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 MV/WPL

CERTAIN NON-PUEBLO DEFENDANTS' MEMORANDUM IN SUPPORT OF ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE INCORPORATING SETTLEMENT AGREEMENT AND ADJUDICATING PUEBLOS' WATER RIGHTS

Undersigned counsel has represented the members of the Rio Pojoaque Acequia and Water Well Association, Inc., J. David Ortiz, President, who are parties to this action, to provide them with a common defense to the water rights claims asserted by the Pueblos and by the United States on behalf of the Pueblos. Counsel participated in the mediation process in this case on the basis that, if the mediation parties reached a settlement agreement, counsel would, in good faith, recommend it to the members of the Association for acceptance, recognizing, however, that each member would be free to accept or reject any settlement agreement in the exercise of his or her own judgment. Many members of the Association have accepted the

Settlement Agreement, and this memorandum in support of entry of the partial final judgment and decree before the Court is submitted on their behalf. The arguments that follow are intended to set forth the proper legal framework for this Court's consideration of entry of the partial final judgment and decree and resolution of the non-settling defendants' objections to it.

SUMMARY OF ARGUMENT

The Order to Show Cause presents two questions for the Court to decide, both of which implicate legal principles that govern the entry of judgments. The first question is whether the Court may approve the Partial Final Judgment and Decree ("PFJD") in so far as it incorporates the Settlement Agreement dated April 19, 2012 ("Agreement"), which has been entered into by *some*, but not all, of the parties to this general water rights adjudication. The PFJD, a consent decree, incorporates the Agreement, *see* PFJD ¶1 at 3, and makes the Agreement subject to the Court's continuing jurisdiction for purposes of interpretation and enforcement, *see* Agreement § 1.1.3. But by its terms, the Agreement "is intended to be binding *on the Settlement Parties* and to resolve *their* objections to *each other's* water rights." Agreement § 1.1.3 (emphasis added). By reason of this limitation, the Court's approval of the PFJD insofar as it incorporates the Agreement is subject to review under the "fair and reasonable" standard. Non-settling parties objecting to the Agreement may not block its approval in the PFJD without demonstrating that the Agreement adversely affects their legal rights or interests, a standard that they cannot meet because the Agreement is *not* binding on them.

The second question is whether the Court may enter the PFJD in so far as it adjudicates the Pueblos' water rights as to *all* parties to this adjudication, including non-settling parties. The Court may enter the PFJD and *bind* all parties to the Pueblos' water rights as adjudged therein, so long as entry of the PFJD satisfies the requirements for a judgment on the merits. In the context of this case, that means that the Court may enter the PFJD upon finding that there is a reasonable

basis to conclude that the water rights to be adjudicated to each Pueblo are no more extensive than could be secured at a trial, and that the Agreement and the PFJD will reduce or eliminate impacts on junior water rights, that is, not materially injure the objectors' water rights. The Court may make these necessary findings in the proceedings on its Order to Show Cause without conducting a full trial on the Pueblos' water rights.

ARGUMENT

I. Entry of the PFJD Approving the Settlement Agreement is Proper.

Ordinarily, settlement agreements need no court approval. In general, "[c]ourts not only frown on interference by trial judges in parties' settlement negotiations, but also renounce the practice of approving parties' settlement agreements." *Gardiner v. A.H. Robbins Co., Inc.*, 747 F.2d 1180, 1189 (8th Cir. 1984). The "traditional view" is that "the judge merely resolves issues submitted to him by the parties . . . and stands indifferent when the parties, for whatever reason commends itself to them, choose to settle a litigation." *Heddendorf v. Goldfine*, 915, 926 (D. Mass. 1958).

In certain circumstances, however, notably class actions, shareholder derivative suits, and bankruptcy claims, court approval of settlements is required. *Colorado Environmental Coalition v. Salazar*, 2011 WL 1773874 at *3 (D.Colo. May 10, 2011). In these situations, such approval "is merely the ratification of a compromise," and the court is simply required to ascertain that "the settlement is 'fair, adequate and reasonable.'" *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981).

