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	)	
	)	**NO. 66cv6639 WJ/WPL**
UNITED STATES OF AMERICA, PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE,	)	
Plaintiffs-in-Intervention.	)	

STATE OF NEW MEXICO, SANTA FE COUNTY AND CITY OF SANTA FE'S JOINT MEMORANDUM IN SUPPORT OF SETTLEMENT

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I. Introduction

The State of New Mexico *ex rel.* State Engineer ("State"), Santa Fe County and City of Santa Fe hereby file their Memorandum in support of their position that the Court should approve the Settlement Agreement and enter the Partial Final Judgment and Decree, pursuant to the August 8, 2014 *Case Management Order* (No. 9506).

On December 6, 2013, the Court entered its *Order to Show Cause*, ordering that all persons claiming water rights in the Nambe-Pojoaque-Tesuque stream system show cause why the Court should not approve the Settlement Agreement and enter the proposed Partial Final Judgment and Decree adjudicating the Pueblos' water rights. *Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso* ("*Order to Show Cause*")(No. 8035). The Objection form approved by the Court required parties filing objections to state the specific legal and factual basis for their objection, and how their water rights would be injured or harmed in a legally cognizable way by the Settlement Agreement and entry of the proposed Partial Final Judgment and Decree and Interim Administrative Order. By the April 7, 2014 deadline, 650 persons had responded by filing with the Court 792 objections to the Settlement Agreement and the proposed Partial Final Judgment and Decree. On August 8, 2014 the Court entered its *Case Management Order*, setting forth a briefing schedule to address those objections:

> Within 90 days of entry of this Order, the Settlement Parties shall file memoranda in support of their position that the Court should approve the Settlement

[1] Magistrate Lynch (and now confirmed by Judge Johnson) has already ruled that issues relating to settlement implementation are irrelevant to consideration of the Settlement and entry of the Partial Final Decree.

> Agreement and enter the Partial Final Decree at this time. Any other parties that have responded to the Order to Show Cause and have filed the form titled "Acceptance of Settlement Agreement and Notice of Domestic Well Election" may also file memoranda in support within 90 days of entry of this Order.

Case Management Order at 6-7. The Court also required the memoranda to address each of the filed objections by category, and state why any such category should be overruled or dismissed at this time. As detailed below, none of the objectors has identified how they will be injured by the Settlement Agreement or the entry of the proposed Partial Final Judgment and Decree in a legally cognizable way. All objections should be dismissed or overruled.

Objectors may be affected, but they are not negatively affected. They will receive many of the benefits of the settlement.

II. Objections to the Settlement Agreement and Proposed Partial Final Judgment and Decree

By the deadline of April 7, 2014, 650 objectors had filed 792 objections with the Court. Most of those 792 objections were simply copies of, or edited portions of copies of five different form objections, each enumerating a number of specific objections. Those five principal form objections are attached hereto as Exhibits A, B, C, D and E.

In addition to the five form objections, there were a number of filings where objectors had written in their own individual objections. Taken together, the enumerated objections contained in the five form objections, along with the unique written in objections which some objectors filed, were largely repetitive and fell into twenty-six identified categories:

a. Taking / Injury to property value
b. Unequal representation on water board
c. Agreement incomplete / Details not available / Rules not drafted / Easements not obtained / EIS not complete
d. Property exempt from settlement
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v. Shared wells not addressed
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x. General dislike / Bill of Rights
y. Not enough time or information
z. Equal protection

Attached as Exhibit F is a matrix, cross-referencing each of the 792 objections with the issue categories listed above.

The twenty-six issues raised by the objections have been categorized into six general categories: A) Due Process / Notice / Equal Protection; B) Federal law / Indian water rights / Rights of Pueblos; C) The State had authority to enter into the Settlement Agreement, which is consistent with State law; D) Domestic wells; E) Treaty of Guadalupe Hidalgo and Acequia rights; and F) Settlement Implementation.

A. Due Process / Notice / Equal Protection

Objectors allege there was a lack of proper service of the Court's *Order to Show Cause*, and that as a result "there are many people currently deprived of due process and the opportunity

to protect their constitutional rights." However, Objectors fail to identify any water right claimant so deprived. Indeed, Objectors themselves obviously did receive notice given the fact that they are participating in this proceeding.

Moreover, Objectors fail to identify any failure by the State or the United States in complying with the Court's Orders regarding service, or any conflict with the Federal Rules of Civil Procedure. The procedures adopted by the Court for service of the *Order to Show Cause* were never objected to, the State and the United States followed the Court's directions to the letter, and the State made every reasonable effort to insure the mailing list was current and correct. In addition, the Court contemplated the likelihood that there would be unknown claimants and known claimants with unknown addresses, and for that reason also provided for publication and posting of the Order to Show Cause.

Further, extensive public outreach, including twenty public meetings, and a ten year history of community involvement in the *Aamodt* Settlement Agreement negotiations have contributed to an unprecedented level of public participation in this *Order to Show Cause* process. Over 1,000 responses to the Court's *Order to Show Cause*, acceptances and objection, have so far been filed.

1. Certified mail was not required to be used (Category g)

The Court has already examined the issue of "alleged lack of proper service," and found that its orders regarding service of the *Order to Show Cause* had been followed:

> The State filed an updated service list on December 2, 2013. The updated service list was prepared from the State's current adjudication records, the electronic public records of the office of the State Engineer, and the public records of irrigation districts, acequias and community ditches. In addition to mailing the Order to Show Cause to the persons on the updated service list, the State published the Order to Show Cause in English and Spanish in the Albuquerque

> Journal on January 3, 10, 17 and 24, 2014, posted the Order to Show Cause on the Office of the State Engineer's website, and posted the Order to Show Cause physically at the Office of the State Engineer, at the Santa Fe County Pojoaque Satellite Office and at the Utton Center in Albuquerque. Defendants make the conclusory allegation that service was not proper based on the fact that approximately 30 percent of the orders to show cause that were mailed to claimants were returned as undeliverable, but do not cite any authority demonstrating that service was legally insufficient.

Case Management and Service Order at 6 (citations omitted) (emphasis added) (No. 9506). Neither do any of the objectors "cite any authority demonstrating that service was legally insufficient."

Nonetheless, many form and individual objections complained that certified mail was not used to serve the *Order to Show Cause*. In Exhibit A:

> 2. The settlement agreement summary and order to show cause have been mailed by the state engineer to claimants of water rights by first class mail, rather than by certified mail, as the law requires. (Rule 4 FRCiv.P.).

and

> 3. . . . The state engineer's failure to use certified mail means that there is no easy way to know how many claimants are settlement parties that actually do not agree with the settlement agreement . . .

(emphasis added). Very similarly, Exhibit B states:

> 1. The Settlement Agreement summary and order to show cause have been mailed to claimants by the State Engineer, utilizing first class mail rather than certified mail. This is contrary to Rule 4 of the Federal Rules of Civil procedure. Thus, aside from the filing of these objections, the State Engineer has no proof that all claimant[s] received the copy of the Order to Show Cause
>
> . . .
>
> The failure to use certified mail means that it will be very difficult to ascertain the number of parties who actually agree with the Settlement and those who simply failed to receive the Order to Show Cause and thus did not respond.

(emphasis added).

As a practical matter, the objectors complaining about improper service have themselves been served. They clearly received the *Order to Show Cause*, as they have responded to it by filing objections. Moreover, none of the objectors complaining of improper service has been able to identify a single party who did not receive actual notice of the *Order to Show Cause*.

Rule 4 does not require that the Court's *Notice and Order to Show Cause* must be sent by certified mail. Fed.R.Civ.P. 4 speaks to summons and serving summons in order to join parties to a lawsuit, and is not applicable here. For serving and filing pleadings and other papers, such as the Court's *Order to Show Cause*, service is under Rule 5, which provides that:

> A paper is served under this rule by:
>
> . . .
>
> (C) mailing it to the persons last known address – in which event, service is complete upon mailing.

Fed.R.Civ.P. 5(b)(2). Further, if an action involves an unusually large number of defendants, Rule 5 further provides that the Court may on motion or on its own, order that other means of service apply. Indeed, in the instant matter, the Court specifically ordered service of the *Order to Show Cause* include publication and posting, in addition to service by regular first class mail. There is no requirement under the Federal Rules of Civil procedure, or this Court's own Orders, that service of the *Order to Show Cause* be by certified mail.

In sum, the procedures adopted by the Court for service to the *Order to Show Cause* were in accordance with law, exceeded requirements under the Federal Rules of Civil Procedure, the State and the United States followed the Court's directions to the letter, and the State made every reasonable effort to insure the Updated List was current and correct. The amount of returned mail was entirely consistent with the State's previous experience with such mailings, and for the

most part accounted for by the practical reality that water right claimants by and large do not substitute into this lawsuit or update their contact information with the State Engineer when ownership or addresses change. The Court contemplated the likelihood that there would be unknown claimants and known claimants with unknown addresses, and for that reason also provided for publication and posting of the Order to Show Cause. There was no deficiency in the mailed notice of the *Order to Show Cause*.

2. Notice not received (Category q)

Several objections complain of never having received notice of the *Order to Show Cause*. An *Objection* filed April 2, 2014 states: "I, John Valdez, along with my wife, Darlene T. Valdez, did not receive the letter and package from the State Engineer's office." (No. 8641). An April 4, 2014 *Objection* states: "Were never notified." (No. 8569). Yet, these objectors timely filed objections to the Settlement Agreement. That very fact demonstrates that they did have actual notice of the settlement approval process.

The *Amended Order* and the *Second Amended Order* anticipated that there could be a class of persons who might not receive mailed notice -- that notification was needed for those water right claimants who were not known, and known claimants whose addresses were not on the updated service list. As such, the Court provided that, in addition to direct mailing, notice of the Settlement Agreement and of the approval process should also be published and posted. More specifically, the two *Orders* required:

> 1) [P]ublish[ing of] the Order to Show Cause in English and Spanish, without exhibits, in at least one newspaper(s) of general circulation in the Pojoaque Basin and in the City and County of Santa Fe once a week for four weeks;
>
> 2) post[ing of] an electronic version of the Order to Show Cause in English and Spanish and all exhibits on the Court's and the Office of the State

> Engineer's websites; and
>
> 3) post[ing of] the Order to Show Cause and all exhibits publicly at [a number of locations].

Amended Order at 2-3; *Second Amended Order* at 2. Pursuant to that direction, the State caused the *Order to Show Cause* to be published in both English and Spanish in the Albuquerque Journal on January 3, 10, 17 and 24 of 2014. The *Order to Show Cause* in both English and Spanish, along with all related exhibits was, and continues to be available on the OSE's website, and physically at the OSE offices, at the County of Santa Fe Pojoaque Satellite Office and the Joe M Stell Ombudsman Program at the Utton Center.

Indeed, the Court's Orders regarding service are entirely consistent with the Federal Rules of Civil Procedure. Rule 5 provides that once a person is made a party to a lawsuit, service of a document may be made by "mailing it to the person's last known address – in which event service is complete upon mailing." Fed.R.Civ.P. 5(b)(2)(C). Moreover, in *Mullane v. Central Hanover Bank and Trust Co, et al.*, the United States Supreme Court provides further guidance with regard to matters which involve an unusually large number of defendants. 70 S.Ct. 652 (1950). Specifically, in dealing with notice to large numbers of beneficiaries of a common trust fund, the Supreme Court stated that:

> We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great number so beneficiaries, many of whose interest in the common fund are so remote as to be ephemeral, and we have no doubt that such impracticable and extended searches are not required in the name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages.

Id. at 317-318 (emphasis added). The Supreme Court consequently allowed published notice for

"beneficiaries whose interests or addresses are unknown to the trustee." *Id.* at 318.

Similarly, here, where keeping track of the day-to-day substitution of parties would impose a severe burden, the Court has provided that publication "shall serve as notification to those water right claimants who were not known with reasonable diligence to the Settling parties and claimants whose addresses are not on the updated service list . . ." *Amended Order* at 4. The service by mail and by publication made pursuant to the Court's Orders here is entirely sufficient.

3. Due Process / No opportunity to participate in negotiations and litigation (Categories p & x)

Objectors assert that the settlement violates due process because they have not had the opportunity to litigate the Pueblos' claims. For example, two of the form objections claim: "Defendant objects to entry of the partial final decree without providing an *inter se* proceeding involving the Pueblos as required by Due Process." Exhibit A, p 7 of 7, para. 23. And: "I object to the entry of a partial final decree which adjudicates Pueblo water rights, before the Pueblos have participated in an Inter se proceeding with all defendants, including myself." Exhibit C, p. 12 of 13.

