

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 NAMBE,)
PUEBLO DE POJOAQUE,)
PUEBLO DE SAN ILDEFONSO,)
and PUEBLO DE TESUQUE,)
Plaintiffs-in-Intervention.)

No. 66cv6639 WJ/WPL

**STATE OF NEW MEXICO’S RESPONSE TO JOINT MOTION TO MODIFY THE
PROPOSED FINAL JUDGMENT AND DECREE**

The State of New Mexico (“State”) responds to the *Joint Motion to Modify the Proposed Final Judgment and Decree* filed on April 24, 2017 (Doc. 11471) (“Motion”), as follows:

The State does not object to modifying the *[Proposed] Final Judgment and Decree of the Water Rights of the Nambe, Pojoaque and Tesuque Stream System* (Dec. 9, 2016, Doc. 11186-1) (“Proposed Final Decree”) to include language that has already been agreed to in the Settlement Agreement. However, the State objects to the United States’ and Pueblos’ proposed modifications because they go beyond the terms agreed to in the Settlement Agreement. Specifically, the State objects to language in the Motion’s proposed paragraph that purports to provide the State Engineer authority to administer non-Pueblo water rights, instead of recognizing his existing authority under state law to administer water rights in the State. The State also objects to proposed language in the Final Decree that would appoint the State Engineer as the Water Master. While the State Engineer agreed in the Settlement Agreement to serve as

Water Master to administer the Pueblos' water rights, he did not agree that he would be appointed by the Court in order for him to serve in that capacity.

The Court approved the form of the Proposed Final Decree on September 9, 2016 (Doc. 10849-2). Prior to the Court's approval, the United States and the Pueblos filed a response to the motion seeking such approval, and they failed to raise any issues regarding the form of the Proposed Final Decree. (August 9, 2016, Doc. 10784). The State sees no justification for modifying the Proposed Final Judgment and Decree.

A. The State Engineer's Authority to Administer Non-Pueblo Water Rights Arises Under State Law, not the Settlement Agreement or the Court

The State objects to modifying the Proposed Final Decree to state that: "The State Engineer shall administer both the Pueblo and the Non-Pueblo water rights adjudicated by this Court pursuant to the Final Decree." Motion (Doc. 11471) at 2. The State Engineer's authority to administer non-Pueblo water rights arises from his statutory authority under New Mexico law. *See, e.g.*, NMSA 1978, §§ 72-12-1 to 72-2-17. "The state engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts." NMSA 1978, § 72-2-9. The state engineer "has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." NMSA 1978, § 72-2-1. The New Mexico Supreme Court recently clarified in *Tri-State Generation and Transmission Assoc., Inc.*, 2012-NMSC-039, that the State Engineer has broad authority to administer water rights that is not limited to those under licenses or final adjudications of the courts. *See Tri-State*, 2012-NMSC-039, ¶¶ 32- 34.

While the State Engineer entered into the Settlement Agreement and is bound by its terms, the State did not agree that its terms limit his statutory authority to administer water rights

under state law. Instead, the first sentence in Section 5.2 of the Settlement Agreement specifically recognizes and affirms the State Engineer's statutory authority to administer non-Pueblo water rights.

Pursuant to his statutory authorities, the State Engineer shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in this Agreement and the Final Decree. Additionally, separate and apart from his duties under State law, the State Engineer also agrees to perform the functions of Water Master set forth in this Section 5.2 and in Section 5.6. Performance by the State Engineer of these Water Master functions shall be solely in accordance with, and limited by, this Agreement, the Final Decree, and further orders of the Decree Court.

Settlement Agreement (dated April 19, 2012; filed March 23, 2016; Doc. 10547-1) at 36, § 5.2 (emphasis added).

Contrary to the assertions of the United States and the Pueblos, the Settlement Agreement does not provide that “[a]t all times, the performance of the State Engineer ‘shall be solely in accordance with, and limited by, [the Settlement] Agreement, the Final Decree, and further orders of the Decree Court.’” Motion, p. 5. This is a mischaracterization and distortion of the plain language of the Settlement Agreement. The third sentence in Section 5.2 applies only to the State Engineer's performance of “these Water Master functions,” which are identified in the second sentence as those functions that the State Engineer agrees to perform for the administration of Pueblo water rights “**separately and apart from his duties under State Law**” (emphasis added). The State Engineer did not agree that his administration of non-Pueblo water rights was limited by the Settlement Agreement or the Final Decree, only his administration of Pueblo water rights under Sections 5.2 and 5.6 (Administration of Pueblo Rights). The language proposed by the United States and Pueblos contradicts the explicit agreement of the Settlement Parties in the Settlement Agreement and misstates applicable law.

