IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER, Plaintiff, v. R. LEE AAMODT, *et. al.*, Defendants, and UNITED STATES OF AMERICA, PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE, Plaintiffs-in-Intervention.	)	No. 66cv6639 WPJ/WPL

OBJECTORS' RESPONSE TO MOTIONS IN SUPPORT OF ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE

Objectors identified as Atencio Group, by their undersigned attorney, submit for their Response to the State's, the Santa Fe City and the County's Memorandum In Support Of The Agreement (Dkt. #9913), Plaintiffs-in-Intervention Memorandum And Points And Authorities In Support Of A Partial Final Judgment And Decree (Dkt. # 9910), Certain Non-Pueblo Defendants' Memorandum In Support Of Entry Of Partial Final Judgment And Decree Incorporating Settlement Agreement And Adjudicating Pueblos' Water Rights (Dkt. # 9912), state:

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INTRODUCTION

Plaintiff State Engineer, the Plaintiffs-in-Intervention U.S.A., Pueblo of Nambe, Pueblo of Pojoaque, Pueblo of Tesuque, and Pueblo of San Ildefonso, collectively referred to as "Plaintiff Parties" seek a partial final decree that approves the settlement agreement and makes it an order of the Court. The Court has set the test for approving the settlement agreement. Objectors have the burden to prove that the settlement agreement is **not** fair, adequate, reasonable, in the public interest, or in compliance with applicable law

The motion to approve the settlement agreement should be summarily dismissed for failure to comply with the applicable law. The settlement agreement violates the McCarran Amendment, the Anti-Injunction Act, the Treaty of Guadalupe Hidalgo, the New Mexico Anti-Donation Clause, the New Mexico Domestic Well Act (72-12-1.1), Due Process, and Equal Protection, and should be summarily rejected by the Court as 792 Objectors have rejected it. .

OBJECTIONS

1. Objectors adopt all objections of record.
2. The settlement agreement takes the Objectors' right to use up to 3.0 AFY of Pojoaque Basin water without just compensation.
3. The settlement agreement uses a double standard for determining and administering water rights thereby depriving the Objectors of Equal Protection of the Law.
4. The settlement agreement violates the McCarran Amendment.
5. The settlement agreement enforces the restraint against irrigation of trees, lawns, and gardens.
6. The settlement agreement is void for inadequate consideration for the reduction in water rights of non-Pueblos.

7. The promised regional water system is not feasible.

STATEMENT OF FACTS

8. States' evidence is a one page letter and a one page affidavit by Plaintiff's employee stating what the average use of domestic water was in California in 1984. Exhibit 2.
9. The N-P-T Basin holds 55 million acre-feet of water in its aquifer. Exhibit 1.
10. The combined diversion of groundwater in the N-P-T Basin has a *de minimus* impact on surface waters. Exhibit 1.

ARGUMENT

I. THE SETTLEMENT AGREEMENT FAILS TO COMPLY WITH APPLICABLE LAW

The motion to approve the settlement agreement should be summarily dismissed for failure to comply with the applicable laws.

1. The Preliminary Injunction Violates the Anti-Injunction Act.

America decided early in its life that the Federal Government must not interfere with State court proceedings for the system to succeed. (Dkt. # 9906). Congress has codified that policy in the Anti-Injunction Act which prohibits a Federal court from restraining a state officer from enforcing a state statute only if the subject statute is substantially unconstitutional and only by a three judge panel. 28 USCA §2281; 28 USCA . §2284. ***Jackson v, State of Colorado***, 294 F. Supp. 1065 (Colo. 1968). The single judge may enter a temporary restraining order if supported by specific evidence, but only the three judge panel has authority to decide the merits of the case. Responsibility is on the single judge to convene a three judge panel.