The Court has given non-Pueblo parties the opportunity to participate in the adjudication of the Pueblos' water rights since 1983. Instead of following the typical two-step process of first completing the subfile phase (i.e., resolution just between the State and the claimant) before proceeding to the *inter se* phase where other parties have an opportunity to object, the Court collapsed the two phases into a unified proceeding and allowed potential objectors to participate beginning in 1983. The Court allowed "all parties" including non-Pueblo parties opposing Pueblo claims to submit objections to the Special Master's recommended findings on the

Pueblos' rights. *See Pretrial Order*, entered February 2, 1983, at 3. Upon inception of non-Pueblo defendants' participation the Court found:

> There is no question that the non-Indian defendants have had the benefit of each and every bit of evidence, authority and argument that has been presented with ample opportunity to review and with full access to the contentions of the other parties over a protracted period of time. Theirs is the favored position.

Order entered July 22, 1983 at 1-2. The non-Pueblo defendants then participated in ten days of trial in October 1983, leading to the Special Master issuing amended findings of fact and conclusions of law on the Pueblos' rights under Spanish and Mexican law, which were the subject of the *Aamodt II* decision.

From 1983 forward the non-Pueblo parties were active in all facets of the Pueblo proceedings and then participated in the settlement discussions beginning in 2000. The litigation proceedings were open to any claimant who wanted to participate, and any party to the case was allowed to attend and participate in the settlement discussions. By its *Order to Show Cause* entered last year, the Court has afforded non-Pueblo parties another opportunity to participate in the final adjudication of the Pueblos' water rights including the filing of objections to the proposed rights. The complaint that objectors have not been given adequate opportunity to participate has no basis in fact.

Several objectors also complained that they had no opportunity to participate in negotiations of the Settlement Agreement. Exhibit B states:

> 14. Defendant objects to the Settlement Agreement as proposed. Defendant would like to see a proposal which is fair and equitable including having even bodies of representation representing non-Indians. The agreement was negotiated under a confidentiality order.

(citations omitted) (emphasis added). The objectors add that "Defendant objects to the

deprivation of due process and a violation of the Equal protection Clause of the Constitution and the State Open meetings Act." Exhibit C states:

> The settlement agreement was drafted in secrecy and the participants are bound by confidentiality agreement, so information has not been forthcoming.

(emphasis added). Similarly, many non-form objections say the same thing. A March 31, 2014 *Objection* stated at page 3:

> As non-Pueblo water right holders, we have lacked the opportunity to participate in the essential integral parts of the proposed settlement agreement and insufficient opportunity to study the impacts and seek counsel. The settlement negotiations which began in 2010 excluded individual non-Pueblo water right holder parties from participation and settlement information was not provided to all parties.

(emphasis added) (No. 8349). That objection continues on to assert incorrectly that:

> . . . a gag order prevented all access to information by non-Pueblo water-right owner Parties. This exclusion unfairly prejudiced the non-Pueblo water-right owner Parties who, by the terms of the Order to Show Cause are now being required to understand all of the implications to their water rights and to make formal objections within a perilously short time frame or be deemed a Settlement Party and forfeit all or a portion of their lawful water rights.

Id.; and another filed March 3, 2014 states "[t]he settlement agreement has been negotiated and formulated without my input." *Objection* at 4 (No. 8158) (emphasis added). These objections are simply not factually correct. There have been ten years of public participation in the settlement process.

The foundations of this public participation date back at least to May 27, 2004, when the Court appointed representatives of non-Pueblo defendants who were opposed to the *Aamodt* Settlement at that time to participate in the ongoing mediated settlement negotiations. See May 27, 2004 *Clerk's Minutes* (No. 6094). Shortly thereafter, attorneys representing certain groups opposed to the proposed *Aamodt* Settlement began participating in those mediations as well. See

e.g. October 25, 2005 *Entry of Appearance* of attorney Fred Waltz (No. 6144).

By way of these negotiations, and with extensive community participation, the original *Aamodt* Settlement Agreement was revised to its present form, and approved by Congress in December 2010. Since that time all meetings regarding the *Aamodt* Settlement Agreement have been open to and attended by the public. See Sign in Sheets for *Aamodt* Implementation Meetings, attached hereto as Exhibit G. Objections asserting the contrary are not correct.

A number of objectors assert constitutional concerns related to their own water rights and to the adequacy of notice in this proceeding. In response to claims that the settlement has reduced domestic well rights or effected a taking without compensation, see discussion in section D(1). In response to claims that the settlement requires anyone involuntarily to transfer domestic rights to the County utility or to do so prior to connection to the water system, see discussion in section C(4). The settlement does not require parties electing to connect to the County utility to transfer rights before service is available. Finally, as to contentions that notice given in this proceeding violates due process, see section A of this brief.

4. The was sufficient time and information to make a decision about the *Aamodt* Settlement Agreement (Category y)

Many objections complained of not having enough time to make a decision about the *Aamodt* Settlement Agreement. For example: "I have not had sufficient time to review and get legal advice regarding the very complex 49 page, the partial final decree, the summary, the interim administrative order and the correspondence from the State Engineer." See attached Exhibit C (emphasis added); see also, e.g. March 25, 2014 *Objection* at p. 1 (No. 8291). Many of those objections also complained of lack of information: "The settlement agreement was drafted in secrecy and the participants are bound by a confidentiality agreement, so information has not

been forthcoming."(emphasis added) (Id.), a March 31, 2014 *Objection* states, "[t]he Settlement negotiations which began in 2010 excluded individual non-Pueblo water-right holder Parties from participation and even information" and:

> Further, a gag order prevented all –access [sic] to information by non-Pueblo water-right owner Parties.. [sic] This exclusion unfairly prejudiced the non-Pueblo water-right owner Parties who, by the terms of the Order to Show Cause are now being required to understand all of the implications to their water rights and to make formal objections within a perilously short time frame or be deemed a Settlement Party and forfeit all or [a] portion of their lawful water rights.

(emphasis added) (No. 8364). As already noted, various of the Settlement Parties have held over seventy (70) public meetings in the Pojoaque Valley regarding the *Aamodt* Settlement since 2004, and all *Aamodt* negotiations and implementation meetings have been open to the public since 2010. All relevant documents have been posted on-line at the websites of the Court of Santa Fe, Office of the State Engineer, and the Utton Center.

Moreover, the amount of public outreach associated with the Court's Order to Show Cause has been unprecedented. Since the Court issued the *Order to Show Cause*, Santa Fe County ("County") and the State, with assistance from the Pueblos, the United States and others who are interested in the settlement, have engaged in a substantial effort to provide information and explain the Settlement Agreement and Court process to interested individuals. To assist with this outreach, the County hired the Joe M Stell Water Ombudsman Program at the Utton Transboundary Resources Center of the University of New Mexico School of Law ("Ombudsman Program").

Fourteen (14) public meetings conducted by the Ombudsman Program, and attended by the County, the State, the United States, the Pueblos and others have been held in the Pojoaque Valley to make the *Order to Show Cause and Notice of Proceeding to Approve Settlement*

Agreement and associated materials available, and to provide information regarding them to claimants. Meetings took place on February 18, 20, 25 and 27; on March 4, 6, 11, 13, 18, 20, 25 and 27; and on April 1 and 3, 2014.

The Ombudsman Program also held office hours in the Pojoaque Valley every Wednesday and Saturday through the objections deadline of April 7 to explain the issues raised by the *Aamodt* Settlement Agreement and make documents and other materials regarding it available.

Approximately 2,200 individuals attended the fourteen (14) public meetings and twice a week office hours held by the Ombudsman Program.

The State and the County have also attended six more public meetings regarding the *Aamodt* Settlement Agreement held by State Representative Carl Trujillo on March 4, 5, 6, 26 and 27; and on April 3, 2014.[2] Hundreds more people attended these meetings, and were provided with information regarding the *Aamodt* Settlement Agreement.

In addition, over the last two months, the State, the County and the Ombudsman Program have received numerous calls and walk-ins on a daily basis from water right claimants in the Pojoaque Valley with questions and requests for materials, as well as requests to update their water right files with current ownership and address information. The Water Rights Division of the OSE alone had over a thousand walk-ins during that time period, with, as noted above, over

[2] In addition, the parties participating in the settlement discussions have held and attended more than fifty (50) other public meetings since 2004, when the original version of the *Aamodt* settlement Agreement was first published, in an effort to explain the proposed settlement and its terms. For example, in 2010, Santa Fe County conducted ten (10) public meetings in the Pojoaque Valley to inform water users and the general public regarding the settlement and the implementation process. Thirteen (13) meetings were held in 2004, after the Settlement Agreement was first released. Moreover, the County approved the final Settlement Agreement in a public process through the County Commission through the course of several public County Commission meetings. There were many more public meetings over the course of the last decade in addition to these.

400 changes of address and ownership filed.

Further, all relevant documents, as well as extensive information about the settlement and the Court process have been, and continue to be physically available at the Santa Fe Office of the State Engineer, the Santa Fe County Pojoaque Satellite Office, the United States District Court locations in both Albuquerque and Santa Fe and the Ombudsman Program. They have been, and continue to be also available on-line at the OSE website, the County website and the Ombudsman Program website.

5. Equal Protection (Category z)

Two of the form objections make constitutional challenges to the settlement claiming a violation of equal protection of the rights of non-Pueblo water right holders. Exhibit B states:

> Defendant objects to the Settlement Agreement as it violates the Equal Rights and Protection Clause of the Constitution. It allows one group of people rights and protection that are denied to another group of people.

See Exhibit B, p 6 of 13, para. 13. Similarly, Exhibit A states: "Defendant objects to the application of different water laws to the Pueblos and the non-Indians as a … denial of Equal Protection of the Law." *See* Exhibit A, p 6 of 7, para. 20. A number of individual objections also raise this issue. See *Objection* of Elmer and Mary Waite, filed March 27, 2014 (Dkt. No. 8317) (equal protection violated because non-Indians must limit use and Pueblos awarded future rights); *Objection* of Ronald Max Quintana, filed April 1, 2014 (Dkt. No. 8362) (unequal treatment because Pueblo water rights cannot be lost to forfeiture); *Objection* of Leroy and Josie Alderete, filed April 3, 2014 (Dkt. No. 8476) (Pueblos and the US enjoy sovereign immunity that is not waived in the settlement agreement - application of different water laws to the Pueblos and the non-Indians); *Objection* of Monica Trujillo, filed April 4, 2014 (Dkt. No. 8655) (settlement

agreement does not permit non-Pueblos to sell or lease water rights as permitted by NMSA 72-63-3; 14th Amendment equal protection and NM Const Art II, Sec 18 violated because Pueblos can lease and because no reciprocal right of enforcement).

As a starting point, it is important to recognize that the settlement is not the cause of any disparities in the application of law to the Pueblos vis-à-vis state-based water users. The settlement merely reflects existing circumstances in which federal law already applies to the Pueblos. To the extent some parties object that state and not federal law should apply, their objection is not to the settlement but to the laws that govern.

As discussed in section B(2)(Category i), Congress, in enacting Section 9 of the Pueblo Compensation Act of 1933, provided that the Pueblos' water rights "shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians." *See* § 9, Pub. L. No.73- 28, 48 Stat. 108,111. The Tenth Circuit in this case also has expressly held that the water rights of the Pueblos are not subject to state law forfeiture and abandonment. *See Aamodt I*, 537 F.2d at 1111-1112 (the United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law).

Likewise, federal Indian Tribes may claim reserved water rights on lands reserved for them by the federal government, under the Federal Reserved Rights or *Winters* Doctrine. *See Winters v. United States*, 207 U.S. 564 (1908). Although this doctrine does not apply to water on the Pueblos' Spanish or Mexican grant lands, it does apply to federal lands reserved for the Pueblos by the U.S. government, as this Court held:

> *Winters* rights exist on the Pueblo lands set aside by Executive Order for Nambe Pueblo on September 4, 1902 and any other Executive Order or Congressional reservations that may exist. Nambe and other Pueblos with Executive Order or Congressional reservations have priority to irrigate all of the

> irrigable acreage within the reservation subject to prior uses established before the date of the creation of the reservation.

Aamodt II, 618 F.Supp. at 1010. The Partial Final Judgment and Decree proposes to recognize 302 AFY of reserved rights to Nambe Pueblo, *see* § 3(A)(1)(b), but, as discussed in section B(1)(Category w) of this brief, under the settlement Nambe Pueblo agrees not to use its reserved rights and instead convey them to the United States for use from the Regional Water System. *See* Settlement Agreement at § 2.6.2.2 & -.3; Settlement Act §§ 613(a)(1)(A) & 617(c)(1)(A)(ii).

