

## Editor's Note

Welcome to the slightly belated summer issue of NREEL Vista. In this edition law student Selena Sauer reviews the extensive and arcane history of the long-running Aamodt litigation adjudicating water rights in the Nambé-Pojoaque-Tesuque Basin, and describes the remaining steps as it works its way to an expected resolution in the coming year.

The news and updates section includes a recap of our spring mixer in Santa Fe and NREEL Section CLE presentation at the State Bar Annual Meeting. We also include a preview of our upcoming CLE on oil and gas issues in New Mexico.

We welcome and encourage submissions from our law student and attorney readers. If you would like to submit an article for the Winter 2017 edition of NREEL Vista, please contact me at [luke@egolfaw.com](mailto:luke@egolfaw.com). The views expressed in the articles published in the NREEL Vista are those of the authors alone and not the view of the NREEL Section. Thank you for your continued support of the NREEL Section of the State Bar.

Thank you,  
Luke Pierpont, Editor

## The Aamodt Water Rights Adjudication, is the End in Sight?

Selena Sauer\*

In 1995 Ismail Serageldin, World Bank Vice President, predicted that, “if the wars of this century were fought over oil, the wars of the next century will be fought over water.”<sup>1</sup> In the American West legal battles over water have been waged throughout the 20th century and will continue *ad infinitum*. A key driver of these battles is the tension between water right ownership in the American West, which is based on the principal of prior appropriation for the first beneficial use of that water, and the inexorable increase in new water use needs. At the same time, climate change and drought are transforming the landscape of the battlefield. One such battle, the Aamodt adjudication of water rights in the Nambé-Pojoaque-Tesuque (“NPT”) Basin of north central New Mexico, is the longest running federal litigation on the books, having reached its 50th year of litigation in 2016.<sup>2</sup> While there may be a few more skirmishes left in this war, a federally mandated deadline for the cessation of hostilities in the NPT Basin is in sight. This article describes the recent history, the current status of the Aamodt adjudication, and what remains to be done.

The Aamodt adjudication reached a significant milestone on March 21, 2016,

when Judge William P. Johnson of the Federal District Court for the District of New Mexico overruled nearly 800 objections and approved the Aamodt Settlement Agreement. This ruling settles the water rights of the Nambé, Pojoaque, San Ildefonso, and Tesuque Pueblos according to the terms of the agreement after years of negotiations.<sup>3</sup> On March 23, the court entered a Partial Final Judgment and Decree and Interim Administrative Order directing that the Pueblos’ water rights be governed according to the Settlement Agreement and Partial Final Judgment and Decree, and that individual water rights will be administered by the Office of State Engineer (“OSE”) pursuant to the Settlement Agreement and state law governing the individual subfile order for the right, pending the entry of a Final Decree.<sup>4</sup> The adoption of the Settlement Agreement and entry of the Partial Final Judgment and Decree has triggered the Settlement Agreement enforcement date, which closed the NPT Basin to all new appropria-

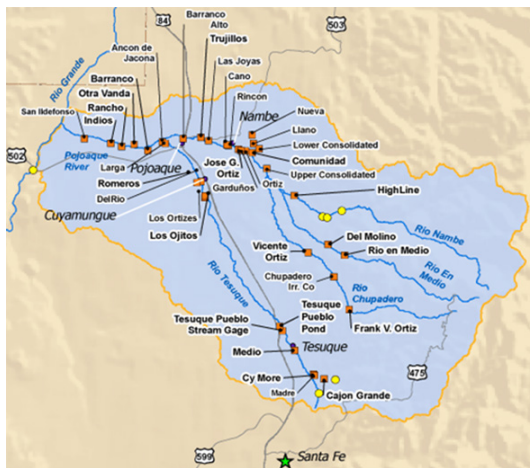
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tions of water, including domestic wells.<sup>5</sup> Despite this major development in the case, the adjudication of many individual water rights still needs to be completed before September 15, 2017, to comply with the Aamodt Litigation Settlement Act.<sup>6</sup> This deadline, set by Congress, requires the adjudication of all water rights in the NPT Basin, the acquisition and transfer of certain water rights pursuant to the Settlement Agreement, and the entry of a Final Decree.<sup>7</sup> If the deadline is not met, or extended by Congress, the Settlement Agreement will be in jeopardy.<sup>8</sup>