On February 26, 1982 the U.S.A. and Pueblo Plaintiffs-in-Intervention filed a motion and memorandum (Dkt.# 576, 577) alleging a concern that they did not have reliable information

regarding the amount of water actually being pumped by domestic wells in the Pojoaque Basin and sought an adjudication of all such wells to determine that amount. To that end, they requested a preliminary injunction to maintain the status quo *pendent lite* and to ensure that all water users in the Pojoaque Basin have their water rights adjudicated. Id at pp. 1-2.

On January 13, 1983, the Court entered a preliminary injunction (Dkt. # 641) to restrain the New Mexico State Engineer from issuing permits pursuant to the Domestic Well Statute to drill a well and divert groundwater to be used for domestic purposes that allow outdoor irrigation of non-commercial trees to one acre of non-commercial trees, lawns or gardens.

The preliminary injunction is in direct conflict with the New Mexico Domestic Well Statute (§72-12-1.1 1978 as amended) which grants all applicants for a permit to drill a well pursuant to the Domestic Well Statute ("DWS") to be issued a permit to divert sufficient groundwater to irrigate up to one acre of non-commercial trees, lawns and gardens.

The preliminary injunction herein is void *ab initio* for failure to comply with the procedure set forth in 28 U.S.C. §2284 . That renders condition number 8 of the Defendants' permit to drill a domestic well, void. The prohibition against outdoor irrigation is void. The settlement agreement is void.

The motion for three judge panel (Dkt. #9906) is pending before the Court.

2. The Settlement Agreement Violates the McCarran Amendment.

One objection is that the Pueblos and non-Pueblos are subject to two different sets of laws in the quantification and administration of water rights in the Pojoaque Basin, namely Federal laws and State laws.

The settlement agreement distinguishes claimants between "Pueblos" and "non-Pueblos". That is the same as "Indians" and "non-Indians', clearly a distinction based on race. It is divisive by definition. It divides the community. Resentment caused by the unequal treatment stifles communications necessary for an agreement that is fair, adequate, reasonable, in the public interest, or compliant with applicable law. But the courts have said that the preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. ***Morton v. Mancari,*** Congress granted a preference to Indians in employment matters. It does not follow that because Congress gave Indians an employment preference in the Indian Reorganization Act, that it gave Indians a preference in this water adjudication case. Congress would not approve of taking water rights from the non-Indians to give to the Pueblos.

The McCarran Amendment places the U.S.A. and the four Pueblos on equal footing with all other claimants and thus eliminates the need to distinguish on the basis of race.

By the Treaty of Guadalupe Hidalgo, Art. VIII the U.S.A. agreed:

> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

The term "Mexicans" included the Indians in the promise to protect property.

The U.S.A. has adopted a policy of acting as trustee for the Indians. If Congress decides to give the Indians help to prosper in this Country, that is its prerogative. It is easy to see why the U.S.A. feels compelled to give the Indians preference in employment as in ***Morton v. Mancari*** , or to fund legal representation, as in this case, in light of its history of genocide of the indigenous people. But Congress has not authorized the taking of individuals' water rights from the non-

Indians to give to the Pueblos as the U.S.A. is attempting to do in this case, without compensating the domestic well owners for their losses.

3. The New Mexico Domestic Well Statute Is Being Violated.

The Legislature of New Mexico has set policy regarding the administration of domestic wells of the public waters of the State by the Domestic Well Statute (DWS). The DWS requires the State Engineer to grant all applications for a permit to drill a well for domestic purposes. The New Mexico Supreme Court has affirmed the Legislature's authority to issue a permit to drill a domestic well in a specific water basin without a determination that the water is available and unappropriated. ***Bounds V. State Ex Rel. D'Antonio,*** 2013-NMSC-037, 306 P.3d 457 (2013) The Legislature has also determined that the applicants who are issued a permit pursuant to the Domestic Well Statute are entitled to sufficient water to irrigate one acre of trees, gardens and lawns.