Court approval also is required where, as here, parties to civil litigation who have reached a settlement seek to incorporate their agreement into a consent decree. In such cases, "[a] consent decree is a negotiated agreement that is entered as a judgment of the court." *Johnson v. Lodge #93 of the Fraternal Order of Police*, 393 F.3d 1096, 1101 (10th Cir. 2004). It has

"characteristics both of contracts and of final judgments on the merits." *Id.* (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986)). Thus, a consent decree is to be interpreted in the same manner as a contract, but it may be enforced by judicial sanctions, including citation for contempt if it is violated. *City of Miami*, 664 F.2d at 440. As a result, courts must not give consent decrees "perfunctory approval." *Id.* at 441. Rather, the court must determine that the decree embodies "a fair settlement"; that it "does not put the court's sanction on and power behind a decree that violates Constitution, statute or jurisprudence"; and that it "represents a reasonable factual and legal determination based on the facts of record." *Id.*

Very recently, the Second Circuit explicated this "fair and reasonable" standard in a case in which it vacated a district court's rejection of a consent decree that embodied a settlement agreement resolving an enforcement action brought by a federal agency against a private defendant. *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2nd Cir. 2014). In *Citigroup*, the court first clarified that consideration of the "adequacy" of a settlement agreement may be omitted from the fair and reasonable test, except when the court is "rightly concerned that the settlement achieved be adequate," as in a class action where settlements typically preclude future claims by absent class members. *Id.* at 254. In other contexts, however, such as a suit by the SEC to enforce federal securities law, or here, the adjudication of Indian water rights in which the Pueblos and the United States have brought and now seek to settle the Pueblos' own claims, the court made clear that the "adequacy" requirement is "inapt." *Id.* Second, the court further clarified that a requirement that the "public interest [ ] not be disserved," also is not part of the fair and reasonable test, unless the proposed consent decree "includes injunctive relief," another circumstance not present in this case. *Id.* Third, the court plainly stated that judicial assessment of a consent decree for "fairness and reasonableness" does require determination by the district

court of (i) the basic legality of the decree, (ii) whether the terms of the decree are clear, (iii) whether the decree reflects a resolution of the actual claims in the complaint, and (iv) whether the decree is tainted by improper collusion or corruption of some kind. *Id.* at 294-95. Depending upon the particular decree, the appeals court indicated that the district court may need to make additional inquiry to ensure that the decree is fair and reasonable. *Id.* To the extent relevant, New Mexico law is not materially different. *In Re Norwest Bank, N.A.*, 2003-NMCA-128, ¶¶ 22-25.

The situation is somewhat more complicated, however, in multi-party litigation where, as here, many parties, but not all, have entered into the settlement agreement incorporated into the proposed consent decree. In such cases, the court reviews the settling parties' agreement under the fair and reasonable standard set forth above, and in doing so, its review also "is intended to protect those who did not participate in negotiating the compromise[.]" *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). In addition, the non-settling parties have an independent right to object to the consent decree incorporating the settlement agreement. *Johnson*, 393 F.3d at 1106-1107. Crucially, however, the right to object is *limited*.

Johnson is the leading decision in the Tenth Circuit prescribing the limits on non-settling parties' right to object to a consent decree which incorporates a settlement agreement entered into by other parties to litigation. In *Johnson*, a defendant-intervenor, Fraternal Order of Police ("FOP"), appealed the district court's approval of a consent decree entered into by another defendant, the City of Tulsa, with plaintiffs, African-American members of the Tulsa Police Department, settling the plaintiffs' discrimination claims against the City. *Id.* at 1098. FOP, the exclusive bargaining agent for Tulsa police officers, argued that the consent decree altered its contract rights under its collective bargaining agreement with the City, imposing binding legal

obligations on FOP without its consent. *Id.* at 1106. Relying on the Supreme Court's decision in *Local No. 93 Int'l Ass'n of Firefighters*, the Tenth Circuit rejected FOP's argument and affirmed the district court's approval of the consent decree. Quoting the Supreme Court's express pronouncement in *Firefighters*, the court made clear that one party to a case "[may not] preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Id.* at 1107 (quoting *Firefighters*, 478 U.S. at 529). The first principle, therefore, is that a party objecting to approval of a consent decree "does not have power to block the decree merely by withholding its consent." *Id.*