The application of federal laws to the Pueblos is not a violation of equal protection. Because Indian Tribes are governmental entities under the protection of the federal government, it is not a denial of equal protection to treat Indian Tribes and their members differently from other people when the distinctions are rationally related to Congress' trust responsibility toward the Indians. *See Morton v. Mancari*, 417 U.S.535, 554-555 (1974) (statutes providing special treatment for Indians will not be disturbed so long as such treatment can be tied rationally to the fulfillment of Congress' unique obligation towards Indians); *U.S. v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (laws that "might otherwise be constitutionally offensive" might be acceptable if they are enacted pursuant to the United States' trust relationship).

The objections do not demonstrate an equal protection violation. Arguments that Pueblo sovereign immunity violates equal protection are off base, especially in the context of the this case, where both the U.S. and Pueblos have waived sovereign immunity for the adjudication and administration of water rights, as discussed in section B(2)(Category i) and B(3)(Category k).

Finally, the complaint that the settlement does not provide for non-Pueblo leasing is also not a violation of equal protection. The settlement does not address leasing by non-Pueblo parties and doesn't affect it one way or the other. Non-Pueblo water right owners have the right

to lease their water provided to them under state law. *See* New Mexico Water-Use Leasing Act, §§ 72-61-1 to 72-6-7 N.M.S.A. 1978, amended (2014). Indeed, in contrast to federal restrictions on alienation of Pueblo trust assets, non-Pueblo water right owners have the ability to permanently sell their water rights and to lease them without many of the restrictions imposed on Pueblo leasing.

B. Federal Law / Indian water rights / Rights of Pueblos

A number of objections question the application of federal law in determining the Pueblo water rights proposed in the settlement. Some objections oppose the types of uses that are allowed, including for leasing and non-agricultural purposes. Other objections assume the Settlement Agreement and Partial Final Judgment and Decree will not be enforceable.

As discussed in this section, the settlement will be enforceable and will give substantial protections to non-Pueblo water users in the Pojoaque basin. The quantities of the Pueblo First Priority Rights are based upon this Court's findings of actual Pueblo historic irrigation and upon settlement of Pueblo replacement water rights claims and other historic beneficial uses based on the Court' opinions in this case. The senior or time immemorial priority date also is based upon rulings by this Court in this case. The proposed Pueblo water rights are based on applicable law, will be enforceable by this Court and will be administered by the State Engineer as Water Master.

Under the settlement, the Pueblos have agreed to limitations on their water rights in order to provide protections to other water rights. The Pueblos have made these concessions in exchange for construction by the federal government of the Regional Water System, which will deliver up to 2,500 AFY to the Pueblos and up to 1,500 AFY to Santa Fe County Water Utility

customers. This water will be imported into the Basin from a diversion on the Rio Grande and will greatly relieve the conflict over limited local water supplies. Without the settlement, the water system would not be built and the Pueblos would look to meet all of their claims from the water resources of the Basin; and the Pueblos would continue to claim an expanding federal water right. By contrast the settlement ends the litigation and gives all parties greater certainty and reliability in their water supply.

1. Pueblo uses of water under the Settlement. (Category w)

Although most objections seem to accept the quantities and senior priority dates of water rights proposed to be adjudicated to the Pueblos, some objections question the proposed quantities, the basis for their quantification or the Pueblos' senior priority date. For example: "The settlement agreement recognizes future water rights … for the Pueblos but not for the non-Indians." *See* Exhibit C, page 12 of 13. The same form objection further states:

> I object to the entry of a partial final decree which adjudicates Pueblo water rights, before the Pueblos have participated in an Inter se proceeding with all defendants, including myself. I have no information on how the amounts of Pueblo water rights were determined or how the priority dates were determined.

Id. Another objection asserts: "The Pueblo Parties have no requirement to demonstrate historic beneficial use. Those Parties are simply allocated a water right to support desired use, including … non-historic uses…." *See* Exhibit E, pp 10 & 11 of 12. Some objections specifically single out water proposed to be decreed to Pojoaque Pueblo:

> … the proposed Settlement Agreement grants to Pojoaque Pueblo over and above a primary allocation, an additional 475 afy (called a 'supplemental allocation') which will provide for its golf course. Not only is this supplemental allocation to Pojoaque Pueblo not related to beneficial historical use but funding the facility to provide it is given an early priority for funding.

See Exhibit E, p. 11 of 12.

The complaint that the Pueblos' water rights may not be based on state law is addressed under other sections of this brief. Section B(2) (Category i) and section B (3) (Category k)), below, discuss why the application of federal law, instead of state law, applies to certain categories of Pueblo water rights. Section A(5) (Category z) addresses how the application of federal law to the Pueblos is not a violation of equal protection for state-based water rights owners. Regarding the point that objectors have the right to participate in *inter se*, section A(3) (Category x) describes the due process this Court has afforded for participation by non-Pueblo parties culminating in the pending objection proceeding.

The quantities and time immemorial priority proposed by the settlement for the Pueblos' First Priority Rights are based upon the prior rulings of this Court. Under the Settlement Agreement and Partial Final Judgment and Decree, the Pueblos' total First Priority Rights are 3,660 acre-feet per year consumptive use (AFY). *See* Settlement Agreement § 2.1.2. This number is based on the Court's prior findings of the amount of the Pueblos' historically irrigated agriculture and on settlement of the Pueblos' claims for replacement water rights and other historic beneficial uses based on the opinions of the Court. *See The Rio de Tesuque Association, Inc's Memorandum in Support of the Settlement Agreement and Entry of a Partial Final Decree on the Pueblos' Rights*, filed November 6, 2014, at §§ B & C. The Partial Final Judgment and Decree and the Settlement Agreement separate the Pueblos' First Priority Rights into two categories: "Existing Basin Use Rights," which are that portion in use as of the year 2000, s*ee id*. at 2.3; and "Future Basin Use Rights" which are the remainder, *id*. at § 2.4. The following table breaks down these two categories of the Pueblos' First Priority Rights.

Pueblo First Priority Rights: Acre-Feet per Year Consumptive Use			
Pueblo	**Existing Basin Use Right**	**Future Basin Use Right**	**Total First Priority Right**
Nambe	522	937	1,459
Pojoaque	236	0	236
San Ildefonso	288	958	1,246
Tesuque	345	374	719
Totals	**1,391**	**2,269**	**3,660**

It is important to recognize that the Future Basin Use Rights are not Federal Reserved or *Winters* rights that have never been put to beneficial use. Instead, they are based on actual past uses of the Pueblos. Although they are currently unexercised, they are part of the Pueblos' historically used water rights that the Pueblos may use in the future, with restrictions as described below. Furthermore, this Court has determined the historic prior water rights of the Pueblos are entitled to a first or time immemorial priority. *See State of New Mexico v. Aamodt*, 618 F.Supp. 993, 1005-1010, (Dist. Ct. N.M. 1985) *(Aamodt II)*; Mem. Op & Order, May 1, 1987 at 3-5; Mem. Op & Order, Apr. 14, 2000 at 8-9 (Dkt. No. 5596).

The only Federal Reserved or *Winters* rights proposed by the settlement are 4.82 AFY for San Ildefonso with a 1939 priority for grazing purposes on the San Ildefonso Eastern Reservation, *see* Settlement Agreement § 2.6.1; and 302 AFY with a 1902 priority associated with reserved lands for Nambe Pueblo, *id*. at § 2.6.2. Again, settlement of these Federal

Reserved water right claims was based on prior rulings by the Court.[3] Under the settlement, however, Nambe Pueblo agrees not to use its 302 AFY of water rights and, instead, to convey these water rights to the United States for use from the Regional Water System. *See id*. at § 2.6.2.2 & -.3; Settlement Act §§ 613(a)(1)(A) & 617(c)(1)(A)(ii). In the absence of the settlement, the exercise of reserved water right in the Basin could affect other water users. But under the settlement, the Nambe reserved right will be diverted from the Regional Water System's point of diversion on the Rio Grande and is subject to the further restriction that its use "shall not impair Pueblo or Non-Pueblo ground water rights." *See* Settlement Agreement § 2.6.2.3; Partial Final Decree § 3(A)(1)(b).

In addition to limiting the Pueblos' First Priority Rights to quantities commensurate with their historic uses and replacement rights, the Settlement Agreement contains further concessions governing use of the Pueblos' water rights. The Pueblos have accepted three substantial limitations on the exercise of most or all of their First Priority Rights: (1) the Pueblos agree to relinquish their right to priority administration of any of their rights against junior groundwater users, including domestic well owners who join and comply with the terms of the settlement; (2) under Section 4 of the Settlement Agreement, the Pueblos will relinquish their right to priority administration of their first priority Future Basin Use Rights, which constitute almost two-thirds of the Pueblos' First Priority Rights, against protected non-Pueblo surface water right owners and other settling water right owners; and (3) under Section 2.5.3 of the Settlement Agreement the

3 The Court's January 17, 1997 Memorandum Opinion and Order (Dkt. 5209) and April 30, 1998 Partial Judgment (Dkt.. 5390) recognized San Ildefonso Pueblo's reserved grazing rights. The Court's July 10, 2001 Memorandum Opinion and Order (Dkt. 5916) vacated the Special Master's December 8, 1999 Report (Dkt. 5560) on Nambe Pueblo's reserved rights and ordered the parties to request, if necessary, a status conference after settlement negotiations did not settle the claim.

Pueblos agree to supply any increasing demands for water in the future from the Regional Water System before exercising their Future Basin Use Rights. These three important concessions are discussed in more detail directly below.

First, as discussed in section D(1) (Category a), above, junior domestic well owners who make an election under Section 3.1.7.2 of the Settlement Agreement will be "protected from enforcement and administration of priorities within the Pojoaque Basin…." Without the settlement, domestic well owners, who have some of the most junior water rights in the Basin, risk curtailment in the event of water shortages.

Second, the Pueblos are agreeing that their Future Basin Use Rights, which are the largest category of their First Priority Rights, will not be enforced against non-Pueblo water rights that continue in beneficial use, including by acequias. *See* Settlement Agreement at § 4.2. Accordingly, of the Pueblos' total First Priority Rights of 3,660 AFY, only the "Existing Basin Use Rights" of 1,391 AFY will be exercised and administered with a first priority against protected non-Pueblo water right owners. As explained in more detail in section E(2) (Category n), this provision means that 62 percent of the Pueblos' First Priority rights, in the amount of 2,269 AFY, is effectively made a third priority.

Third, once the Regional Water System is constructed and capable of delivering water from the 2,500 AFY allocated to the Pueblos, each "Pueblo shall use that water supply to the maximum extent feasible prior to exercising its Future Basin Use Rights described in Section 2.4." Settlement Agreement § 2.5.3. By agreeing to defer and subordinate exercise of in-Basin water rights and to rely on new sources of supply, this provision will protect the local water resources of the Basin. This subordination also applies to all of Pojoaque Pueblo's 475 AFY of

Supplemental Pueblo Rights, which "shall be subordinated to a right to receive an equivalent amount (475 AFY) of water delivered through the Regional Water System…." *Id*. at § 2.2.4. The practical effect of this provision is that pumping of groundwater for the Pojoaque golf courses will be discontinued and replaced with imported water, along with increasing reuse of treated effluent for turf irrigation. The settlement seeks to expedite this conversion and subordination process by giving priority to implementation of this provision. *Id*. at § 2.2.4; Settlement Act § 617(a)(3)(B). Objections, such as that quoted at the beginning of this section, appear not to understand that priority in funding will address the conflict over the Pueblo's use of local groundwater for the golf courses, which would be resolved by this requirement.

In 2002 the State sought a preliminary injunction from this Court to stop Pojoaque Pueblo from using water for a second 18-hole golf course. Magistrate Judge Leslie Smith conducted an evidentiary hearing and then entered *Magistrate Judge's Proposed Findings and Recommended Disposition* on February 4, 2002 (Dkt. No. 6044), which were adopted by the Court by Order entered July 1, 2003 (Dkt. No. 6065) (*Findings and Disposition*). The *Findings and Disposition* recited that the Court had already recognized that the Pueblos can use both surface and inter-related groundwater to satisfy the amount of their first priority rights. *Findings and Disposition* at 15 (citing *Aamodt II*, 618 F.Supp. at 1010). Among its determinations, the *Findings and Disposition* found: (1) the Pueblos may be entitled to more water rights than the State has acknowledged; (2) No appeal has been made to the Tenth Circuit on the Pueblo's ultimate water rights; and (3) the Court has not entered a final order defining the Pueblo's ultimate water rights. *Id*. at 36. Based on the Magistrate's recommendation, the Court denied the petition for preliminary injunction. *See* Order at 27. The Settlement Agreement avoids an appeal and the

risk that the Pueblos could claim additional water rights. The Pueblos have given up claims to an expanding federal water right and instead have agreed to quantification of their rights based predominantly on historic uses.