## BACKGROUND

The Aamodt adjudication began in 1966, when the OSE brought suit against water right owners in an attempt to quantify the water rights in the NPT Basin as a precondition for the federal San Juan-Chama Diversion Project.<sup>9</sup> Mr. R. Lee Aamodt, living in the NPT Basin, was “lucky” enough to be the first named party in the lawsuit caption. The NPT Basin makes up the geographic area drained by the Rio Pojoaque, Rio Tesuque, and Rio Nambe, which all flow into the Upper Rio Grande basin in north-central New Mexico, north of Santa Fe.<sup>10</sup> Now, 50 years after the adjudication began, the Settlement Agreement includes, as a centerpiece, the construction of a Regional Water System and Water Utility as part of the long-term solution for the NPT Basin’s water supply needs. Yet, despite the progress of the settling parties, many NPT Basin water right owners are not satisfied with the terms of the Settlement Agreement and its long-term plan for water in the Basin, as evidenced by the nearly 800 objections that the court received to the entry of the Settlement Agreement.



*NPT Basin, source: OSE*

## OBJECTIONS TO SETTLEMENT AGREEMENT

The court summarily dealt with the numerous objections to the Settlement Agreement by grouping them into three categories of legal issues and addressing each in turn.<sup>11</sup> The first category of objections focused on the procedure used to negotiate and approve the Settlement Agreement, and included complaints about the exclusion of individual water right owners from settlement negotiations between the settling parties.<sup>12</sup> The settling parties include the Pueblos, the state of New Mexico, the United States, the City of Santa Fe, Santa Fe County, and several representatives of individual water users in the NPT Basin.<sup>13</sup> The court noted that it had previously ruled that not all parties were necessary to negotiate the settlement and that “the guarantee of confidentiality is essential to the proper functioning of a settlement program.”<sup>14</sup> Yet, at least one objector feels that years of exclusion of individual water rights owners from settlement negotiations has alienated them.<sup>15</sup> He believes that this procedural inadequacy angered some water right owners causing them to object to the Settlement Agreement, while others have become disengaged over the years and now may be confused about the adjudication process or misunderstand the ramifications of their decisions regarding their water rights.<sup>16</sup>

Another objection in this category claimed that the state of New Mexico officers who signed the Agreement did not have the legal authority to enter into an Indian water rights settlement agreement without the express approval of the New Mexico Legislature.<sup>17</sup> The court pointed to NMSA 1978, Section 36-1-22, which delegates to the Attorney General broad authority to enter into settlement agreements on behalf of the State.<sup>18</sup> This objection is the subject of a pending motion to reconsider.<sup>19</sup>

The second category of objections questioned the fairness of the implementation of the Settlement Agreement. These objections asserted that the OSE has a conflict of interest in administering both Pueblo and individual water rights, and that representation on the Water Authority Board, which will operate the Regional Water System, is unequal.<sup>20</sup> The court was not persuaded by these claims, nor by objections to the perceived unenforceability of the Settlement Agreement by non-Indians, objections to the availability and cost of the Regional Water System, or water quantity and quality issues.<sup>21</sup>

The third category of objections contended that the implementation of the settlement agreement will violate state and federal law, including the McCarran Amendment which allows for joinder of the United States as a defendant in state

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water rights adjudications, and the equal protection clause of the Constitution.<sup>22</sup> The court found these objections to be similarly without merit, or to have been addressed in earlier rulings by the court.<sup>23</sup> After overruling all objections, as described by these three broad categories, the court adopted the Settlement Agreement, finding it fair, reasonable, and adequate.<sup>24</sup>