Moreover, in the Tenth Circuit, non-settling defendants who are not bound by the terms of a settlement agreement entered into by other litigants "generally have no standing to complain about a settlement[.]" *In Re Integra Realty Resources, Inc.,* 262 F.3d 1089, 1102 (10th Cir. 2001). Thus, in *Integra Realty*, the court noted that "nonsettling defendants in multiple defendant litigation have no standing to object to the fairness or adequacy of a settlement by other defendants[.]" *Id.* at 1103 (quoting Herbert B. Newberg & Alba Conte, 2 *Newberg on Class Actions* § 11.55 (3d ed. 1992)).

At the same time, however, the court in *Integra Realty* did recognize a "limited exception" to the non-settling parties' lack of such standing. The court held that non-settling defendants do have standing to object to a settlement, if they can show some formal legal prejudice to them under the terms of the agreement. *Id.* at 1102-1103. As the court put it, "[p]rejudice in this context means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.'" *Id.* at 1102 (citations omitted); *accord New England Healthcare Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (A party "suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of

action, such as a cross-claim or the right to present relevant evidence at trial.") (internal quotations and citation omitted).

The Tenth Circuit's subsequent decision in *Johnson* makes clear that the "limited exception," recognized in *Integra Realty* in the class action context, applies equally in multi-party litigation to limit the ability of non-settling parties to object to the terms of a consent decree that settles the litigation among other parties. To implement the Supreme Court's teaching in *Firefighters* that "a consent decree may not impose duties or obligations on [a party] that does not consent to settlement," the *Johnson* court ruled that "a nonconsenting [defendant] may block approval of a consent decree *only if the decree adversely affects its legal rights or interests*." *Id.* (citations omitted; emphasis added). Accordingly, because the consent decree in *Johnson* "[did] not bind FOP to do or not to do anything," the Tenth Circuit held that the decree "[did] not impermissibly affect FOP's legal rights." *Id.* The same reasoning applies here: Because the Agreement incorporated into the PFJD here binds *only* the Settlement Parties, it does not affect the objectors' legal rights. *State of New Mexico ex rel. State Engineer v. Aamodt*, 582 F. Supp. 2d 1313, 1319-20 (D.N.M. 2007) ("Those claimants objecting to the settlement will not be forced to join the settlement but instead will be permitted to adjudicate their water rights via litigation.").

Under the Tenth Circuit's decisions in *Johnson* and *Integra Realty*, the non-settling objectors in this case do not have the power to block approval of the PFJD incorporating the Agreement merely by withholding their consent; they do not have standing to object to the fairness or reasonableness of the Agreement; and they may not block approval of the PFJD in so far as it incorporates the Agreement, without demonstrating that the PFJD adversely affects their

legal rights or interests, a showing that cannot be made because the Agreement is not binding on them. Agreement § 1.1.3.