The Supreme Court of New Mexico upheld the constitutionality of the Domestic Well Statute. In ***Bounds V. State Ex Rel. D'Antonio,***supra**.** The court held that the state engineer cannot deny an application for a permit to drill a well but is responsible for enforcing the priority of each well to groundwater for domestic use. New Mexico law provides that the statute requires the state engineer to issue a permit without considering whether the Basin is fully appropriated. It is up to the state engineer to administer the water use by enforcing the priority of water rights. Id.

II. The Settlement Agreement is Based on the Wrong Law.

1. State Law Governs These Proceedings.

Congress enacted the McCarran Amendment (43 U.S.C. §666(1952) to remedy the chaos created by the development of two sets of laws relating to the ownership and administration of water rights in the western states: Federal law verses State law. 97 Cong. Rec. 7817 (1951). Congress waived the U.S.A.'s sovereign immunity in comprehensive water adjudication cases, such as this case, wherein the U.S. claims a water right. The waiver also makes the U.S.A. and the Pueblos subject to a State court judgment. The State court judgment applies to all claimants equally. The Plaintiffs-in-intervention should be realigned as defendants.

The purpose of the McCarran Amendment is to make the Federal law amenable to State law for a proper administration of the water law "as it has developed over the years." See Statement of Purpose, S. Rep. No. 755, 82nd Cong., 1st Sess. (1951).

At the time the Amendment was being debated in Congress, the situation was described as:

> "…[i] t is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States . . . is permitted to claim immunity from suit in, or orders, of a State court, such claims could materially interfere with the lawful and equitable use of water . . . by the other water users who are amenable to and bound by the decrees and order of the State courts." Id. at 5.

The Committee described this situation as one that "cannot help but result in a chaotic condition." Id.

The non-Indian Objectors and the Pueblos are similarly situated as claimants to the Pojoaque Basin water. Each may own different amounts but the same laws and rules apply to all claimants equally. The Court has denied a motion to reject the settlement agreement because it denies the non-Indians Equal Protection of the law. The motion was denied with a finding that the two groups are not similarly situated because the Pueblos' water rights are governed by Federal laws and non-Pueblos' water rights are governed by State laws. (*See* Mem. Op. and Order, Doc. No.

7579, filed March 30, 2012). But the McCarran Amendment places the U.S.A. and the Pueblos under a single legal standard as all other claimants.

The settlement agreement proposes a dual system of administration of water rights implemented by the State Engineer resulting in a double standard that treats the Pueblos and the non-Indians differently. The settlement agreement calls for the non-Indians' water rights to be reduced while the Pueblos' water rights are increased. The Pueblos are awarded water rights under Federal laws that are not available to non-Pueblos. Forfeiture applies to the non-Pueblos water rights while Pueblo rights are protected from forfeiture.

There can be no compelling reason for a double standard of laws because Congress has waived sovereign immunity in general water adjudication cases where the U.S. has a claim, such as this case, to be sued in State court and to be bound by a State court judgment by the enactment of the McCarran Amendment. The Court is required to apply a single standard – State law.

The McCarran Amendment applies to the U.S.A. and Tribes in State general water adjudications such as the one at bar. See ***Colorado River Conservation District v. U.S.,*** 424 U.S. 800, 96 S.Ct. 1236 (1976).

It is *not reasonable* to have two standards that violate constitutionally protected property rights in the face of the McCarran Amendment.

The Plaintiffs-in-Intervention argue that the Federal law applies because the State has no force on Indian Tribes and their property and cite ***Morton V. Mancari ,*** 435 U.S. 517, 94 S.Ct. 2474 (1974), for their justification that treating Pueblos differently than the non-Indian claimants is not a denial of Equal Protection to give the Pueblos a preference. But the Supreme Court held that:

"These 1964 exemptions [to the Civil Rights Act] as to private employment indicate

> Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in **the narrow context of tribal or reservation-related employment** did not constitute racial discrimination of the type otherwise proscribed." Id at p. 2481.