Finally, in addition to objections about the amount and priority date of Pueblo rights, a number of objections express opposition to the type of water use made by the Pueblos. In particular these objections oppose use of water by the Pueblos for non-agricultural purposes, such as for casinos, the Pojoaque golf course and livestock. One repeated objection states: "Those Parties [the Pueblos] are simply allocated a water right to support desired use, including such non-historic uses as golf courses. *See* Exhibit E, pp. 10 & 11 of 12, para. 1. *See also Objection* of Jose P Archuleta, filed March 11, 2014 (Dkt. 8181) (valley would be harmed because Pueblos do not use water for agricultural purposes); *Objection* by Richard Rodriguez, filed March 11, 2014 (Dkt. 8192) (water comes from the land to share; water is life not for golf or casinos); *Objection* by Edward A. Romero, filed March 25, 2014 (Dkt. 8286) (excessive allocation to the Pueblos for livestock has potential detrimental effects of me not getting my allocation of surface water and thus affecting my water rights).

The settlement is structured to protect existing agriculture, by limiting Pueblo priority calls on existing surface water rights including calls on historic acequias. Without the settlement, the Pueblos would be entitled to priority administration in order to satisfy the full amount of their First Priority Rights. By contrast, with the settlement the Pueblos are agreeing to substantial limitations on priority calls and administration, as explained in more detail in section E(2) (Category n).

With respect to the view that Pueblo water should not be used for non-agricultural

purposes or other purposes that are not historic, such as golf course and casino uses, such uses are already being made by the Pueblos and are not a function of the settlement. Even without the settlement, this Court would certainly determine that the Pueblos, like other water right claimants, have the legal right to use their historic water rights for purposes other than agriculture. In the 2002 preliminary injunction proceedings, no party contended Pojoaque Pueblo's rights could not be used for recreational purposes such as commercial turf irrigation. The only issue was whether the Pueblo's expansion of groundwater pumping for the new golf course would exceed the Pueblo's water rights, an issued disposed of by the Settlement Agreement. Lastly, the total proposed first priority right of 3,660 AFY includes water for livestock. Consequently, any concern that a Pueblo is using excessive amounts of stock water is answered by the requirement that stock water must come from each Pueblo's total right and will reduce the amount available under that right for other purposes.

2. Non-Indian Has No Enforcement Rights / Forfeiture. (Category i).

Exhibit C, at p. 12 of 13 makes the following objection: "I object to the lack of right to enforce the settlement agreement by non-Indians." There is no explanation of the basis for this objection. To the extent this concern assumes the Court does not have jurisdiction over Pueblo water rights, the Pueblos have explicitly agreed in the Settlement Agreement that the State Engineer will have the authority to administer the Pueblos' water rights. *See* Settlement Agreement at p. 36, § 5.2. The Settlement Agreement also provides: "the Decree Court shall retain jurisdiction to interpret and enforce the terms, provisions and conditions of the Agreement, the Interim Administrative Order, and the Final Decree." *Id.* at 4, § 1.5.

The proposed Partial Final Judgment and Decree defines the water right amounts of the

Pueblos in terms that state over and over again that the rights are in "amounts not to exceed" and that uses and diversions "shall not exceed" the decreed amounts. *Id*. at 3-11. In addition, the end of the Partial Final Judgment and Decree contains a specific "Limitations" section that provides:

> E. Limitations
>
> 1. The Pueblos have no right to use the public waters of the Pojoaque Basin except as set forth in this Partial Final Judgment and Decree, the Settlement Agreement, and subfile orders entered by this Court in this action.
>
> 2. Each Pueblo, and its successors, representatives, lessees, and assigns, are permanently enjoined from any diversion, impoundment, or use of the public waters of the Pojoaque Basin except in strict accordance with this Partial Final Judgment and Decree, Settlement Agreement, and other orders entered by this Court in this action.

Id. at 11-12.

Finally, the Partial Final Judgment and Decree orders that the water rights of the Pueblos shall be administered in accordance with the Settlement Agreement:

> 5. ADMINISTRATION OF THE PUEBLOS' WATER RIGHTS.
>
> Administration of the Pueblos' water rights that are the subject of this Decree shall be in accordance with the Settlement Agreement.

Id. at 12. The Settlement Agreement, in turn, contains detailed provisions for the administration of the Pueblos' water rights. In addition to the State Engineer's statutory authorities and duties under state law, under Section 5.2 the State Engineer will perform the function of Water Master in administering Pueblo rights, as described in Sections 5.2 and 5.6. Section 5.2.1.2 gives the State Engineer authority in capacity as Water Master to enforce the limits on Pueblo uses: "The Water Master shall have the authority to curtail Pueblo surface and groundwater diversion 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."

Another repeated objection is that "Pueblos' water rights are protected from forfeiture but not the non-Indians' rights." *See* Exhibit C at p. 12 of 13. Objectors appear to believe that the Settlement Agreement is the source of protection of the Pueblos' water rights from forfeiture and abandonment. *See* Exhibit E at p. 11 of 12, paras. 2&5. For example, one objection contends: "The proposed Settlement Agreement specifically exempts Pueblo Parties from such loss by non-use." *Id* at para. 2. The Settlement Agreement, however, does not and cannot change the law that already applies to non-use of water rights.

The Tenth Circuit in this case has explicitly held that the water rights of the Pueblos are not subject to state law forfeiture and abandonment. *See State of New Mexico v. Aamodt*, 537 F.2d 1102, 1111-1112 (10th Cir. 1976) ("*Aamodt I*") (the United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law). Section 9 of the Pueblo Compensation Act of 1933 provided that the Pueblos' water rights "shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians." *See* § 9, Pub. L. No.73- 28, 48 Stat. 108,111. So, although it is understandable that state-based water right holders may not like that a different law applies to the Pueblos, this difference is not created by the settlement. Provisions in the Settlement Agreement, Section 2.8, and the Settlement Act, Section 613(b), 42 U.S.C. § 1305, only reflect the already existing law.

3. McCarran Amendment violated / sovereign immunity not waived / US not bound as trustee. (Category k)

One form of objections raises the following concern: "The Pueblos and the USA enjoy sovereign immunity that is not expressly waived in the settlement agreement." *See* Exhibit A, p.

5 of 7 at para. 10. The same form further asserts: "The settlement agreement is not clear and unequivocal that that the USA as trustee for the Pueblos is bound by the agreement." *Id.*, p. 6 of 7 at para. 22. These assertions give no basis for concluding that sovereign immunity or any other legal impediment prevents enforcement of either the Partial Final Judgment and Decree or the Settlement Agreement.

This Court has had jurisdiction over the United States and Pueblos for decades, since the inception of this case. As discussed in section B(2) (Category i), by the terms of the Settlement Agreement and the Partial Final Judgment and Decree, the Court would retain jurisdiction to interpret and enforce the requirements and limitations ordered and decreed by the Court. And the State Engineer will have authority to administer water rights under his state statutory authority and under the authority as Water Master. Objectors cite no legal rationale or theory in support of their claim that the United States or the Pueblos will not be bound by the Settlement Agreement or the Partial Final Judgment and Decree. Congress through the Settlement Act expressly approved the Settlement Agreement and authorized the Secretary of the Interior to sign it. *See* § 621 (a) & (b) of Settlement Act. Secretary Ken Salazar signed the Settlement Agreement on March 14, 2013.

In addition, because Congress waived any claim of sovereign immunity for the U.S. and Pueblos in passage of the McCarran Amendment in 1953, there has never been a question of waiver of sovereign immunity in this case. That federal law established a statutory waiver: "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, . . . and the United States is a necessary party to such suit." 43 U.S.C. § 666. This waiver includes adjudication of

Indian water rights. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-812 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). The McCarran Amendment operates as a waiver of sovereign immunity in either state or federal court and it applies to Indian water rights, whether on reserved or fee simple lands. *See U.S. v. Bluewater-Toltec Irr. Dist*., 580 F.Supp. 1434, 1437 & 1439 (Dist. N.M. 1984) *affirmed* 806 F.2d 986 (10th Cir.) (1986). *See also* Law of Water Rights and Resources (updated July 2014), A. Dan Tarlock, Chapter 7, Joinder of United States and Indian Tribes at § 7:3 (discussing McCarran Amendment waiver of the sovereign immunity of the United States and Indian Tribes in suits to adjudicate and administer the rights to a river system).

The last line of objections grouped under this section is founded on a misapprehension of the effect of the McCarran Amendment. The objections appear to assume that the McCarran Amendment not only waives sovereignty immunity but also restricts Pueblo claims to state-based water rights: "Defendant objects to the application of different water laws to the Pueblos and the non-Indians as a violation of the McCarran Amendment," *see* Exhibit A, p. 6 of 7 at para. 20; and "Defendant objects to the use of the federal reserve doctrine to determine the Pueblo's water rights as a violation of the McCarran Amendment," id. at p. 6 of 7 at para. 21.

Although federal law, such as Section 8 of the 1902 Reclamation Act, generally does limit federal water uses to appropriations under state law, the McCarran Amendment is a procedural law and does not prohibit claims under federal law on federal lands:

> Sovereign immunity is waived for both federal reserved rights claimed by federal land management agencies and … for Indian reserved water rights. State courts may apply state procedures but must apply federal substantive law.

Law of Water Rights and Resources at § 7:3 (citing, among other authorities, *Colorado River*

Water Conservation Dist. v. United States, 424 U.S. 800, 812-13 (1976)); see also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). Prior holdings in the *Aamodt* case have already determined that the Pueblos' water rights on their grant lands are governed by federal law, *Aamodt I*, 537 F.2d at 1111-1112, and that a claim may be made for federal reserved water rights on federal lands reserved for a Pueblo, *Aamodt II*, 618 F.Supp. at 1010.

4. Pueblo water leasing ability (Category m)

Some objections also oppose provisions in the Settlement Agreement that allow the Pueblos to lease their water rights:

> With regard to long term leases enforced by the Pueblos, Defendant and Defendant's children and grandchildren become vulnerable to rate hikes by the Pueblos. A 99 year lease violates the 10-year limitation on leases of water rights and the very long term lease violates State Law against perpetuities.

See Exhibit B, p. 7 of 13, para. 15, pp. 9 & 10 of 13, para. 9. A similar objection states:

> The Pueblos can lease their water right to others for up to 99 years. Although the proposed Settlement Agreement states that the leased water must be used in the Basin, there is no protection against a sub-lessee removing the water from the Basin, thus the lease provision as written adds to the likelihood of a first priority call by the Pueblos if water is removed from the Basin.

See Exhibit E, p. 12 of 12, para. 7.

The objections are correct that the Settlement Act authorizes each Pueblo to lease its first priority rights by entering into "leases or contracts to exchange water rights or to forbear undertaking new or expanded water uses for water rights recognized in section 2.1 of the Settlement Agreement for use within the Basin," *see* Settlement Act § 621(c)(1), and for a term not to exceed 99 years. *Id*. at § 621(c)(3). In its last session, the New Mexico Legislature amended the state leasing statute to conform to the Settlement Act and allow leases for up to 99 years:

> A water use due under an adjudicated water right secured to a pueblo pursuant to the settlement agreements approved in Title 5 [Taos Settlement] and Title 6 [Aamodt Settlement] of the federal Claims Resolution Act of 2010, P.L. No. 111-291, Sections 501-626, or in the partial final judgments and decrees entered pursuant to those settlement agreements, may be leased for a term, including all renewals, not to exceed the term specifically authorized in that act; provided that this subsection shall not apply to any water use due under any state-law based water rights acquired by a pueblo or by the United States on behalf of a pueblo.

See § 72-6-3(D) NMSA 1978 (2014). Consequently, a lease term of up to 99 years is expressly and specifically approved by both federal and state law.

The leasing provisions do not allow a Pueblo to exceed its total water right. If a Pueblo decides to lease a portion of its water right, then its own use will be limited to the amount of its remaining water right not leased. Furthermore, any lease for use of water on lands outside of the Pueblo will require approval by the State Engineer or by the State Engineer acting as Water Master, upon a showing that the change does not impair other groundwater uses, does not interfere with surface water uses and complies with other requirements set forth in the Settlement Agreement. *See* Settlement Agreement at § 5.6.3.

Without the settlement, the Pueblos could still seek federal approval to lease water rights and could conceivably enter into agreements to lease their first priority water outside of the basin. Under both the Settlement Agreement, § 2.1.5, and under the Settlement Act, § 621(c)(1), the Pueblos have agreed and are limited to leases of their first priority rights within the basin.

Furthermore, the Settlement Act even restricts Pueblo leasing of the imported water described in § 613(a)(1), which the federal government has acquired for the Regional Water System. If an individual Pueblo does not need all of its allocation from the Regional Water System the excess "may only be leased or marketed by any of the Pueblos pursuant to the intergovernmental agreements" among the Pueblos or with the County Water Utility as set out in

section 614(c)(2). *See* § 621(c)(5).

