

Briefing Paper*
State of New Mexico *ex rel* State Engineer v. Aamodt
2/2/04

This memo summarizes a proposed global settlement of the Rio Pojoaque Basin water rights adjudication that began in 1966, including all water rights claims in the Basin of the Indian Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque (“the *Aamodt* case”). The proposed settlement is the result of more than three years of negotiations before a court-appointed mediator. Attorneys for each of the Pueblos, the United States through the Departments of Justice and the Interior, the State of New Mexico through the State Engineer, the County of Santa Fe, the City of Santa Fe, and more than 1,000 non-Pueblo defendants have participated actively in the mediation.

I. FACTUAL BACKGROUND

The foundation of the proposed settlement is the development of a Regional Water System to serve the Pojoaque Basin and deliver additional water to the Santa Fe Basin, immediately south. For centuries Pueblo and non-Pueblo water users have used the stream flows in the Pojoaque Basin for irrigation. The demand for such water far exceeds the divertible supply, however. On average the historically available supply satisfies only 50% of annual irrigation demand and in drought years, far less. Up to the present, domestic and commercial water users in both the Pojoaque Basin and the Santa Fe Basin have depended on ground water from the same underground aquifer. The diversion of such ground water hydrologically affects the surface flows in the Pojoaque Basin, further depleting the already fully appropriated stream system. One result has been that all new domestic well permits issued in the Pojoaque Basin since 1983 have, except for a partial settlement, been subject to an injunction entered in the *Aamodt* case restricting the use of ground water to indoor use only. Because the Pojoaque Basin is so water short, the very substantial water rights claims of the Pueblos have met with sustained opposition for 38 years by the State and non-Pueblo defendants. In support of mediation of the *Aamodt* case, Congress appropriated \$1.5 million to evaluate the feasibility and cost of a proposed Regional Water System to resolve the Pueblos’ water rights claims, and the Bureau of Reclamation has completed a final draft of the study. The total cost of the proposed settlement is estimated to be \$280 million. To effect the proposed settlement, the mediation parties contemplate that the State of New Mexico, the County of Santa Fe, the City of Santa Fe, the Pueblos and the Federal Government will enter into a cost-sharing agreement. Subject to negotiation and approval of such an agreement, the non-federal parties to the mediation estimate that the Federal Government’s share of the total cost of the settlement will be approximately \$212 million.

II. PUEBLO WATER RIGHTS

The proposed settlement will adjudicate all Pueblo water rights in the Pojoaque Basin, protect all existing Pueblo water uses and provide for future development of Pueblo water use as follows:

* Disclaimer: It is expressly understood that the proposed signatories, or their governing bodies or authorities, have not approved the settlement documents, including the Settlement Agreement, the Interim Administrative Order, or any draft legislation, briefing papers or articles of incorporation provided herewith. This Briefing Paper is provided for discussion purposes only, during and for compromise negotiations, and pursuant to Fed.R.Evid. 408, and court order, is not admissible evidence concerning the claims or defenses of any party.

A. Using the Court’s rulings in the *Aamodt* case as a starting point, the first priority water rights of each Pueblo have been specifically agreed upon and quantified as follows: Nambe Pueblo, 1459 acre-feet per year (“AFY”); Pueblo of Pojoaque, 236 AFY; San Ildefonso Pueblo, 1246 AFY; and Tesuque Pueblo, 719 AFY; total first priority rights, 3660 AFY.

B. Each Pueblo will be entitled to assert its first priority to secure the full amount of the existing use portion of its first priority water rights, quantified as follows: Nambe Pueblo, 522 AFY; Pueblo of Pojoaque, 236 AFY; San Ildefonso Pueblo, 288 AFY; and Tesuque Pueblo, 345 AFY; total existing use water rights, 1391 AFY.

C. Each Pueblo possessing currently unexercised first priority rights will be entitled to develop new water uses up to the limit of those rights. Such future basin use first priority rights have been quantified as follows: Nambe Pueblo, 937 AFY; San Ildefonso Pueblo, 958 AFY; and Tesuque Pueblo, 374 AFY; total future basin use water rights, 2269 AFY. The Pueblos will be permitted to develop such new water uses subject in certain circumstances to the obligations (a) to offset increased depletions in the surface flows of the Pojoaque Basin stream system, and (b) to avoid impairment of existing ground water diversions in the Pojoaque Basin. Such obligations are intended to protect existing Pueblo and non-Pueblo surface and ground water uses.