#### **THE SETTLEMENT AGREEMENT**

Settlement negotiations between the settling parties in the Aamodt adjudication began in 2000.<sup>25</sup> The settling parties executed an initial Settlement Agreement in 2006, which never became effective because the Aamodt Litigation Settlement Act of 2010 required that the agreement conform to provisions of the Act.<sup>26</sup> After several more years of negotiation the settling parties executed a conformed version of the Settlement Agreement in March 2013.<sup>27</sup>

Under the approved Settlement Agreement the Pueblos agree to relinquish all claims against other settling parties and not make priority calls, in the event of drought or shortage, against junior water right owners who join the settlement except under limited circumstances.<sup>28</sup> In exchange for the Pueblos' concessions, the United States agreed to acquire 2,500 additional acre-feet of water for Pueblo use.<sup>29</sup> Equally important, the Settlement Agreement ends the Pueblo's battle for legal recognition of their prior and paramount historic rights and defines their future use water rights.<sup>30</sup>

The Regional Water System, a key component of the Settlement Agreement, is intended to provide treated Rio Grande surface water to both the Pueblos and to non-Pueblo water right owners. Individual domestic well water right owners that join the Settlement Agreement are required to make an election to either connect to the Regional Water System and transfer their well to the System, or to keep their domestic well and accept a reduction in their historic water right.<sup>31</sup> While some domestic well owners are not happy with this compromise, one junior water right owner believes that under the Settlement Agreement, the amount of water he is allocated will still meet or exceed his needs.<sup>32</sup> Additionally, he believes that many well owners will not see the Regional Water System for a long time, if ever, and by agreeing to connect, they will have the practical result of keeping their well at full use until the Regional Water System is available. Even if a well owner elects to join the settlement and keep their well forever with a reduced allotment of water, he sees the compromise the settlement provides as a good choice, reasoning that "in the face of climate change, the likelihood of

a junior water rights holder suffering a 'priority call' becomes a significant risk that the settlement protects against."<sup>33</sup>

As of the enforcement date of March 23, 2016, no new water rights, including domestic wells, can be developed in the NPT Basin.<sup>34</sup> As such, any new use of water will require the transfer of existing water rights to serve that new use.<sup>35</sup> The OSE is designated by the Settlement Agreement as the "Water Master" and is charged with administering the Pueblo water rights and non-Pueblo individual water rights according to the terms of the Settlement Agreement and state law.<sup>36</sup> To facilitate the administration of water in the NPT Basin the settling parties have entered into a Cost Sharing and System Integration Agreement, with the United States shouldering the largest portion of the cost under its trust responsibility to the Pueblos.<sup>37</sup>

#### **THE AAMODT LITIGATION SETTLEMENT ACT OF 2010**

The Aamodt Litigation Settlement Act provides approximately 82 million dollars in mandatory federal funding and 93 million dollars in discretionary funding, subject to congressional appropriations, to implement the Settlement Agreement.<sup>38</sup> The authorization and expenditure of funds is contingent upon meeting the Act deadline for the entry of the Final Decree and completion of all of the conditions precedent by September 15, 2017.<sup>39</sup>

The Act authorizes funding for: (1) construction of the Regional Water System, which requires an approved operating agreement between Santa Fe County and the Pueblos; (2) acquisition of additional water rights to supply the Regional Water System, including acquisition and the transfer of 1,752 acre-feet of water rights from the "Top of the World" farm in northern New Mexico; (3) establishment of an Aamodt Settlement Pueblos' Fund for rehabilitation, improvement, replacement and operation of water related infrastructure including the Regional Water System; and, (4) environmental compliance, including completion of an Environmental Impact Statement for the Regional Water System.<sup>40</sup> It is clear that federal funding for infrastructure and additional water supply for the basin is a critical part of the settlement of the Aamodt adjudication.