In response to the concern that the Pueblos' water rights could be used outside the Basin under a sublease, the restriction on the use of the water applies to the water, not the Pueblos. The water rights may only be used within the Basin, whether by a Pueblo, a lessee, or a sublessee. There is no right, by any user, to lease the water rights outside the Basin.

The final concern raised by these objections assumes that Pueblo leasing will make non-Pueblo parties vulnerable to rate hikes by the Pueblos. But the settlement neither imposes requirements nor creates conditions causing non-Pueblo parties to lease water from a Pueblo. To the contrary, as described in section B(1)(Category w) above, under the Settlement Agreement the Pueblos are limiting priority calls and use of their first priority rights and are usingthe imported supply to meet their needs. These limitations make junior non-Pueblo water right owners more secure in their own rights and less likely to need to acquire additional supplies.

With respect to rates of service from the County Water Utility, any Pueblo leasing will not affect the cost of service to County customers. Existing domestic well water right owners who elect to connect to the County Water Utility will not be charged the cost of acquisition of water rights and only for the cost of service, i.e., cost of diversion, treatment, transmission and distribution, including utility operations, maintenance, repair and upkeep of the system. *See* Settlement Agreement § 3.1.8.1. Because the connecting well owners will contribute the water rights to serve them, they are immune from water rights acquisition or leasing costs in the future. With respect to future customers who do not have domestic well water rights to contribute, the County has already acquired sufficient permanent water rights, *see* Settlement Agreement § 9.6.4, to meet increasing demand long into the future. While those future customers are not

exempt from a water right acquisition payment, the cost will be based on the permanent water rights already acquired by the County and will not be subject to fluctuating lease prices.

C. The State had authority to enter into the Settlement Agreement, which is consistent with State law

Several of the objections allege that the Settlement Agreement is somehow inconsistent with State law, and that it, exceeds the State's authority. More specifically, these objections allege that the Settlement Agreement violates the State Constitution, its Anti-Donation Clause and Equal Protection Clause; that it creates a conflict of interest for the State Engineer and directs the State Engineer to exceed his authority in a number of ways; that it does not provide enough protection for the objectors from Pueblo priority calls; and finally, that the Settlement Agreement "lacks consideration." For all the reasons identified below, none of these objections are well taken; all should be overruled.

1. OSE conflict of interest/authority to award future rights/declare basin closed (Category j)

Exhibit A, B and D all contain allegations that the state engineer has a potential conflict of interest because under the Settlement Agreement he has authority to curtail both Pueblo and non-Indian water rights.

> There appears to be a conflict of interest in the terms of the Settlement Agreement relating to the role of the New Mexico State Engineer. Section 5.2.1.1 of the Settlement Agreement provides the State Engineer with the right to restrict Pueblo water rights. Section 5.2.1.2 of the Settlement Agreement provides that a Water Master has the same authority over non-Indian water rights. However, the State Engineer is also designated as the Water Master in Section 5.2 of the Settlement Agreement.

Exhibit B, paragraph 10 (emphasis added). These objections do not explain how the State Engineer having authority over both Pueblo and non-Pueblo water rights is a conflict. In fact,

the State Engineer is charged by statute with the administration of all the waters of the state. "He has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." Section 72-2-1 NMSA, 1978. The State Engineer's ability to also administer the Pueblos' water rights under the Settlement Agreement only increases his ability to administer all the water right in the Basin consistently. The objectors do not provide any factual basis or legal authority to support their allegation that because the Settlement Agreement provides the State Engineer the authority to administer both Pueblo and non-Pueblo water rights, a conflict of interest exists.

Several objections also assert that the Settlement Agreement requires the State Engineer to "close the basin" to new domestic well permits, and that it is beyond the State Engineer's authority. More specifically,:

> The partial final decree declares the N-P-T basin fully appropriated and proposes to close to new wells. (Sec. 3.1.4). The State Engineer has stated that he does not have evidence of how much water is in the N-P-T aquifer. Any unappropriated groundwater is owned by the people of New Mexico. <u>The state engineer is without jurisdiction to unilaterally and arbitrarily close the N-P-T aquifer to further development</u>.

Exhibit A, paragraph 24 (emphasis added). See also: "The state engineer is also prevented from closing the Pojoaque aquifer by the Domestic Well Statute which imposes a non-discretionary duty on the state engineer to issue a permit to divert groundwater for domestic uses to any person who applies for one and complies with the state engineer rules. (Sec. 72-12-1.1)" *Id.*, Exhibit B paragraph 17; (Exhibit C, paragraph 6 and Exhibit D, paragraph 11. These assertions are contrary to State law. Under State regulations of domestic wells, 19.27.5 NMAC, the State Engineer has the authority to limit or curtail the issuing of domestic well permits under 72-12-1.1 N.M.S.A.. Under NMAC 19.27.5.14, the State Engineer may declare a Domestic Well

Management Area, limiting the issuance of permits for new appropriations of water. In addition, the State Engineer has the authority to issue orders closing basins from all new appropriations. NMSA Section 72-2-8. . Moreover, in the instant case, the Court has already made finding regarding the limited water supply in the Pojoaque Basin. See January 13, 1983 *Order* (No. 541). Objections that the State Engineer does not have the authority to close the Pojoaque Basin, or that there is no basis for doing so, are not well taken, and should be overruled.

2. Anti-donation clause/NM Constitution (Category u)

A number of objections complain that the Settlement Agreement is at odds with the State's Anti-Donation Clause and otherwise violates the Constitution of the State of New Mexico, and in particular, that the State does not have the authority to enter into the *Aamodt* Settlement without the approval of the State Legislature because the Settlement Agreement is in the nature of a "compact" under New Mexico law. None of these objections are well taken.

Specifically, one April 7, 2014 Objection argues that with the *Aamodt* Settlement Agreement, "a member of the executive (in this case New Mexico State Engineer instead of the Governor) has signed a tribal settlement or compact without statutory authorization of the New Mexico Legislature." No. 9011 at paragraph 5. That objection goes on to explain:

> The proposed settlement has not been submitted to the New Mexico Legislature for enactment or rejection or modification, as required in [*State ex rel. Guy Clark, George Buffet, and Max Coll v. Gary Johnson*, 1995-NMSC-048, 120 N.M. 562]. In an opinion by Justice Minzner, this Court held unanimously that a governor (in this case a member of the executive, the State Engineer) does not have the constitutional authority to bind the State of New Mexico to a compact with an Indian Tribe without a statute.

Id. This assertion is not correct. The operative signature on the *Aamodt* Settlement Agreement is not that of the Governor or the State Engineer, but of the Attorney General. The New Mexico

Legislature charged the Attorney General with the general duty to "prosecute and defend in any other court or tribunal [in addition to the New Mexico Supreme Court] all actions and proceedings, civil or criminal, in which the state may be a party," NMSA 1978, § 8-5-2(B) (1975), and has explicitly and unmistakably authorized the Attorney General to act on behalf of the State to adjudicate water rights and to enter into settlements of claims. By passage of the 1907 water code, the Territorial Legislature set forth the procedures and requirements for determination of rights to use waters within the State of New Mexico. *See* NMSA 1978, §§ 72-4-13 to -19 (1907). The adjudication statutes authorize and direct the State Engineer to conduct hydrographic survey work necessary for the determination of rights, *id*. at §§ 13-17, and direct the Attorney General to "enter suit on behalf of the state for the determination of all rights to the use of such water . . . . and diligently prosecute the same to a final adjudication ". *Id.* at §15. Additionally, the Legislature has also specifically charged the Attorney General with the power to compromise or settle any suit or proceedings in NMSA 1978, § 36-1-22 (1876).

The objection's reliance on *State ex rel. Clark v. Johnson* is unavailing. The New Mexico Supreme Court in *Johnson* considered whether by signing Indian gaming compacts the Governor had infringed on powers properly belonging to Legislature, in particular the Legislature's power to regulate gambling. The Court determined that a violation of separation of powers occurs when an action by one branch of government disrupts the proper balance with another branch, and thereby prevents the other branch from accomplishing its constitutionally assigned functions. 120 N.M. 562, 574, 904 P.2d 11, 23, 1995-NMSC-048 (1995). With respect to the effect of the executive branch action's on legislative functions the Court noted:

> One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority

> could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement.

Id. Because the Governor had no express or implied authority to bind the State to terms of a gaming compact falling squarely within an area regulated by the Legislature and inconsistent with existing statutory law, the Governor's action violated constitutional separation of powers. *Id.* 120 N.M. at 574-76, 904 P.2d at 23-25.

In contrast to the facts and holding in *State ex rel. Clark v. Johnson*, no further legislative approval was needed in order for the Attorney General to execute the Settlement Agreement here. The executive action in *Johnson* infringed on an area directly regulated by the Legislature without either an express or implied legislative grant of authority to the executive. *Id.* By contrast, the authority of the Attorney General in litigating and settling Indian water rights adjudication claims derives from state law in existence for over a century. NMSA 1978, § 36-1-22 (1876); NMSA 1978, § 8-5-2(B) (1975); NMSA 1978, §§ 72-4-13 to -19 (1907).

Moreover, the New Mexico Legislature has been kept informed regarding the substance and status of the *Aamodt* Settlement for years. Lawmakers review Indian water rights settlements through an Indian Water Rights Settlement Report, which the State Engineer and the Interstate Stream Commission Director provide annually to lawmakers. The State Engineer and staff as well as the Interstate Stream Commission Director also have briefed members of the New Mexico Legislature extensively on the details of the *Aamodt* Settlement and the other Indian water rights settlements over the last several years. In response, the lawmakers have made multiple appropriations to the Indian Water Rights Settlement Fund to implement the Indian water rights settlements, including *Aamodt*.

That same April 7, 2014 Objection also complains that the Settlement Agreement somehow violates the Rio Grande Compact:

> The 2,500 acre-feet of imported water will come from the Rio Grande, therefore, can be potentially leased outside the basin. Thus, there is nothing requiring the Pueblos to keep the 2,500 acre-feet of wet water inside the basin. These waters are diverted just north of the Otowi gauge, possibly violating the Rio Grande Compact depending on where the water is leased.

No. 9011 at paragraph 4. This is false. The reality is that such water may not be leased outside the Pojoaque Basin. With regard to such Acquired Water, the Settlement Agreement expressly provides:

> The Pueblo may use such water for any purpose, including uses off that Pueblo's lands; *provided*, however, that uses off that Pueblo's lands shall be in the Pojoaque Basin.

Section 2.5.1 (emphasis added). The notion that Acquired Water might be leased outside the Pojoaque Basin is at odds with the express terms of the Settlement Agreement. As such, the Acquired Water will remain in the Pojoaque Basin, and north of the Otowi gauge. Moreover, any transfer of water for use as Acquired Water under the Settlement Agreement in the Pojoaque Basin will have to be permitted by the State Engineer. Such a permit would not be granted if it would violate the Rio Grande Compact.

The April 7, 2014 objection also complains that the Settlement Agreement somehow exempts the Regional Water Authority from certain State statutes:

> As a New Mexico Legislator and a taxpayer in Santa Fe County and State of New Mexico, I do **not** agree with Section 9.4.1.1 of the Settlement Agreement. In this Section, the Regional Water Authority (RWA) is not subject to the to the New Mexico Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, New Mexico Audit Act, Sections 12-6-1 through 12-6-14, NMSA 1978, or any successor to such law.

No. 9011 at paragraph 2 (emphasis in original) (emphasis added). Again, this is false. The Settlement Agreement does not provide for such an exemption. The Settlement Agreement actually

states that "[p]rior to the entry of the Final decree, the State must, by legislation, regulation or administrative order":

> Confirm, if the constituting documents of the RWA so provide, that the RWA is not subject to the New Mexico Procurement Code, §§13-1-28 through 13-1-199, NMSA 1978, New Mexico Audit Act, §§ 12-6-1 through 12-6-14, NMSA 1978, or any successor to either such law, or to any law governing or relating to public officers and employees, and authorize the RWA to adopt procurement, audit, and personnel policies;

Section 9.4.1.1. In other words, the Settlement Agreement requires that the State must pass legislation to allow those exemptions if those exemptions are necessary. It absolutely does not provide that the Regional Water Authority is not subject to those sections, nor could it.

> Finally, certain of the objections assert that the Settlement Agreement in some way violates the State's Anti-Donation Clause. A March 10, 2014 Objection states: "Hookups into my property are not paid for using the hookup funds because of the anti-donation clause." No. 8191 at 3. This objection does not state how the anti-donation clause is implicated. . Funds from the Water Connection Fund to be provided under the Settlement Agreement to cover the cost of connecting to the CWU are only available to settling parties that agree to transfer their water rights to the CWU. Further, the Settlement Agreement provides that the State Engineer shall promulgate rules respecting the administration of the Water Connection Fund.

