOTION TO MODIFY THE
PROPOSED FINAL JUDGMENT AND DECREE
AND
CROSS MOTION FOR FURTHER MODIFICATION**

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 for its response to the US/Pueblos’ *Joint Motion to Modify the Proposed Final Judgment and Decree* [Doc. 11471; *Joint Motion to Modify*] and *Cross Motion for Further Modification (Cross Motion)*, states:

1. The relief sought by the US/Pueblos in their *Joint Motion to Modify* primarily seeks a protection of the “benefit of their (the Pueblos) bargain” under the Settlement Agreement. The non-Pueblo water right owners are also entitled to the “benefit of their bargain” under the Settlement Agreement which provides non-Pueblo water rights with significant protections under Sections 4 and 3.7.2 of the Settlement Agreement. As stated by the US/Pueblos at 5: “As previously contemplated by the parties and approved by the Court, the State Engineer should oversee administration of all water rights adjudicated in the Final Decree as provided in the Settlement Agreement,...” Emphasis by the Association.

2. For its cross motion for further modification, the Association requests that the Final Decree contain the language set forth below requested by the US/Pueblos but with the addition of the highlighted modifications. The paragraph requested by the US/Pueblos with the Association’s requested modifications highlighted, provides:

As specified in the Settlement Agreement dated April 19, 2012, this Court incorporates by reference the Settlement Agreement and appoints the State Engineer to be the Water Master responsible for administering the water rights adjudicated to the Pueblos under this Decree. The State Engineer shall administer both the Pueblo and the Non-Pueblo water rights adjudicated by this Court ~~pursuant to the~~ **as set forth in the Settlement Agreement and** Final Decree. This Court maintains continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Settlement Agreement dated April 19, 2012, and this Decree.

US/Pueblos’ *Joint Motion to Modify* at 2, with the Association’s requested modification.

ARGUMENT IN SUPPORT OF *CROSS MOTION*

Significantly, at the heart of the US/Pueblos' *Motion to Modify* and the Association's *Cross Motion for Further Modification* is the reluctance of the State Engineer to acknowledge it is bound by what it agreed to in the April 19, 2012 Settlement Agreement (Doc. 7970-1, Doc. 10547-1) approved by this Court on March 21, 2016 (Doc. Doc. 10543). *See, e.g.,* Association's *Motion for Clarification*, Doc.11208, and *State's Response*, Docket 11270, at 5-9. The Association previously sought clarification on the binding effect of the Settlement Agreement over rules and regulations to be promulgated by the State Engineer which were in conflict with the Settlement Agreement (Association's *Motion for Clarification*, Doc.11208). On May 10, 2017, this Court entered its *Order Denying Motion for Clarification* (Doc. 11494), stating: "The Court will deny the Motion for Clarification because the parties have agreed to work with Judge Michael Nelson to resolve the issues that have arisen in the drafting of the rules required by the Settlement Agreement."

Although the Court declined to address the merits of the *Association's Motion for Clarification*, it quoted from Section 5.2 of the Settlement Agreement pertaining to the State Engineer's duties with respect to the administration of water rights within the Pojoaque Basin. *Order, Id.* at 1-2. The Association again asserts that under those provisions of the Settlement Agreement, the State Engineer is obligated to administer all rights within the Pojoaque Basin "in order to ensure compliance with the terms of, and delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree." Section 5.2 of the

Settlement Agreement makes it clear that its provisions apply to the administration of both Pueblo and non-Pueblo water rights within its purview.¹

The Association does not challenge, *per se*, any contentions made by the US/Pueblos' in their *Motion to Modify*, but rather wishes to elaborate on some of their contentions. The US/Pueblos state that after decades the US, Pueblos, the State, and "many others arrived at a Settlement Agreement to determine the Pueblos' water rights." While this is true, what made the determinations of the Pueblos' water rights possible, however, were the protections provided to non-Pueblo water rights under Sections 4 and 3.1.7 of the Settlement Agreement. Without those protections there would not have been a settlement and those protections are part and parcel thereof. While the relief sought by the US/Pueblos' speaks primarily in terms of the protection of the "benefit of their bargain" for the Pueblos under the Settlement Agreement, the "benefit of their bargain" for the non-Pueblos should be equally protected. As the Us/Pueblos correctly state, "...the State Engineer should oversee administration of all the water rights adjudicated in the Final Decree as provided in the Settlement Agreement..." (US/Pueblos' *Motion* at 5, emphasis by the Association), and "The Settlement Agreement expressly provides that '[t]he Final Decree entered by the District Court shall incorporate ... this [Settlement] Agreement and the Decree Court shall incorporate by reference this Agreement and ... shall retain continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Agreement...." *Id.* at 4.

The following authorities were cited in support of the Associations' *Motion for Clarification, supra.*, and are equally applicable here. The Settlement Agreement, *supra*;

¹The Association acknowledges there may be instances of the administration of non-Pueblo rights not within the purview of the of the Settlement Agreement which may administered under state law

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); and the Interim Administrative Order entered March 23, 2016 (Doc. 10548), which provides, *inter alia*, that the Non-Pueblo 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 supports the relief sought by the US/Pueblos and by its cross motion requests the Court to include in its Final Decree the paragraph requested by the US/Pueblos with the Association's requested modification as set forth at page 2 above.

The State Engineer opposes the relief sought in the Association's cross motion. The US/Pueblos, City and County have responded that they take no position on the Association's motion at this time.

Respectfully submitted this 22nd day of May, 2017

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 22nd th day of May, 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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