D. To settle all remaining Pueblo water rights claims, an additional 2500 AFY of water will be acquired. Of that quantity, 475 AFY will be allocated to the Pueblo of Pojoaque to supply a Supplemental Pueblo Water Right, 525 AFY will be allocated to the Pueblos for economic development purposes, and 1500 AFY will be allocated in equal shares of 375 AFY to each Pueblo for unrestricted use within the Regional Water System.

E. Subject to conditions, the proposed settlement provides federal reserved water rights as follows: Nambe Pueblo, 302 AFY, 1902 priority; and San Ildefonso Pueblo, 4.82 AFY, 1939 priority.

III. NON-PUEBLO WATER RIGHTS

The proposed settlement will recognize the priority and quantity of all non-Pueblo surface and ground water rights in the Pojoaque Basin, subject to *inter se* challenges among certain non-Pueblo defendants. Non-Pueblo water rights will be subject to priority call by the Pueblos only for the 1391 AFY existing use portion of the Pueblos’ first priority rights. Subject to conditions, the Pueblos will forbear, that is refrain, from making priority calls against non-Pueblo water rights for of the Pueblos’ future basin use first priority rights, totaling 2269 AFY. Non-Pueblo water rights will lose the benefit of such Pueblo forbearance in the event of non-use of the non-Pueblo right for a period of five years or upon certain transfers of the non-Pueblo right. New non-Pueblo ground water appropriations in the Pojoaque Basin generally will be prohibited.

IV. REGIONAL WATER SYSTEM

The proposed settlement seeks to facilitate development of the Pueblos’ future basin use first priority water rights, promote Pueblo economic development and resolution of remaining Pueblo claims through use of the 2500 AFY of acquired water, and protect non-Pueblo water rights against impairment from such new Pueblo water uses. To accomplish these objectives, the proposed settlement contemplates that the Regional Water System will operate as follows:

A. The Regional Water System will consist of diversion, water treatment and transportation facilities owned and operated by a new not-for-profit corporation. Upon construction of the System, non-Pueblo domestic ground water well users in the Pojoaque Basin will disconnect their wells from the aquifer. Non-Pueblo commercial well users also will disconnect their wells, unless agreement is reached with affected Pueblos authorizing continued use. Such non-Pueblo ground water rights will be conveyed to Santa Fe County and become the core supply of a County water utility that will serve non-Pueblo domestic and commercial water users in the Pojoaque Basin. The Regional Water System will divert, treat and transport such water, delivering it to a County water utility distribution system that will be built to serve non-Pueblo water users. The point of diversion of the disconnected non-Pueblo well rights will be transferred to one or more locations in the Basin where diversion by the Regional Water System will not deplete the surface flows of the stream system. To meet the County water utility's future demands, an additional 750 AFY of water rights will be acquired. The disconnection of non-Pueblo ground water wells, conveyance to the County and change in the point of diversion of such water rights are intended to mitigate the hydrological effect on surface and ground water of existing non-Pueblo ground water diversions in the Basin, thereby enabling the Pueblos to develop use of their 2269 AFY of currently unexercised first priority water rights, and, at the same time, provide reliable, safe, permanent and cost-effective water utility service to non-Pueblo domestic and commercial water users.

B. The Regional Water System also will divert the 2500 AFY of water acquired for the Pueblos. That supply likely will be surface water, imported into the Pojoaque Basin for diversion by the Regional Water System at or near the Rio Grande. As part of the System, a raw water pipeline will be built to transport untreated water from the point of diversion to one or more Pueblos for non-potable water use, such as golf course irrigation. For potable water use, following diversion of the acquired supply, the Regional Water System will treat it to the extent necessary, and then transport it to the Pueblos via the same backbone pipeline that will supply the County water utility. The Pueblos' community water distribution systems will be rehabilitated to adequately serve Pueblo water users.

C. As part of the Regional Water System, infrastructure will be constructed to divert and transport up to 15,000 AFY of additional imported water. Such additional water will be transported by pipeline from the point of diversion in the Pojoaque Basin to the Santa Fe Basin for delivery to the City and County of Santa Fe for use by Santa Fe Basin water utility customers. Connection of the Santa Fe Basin to the Regional Water System will benefit the Pueblos by enabling the City and the County to increase their use of imported surface water supplies, thereby reducing City and County demands on ground water otherwise diverted from the same aquifer on which the Pueblos rely and which depletes the surface flows in the Pojoaque Basin stream system.