Section 3.1.7.3. As such rules have not yet been developed, any allegations regarding violations of the anti-donation clause are purely speculative and impossible to assess. These objections should be dismissed.

3. The Settlement does not violate Equal Protection (Category z)

> Pre-Printed Attachment B states:
>
> 13. Defendant objects to the Settlement Agreement as it violates the Equal Rights and Protection Clause of the Constitution. It allows one group of people rights and protections that are denied to another group of people.

(emphasis added). Defendants do not state which group gets the rights and protections, which group is denied them, nor do they identify what rights and protections are involved. Exhibit B

paragraph 14 states "Defendant objects to the deprivation of due process and a violation of the Equal protection Clause of the Constitution and the State Open Meetings Act," and again in paragraph 16 that "Defendant objects to requirements of the Court which have deprived Defendant of fundamental fairness required by the 5th and 14th Amendments of our Constitution." Again Defendants fail to provide any particulars as to their equal protection claim, making an analysis of, and response to the objection impossible.

4. Lacks consideration; transfer of water rights before system complete; Pueblo protection from priority call not sufficient (Category l)

Several objections allege incorrectly that the Settlement Agreement requires the transfer of water rights before the Regional Water System is complete, and that there is a corresponding lack of consideration. Pre-Printed Attachment A states:

> 12. Defendant objects to the transfer of his domestic well water rights to the county water utility upon entry of the partial final decree (Sec. 8.1). Given the state of required agreements, rules, funding, and easement acquisition that have not been completed, Defendant would not be connected to the regional water system until the year 2024 (possibly) without just compensation. The settlement agreement is void for lack of consideration.

(emphasis added); similarly, Pre-Printed Attachments B states:

> 11. The Defendant objects to the transfer of the Defendant's domestic well rights to the County water utility upon entry of the Partial Final Decree. Due to the lack of certainty concerning rules, easements, required agreement and funding, the water system installation may be delayed for an indefinite period of time. There is no provision for compensation to the Defendant for transfer of water rights without certainty concerning the timeline and costs associated with the Defendant's ability to connection [sic] to said system.

(emphasis added).

These objections misstate the provisions of the Settlement Agreement. First, no party is required to transfer their domestic well water rights to the County Water Utility (CWU) unless

they elect to connect under the Settlement Agreement. Second, if they do elect to connect, no water rights are required to be transferred simply upon entry of the Partial Final Judgment and Decree. If a party does elect to connect to the County Water Utility, Section 3.1.7.2.1 of the Settlement Agreement provides that the owner will only discontinue the use of such well for domestic purposes "upon connection to the CWU." (emphasis added). There is no requirement anywhere in the Settlement Agreement that any party transfer a water right to the CWU "upon the entry of the partial final decree," as the objectors allege, or at any other time prior to receiving service from the utility. See Section 3.1.7.2.1 (They shall "upon written notice from the CWU, connect to the CWU for domestic water service as soon as such water service is available, transfer any Section 72-12-1 well permit to the CWU, and discontinue the use of such well for domestic purposes upon connection to the CWU.") In fact, the Settlement Agreement expressly provides that those making the election to connect to the CWU "shall be permitted to continue to use [their] well . . . until they are able to connect to the CWU and obtain service." 3.1.7.2.1.

And Settlement Parties are free to make an election not to connect to the CWU at all. Correspondingly, such a Settling Party would never be obligated to transfer their permit or domestic well water right to the CWU. Indeed, section 3.1.7.1 of the Settlement Agreement specifically provides that: "[A] Settlement Party who is an owner of a water right from a well shall not be required to connect to the CWU water system and shall not be required to cease use of that well." For these reasons, the objections based on the allegation that there is a lack of consideration or that they are required to transfer their domestic well water rights under the Settlement Agreement should be overruled.

D. Domestic Wells

There are a number of objections that are based on concerns about the treatment of domestic wells under the Settlement Agreement: that the Settlement Agreement provides for an unconstitutional "taking" of the objectors domestic well water rights, that it is at odds with the State's domestic well statute, that the indoor use restriction for wells permitted after 1983 arises unlawfully from the Settlement Agreement, and that shared wells are not spoken to by the Settlement Agreement in any way. None of these objections are factually or legally correct.

1. Taking/Injury to Property Value (Category a)

In a variety of ways, many objections complain that the Settlement Agreement causes an improper taking of domestic well water rights or otherwise reduces the value of the objectors' property as a result of transactions involving domestic well water rights. More specifically, these objections allege that the Settlement Agreement allows the County Water Utility to take the objectors' domestic well water rights without compensation, that it arbitrarily reduces the quantity of the objectors' domestic well water rights, and that it otherwise misquantifies the objectors' domestic well water rights. For instance, an objection in Exhibit A incorrectly asserts that the Settlement Agreement reduces domestic well water rights to 0.5 AFY:

> 1. By the terms of the settlement agreement (See Section 3), the beneficial use of 3.0 AFY of groundwater granted by permits issued after 1956 by the New Mexico State Engineer, are reduced to 0.5 AFY without just compensation, arbitrarily and in violation of the Domestic Well Statute (Sect. 72-12-1.1; NMAC 19.27.5.9).

(emphasis added); Similarly, an objection in Exhibit B complains that beneficial use is impossible to define:

> 4. Defendant objects to the method in which the OSE has come up with "Beneficial Use." Beneficial use has not been fully defined. There is no proof as to what Defendant's historical beneficial use is at this point. The State Engineer

> does not have the authority to determine Defendant's water rights.

(emphasis added); and in Exhibit C:

> 5. My rights to beneficial use of groundwater are reduced without consideration or just compensation.

(emphasis added).

These objections are factually and legally incorrect. There are no provisions in the Settlement Agreement that "reduce" a domestic well owner's "beneficial use."

The objections cited above seem to suggest an expectation on the part of the objectors that generally speaking a domestic well permit to appropriate up to three acre feet of water per year is equivalent to a water right. It unambiguously is not. This Court has already held many times that a permit is not a water right. More specifically, on September 20, 2012, this Court held:

> A permit is not a water right and Trujillo does not cite any authority, nor did the Court find any authority, for the proposition that a permit to appropriate water is a perfected property right. "A water permit is an inchoate right, and is the necessary first step in obtaining a water right. It is the authority to pursue a water right – a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired." *Hanson v. Turney*, 136 N.M. 1, 3 (Ct. App. 2004) (Language in New Mexico water statutes "is compelling evidence that the legislature did not intend to allow permit holders who had not yet applied any water to beneficial use to be considered owners of a water right"); see also N.M. Stat. Ann. § 72-12-8 (distinguishing an "owner of a water right" from a "holder of a permit").

Memorandum Opinion and Order at 6 (No. 7757) (emphasis added). This Court then held that water rights for domestic wells in New Mexico are limited to the quantity of water beneficially used, and noted that in the Zuni River Basin Adjudication the Court stated:

> New Mexico law is clear on the subject. The constitutional provision and statutes . . . as well as abundant case law clearly state that beneficial use defines the extent

> of a water right. This fundamental principal is applicable to all appropriations of public waters. Only by applying water to beneficial use can an appropriator acquire a perfected right to that water.

Id. at 7 (citing *United States v. A & R Productions*, No. 01cv72, Doc. No. 733 at 4, filed June 15, 2006 (D.N.M.) (Black, J.) (citations and quotation marks omitted). That the objectors' water rights are defined by beneficial use arises from New Mexico water law, and applies to the objectors whether or not the Settlement Agreement is approved.

With regard to the notion that the objectors' water rights "are reduced to 0.5 AFY" by the Settlement Agreement, or that '[t]here is no proof as to what Defendant's historical beneficial use is at this point," this again is false. This Court has already found that the quantity of water beneficially used from a domestic well when water from that well can be used for both indoor and outdoor purposes in this Basin is an average of 0.3 acre-feet per year based upon evidence from meter readings of domestic wells in the Basin:

> The State pointed to the Water Master Report filed in this case which includes meter readings for over 300 post-1982 domestic wells. (See Doc. No. 6127, filed April 25, 2005. The owners of wells in the Water Master Report had entered into a settlement agreement which allowed them to divert 0.7 acre-feet per year for both indoor and outdoor use of water. The meter records for those wells showed an average use of 0.3 acre-feet per year. (See Doc. No. 6186 at 3). Because there were no objections to the State's motion and for good cause shown, the Court ordered claimants of unadjudicated water rights under post-1982 well permits to show cause why the water right quantity for post-1982 well permits should not be adjudicated as 0.5 acre-feet per year consistent with the terms of the domestic well permit. (See Doc. No. 6194, filed December 11, 2006).

Id. at 9-10. Indeed, several years' worth of annual water master reports filed with the Court consistently support the fact that beneficial use from domestic wells for both indoor and outdoor use varies little from the average of 0.3 acre-feet per year cited above, and is frequently even less than that. See e.g., *Notice of Filing 2010 Report of Post Moratorium Wells Water Master*,

Exhibit 1 at 2 ("Based on these readings the average use for each household decreased from the previous year to approximately 0.235 acre-feet per annum") (No. 7693-1); see also *Notice of Filing 2009 Report of Post Moratorium Wells Water Master*, Exhibit 1 at 2 ("Based on these readings the average use for each household is approximately 0.271 acre-feet per annum") (No. 7035-1); *Notice of Filing 2008 Report of Post Moratorium Wells Water Master*, Exhibit 3 Tabulation at 8 ("0.296 Average Use Per Meter") (No. 6740-3); see also *Notice of Filing 2007 Report of Post Moratorium Wells Water Master*, Exhibit 3 Tabulation at 8 ("0.296 Average Use Per Meter") (No. 6374-3).

Further, the State Engineer is not determining any party's water rights in this adjudication. The New Mexico Attorney General, not the State Engineer, is representing the State in adjudicating the water rights in this stream system pursuant to the statutory authority expressly granted in NMSA Section 72-4-15 (1907).

The only reduction of use required under the Settlement Agreement is voluntary -- a Settlement Party can voluntarily agree to reduce their use in return for receiving certain benefits of the Settlement Agreement. For example, Section 3.1.7.2 provides that "in order to be protected from enforcement and administration of priorities within the Pojoaque Basin, a Settlement Party who is an owner of a water right from a well must elect" in some cases, to reduce their use. See e.g., Section 3.1.7.4.2.2 (Section 72-12-1 wells permitted prior to January 13, 1983: 3.0 AFY or historic beneficial use, whichever is less, with a 15% reduction, but in no event will use be required to be less than 0.5 AFY"). However, these provisions are elective, and only apply where a party's beneficial use is actually above 0.5 AFY, which, as shown above, is much greater than the average beneficial use from domestic wells in the Basin. And, a settling

well owner can always choose to keep their well and not connect to the CWU or reduce their water usage pursuant to Section 3.1.7.1.

In sum, beneficial use is the basis, the measure, and the limit of a water right, including domestic well water rights, and domestic wells on average use far less than the 0.5 AFY protected by the Settlement Agreement. The Settlement Agreement does not result in a taking of property, the objectors have failed to show it would injure property values, and the objections should be dismissed.

2. Violates Domestic Well Statute (Category f)

Several objections argue that the Settlement Agreement is contrary to New Mexico's domestic well statute. In particular, two of the form objections assert that the Settlement Agreement "declares a minimum amount of water for household uses that is immune from priority call" in violation of New Mexico law. In exhibit A, an objection states:

> 17. The Settlement Agreement denies the protection afforded by the New Mexico Legislature to domestic well owners by declaring a minimum amount of water used for household uses that is immune from priority call. (Sect. 72-12-1.1; NMAC 19.27.5.9). Defendant objects to the denial of protection afforded by the state water code and related rules and regulations. (NMAC 19.27.5)

(emphasis added); and in almost identical fashion, in Exhibit B:

> 12. The Defendant contends that the Settlement Agreement denies the Defendant the protections afforded domestic well owners under New Mexico law. Section 72-12-1.1 of the NMAC protects the owners of domestic wells by declaring that a minimum amount of water used for household purposes should be immune from a priority call. Defendant therefore objects and states that Defendant is being denied the protections embodied in the State [W]ater Code.

(emphasis added).