#### **WHAT STILL NEEDS TO BE ACCOMPLISHED**

Although the Top of the World water rights have been acquired by the Settling Parties, the application to transfer those rights from north of Taos to the Regional Water System in the NPT Basin is currently being protested.<sup>41</sup> The OSE received protests from Taos County and four individual

water right owners in July 2015.<sup>42</sup> The Protestants all assert that the transfer of these water rights will be detrimental to the public welfare, a standard that is only loosely defined.<sup>43</sup> A hearing on the protested application to transfer the Top of the World water rights is scheduled to be held on October 7-8, 2016, before the OSE Hearing Examiner.

In parallel with the required acquisition and transfer of water rights, the OSE and settling parties are proceeding to complete the adjudication of all water rights in the NPT Basin. To this end, the OSE filed a Motion to Establish Procedures for Final *Inter Se* Proceeding and Entry of Final Judgment and Decree on July 21, 2016.<sup>44</sup> At a recent July 29, 2016, Status Conference the OSE reported that it has almost finished addressing all remaining individual subfiles which define the nature and extent of existing water rights.<sup>45</sup> In a timeline, submitted with its July 15, 2016, Quarterly Status Report, the OSE anticipates filing motions for default judgment against unknown claimants and individual water right owners who do not respond to published notices and motions for judgment on remaining subfile orders.<sup>46</sup> According to its timeline, the OSE anticipates addressing all outstanding water rights in the basin by September 2016.<sup>47</sup>

The timeline also includes a schedule for the final *inter se* procedure, wherein individual water right owners may challenge the subfile orders of others.<sup>48</sup> The OSE predicts that the notice of *inter se* proceedings will occur by January 2017 with hearings on *inter se* objections taking place from February to May 2017.<sup>49</sup> The final *inter se* will address all individual groundwater rights and surface water rights not adjudicated in previous *inter se* procedures conducted during prior phases of the adjudication.<sup>50</sup> Previously, in 1983, *inter se* was conducted for individual surface water right claims, but excluded establishment of priority dates.<sup>51</sup> *Inter se* for surface water right priority dates was conducted in 2008, and fully adjudicated in 2014.<sup>52</sup> The remaining issues which will be addressed in the final *inter se* phase include all elements of non-Pueblo groundwater rights in the basin; the source of water, point of diversion and priority dates for Los Acequias de Chupadero non-Pueblo surface water rights; and various additional sources of water that have been adjudicated to non-Pueblo owners since the 1983 surface water rights *inter se*.<sup>53</sup> Importantly the settling parties, as part of the Settlement Agreement, have waived their right to challenge other settling parties' water rights in *inter se*.<sup>54</sup>

Finally, individual water right owners must decide if they will join the Settlement Agreement or not, and if joining, must elect whether or not to connect to the Regional Water System.<sup>55</sup>

## CONCLUSION

While the schedule for the coming year is ambitious, the court and the OSE are highly motivated to meet the deadline for entry of the final decree, which will end the longest federal litigation in United States history.<sup>56</sup> During the July 29 Status Conference, New Mexico State Representative Carl Trujillo, District 46, brought some of the concerns of his NPT Basin constituents before the Special Master, specifically those relating to shared wells that are still designated in the OSE and court records as single-residence domestic wells, and remarked that some of his constituents do not understand why they need to work with the State to secure their water rights at this time. The Special Master, although sympathetic, declared that the September 15, 2017, deadline "is not aspirational," and everyone should be aware "that it is now or never," for water right owners to ensure that their water rights are accurate and participate in the adjudication.<sup>57</sup> Like a general exhorting his troops to march double-time on the last leg of a long campaign, he warned "the deadline is not a deadline anyone can disregard . . . it is a hard deadline."<sup>58</sup>

## Endnotes

\* Selena Sauer is a Second Year Student at the University of New Mexico School of Law, pursuing her interest in natural resources and water law.

<sup>1</sup> *Global Water Partnership*, SERAGELDIN.COM, <http://www.serageldin.com/Organization/Details.aspx?id=4> (last visited Aug. 26, 2016).

<sup>2</sup> Darcy S. Bushnell, Utton Transboundary Resources Center, *American Indian Water Rights Settlements* 4, [http://utton-center.unm.edu/pdfs/American\\_Indian\\_Water\\_Right\\_Settlements.pdf](http://utton-center.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf).

