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.	)	CASE NO. 6:66-cv-6639 WJ/WPL

UNITED STATES' AND PUEBLOS' (1) REPLY TO THE STATE OF NEW MEXICO'S RESPONSE TO JOINT MOTION TO MODIFY THE PROPOSED FINAL JUDGMENT AND DECREE AND (2) RESPONSE TO THE RIO TESUQUE ASSOCIATION CROSS MOTION

I. INTRODUCTION

The United States of America and the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque (collectively "United States and Pueblos") jointly (1) reply to the *State of New Mexico's Response to Joint Motion to Modify the Proposed Final Judgment and Decree* (May 22, 2017) (Doc. No. 11500) ("State Response") and (2) respond to the Rio de Tesuque Association, Inc.'s

("Association") *Response to Joint Motion to Modify the Proposed Final Judgment and Decree and Cross Motion for Further Modification* (May 22, 2017) (Docket No. 11499) ("Association Cross Motion").

First, the State of New Mexico ("State") does not question the Court's "continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Settlement Agreement dated April 19, 2012 and [the Final] Decree." *See Joint Motion to Modify the Proposed Final Judgment and Decree* at 2 (Apr. 24, 2017) (Doc. No. 11471) ("Joint Motion"). The State insists nevertheless that the State Engineer operates free of Court supervision when carrying out his assigned duties under the *Settlement Agreement* (Apr. 19, 2012) ("Settlement Agreement") and Final Decree. According to the State, the Court may not supervise the State Engineer when he is overseeing non-Pueblo water rights as State Engineer or when acting as Water Master with authority over the Pueblo rights, both of which are accomplished pursuant to the Final Decree. State Response at 4-5. The United States and Pueblos disagree. Decades ago at the inception of this case, the State, the United States, and Pueblos originally invoked the jurisdiction of this Court to determine and administer all of the water rights of the Nambé Pojoaque Tesuque Basin ("NPT Basin"), including the Pueblos' water rights. Nothing in the Settlement Agreement suggests that in interpreting and enforcing the Settlement Agreement and Final Decree, the Court now lacks supervisory authority over the State Engineer who is expressly directed by the Settlement Agreement to exercise his authority in accordance with those documents. Settlement Agreement §§ 1.5, 5.2.1; *contra* State Response at 4-5.

Second, the Association Cross Motion, while generally consistent with the Settlement

Agreement and the Joint Motion, is unnecessary and raises issues regarding the interaction between the Settlement Agreement and state law that do not need to be addressed in the course of entering the Final Decree. *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). The additional decree language proposed by the United States and Pueblos ensures that the non-Pueblos, like the Pueblos, receive the full range of protections provided by the Settlement Agreement and there is no need to add the language proposed in the Association Cross Motion.

II. ARGUMENT

A. THIS COURT RETAINS JURISDICTION TO SUPERVISE THE ACTIONS OF THE STATE ENGINEER AS AGREED TO IN THE SETTLEMENT AGREEMENT.

At the outset of this litigation, the United States and Pueblos, as well as the State, envisioned a comprehensive final decree from this Federal Court that fully adjudicated the rights of all parties in the NPT Basin and provided for the continued use of water in accordance with that decree. When it filed this case asking that the Court enjoin all illegal use of water in the NPT Basin, the State, among other things, invoked the McCarran Amendment, 43 U.S.C. § 666, which provides consent to sue the United States in a general stream adjudication for the determination of federal and tribal water rights under federal law. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Complaint* ¶ 4, at 9 (Apr. 20, 1966) (Doc. 1). When the United States and Pueblos intervened, they expressly requested "[t]hat

the Court appoint a water master to administer the waters of the Nambé-Pojoaque River and the respective rights of all users therefrom . . ." *Complaint in Intervention* at 6 (Feb. 13, 1967).

The Supreme Court has recognized the need for the comprehensive adjudication and administration of all rights on a stream system such as this, stating that "'by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.'" *Colorado River Water Conservation Dist.*, 424 U.S. at 811 (quoting S. REP. NO. 82-755, at 4-5 (1951)). In concluding that under the McCarran Amendment the United States could be joined in a general stream adjudication, the Court further noted that the retention of jurisdiction by a single court in a water rights adjudications avoids piecemeal litigation, promotes consistency, and supports unified proceedings. *Id.* at 819. The jurisdiction retained by this Court in a case such as this is both continuing and exclusive: "the first court to gain jurisdiction over a *res* exercises exclusive jurisdiction over an action involving that *res*." *U.S. v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999) ("'when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.'") (quoting *Kline v. Burke Const. Co.*, 260 U.S. 226, 229-30 (1922)). These well-established principles support this Court's inherent ability to enforce its Final Decree:

> "The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have [another] court construing what the [decree court] meant in the judgment. Such an arrangement would potentially frustrate the [decree court's] purpose."

Alpine Land & Reservoir Co., 174 F.3d at 1013 (quoting *Flanagan v. Arnaiz*, 143 F.3d 540, 545

(9th Cir. 1998)).

The Settlement Agreement expressly embraces these bedrock principles by providing that this 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." Settlement Agreement § 1.5. Indeed, the Settlement Agreement's complex terms governing the exercise of the adjudicated rights is at the heart of the compromise which allowed this longstanding adjudication to be finally resolved. The additional decree language proposed by the United States and the Pueblos ensures that these important concepts are embodied in the Final Decree and is fully consistent with the Settlement Agreement.

