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

REPLY TO: 1) THE UNITED STATES' AND PUEBLOS' RESPONSE TO THE RIO DE TESUQUE ASSOCIATION CROSS MOTION (DOC.11508) AND 2) THE STATE OF NEW MEXICO'S RESPONSE TO CROSS MOTION FOR FURTHER MODIFICATION (DOC. 11517)

Comes now the Rio de Tesuque Association, Inc. (hereafter "the Association") and files this reply to both the US/Pueblos' *Response to the Rio Tesuque Association Cross Motion* (Doc. 11508, *US/Pueblos Response to Cross Motion*) and the *State of New Mexico's Response to Cross Motion for Further Modification* (Doc. 11517, *State's Response to Cross Motion*).

A. Association's Reply to *State's Response to Cross Motion*

In the *State's Response to Cross Motion*, the State incorporates the *State of New Mexico's Response to [the US/Pueblos'] Joint Motion to Modify the Proposed Final Judgment and Decree*

(*State's Response to US/Pueblos' Motion*, Doc. 11500). The only other arguments to the *Association's Cross Motion* are set forth on page 2 and are *non-sequitur*. First, the State objects to the Association's proposed addition ("The state Engineer shall administer both the Pueblo and the Non-Pueblo water rights adjudicated by this Court as set forth in the Settlement Agreement and Final Decree") on the grounds that "the water rights adjudicated by the Court are not 'set forth' in the Settlement Agreement." Section 5.2 of the Settlement Agreement itself provides "[t]he State Engineer shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in this agreement and the Final Decree." Hence the administration of Pueblo and non-Pueblo rights "as set forth in the Settlement Agreement" was something specifically agreed to by the State Engineer in the Settlement Agreement. Further, Sections 3.1.1 and 3.1.2 of the Settlement Agreement set forth and incorporate the priority and quantity of groundwater rights set forth in sub-file orders and Section 3.2 does the same for the quantification Non-Pueblo surface rights and provides for the establishment of priorities of those rights. In fact the entire Section 3 of the Settlement Agreement deals with non-Pueblo rights and provides for certain protections therefore under Section 3.1.7 in addition to those provided under Section 4. Hence the State's argument the Association's proposed language should be rejected because water rights adjudicated by the Court are not set forth in the Settlement Agreement, should be rejected.

Second, it appears that the State is objecting because unlike what it agreed to in Section 5.2 of the Settlement Agreement, "[t]he only language the parties agreed to include in the Final Decree is found in Section 1.5 of the Settlement Agreement which states [quotation omitted]." If the State is arguing that only language agreed in the Settlement Agreement to be included in the Final Decree could be included, such an argument is absurd. The Settlement Agreement did not

specifically address any of the language in the Proposed Final Decree. Applying the State's reasoning, presumably all language currently in the Proposed Final Decree should be excluded.

Conspicuously absent from the Proposed Final Decree is any reference to the Settlement Agreement much less the substance of Section 1.5. In the *State's Response to US/Pueblos' Motion* it concedes: "The State does not object to modifying the ...["Proposed Final Decree," Doc. 11186-1] to include language that has already been agreed to in the Settlement Agreement." *Id*. at 1. In the *State's Response to Cross Motion*, it further concedes, referring to Section 1.5 of the Settlement Agreement: "The State has no objection to the inclusion in the Final Decree that the Court incorporates by reference the Settlement Agreement and retains 'continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Agreement, the Interim Administrative Order, and the Final Decree." There is currently no such provision in the *Proposed Final Decree*. Therefore, at a minimum, and without objection by the State, the Final Decree should be modified to incorporate the Settlement Agreement by reference and provide that the Court retains jurisdiction as set forth in Section 1.5 of the Settlement Agreement.

Further with respect to the Association's proposed modification, the State Engineer also agreed: "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." Settlement Agreement, Section 5.2, emphasis by the Association. And, further recognizing the State Engineer's authority under state law:

> 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 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., Section 5.2.1.1, emphasis by the Association. The Association has never contended that the State Engineer does not have the authority under state law to administer non-Pueblo water rights. However, despite the State's contention that the Settlement Agreement did not limit that authority, as noted in the *State's Response to US/Pueblos Motion*, Section 5.2.1.1 of the Settlement Agreement places parameters on the exercise of that authority "to ensure compliance with the terms of the Settlement Agreement and Final Decree." *Id*. at 4.

Curiously, contrary to the State's current position, it approved 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." The Association is only asking that this protection be included in the Final Decree.

B. Association's Reply to the *US/Pueblos' Response to Cross Motion*

The US/Pueblos acknowledge that the *Association's Cross Motion* is "generally consistent with the Settlement Agreement and the Joint Motion," but claim that it 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." *US/Pueblos Response to Cross Motion* at 2-3. The US/Pueblos then contend that their proposed language insures that the non-Pueblos will have the full range of protections provided them in the Settlement Agreement. *Id*., and at 8-9. First, as with some of the State's arguments, the US/Pueblos' reasoning is *non-sequitur.* On the one hand the US/Pueblos state the Association's language will get us into a thicket with respect to the issues raised in the Association's *Motion for Clarification,* Doc.11208,

and *State's Response*, Docket 11270, at 5-9 (conflicts between state law and the Settlement Agreement), on the other they claim the protections the Association seeks are included within the US/Pueblos' proposed modifications. As for the later, the Association does not take comfort in the US/Pueblo's assertion that non-Pueblos are fully protected under their proposed modifications to the Proposed Final Decree. If such were the case, why would they want to avoid the "thicket" of the interaction between the Settlement Agreement and state law. They also assert that a problem with Association's language is that it raises issues regarding application of the Settlement Agreement to non-settling parties. *Id*. To be clear, the Association is not challenging the State Engineer's general authority over state law water rights.[1] The Association is asserting that, in the event of conflict, the Settlement Agreement controls with respect to protections within its purview. If there is a dispute between non-Pueblo water right owners or non-settling parties that is not within the purview of the protections provided under the Settlement Agreement, then the Settlement Agreement has no application to that dispute and state law controls.

In conclusion on this point, the Association's position is that if administration of water rights comes within the purview of the Settlement Agreement, the State Engineer or Water Master "shall exercise his authority to ensure compliance with the terms of, and delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree." In other words, and to be totally redundant, as agreed to by the State in Section 5.2 of the Settlement Agreement, "[t]he State Engineer shall administer the Non-Pueblo water rights adjudicated by

[1]The Association does not believe the US/Pueblos are challenging such authority either, seemingly contrary to arguments in the State's Response to US/Pueblos Motion.

the Decree Court as set forth in this agreement and the Final Decree." Emphasis by the Association.

Conclusion

For the reasons set forth in the Association's *Cross Motion for Further Modification* and herein, the Court should adopt the further modification to the Proposed Final Decree. At a minimum the Court should adopt the language set forth in Section 1.5 of the Settlement Agreement, to which the State indicates it has no objection.

Respectfully submitted this 19th day of June, 2017
Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the19th day of June, 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.

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