II. Entry of the PFJD Adjudicating the Pueblos' Water Rights As To All Parties is Proper.

To make the PFJD binding on *all* parties to this action in so far as it adjudicates the Pueblos' water rights, specific paragraphs of the judgment, PFJD ¶ 3(A) – (D) at 3-12, must be entered *on the merits*. Res judicata is the doctrine that "ensures the finality of decisions." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). It *prevents* "litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted in the prior proceeding." *Id.* And under res judicata, it is "a final judgment on the merits [that] bars further claims by parties or their privies based on the same cause of action." *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

For the Court to enter judgment on the merits respecting the Pueblos' water rights does not mean, however, that the objectors can force a full trial of the Pueblos' claims. Rather, the proceedings under this Court's Order to Show Cause must simply be adequate to assure that the non-settling objectors are afforded due process before the PFJD provisions adjudicating the Pueblos' water rights on the merits are entered. In this regard, the decision in *Johnson* again is controlling. There, in objecting to entry of the consent decree, FOP argued that it was entitled "a trial on the merits" of the plaintiffs' claims. *Johnson*, 393 F.3d at 1109. In rejecting this argument, the Tenth Circuit made clear that the right "to file written objections to the consent decree in the district court, and to participate in the [Order to Show Cause] hearings as a full party to the litigation" is "all the process" that non-settling objectors to such a decree are due. *Id.*

Here, affording the non-settling objectors these same safeguards, together with the Court's conducting these proceedings in accordance with the well-established principles that

permit the adjudication of the merits of Indian water rights pursuant to a settlement agreement and consent judgment, will satisfy the requirements of due process. The governing principles are as follows:

First, the party alleging the existence of a water right, including an Indian tribe, has the burden of proof and must prove it by a preponderance of the evidence. *See United States v. Washington*, 375 F. Supp. 2d 1050, 1076 (W.D. Wash. 2005) (holding that the United States and the Tribe have the burden of proving what federal Indian reserved water rights are held by the Tribe and its members), *vacated pursuant to settlement agreement by United States ex re. Lummi Indian Nation v. Washington*, 2007 WL 4190400 (W.D. Wash. 2007); *see also In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 90 (Wyo. 1988) (same).

Second, the risk that a party may recover less at a trial than the party claims in its complaint is a principal motivating force in the negotiation of all settlements, and public policy "encourage[s] voluntary resolution of lawsuits." *Aamodt*, 582 F. Supp. 2d at 1318. With respect to Indian water rights settlements in particular, the Arizona Supreme Court has noted that such settlements can "not only significantly advance [an] adjudication but also benefit[] other non-settling parties[.]" *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 224 P.3d 178, 184 (Ariz. 2010) ("*Gila River II*").

Third, based on such public policy considerations, courts have adopted orders to govern the adjudication of the merits of Indian water rights pursuant to a proposed consent judgment that is the product of a settlement agreement. In *Gila River II*, the Arizona Supreme Court adopted a special procedural order, prescribing express terms under which such a consent judgment adjudicating Indian water rights based on a settlement agreement may be entered and

made *binding* on non-settling objectors. *Gila River II*, Arizona Supreme Court, Nos. WC-75-0001 – WC-79-0004 (consolidated), Special Procedural Order for the Approval of Federal Water Rights Settlements, Including those of Indian Tribes, at 7-8 (May 16, 1991) ("Special Procedural Order"), Exhibit A, attached. The Special Procedural Order provides that such a judgment may be entered so long as the settling parties prove by a preponderance of the evidence that

> a. there is a reasonable basis to conclude that the water rights of the Indian tribe[] established in the settlement agreement and set forth in the stipulation are no more extensive than the Indian tribe[] would have been able to prove at trial; [and]
>
> b. …the water rights of the objector, if established at trial on the objector's water rights, would not be materially injured by the water rights of the Indian tribe[] established in the settlement agreement and set forth in the stipulation[.]

Ex. A at 7-8; *see also In Re General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, No. WC-79-0006 (Ariz. Sept. 27, 2000), Administrative Order at 8-9.

The New Mexico District Court adopted substantially the same standard to adjudicate the merits of the Navajo Nation's water rights pursuant to a consent decree that was the product of a settlement agreement among some, but not all, parties. *State of New Mexico ex rel. State Engineer v. United States*, State of New Mexico, San Juan County, Eleventh Judicial District, No. CV-75-184 ("*San Juan River*"), Claims of Navajo Nation No. AB-07-1, Amended Order Establishing Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof, at 3 (April 19, 2012) ("Order Establishing Legal Standards"), Exhibit B at 3, attached. In

San Juan River, the court held in relevant part that the legal standard for entry of the proposed consent judgment that would bind non-settling objectors required the settling parties to demonstrate that "there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial," and that "the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights."

