

**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

**ATENCIO GROUP’S REPLY ON MOTIONS FOR EXTENSION OF TIME TO
RESPOND TO THE MOTIONS IN SUPPORT OF THE SETTLEMENT AGREEMENT**

Defendant-Objectors identified as Atencio Group, through their undersigned attorney, submit their REPLY to RESPONSES (Dkt. # 9936; Dkt. # 9937) on the Motions for Extension of Time (Dkt. # 9915; Dkt. #9916), as follows:

STATEMENT OF FACTS

1. The settling parties are allowed 90 days from the date of the Case Management Order to file a brief in support of approving the settlement agreement. The Objectors are allowed 60 days to respond thereto. Included in the 60 days are the Christmas holidays.

2. The defendants who objected to the settlement agreement were given a deadline of April 7, 2014 to file all objections. Defendants accepting the proposed settlement agreement are not given deadline to file an acceptance. Acceptances are still being filed at this time.

ARGUMENT

1. **The Case Management Order is Unfair in its Scheduling of Motions.**

The Court's orders setting the procedure for approval of the settlement agreement are unequal in their treatment of the Defendant-Objectors and the Pueblos as they relate to scheduling and are unfair on their face.

The motions for extension of time are based on a request for fairness. (Dkt. # 9915; Dkt. #9916).

One objection to the settlement agreement being made is to the unequal treatment of Pueblo water rights and non-Pueblo water rights in the identification and quantification of those rights. The case management order treats the Plaintiff Parties differently than the Defendant-Objectors by allowing the Objectors less time to file their briefs in opposition to the settlement agreement than the Plaintiff Parties are given to file their brief in support thereof without stating a compelling purpose for the unequal treatment. No reason is given for the different times to file those briefs. The disparate treatment suggests a bias.

Plaintiff Parties seek to perpetuate the double standard of law that is contained in the settlement agreement. They completely ignore the McCarran Amendment, §666 (1951). That statute waives sovereign immunity for USA and the Pueblos and thereby places them on equal

standing with state court claimants, including Defendant-Objectors. That converts to a single standard for all claimants, as Congress intended.¹

Group 1 requests 30 additional days to file responses to allow them as much time as the Plaintiff Parties are allowed. Granting thirty additional days will not cost the Plaintiff Parties millions of dollars, especially in light of the Act's provision that the deadline may be extended.²

2. Atencio Group Request for an Extension of Time.

The Atencio Group requests a decision on the objections to the order denying Defendant's motion for summary judgment and granting the State's motion for summary judgment prior to proceeding with the objections to the settlement agreement. The pending objection to the special master's order (Dkt. #8223; 8233, 8250) raise issues that have not been decided regarding the existence and quantity of property interests in the water use according to State law.

The State Engineer admits that defendants own a property right in the domestic well water but disagrees that the quantity of water right has been set by the Legislature at enough water to irrigate one acre of trees, lawn or garden. §72-12-1.1. These questions must be answered before the objections to the settlement agreement can be decided completely. The claims of a

¹ "Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." Senate Judiciary Committee Report S. Rep. No. 755, 82nd Cong., 1st Sess. 6 (1951). "...Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results." 97 CONG. REC. 12947-48 (1951).

² "The date by which the Final Decree must be entered may be extended if the parties to the Cost-Sharing and System Integration Agreement agree that such an extension is reasonably necessary." Settlement agreement Section 10.1.

taking without just compensation, and whether adequate consideration is being paid for the reduction in water rights require that information. There is also a pending challenge to the preliminary injunction that, if successful, may require a re-evaluation of the settlement agreement as it relates to outdoor irrigation with domestic well water.

It seems logical that granting the extension will delay the approval of the settlement agreement and denying the requests will further ensure meeting the deadline. But, if history is an indicator, litigation has not been very successful in this case. Progress has been the result of negotiations. Much has been accomplished through negotiations for the proposed settlement agreement. But the settlement agreement ignores the water rights acquired by the non-Indians who developed the Pojoaque Basin beginning in the early 1700's. The Pojoaque Basin was not developed by Pueblos alone. Attempting to ignore the pre 1848 water rights of non-Indians has resulted in 792 Objectors as of April 7, 2014 filing objections, and more Objectors are possible.³

The Plaintiff Parties ask the Court to ignore the McCarran Amendment, the Anti-Injunction Act, the Treaty of Guadalupe Hidalgo, the Fifth and Fourteenth Amendments to the U.S. Constitution and 5737 objections⁴ to the settlement agreement by 792 Objectors, and enter a partial decree or the funding will be lost; to sacrifice Due Process for expediency. But the Federal Rules of Civil Procedure still apply, including the right to discovery in the normal course of resolving conflicting claims. To ignore the Constitutional rights of the Objectors and file the proposed partial final decree and take the water because they can would be a re-manifestation of the manifest destiny doctrine.

³ As of April 7, 2014, no other objections are allowed. A defendant is not allowed to change an "acceptance" of the settlement agreement to an "objection", but defendants who objected initially can change their "objection" to an "acceptance".

⁴ See Appendix in Exhibit 1 to The Plaintiffs –in-Intervention's Response. Dkt.# 9910-1

The United States agreed in the Treaty of Guadalupe Hidalgo, Article XIII, in part, that

“[t]he present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, *shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.*”

Water rights run with the land. Present land owners are entitled to present their claims to water based on land titles, especially in light of the efforts by the Plaintiff Parties to close the Basin to new domestic wells.

The Plaintiff Parties rely on prior rulings by the Court before the Defendants-Objectors were joined and made parties to this lawsuit. The Objectors did not sign the settlement agreement nor did anyone sign for them. The Debtors-Objectors are not bound by judgments that they had no notice of and no opportunity to be heard. The Plaintiff Parties are delaying the resolution of the Objections by insisting on litigation rather than negotiations.

Defendant-Objectors respectfully request an extension of time sufficient to obtain a ruling on the issues in the objections to the special master’s order denying Defendant’s motion for summary judgment and granting the State’s motion for summary judgment, or, in the alternative, 30 days.

FAMILIA LEGAL SERVICES

S/ Filed electronically

LORENZO ATENCIO
Attorney for certain Defendant-Objectors
P.O. Box 1538
Española, NM 87532
(505) 753-4768

I hereby certify that I have served by CM/ECF
a true and correct copy of the foregoing
pleading upon the following opposing counsel
of record this 8th day of December, 2014

S/ filed electronically

Lorenzo Atencio