The State Engineer's statutory authority is again explicitly recognized in paragraph 5.2.1.1 of the Settlement Agreement:

5.2.1.1. The State Engineer has the authority, pursuant to state law, to curtail non-Pueblo surface and groundwater diversions and shall exercise his authority as necessary 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.

Id. at 37, § 5.2.1.1. The State Engineer agreed to exercise his existing authority under state law, not the Settlement Agreement or the Court, to administer non-Pueblo water rights “as necessary to ensure compliance with the terms of” the Settlement Agreement and the Final Decree. He did not agree that his administrative authority was either limited, or provided, in the Settlement Agreement or the Final Decree.

The State therefore objects to the second sentence in the United States and Pueblos' proposed paragraph that the “State Engineer shall administer both the Pueblo and the non-Pueblo water rights adjudicated by this Court pursuant to the Final Decree.” This Court is not the source of the State Engineer's authority, and the Final Decree should not contain language directing the State Engineer to administer pursuant to the Court's authority. The State Engineer is already required to administer non-Pueblo water rights according to his statutory authority, consistent with state law and the terms of the Settlement Agreement. Any additional language will only create ambiguity as to the source of the State Engineer's authority, and the Court's role in the administration of state water rights.

B. The Settlement Agreement Does Not Provide for the Court to Appoint the State Engineer as Water Master for the Pueblos

The State agreed in the Settlement Agreement that the State Engineer would serve as the Water Master for the administration of the Pueblos' water rights, but the State did not agree that the State Engineer would be appointed by the Court, or serve under the supervision and authority

of the Court. The Settlement Agreement specifically provides that “the State Engineer also agrees to perform the functions of Water Master set forth in this Section 5.2 and in Section 5.6.” Settlement Agreement (Doc. 10547-1) at 36, § 5.2. The functions of Water Master in Section 5.2 apply only to the Pueblos’ water rights, as set out in Section 5.2.1.2. “The Water Master shall have the authority to curtail Pueblo surface and groundwater diversion 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.” *Id.* at 38, § 5.2.1.2. Where Section 5.2 addresses non-Pueblo water rights, it refers to the State Engineer, not the Water Master. *See id.*, §§ 5.2, 5.2.1.1.

The State Engineer has agreed to perform the functions of Water Master to administer the water rights of the Pueblos under the Settlement Agreement, and will exercise his existing authority to administer the water rights of the non-Pueblos under state law. Therefore, there is no need for this Court to appoint the State Engineer as Water Master, and it would in fact be contrary to the terms of the Settlement Agreement which has already been approved by this Court as “fair, adequate, reasonable, in the public interest, and consistent with applicable law.” Doc. 10547 at 2, §§ 4, 7. This Court should not modify the terms of the negotiated agreement by inserting this proposed language into the Proposed Final Decree. This Court has already ordered that “[a]dministration of the Pueblos’ water rights that are the subject of this Decree shall be in accordance with the Settlement Agreement.” *Id.* at 12, § 5. Nowhere in the Settlement Agreement is a provision that the Court appoint the State Engineer as the Water Master in order for the State Engineer to take on those responsibilities. The State Engineer will perform those functions, but not as an appointee of the Court.

C. The Continuing Jurisdiction of the Court is not Inconsistent with the State Engineer's Statutory Authority to Administer Water Rights

The Settlement Agreement's recognition of the State Engineer's statutory authority to administer water rights is not inconsistent with Section 1.5 of the Settlement Agreement providing for this Court's continuing jurisdiction. In Section 1.5 the Settlement Parties agreed that the Court retains jurisdiction to "interpret and enforce the terms, provisions, and conditions of the Agreement, the Interim Administrative Order, and the Final Decree." Settlement Agreement (Doc. 10547-1) at 4, § 1.5. But this language does not provide that Court has jurisdiction to **administer** water rights, or supervise the administration of water rights pursuant to the State Engineer's statutory authority. That authority remains with the State Engineer, under state law. The State did not agree to include any language in the Final Decree proposing to grant the Court authority over the administration of water rights.

CONCLUSION

Wherefore, for the reasons stated above, the State requests the Court deny the *Joint Motion to Modify the Proposed Final Judgment and Decree* because it seeks to include language in the Final Decree that is contrary to the terms negotiated in the Settlement Agreement.

Electronically Filed,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 22, 2017, I filed the State of New Mexico's Response to the Joint Motion to Modify the Proposed Final Judgment and Decree 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 and served the parties listed below by first class mail on May 23, 2017.

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