The requirements established in the Special Procedural Order and the Order Establishing Legal Standards, both of which are intended to satisfy res judicata, should be applied in this case. Both orders make clear that entry of the PFJD adjudicating the Pueblos' water rights will bind all parties to this action upon a satisfactory showing that (i) the rights set forth in the PFJD are no more extensive than the Pueblos would have been able to prove at trial; and (ii) the Agreement incorporated into the PFJD will reduce impacts on junior water rights, that is, that the Agreement will not materially injure the objectors' water rights.

Proof of the first element above requires the Court, in the exercise of its discretion, to balance "the strength of the plaintiffs' case [ ] against the settlement offer." *In Re Traffic Executive Ass'n Eastern R.R.*, 627 F.2d 631, 633 (2d Cir. 1980). In other words, the Court is required to determine the "likelihood" that at the conclusion of this action on the merits, including all appeals, the Pueblos will not have been able to secure greater water rights than in the PFJD. *See Star of West Virginia v. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1979). And while the Court "should not convert the settlement hearings into a trial on the merits, [it] is required to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and the probable recovery." *Traffic Executive Ass'n*, 627 F.2d at 633.

Applying this likelihood of success requirement here is no small task. The record in this case is enormous. There are numerous interlocutory orders by the district court, as well as a decision by the Tenth Circuit, which have been entered over many years, that bear directly on the likelihood of success on the merits of Pueblos' water rights claims. In addition, given the objectors' current vague and conclusory filings, it is difficult, if not impossible, to address which objections are directed to the merits of the Pueblos' claims, and without such information it is impossible to determine whether such an objection has previously been raised in the defense of this action and decided, either directly or indirectly, by previous rulings of the Court. Therefore, the Court should direct the Settling Parties to compare, based on the record in this case, the water rights to be adjudicated to the Pueblos in the PFJD with the Pueblos' claims and the prior rulings of the Court in this action to show that the PFJD does not adjudge greater water rights in the Rio Pojoaque Basin to the Pueblos than could be secured at a trial on the merits of the Pueblos' claims. As important, the Court should also direct the non-settling objectors to identify each objection that they contend constitutes a defense to the Pueblos' claims, and, in conformity with Rule 11, demonstrate that the objection has neither been raised nor decided in this action, and how it will result in less water rights being adjudicated on the merits to the Pueblos than are adjudged in the PFJD.

Proof of the second element above requires an analysis of the Agreement incorporated into the PFJD, identifying the provisions that reduce or eliminate impacts on junior water rights, to show that the non-settling objectors' water rights will not be materially injured by the water rights adjudged to the Pueblos in the PFJD. The Court should direct the Settlement Parties to make such a showing in a written submission and afford the objectors the opportunity to file a written response.

After review of the forgoing submissions, the Court should consider whether further factual development of either element of proof is necessary, and determine whether an evidentiary hearing or oral argument or both are required for the Court to decide whether to enter the PFJD adjudicating the merits of Pueblos' water rights as to all parties in this action. Although potentially tedious and time consuming, the two showings necessary to adjudicate the Pueblos' water rights on the merits are fully supported by the record in this case, supplemented if necessary by such additional proof as may be required from the Settlement Parties. Following due consideration, this Court should enter the PFJD adjudicating the Pueblos' water rights as binding upon all parties to this action.

For the foregoing reasons, J. David Ortiz and the members of the Association who have accepted the Settlement Agreement respectfully request that the Partial Final Judgment and Decree be entered in accordance with arguments and authorities set forth herein.

Dated this 6th day of November, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and to the following person(s) by United States Mail:

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