The State first objects to the simple directive that the State Engineer should administer the non- Pueblo water rights pursuant to the Final Decree on the grounds that the State Engineer's authority over non-Pueblo rights arises under state law, not the Settlement Agreement. State Response at 2-4. The State further objects to that proposed language because it mistakenly reads it as a limit on the State Engineer's authority with regard to non-Pueblo water rights. *Id.* Both assertions are wrong.[1]

The proposed directive that the State Engineer administer non-Pueblo water rights pursuant to the Final Decree tracks the agreed-upon language in the Settlement Agreement with

[1] Citing no authority, the State attempts to distinguish the State Engineer's efforts to administer the water rights subject to the Final Decree from his duties assigned pursuant to the Settlement Agreement. State Response at 6. But administer means simply "to manage" which is an apt, broad description of the duties assigned to the State Engineer under the Settlement Agreement. *See, e.g.*, http://www.dictionary.com/browse/administer?s=t (last visited May, 30, 2017).

regard to non-Pueblo water rights. The Settlement Agreement provides that the State Engineer "shall exercise 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." Settlement Agreement § 5.2.1.1. The language proposed by the United States and Pueblos does not suggest that the State Engineer's authority is derived solely from this Court but rather provides only that the State Engineer must administer those state law rights in accordance with the Final Decree, as the State previously agreed. Nor does the proposed language purport to limit, as the State fears, the State Engineer's authority to act in matters not governed by the Settlement Agreement or the Final Decree. Rather, it provides that in areas governed by those documents, the State Engineer must act in accordance with those terms just as the State previously agreed. In sum, the proposed decree language simply reflects the terms of the Settlement Agreement and does not serve to diminish or otherwise alter the State Engineer's authority under state law so long as he acts in accordance with the Settlement Agreement and Final Decree.

The State's position regarding the State Engineer's role as Water Master for the Pueblo water rights is more troublesome. As the State notes, the Settlement Agreement does not expressly call for the Court to appoint the State Engineer to the position of Water Master. But the Court approved the Settlement Agreement that is the sole source of authority for the State Engineer to carry out his Water Master duties under the Settlement Agreement. *See Memorandum Opinion and Order Approving Settlement Agreement* at 23-24 (Mar. 21, 2016) (Doc. 10543). The Settlement Agreement describes the Water Master's duties and directs the

Water Master "to ensure compliance with the terms of, and the delivery of water in accordance with, [the Settlement] Agreement . . . and the Final Decree." Settlement Agreement at §§ 5.2.1.2, 5.6.1. Those provisions provide no basis for the State to complain about the proposed language by which the Court would appoint the State Engineer as Water Master as to the Pueblos' rights. Indeed, without that language the State Engineer would have no authority over the Pueblos' use of their water rights since the Pueblos, by agreement, could not approve such a jurisdictional shift.

Those same provisions, along with the Settlement Agreement's express statement regarding the Court's continuing jurisdiction "to interpret and enforce the terms, provisions, and conditions of the [Settlement] Agreement . . . and the Final Decree," Settlement Agreement § 1.5, establish that under the Settlement Agreement, the Court should maintain its authority over the State Engineer when he is acting as Water Master for the Pueblo rights. The State's position that when acting as Water Master, the State Engineer does not "serve under the supervision and authority of the Court" cannot be reconciled with the Settlement Agreement's provision for the Court's explicit retention of jurisdiction to enforce the Settlement Agreement and Final Decree. *See* State Response at 4-5. Together, those documents comprise the sole source of the State Engineer's authority with regard to the Pueblos' water rights which arise under and are protected by federal law. *See New Mexico ex rel State Eng'r v. Aamodt,* 537 F. 2d 1102, 1111 (10th Cir. 1976) ("The United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law.").

To conclude, the additional decree language proposed by the United States and Pueblos is

fully consistent with both the letter and intent of the Settlement Agreement and makes certain that the Court retains the authority required for it to interpret and enforce its Final Decree, as the State previously agreed.

B. THE ADDITIONAL LANGUAGE REQUESTED IN THE ASSOCIATION CROSS MOTION IS NOT NECESSARY.

The Association Cross Motion seeks to have the State Engineer administer the water rights at issue "as set forth in the Settlement Agreement and Final Decree" rather than "pursuant to the Final Decree" as proposed by the United States and Pueblos. Association Cross Motion at 2. The requested revision potentially raises issues that do not need be resolved now and it does not add to the protections afforded to non-Pueblo water rights holders by the language proposed by the United States and Pueblos.

First, there is no question but that the language proposed by the United States and Pueblos fully protects the non-Pueblo interests before this Court since it expressly provides for the Court's continuing jurisdiction to enforce the Settlement Agreement and Final Decree. Joint Motion at 2. Moreover, under the United States and Pueblos' proposed language, the Settlement Agreement is incorporated by reference into the Final Decree. Thus, there is no danger that the non-Pueblos will not receive the full range of protections provided by the Settlement Agreement.

The problem with the language proposed in the Association Cross Motion is that it raises issues regarding the application of the Settlement Agreement to non-settling parties. The State approved the Settlement Agreement and presumably was confident at the time that its provisions were consistent with state law or otherwise justified by the need to integrate state and federal law

in the course of determining the non-Pueblo and Pueblo rights. Since that time, the State and the Association have disagreed over the relationship between state law and the Settlement Agreement and how to resolve any conflict that might arise in the future. *See, e.g.*, *State's Response to the Rio de Tesuque Association, Inc.'s Motion for Clarification* at 6 (Jan. 17, 2017) (Doc. 11270). There is no need to venture into that thicket now since the Association's concerns are fully protected under the United States' and Pueblos' proposed language.

III. CONCLUSION

For the reasons stated in the Joint Motion and this memorandum, the United States and Pueblos ask the Court to include their proposed language, which is fully consistent with the agreed-upon terms of the Settlement Agreement, in the Final Decree.

Respectfully submitted on this 5th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 5th, 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 June 5th, 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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