These objections misstate the law. There is no protection from priority call provided for by New Mexico's domestic well statute. Neither Section 72-12-1.1 NMSA 1978 nor its

predecessor statutes have ever given protection from priority call for any uses of water. Neither does NMAC 19.27.5.9 provide for any protection from priority call. This is exactly what the New Mexico Supreme Court held in *Bounds v. State ex rel. D'Antonio*: "Nothing in the language of the [Domestic Wells Statute] prevents domestic well permits from being administered in the same way as all other water rights, including priority administration—exactly what Article XVI, Section 2 of the New Mexico Constitution requires." 2013-NMSC-037, 306 P.3d 457, 465 (2013). The Supreme Court added:

> Significantly, according to the very permits that authorize them, domestic wells are "subject to curtailment by priority administration as implemented by the state engineer or a court." 19.27.5.13(B)(11) NMAC. Curtailment by priority administration authorizes the State Engineer to limit water use administratively in times of water shortage to protect senior water rights. *See* NMSA 1978, § 72–2–9 (1907) (giving the State Engineer authority to supervise the apportionment of water in New Mexico).

Id. at 466-467.

On the other hand, although New Mexico's domestic wells statute does not provide any protection from priority calls, the Settlement Agreement actually does. Section 4 of the Settlement Agreement provides that Settlement Parties that have made an election for their well under Section 3.1.7.2, shall be protected from priority enforcement of the Pueblos' water rights. This is a protection that is not provided under state law, but only by voluntary agreement of the Pueblos in the Settlement Agreement. *Aamodt* Settlement Agreement at 35.

This category of objections should be overruled.

3. Water Quantity Insufficient to Meet Needs (Category o)

A number of objections to the Settlement Agreement in fact appear to be objections to the Court's January 13, 1983 *Order* (No. 753) which granted a motion for a preliminary injunction,

and required the State Engineer to limit all future domestic well permits to indoor use only.

More specifically, in Exhibit A:

> 26. Defendant objects to the arbitrary restriction against outdoor use of a domestic well for irrigation of non-commercial trees, gardens or lawns as a deprivation of procedural and substantive Due Process of Law.

(emphasis added)and in Exhibit C:

> 2. The restriction against outdoor use of a domestic well for irrigation of non-commercial trees, gardens or laws [sic] is arbitrary.

and

> 4. The settlement agreement is coercive by granting domestic well owners who agree to the settlement agreement 0.5 AFY while well owners who desire to keep their wells and not connect to the regional water system are only granted 0.3 AFY. A claimant who agrees with the settlement agreement may use 0.5 AFY for indoor and outdoor domestic uses, but a well owner who does not agree with the settlement agreement is subject to the preliminary injunction.

(emphasis added). These objections are unfounded. The restriction against outdoor use arises from the Court's January 13, 1983 *Order*, and is not a creation of the Settlement Agreement.

On February 26, 1982, the U.S. and the four Pueblos filed a *Motion* (No. 576) seeking an injunction barring the State from issuing any well permits under Section 72-12-1 NMSA 1978. Following oral argument, on January 13, 1983 the Court ordered that:

> No permits to appropriate underground waters shall be issued within the Rio Pojoaque stream system under Section 72-12-1, N.M.S.A. 1978. Permits may issue limited to the use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing and [sic] consumptive use of water. All subject to further orders of the court.

No. 641. All domestic well permits issued by the State Engineer since that time have included the indoor use restriction.

In the years since, the Court has spoken many times to the validity of the January 13,

1983 preliminary injunction. See e.g. March 30, 2012 *Memorandum Opinion and Order* (denying motion to quash January 13, 1983 preliminary injunction) (No. 7579); see also June 2, 2011 *Memorandum Opinion and Order* (denying motion for relief from January 13, 1983 *Order*) (No. 7398); see also September 20, 2012 *Memorandum Opinion and Order* (denying defendant's objection to Special Master's *Order* granting summary judgment in part on the basis of the validity of the 1983 preliminary injunction) (No. 7757). To the extent the objectors' domestic well water rights are limited to indoor use, it is due to conditions in their permits imposed pursuant to the Court's 1983 *Order*, and definitely not due to the Settlement Agreement.

Moreover, the Settlement Agreement, far from limiting the Settlement Parties to indoor use, actually does the opposite. In most cases, for domestic well water right owners under permits issued after January 13, 1983, the State has agreed in the Settlement Agreement to lift the permit limitation to indoor use. For instance, under Section 3.1.7.4.1.4, wells subject to permit restrictions imposed under the Court's January 13, 1983 Order will have uses up to 0.7 AFY or historic beneficial use, whichever is less, protected from enforcement of priorities, for "indoor and outdoor use combined." (emphasis added)). Objections that the Settlement Agreement does the opposite are factually incorrect, and should be overruled.

Another group of form objections complain that the Settlement Agreement somehow limits or quantifies water rights at a level which is insufficient to meet the objectors' needs. One *Objection* (No. 8308) states "[l]imitation on my current water usage will deprive my future family development." Another *Objection* (No. 8400) states "[l]ivestock, alfalfa, orchards will be affected" and another (No. 8418) states the Settlement Agreement "jeopardizes future and historical generation use" and "free access to fire department, our community." *Objection* ("I

want to be able to water livestock, alfalfa fields, garden vegetables, garden flowers, trees, landscape, small orchard, some of which I sell.") (No. 8438); Objection ("We want our 3 acre feet of water.") (No. 8546); see also Objection ("need water for garden and trees and household use . . . retired need to work on garden and yard to stay busy.") (No. 8601). These objections misunderstand the basis for the determination of their water rights. As noted above, water rights are quantified based on actual, historical, beneficial use. Water rights are not quantified based on future need, or the 3.0 acre-feet permit limit, or the terms of the Settlement Agreement. To the extent a party has beneficially used water under an adjudicated water right or permit from the State Engineer, they will be able to continue doing so if the Settlement Agreement is approved. The Settlement Agreement does not adjudicate or determine their water right, but it does provide protections for water right owners that agree to accept its determination of the Pueblos' water rights. These objections have no basis in fact or law and should be overruled.

4. Shared Wells Not Addressed (Category v)

A number of non-form objections complain that the Settlement Agreement is vague or detrimental or discriminatory toward shared domestic wells. A March 26, 2014 *Objection* states simply:

> Shared well – less water rights than with individual wells. No possibility of hookup to planned water system. No city hookup possible.

No. 8312 at p. 2. Another March 26, 2014 *Objection* recites that the objector is possessed of a shared well, and then states:

> Only two properties have full time residents (each with only two persons) and the third (with only one full time resident) No. 14 Tano Point Lane is for sale. Because of Aamodt we will/may be significantly limited in our water usage thus deterring any possible future sales and more immediately, creating severe inconvenience to our already conservative water usage.

No. 8313 at 3. See also March 26, 2014 *Objection* at 3 (No. 8321); March 26, 2014 Objection at 3 ("By detrimentally relying on well use and rights not being diminished by Aamodt, the three parties to the shared well use agreement have been physically and financially harmed) (No. 8320) (emphasis added); March 10, 2014 *Objection* at 3 ("The rules for shared wells are not to be found in the settlement documents.") (No. 8191). Similarly, an April 1, 2014 *Objection* at p. 5 states:

> 5).—No where [sic] in the settlement agreement is there any provision in writing providing specifically what my rights, protections, or enforcement of non-compliance are because I have a **shared well**. No provision exist [sic] in the Interim Administrative Order and Settlement Agreement that addresses this situation of a **shared well.**

No. 8384.

These objections misunderstand the Settlement Agreement's treatment of shared wells. Section 3.1.2.2 describes an evidentiary presumption with regard to quantity that "historic beneficial use from a well is presumed to be .5 AFY per household." Section 3.1.2.2 (emphasis added). This is not a quantity per well, but rather a quantity *per household*, and as such, while there is no express provision regarding shared wells, under Section 3.1.2.2, their rights are not "reduced."

Beyond that important recognition that shared wells are quantified based on the number of households served by the well, and not limited to a quantity per well, the Settlement Agreement otherwise makes no distinction between single user wells and "shared" or "multiple-household" wells. Rather, it speaks to domestic wells generally, and within the category of domestic wells, both single household and multiple household wells are included. The provisions of the Settlement Agreement apply to both.

For example, Section 3.1.7.4.3.1 speaks to "Pre-Basin Wells" only. It makes no

distinction between Pre-Basin single household domestic wells and Pre-Basin shared or multiple-household domestic wells. Similarly throughout the rest of the Settlement Agreement both single household and multiple-user wells are included under the general headings of domestic wells. No carve-out or distinction regarding "multiple-household" or "shared wells" exists under the Settlement Agreement.

5. Property exempt from Settlement (Category d)

One objector claims that his property is exempt from the Pueblos' claims: "Property deed signed by Herbert Hoover ... specifically segregates this well property from all future Indian pueblo claims or federal claims." *Objection* of Richard C. Bibb, filed March 4, 2014 (Dkt. No. 8096). The objection does not explain how a land deed exempts the owner from the adjudication and administration of water rights Assuming the objector is referring to a deed recognizing a Private Claim under the 1924 and 1933 Pueblos Lands Acts, the Tenth Circuit in *Aamodt I*, found: "The water rights of the Pueblos are prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts." 537 F.2d at 1113.

E. Treaty of Guadalupe Hidalgo and Acequia Rights

This section responds to concerns that the settlement violates non-Pueblo rights under the Treaty of Guadalupe Hidalgo, including detrimental effects to historic acequias. In negotiating the Settlement Agreement, a key objective of the State and non-Pueblo parties was to protect existing irrigation by acequias and other non-Pueblo surface water rights holders.

1. Treaty of Guadalupe Hidalgo (Category s)

A handful of individual objectors oppose the settlement as contrary to the Treaty of Guadalupe Hidalgo: "The settlement forgoes the Treaty of Guadalupe Hidalgo Rights and

doesn't consider the protections of those rights." *Objection* of Paul White, filed March 10, 2014 (Dkt. No. 8191) at p. 3 of 6. See *Objection* of Eric Valdez, filed April 1, 2014 (Dkt. No. 8379) (settlement challenges the Treaty of Guadalupe Hidalgo 1848, stating no 'superior access' water rights by anyone, tribe, other entities before 1848); *Objection* of Stephanie Kelly, filed April 7, 2014 (Dkt. No. 8899) (Treaty of Guadalupe Hidalgo requires Pueblo post-1846 rights to be treated the same as all others); *Objection* of Lucy Cornwell, filed April 7, 2014 (Dkt. 9124) (Treaty of Guadalupe Hidalgo, Constitution violated by changing priority dates).

"In the Treaty of Guadalupe Hidalgo, the United States agreed to protect rights recognized by prior sovereigns." *Aamodt I*, 537 F.2d at 1108-1109. In *Aamodt II*, the Court held:

> Acreage under irrigation in 1846 was protected by federal law including the Treaty of Guadalupe Hidalgo, *supra*, and the 1851 Trade and Intercourse Act, *supra*. The Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need. Acreage brought under irrigation between 1846 and 1924 was thus also protected by federal law.

618 F.Supp at 1010. As described in section B(1)(Category w) of this brief, the quantities and priority dates of the Pueblos' proposed water rights are based on the rulings of this Court. In holding that aboriginal title gave the Pueblos first priority, the Court rejected the arguments of the non-Pueblo ditches and acequias, most of which were established under Spanish and Mexican sovereignty, that water should be allocated under a "repartimiento" or equitable sharing system. *Compare Aamodt II* at 997-999 & 1005-1010 to *Certain Defendants' Requested Findings of Fact and Conclusions of Law*, filed Jan. 17, 2004, beginning at p. 11. *See* Mark F. Sheridan, *Pueblo Indian Water Rights, the Federal Law Sources, A Non-Pueblo Position* (Jan. 2002) (CLE International, Law of the Rio Grande conference). As discussed below in section E(2)(Category

n), the Settlement Agreement contains protections for water rights on acequias that will insulate them from strict priority administration that would otherwise apply under the Court's prior rulings.

2. Threatens Acequia System Culture (Category n)

Some objections assert the Settlement Agreement will harm traditional acequia uses:

> The settlement agreement protects the Pueblos' surface water rights from forfeiture but does not protect non-Indians from forfeiture (Sec. 2.10.2). Forfeiture eliminates a member of the acequia and threatens the survival of the acequia system.

Exhibit A, pp. 7 of 7, para. 25. As covered in section B(2)(Category i) and section A(5)(Category z), the settlement does not affect or modify the existing laws governing forfeiture of water rights.

Under the settlement, existing non-Pueblo water rights receive a number of protections they would not otherwise, as set out in detail in section B(1)(Category w). Without settlement, the Pueblos would be entitled to priority administration in order to satisfy the full amount of their first priority rights. By contrast, with the settlement the Pueblos are agreeing to substantial limitations on priority calls and administration.