It is one thing to give preference to an Indian applicant for a job that is being filled. It would be quite different if the non-Indian was removed from an employment position already held and the job awarded to the Indian. That is the circumstance in this case: vested non-Indian water rights are being taken from non-Indians and awarded to the Pueblos. The settlement agreement does not just give the Pueblos a preference, it takes the non-Indians' water rights and transfers them to the Pueblos via the watermaster rules and regulations, the operating agreement, the Joint Powers Agreement.

The leasing of the water to the City and County governments is public record. The settlement agreement is not intended to ",..give Pueblos a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." ***Morton V. Mancari,*** supra. The settlement agreement will transfer ownership of the Basin water to the Pueblos, and then allow the Pueblos to lease the water for economic development elsewhere in the County, and make obscene amounts of money. The land owners who have worked the lands in the Pojoaque Basin get nothing.

Leasing the water rights for up to 99 years is, arguably, economic success for the Pueblos, but what to drink after the aquifer is dried up? Leasing the water was not the primary purpose for reserving the Pueblos' water in this case. There is no preference for secondary use of

the water.

The preference claim is the legal device used in the settlement agreement to take control of all or almost all the water in the Basin without affording the defendants an opportunity to opt out of the settlement agreement and not be bound by it if they object to it.

2. Federal Water Law Favors Application of State Water Law.

In 1866, the U.S. had retained the rights to use water on the public domain, but the U.S. Supreme Court recognized the acquisition of water rights by the doctrine of prior appropriations for a beneficial use, including New Mexico's water laws. ***California Oregon Power Co. v. Beaver Portland Cement Co.*** 295 U.S. 142, 154 (1935).

In 1866 and 1870, Congress enacted the Public Lands Act. Then, in 1877, Congress enacted the Desert Land Act of 1877. Together, these Acts served to sever ownership in the non-navigable waters from the public domain, and rights developed under the doctrine of prior appropriations were confirmed. In ***United States v. Rio Grande Dam and Irrigation Co.*** , 174 U.S. 690, 702-09 (1899). The U.S. expressly relinquished plenary control over water resources in the public domain to the States. ***California Oregon Power Co. v. Beaver Portland Cement Co.,*** Id at pp.163-164.

In 1908, the Supreme Court declared in ***Winters v. United States*** 207 U.S, 564, (1908) that when the United States withdrew lands from the public domain in order to establish Ft. Belknap, it impliedly withdrew from the then unappropriated waters of the Milk River sufficient water to satisfy the purposes for which the lands were withdrawn. Id at p. 577.

In ***United States v. New Mexico***, 438 U.S. 696, (1978), the Supreme Court recognized that large claims to water on federal reservations are in competition with other private and public claims for the limited quantities found in the rivers and streams. Id at p. 699. The

quantification of federal reserved rights is made according to Federal law, at least for the primary purpose of the reservation. Thus the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the primary purpose of the reservation: agriculture.

Under Federal law, reserved rights vest on the date of the reservation which differs from the State law which provides that the water rights vest on the date the water is put to beneficial use. The reserved rights apply to unappropriated waters. The reserved rights would not affect waters that were already appropriated at the time the Pueblos' rights were reserved. The Pueblos' reserved rights under State law are usufructuary in nature and must be put to beneficial use, although Pueblo water rights cannot be lost through forfeiture for non-use.

Having two distinct bodies of law to quantify and administer water rights is a recipe for chaos, as the Senate Judiciary Committee recognized in reviewing the McCarran Amendment. The Committee supported the enactment of the McCarran Amendment to

> "…permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to use the water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under state law, by purchase, exchange or otherwise and that the United States is a necessary party to such suit".

S. Rep. No. 755, 82nd Cong., 1st Sess. (1951).

The Committee recognized that each and every owner along a water course must be amenable to the laws of the State if there is to be a proper administration of the water.

> "The Government has long recognized and conceded, particularly in the Desert Land Act of 1877, the supremacy of State law in respect to the acquisition of water. It has been under these laws that the water rights of the owners on a given stream have been adjudicated. Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all parties owning or claiming to

> own any rights to the stream. If one or the other of the owners cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits of the adjudication of water rights necessarily come to a standstill, and confusion results." 97 CONG. REC. 12947-48 (1951).