<sup>3</sup> Memorandum Opinion and Order Approving Settlement Agreement at 2, State of New Mexico ex rel. v. Aamodt, No. 66-cv-06639 (D.N.M. Mar. 21, 2016) [hereinafter Order].

<sup>4</sup> Interim Administrative Order at 1, *Aamodt*, No. 66-cv-06639 (D.N.M. March 23, 2016).

<sup>5</sup> Settlement Agreement, April 19, 2012, Exhibit 1 Certification to the Court of Completion of Modifications to the Aamodt Settlement Agreement §§ 1.6.14, 5.1.1, *Aamodt*, No. 66-cv-06639 (D.N.M. Oct. 2, 2013) [Hereinafter Settlement Agreement].

<sup>6</sup> Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 623, 124 Stat. 3134, 3150 (2010).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> Darcy Bushnell, Utton Transboundary Resources Center, *Nambe, Pojoaque, San Ildefonso, and Tesuque Pueblo's Settlements*, 2015 WATER MATTERS!, at 22-3.

<sup>10</sup> Settlement Agreement § 1.6.24.

<sup>11</sup> Order at 5, *Aamodt*, No. 66-cv-06639 (D.N.M. Mar. 21, 2016).

<sup>12</sup> *Id.*

<sup>13</sup> Office of State Engineer, *Aamodt Water Rights Settlement*, [http://www.ose.state.nm.us/Legal/settlements/Aamodt/index\\_aamodt.php](http://www.ose.state.nm.us/Legal/settlements/Aamodt/index_aamodt.php) (last visited Apr. 24, 2016).

<sup>14</sup> Order at 6, *Aamodt*, No. 66-cv-06639 (D.N.M. Mar. 21, 2016) (*citing* Memorandum Opinion and Order at 11, *Aamodt*, No. 66-cv-06639 (D.N.M. May 24, 2007)).

<sup>15</sup> Telephone Interview with John Gutting (June 22, 2016).

<sup>16</sup> *Id.*

<sup>17</sup> Order at 6, *Aamodt*, No. 66-cv-06639 (D.N.M. Mar. 21, 2016).

<sup>18</sup> *Id.*

<sup>19</sup> Opposed Motion to Alter or Amend Judgment Pursuant to Rule (59)e, *Aamodt*, No. 66-cv-06639 (D.N.M. April 18, 2016).

<sup>20</sup> Order at 9-10, *Aamodt*, No. 66-cv-06639 (D.N.M. Mar. 21, 2016); *see* Settlement Agreement §§ 1.6.30, 5.7.

<sup>21</sup> Order at 10-13, *Aamodt*, No. 66-cv-06639 (D.N.M. Mar. 21, 2016).

<sup>22</sup> *Id.* at 14-21.

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.* at 23.

<sup>25</sup> *Id.* at 1.

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> Settlement Agreement § 12.

<sup>28</sup> *Id.* §§ 4.2, 6.1-3.

<sup>29</sup> Office of State Engineer, *supra* note 13.

<sup>30</sup> Settlement Agreement § 2 (defining Pueblo first priority, supplemental, existing basin use, and future basin use water rights).

<sup>31</sup> *Id.* § 3.1.7.

<sup>32</sup> Telephone Interview with William Scheer (June 28, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> Settlement Agreement §§ 1.6.14, 5.1.1, 5.2.

<sup>35</sup> *Id.* § 3.1.4

<sup>36</sup> *Id.* § 5.2.

<sup>37</sup> CHARLES V. STERN, INDIAN WATER RIGHTS SETTLEMENTS 12 (Congressional Research Service, 2015); *see also* Settlement Agreement § 9.1.

<sup>38</sup> STERN, *supra* note 38, at 1-2.