The settlement provisions are specifically designed to protect the historic and continuing diversions of surface water rights from acequias. The Settlement Agreement limits a first priority call to the Pueblos' current uses, which are about a third of their total historic first priority rights. Section 4.2 of the Settlement Agreement provides that currently unexercised historic first priority rights of the Pueblos ("Future Basin Use Rights") will not be enforced against non-Pueblo water rights that continue in beneficial use, including diversions from acequias. This means that of the Pueblos' total first priority rights of 3,660 AFY, only the "Existing Basin Use Rights" of 1,391

AFY may be exercised and administered with a first priority against protected non-Pueblo surface water rights. As a result, almost two-thirds of the Pueblos' first priority rights, in the amount of 2,269 AFY, are effectively made a third priority.

Surface water administration under Settlement: non-Pueblo rights with Section 4 Protection		
First Priority	Pueblo Existing Basin Rights	1391 AFY
Second Priority	Non-Pueblos' Existing Uses with Section 4 Protection	continuing beneficial use as allowed by water rights
Third Priority	Pueblo Future Basin Rights	2269 AFY

This Section 4 protection's reversing of priorities would not occur without the settlement.

Section 4 protection, however, may be lost if the non-Pueblo water right is not beneficially used for more than five consecutive years in the future without justification or is transferred to a new point of diversion or purpose or place of use, with certain exceptions. *See* Settlement Agreement §§ 4.2.2 & 4.2.3. Some objectors have complained that loss of this protection amounts to forfeiture of the non-Pueblo rights. See *Objection* of Edward Romero, filed March 25, 2014 (Dkt. No. 8286) (I object that if some water rights are not beneficially used for more than five consecutive years forfeiture could occur which would eliminate that member of the Acequia). This objection confuses forfeiture of water rights under state law with the additional protection afforded by the settlement. Under the state forfeiture statutes, NMSA 72-5-28 (1957) and 72-12-8 (1957), if a party fails to beneficially use water for a period of four years before the State Engineer issues a notice and declaration of non-use, and an additional year after

the notice, the water shall revert to the public. Under the Settlement Agreement, if a non-Pueblo surface water right owner fails to irrigate for five years even though there is adequate supply, the water right is not forfeited, but rather may lose the priority protection agreed to by the Pueblos under Section 4. The potential loss of Section 4 protection is not the loss of an existing water right, as under state forfeiture, but rather the possible loss of a benefit that would not exist except under the Settlement. There is no potential for forfeiture of water rights under the Settlement Agreement.

Finally, it is noteworthy that both of the Basin's two large acequia associations support the Settlement Agreement and are filing briefs asking the Court to approve it and enter the Partial Final Decree. *See The Rio de Tesuque Association, Inc's Memorandum in Support of the Settlement Agreement and Entry of a Partial Final Decree on the Pueblos' Rights*, filed Nov. 6, 2014; and *Certain Non-Pueblo Defendants' Memorandum in Support of Entry of Partial Final Judgment and Decree*, Rio Pojoaque Acequia & Water Well Association, filed Nov. 6, 2014.

F. Settlement Implementation

Several objections relate to the implementation of the Settlement Agreement, including complaints that there is unequal representation on the board of the Regional Water Authority, the Settlement Agreement is not complete, certain documents have not yet been developed, and water quality, funding and the Settlement Agreements perceived costs to non-Settlement Parties have not been addressed. These objections should be dismissed because, as discussed below, the Court has already held that these issues related to implementation of the Settlement Agreement are irrelevant to the Court's consideration of the Settlement Agreement and entry of the proposed Partial Final Judgment and Decree.

1. Unequal representation on board, the agreement is incomplete, details are not available, the rules have not been drafted, easements are not obtained, the EIS not complete (Category b and c)

Numerous objections oppose the Settlement Agreement because of a perceived unequal representation on the board of the Regional Water System or that the Settlement Agreement is not complete because the Joint Powers Agreement, the Operating Agreement, the Pojoaque Basin Rules and Regulations, and the Environmental Impact Statement, and the easements for the Regional Water System have not yet been provided or obtained. A February 4, 2014 Objection complains that "water board is 4 out of 5 sovereign nation which we are not a citizen of. So no representation. Takes 3 out of 5 to vote in changes." (No. 8094). Another, dated February 4, 2014, states: "Water board ruled by savereign [sic] nation; no representation for US citizen." (No. 8095); and one Objection dated March 12, 2014 states:

> I object to the JPA (joint powers agreement) or Water Authority Board proposed 4 tribal reps 1 county. Board should reflect interest of parties involved approx. 6000 non-tribal and 1000 tribal individuals.

(No. 8227); another from March 25, 2014 states "I object to the uneven representation on the Water Authority Board. This is unacceptable. There needs to be more non-pueblo representation." (No. 8288).

Exhibit A states:

> 13. The Joint Powers Agreement and the Water Master Rules for the District WaterMaster and the WaterMaster Rules for the N-P-T WaterMaster, including but not limited to the rules required by Section 5 of the settlement agreement, have not been presented or approved;
>
> And
>
> 10 . . . the rules governing the Water Master and the State Engineer in the context of the Settlement Agreement have not yet been adopted. Furthermore, the Joint Powers Agreement, Water Rules for the District Water Master and Water Master

> Rules for the NPT Water Master have not been presented or approved as required by Settlement Agreement.

(emphasis added). Similarly, Exhibit C states: "I object to the entry of the partial final decree before all funding, agreement, rules, reports, and technical information have been provided and approved"; Exhibits D and E, as well as many individual objections which raise basically the same concern.

The Court has already ruled that these objections are not relevant to the Court's approval of the Settlement Agreement or entry of the Partial Final Judgment and Decree. In its September 12, 2014 *Memorandum Opinion and Order Overruling Objection to Magistrate Judge's Order Denying Motion for Partial Stay* the Court rejected exactly the same assertion these objections raise, namely that these subsidiary documents must be completed before the Settlement Agreement can be approved, stating that:

> Defendants have not shown that the requested documents are relevant to the determination of whether the Settlement Agreement is fair, adequate, reasonable, in the public interest, or consistent with applicable law.

No. 9674 at 3. The Court was affirming the Magistrate Judge's *Order*, which examined the same issue, and stated:

> Defendants argue that without these documents, they are unable to determine the feasibility of the Regional Water System. Defendants' argument is not persuasive because the feasibility of the Regional Water System is not one of the criteria relevant to the approval of the Settlement Agreement. Furthermore, the Settlement Act provides for the right to void the final decree if the Regional Water System is not substantially complete by June 30, 2024. If the final decree is void because the Regional Water System is not substantially complete by June 30, 2024, the Settlement Agreement will no longer be effective.

July 7, 2014 *Order* at 3 (citations omitted) (No. 9473). The Magistrate Judge went on to find that the Defendants' other arguments regarding the unavailable documents was equally unpersuasive:

> Defendants also argue that because the requested documents are not available, there is a risk of "erroneous deprivation of water rights," and make the conclusory allegation that approval of the Settlement Agreement could "potentially result in the loss of water rights and the loss of rights and immunities guaranteed by state law, depending on how the relevant agreements, rules, and reports are drafted and how the system is designed." Section 3 of the Settlement Agreement sets forth the non-Pueblo water rights. Defendants do not identify any provisions in the Settlement Agreement or the Settlement Act which would provide for deprivation of the water rights set forth in the Settlement Agreement based on provisions in the requested documents.

Id. at 3-4. The Magistrate Judge therefore concluded, as did the Court, that "Defendants have not shown that the requested documents are relevant to the determination of whether the Settlement Agreement is fair, adequate, reasonable, in the public interest, or consistent with applicable law." *Id.* at 4.

Further, the Court held that the argument that the requested documents are not consistent with the applicable law is meritless on its face because the requested documents do not yet exist. No. 9674 at 5. The same applies now to the instant objections. The objectors have failed to show that the requested documents concerning the implementation of the Settlement Agreement are relevant to the determination of whether the Settlement Agreement is fair, adequate, reasonable, in the public interest, or consistent with applicable law. The objections should be overruled.

2. The Settlement Agreement will not adversely affect water quality (Category e)

Several individual objections raise issues of water quality concerns. One February 4, 2014 Objection complains that "well water – purity needed for elderly resident (age 75)" (No.

8096); another filed March 5, 2014 states "no good to give treated water to livestock will open other doors for further problems" (No. 8157); another from March 10, 2014 states: "we have good drinking water. Water from the Rio Grande would be a health issue." (No. 8187). These objectors fail to state how the Settlement Agreement would affect the quality of their well water, nor could they, as nothing in the Settlement Agreement would do that.

First, if their concern is that the Settlement Agreement requires them to take water from the County Water Utility ("CWU"), and they fear the quality of that water might be an issue, their concerns are misplaced. Nothing in the Settlement Agreement forces any person to connect to the CWU. Connecting to the CWU is completely voluntary. As expressly stated in Section 3.1.7.1 of the Settlement Agreement :

> [A] Settlement Party who is an owner of a water right from a well shall not be required to connect to the CWU water system and shall not be required to cease use of that well.

In fact, unlike water supplied under individual domestic wells, the water supplied by the CWU must meet federal and state regulatory standards for drinking water quality. Therefore, the only effect that the Settlement Agreement may have upon the quality of their water is the opportunity to improve it by connecting to the CWU, an opportunity that does not currently exist without the Settlement. The objections as to water quality should be overruled.

3. Funding concerns: connection fund/impairment fund (Category h)

Several objections complain about a perceived uncertainty as to funding for various aspects of the Settlement Agreement. "The funds needed to connect to the system have not been fully explained and allocated." Exhibit B at paragraph 6. "Additionally, since the design is not fully completed and firm costs established, there is potential that the construction costs for the

system may exceed the early estimates. If this is the case, then the excess costs may be covered through an increase in taxes that will affect the Defendant negatively." Exhibit D (emphasis added). Certain other individual objections complain specifically with regard to uncertainty regarding funding of the impairment fund:

> If the Pueblos impair or damage my water rights, the non-Indian has no enforcement rights. If the impairment fund has no money in it non-Indian has no remedy for impairment[.]

(emphasis added) (No. 8406). Others are concerned about uncertainty regarding funding of the connection fund. None of these objections identify how these funding concerns are relevant to the determination of whether the Settlement Agreement is fair, adequate, reasonable, in the public interest, or consistent with applicable law.

4. Personal financial situation/cost (Category r)

Another group of objections express similar concerns that the Settlement Agreement will impose costs on them which they will be unable to support. "The funds needed to connect to the system have not been fully explained and allocated. Therefore, the Defendant is unable to determine what the costs of connection will be and whether Defendant is financially able to afford such connection." Exhibit B, paragraph 6. (emphasis added). Additionally, certain individual objections express concerns that the Settlement Agreement will impose costs on them which they will be unable to support. One, filed March 5, 2014, states "I don't want another bill to pay every month" (No. 8157); another filed March 31, 2014 states; "we cannot afford to pay"; and yet another filed April 2, 2014 states: "We paid good money for the well. Is somebody going to reimburse us? Money is limited." (No. 8439).

These objections misunderstand the provisions of the Settlement Agreement. The

Settlement Agreement does not require any person to cease using their well or to connect to the CWU, or to be subject to future costs associated with such a connection. In fact, for those parties who elect to connect to the CWU when it is available under section 3.1.7.2.1, their connection costs will be paid out of the Connection Fund. Indeed, under the Settlement Agreement, no person making an election to connect to the CWU under Section 3.1.7.2.1 shall be required to connect to the CWU "unless all connection expenses are paid by the Pojoaque Valley Water Utility Connection Fund or other third party." Section 3.1.7.3. As such, these objections should be dismissed.

III. Conclusion

The Objection form approved by the Court required parties filing objections to state the specific legal and factual basis for their objection, and how their water rights would be injured or harmed in a legally cognizable way by the Settlement Agreement and entry of the proposed Partial Final Judgment and Decree and Interim Administrative Order. None of the objectors has identified how they will be injured by the Settlement Agreement or the entry of the proposed Partial Final Judgment and Decree in a legally cognizable way. All objections should be dismissed or overruled.

WHEREFORE The State of New Mexico *ex rel.* State Engineer, Santa Fe County and the City of Santa Fe request that the Court overrule the objections, approve the Settlement Agreement and enter the proposed Partial Final Decree.

Respectfully submitted this 6th day of November, 2014.

Electronically Filed

/s/ Edward C. Bagley

Arianne Singer
Edward C. Bagley
John Stroud
Special Assistant Attorneys General
Attorneys for State of New Mexico
P.O. Box 25102
Santa Fe, NM 87504-5102
Telephone: (505) 827-7844

/s/ John W. Utton
Sheehan & Sheehan, P.A.
40 First Plaza NW, Suite 740
Post Office Box 271
Albuquerque, NM 87103
(505) 247-0411
Attorney for Santa Fe County

/s/ Marcos. D. Martinez
Assistant City Attorney, City of Santa Fe
P.O. Box 909
Santa Fe, NM 87504-0909
(505) 955-6511
Attorney for the City of Santa Fe

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.