<sup>39</sup> § 623, 124 Stat. at 3150. The conditions precedent include: the Settlement Agreement must conform to the 2010 Aamodt Litigation Settlement Act and be fully executed; all authorized funds must be fully appropriated; the Secretary of Interior must acquire and enter into appropriate water rights contracts; the OSE must issue all required permits to

the Water Authority Board for the Regional Water System; the State must enact legislation and provide the funding required under the Settlement Agreement; a partial final decree setting forth the Pueblos' water rights and a final decree setting forth all water rights in the NPT must be issued by the United State District Court for the District of New Mexico; and all required waivers and releases must be executed.

<sup>40</sup> §§ 602- 626, 124 Stat. at 3134-3156.

<sup>41</sup> Kay Matthews, *Top of the World Protest Winding its Way Through Hearing Process*, LA JICARITA, Mar. 8, 2016, <https://lajicarita.wordpress.com/2016/03/08/top-of-the-world-water-transfer-protest-winding-its-way-through-hearing-process/>.

<sup>42</sup> Formal Protest of Application for Permit to Change Point of Diversion and/or Purpose of Use of Surface Waters of the State of New Mexico, Application No. SP-5081 (July 14, 2015) (Individual protests filed by Tim Cash, Beverly Duran-Cash, David Neal); Protest of Juan Montes (*pro se*) to Application No. RG-1441-S through RG-1441-S-11 into SP-5081 (July 6, 2015); Protest of Taos County to Application No. RG-1441-S through RG-1441-S-11 into SP-5081 for a Permit for Change in Point of Diversion and Place and Purpose of Use from Groundwater to Surface Water (July 8, 2015).

<sup>43</sup> Matthews, *supra* note 42.

<sup>44</sup> Motion to Establish Procedures for Final Inter Se Proceeding and Entry of Final Judgement and Decree, *Aamodt*, No. 66-cv-06639 (D.N.M. July 21, 2016).

<sup>45</sup> Exhibit A to the July 15, 2016 Quarterly Status Report Regarding the Adjudication of Domestic Well and Surface Water Rights 1, *Aamodt*, No. 66-cv-06639 (D.N.M. July 27, 2016).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1-2

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> Motion to Establish Procedures for Final *Inter Se* Proceeding and Entry of Final Judgment and Decree at 3, *Aamodt*, No. 66-cv-06639 (D.N.M. July 21, 2016).

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *See* § 623, 124 Stat. at 3150-51.

<sup>56</sup> *See* Bushnell, *supra* note 2.

<sup>57</sup> United States District Court for the District of New Mexico Special Master, Status Conference, *Aamodt*, No. 66-cv-06639 (D.N.M. July 29, 2016) (statements made in response to Representative Carl Trujillo's address to the court).

<sup>58</sup> *Id.*

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# News and Updates

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## State Bar Annual Meeting, Bench and Bar Conference, August 18-20, 2016

The NREEL Section was selected again by the New Mexico State Bar to present at its Annual Meeting–Bench and Bar Conference, held at Buffalo Thunder Resort and Casino on August 18-20. Our speaker, UNM School of Law Professor and UNM Liaison to the NREEL Section, Alex Ritchie, presented a well-received CLE on Environmental Regulation of the Oil and Gas Industry.

## Spring NREEL Section Mixer in Santa Fe



The NREEL Section held its spring mixer in Santa Fe on April 28th. Approximately forty-five lawyers and natural resource professionals from multiple state and federal agencies, private practice, and academia

gathered to meet and get to know each other. With plentiful food and drink, the evening was a success as we made new friends and caught up with old ones. We hope that NREEL members will join us this fall for our next mixer, which will be in Albuquerque. Look for an announcement from the NREEL Section with the time and place.

## 2016 Annual Winter CLE: Oil and Gas Issues

On Friday, December 16, 2016, the NREEL Section will present its annual CLE event, which will focus on oil and gas issues. The all day CLE will take place at the State Bar Center and attendance by video will be available. This timely CLE will address a range of issues from the effect of declining oil and gas revenues on New Mexico to the most recent regulatory developments. Watch for announcements from the NREEL Section and the State Bar as the event draws closer.





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