In ***Colorado River Water Conservation District v. United States,*** 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976), a water adjudication case in Colorado very similar to the case at bar as they relate to state court water law: both apply the doctrine of prior appropriations in establishing rights to use water, both require the water to be diverted from its natural source and applying it to some beneficial use, both have a state engineer charged with administration of water rights and enforcement of the priority dates – the dates the water is first diverted from its natural source and put to beneficial use. The Supreme Court held that the State court and the Federal court have concurrent jurisdiction in comprehensive water adjudication suits like this case.

The U.S. district court dismissed the Federal water adjudication suit filed by the U. S on grounds that there was already a water adjudication suit in State court that was filed prior to the Federal case. The district court reasoned that the doctrine of abstention required the federal court to give deference to the state court proceedings. Id at 96 S.Ct. 1241.

The court also held that the State court has jurisdiction over Indian water rights under the McCarran Amendment; that the Amendment includes consent to determine in State court reserved rights held by the Pueblos. Id at 424 U.S. 810-811. Since Indians own water rights throughout the Southwest, excluding Indian water rights from coverage by the Amendment "would enervate" the Amendment's objective to avoid piecemeal litigation.

The court rejected the assumption by the U.S. that consent to State jurisdiction for the purpose of determining Indian water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect the Indians. Id at 424 U.S. 812.

In considering the propriety of dismissing the Federal case pursuant to the doctrine of abstention, the Supreme Court noted that the McCarran Amendment "… bespeaks a policy that recognizes the availability of state systems for adjudication of water rights…," and the responsibility of managing the state's water is delegated to a state engineer. Id at 424 U.S. 820.

Thus, the McCarran Amendment has been a significant move by Congress to combine Federal and State laws governing the acquisition and administration of water rights into a more equitable and simplified process. The amalgamation of the two law systems is accomplished facilely. The doctrine of prior appropriations automatically gives the Pueblos preferential treatment by its corollary that "first in time is first in right". The Pueblos have existed in the Basin before any non-Indian so their rights would be superior to any non-Indians in the amount that was being diverted at the time of the arrival of the Spanish settlers after the Revolt of 1680. Water rights after 1695 were documented.

3. Quantifying Non-Indian Water Rights.

The Plaintiff Parties relate the Pueblos' history of residing in the Pojoaque Basin in times before the written record was kept. Nothing is said of the Spanish settlers who have worked the land for centuries and generations. Certainly having used the waters of the Basin for 300+ years, the land owners own vested property interest in the water used to develop the Basin.

When Spanish settlers arrived at the Pojoaque Valley circa 1695, they brought metal tools, horses and oxen, and the knowledge and experience of Moorish irrigation methods acquired over centuries of irrigating southern Spain. The Pueblos were irrigating with an intricate system of canals, diversion dams and head gates for irrigating with ditches and natural precipitation and

runoff from mesa tops. The settlers installed the first acequia in 1598 in Chamita west of Ohkey Owenge. See "*Acequia Culture: Water, Land and Community in the Southwest*", p. 1, Jose' A. Rivera, © 1998 University of New Mexico Press. ISBN 0-8263-1859-2.

The acequias required a community effort to install and maintain the system that fed the community. *Acequias: p.*15 . The acequias were administered according to the equitable principal of first in time is first in right. The right to water for cultivating the land was appurtenant to the land, the longer a landowner used the water for irrigation, the higher was his priority when it came to scheduling the distribution of water for irrigation. The *Water in New Mexico: A History of Its Management and Use* , pp. 9-23, Ira G. Clark, UNM Press. ISBN 0-8263-0923-2.

Administration of the acequia was delegated to the *mayordomo* who had the authority to allocate water and to compel the residents to assist in repairing and cleaning the acequia. In times of drought, he prepared a list with the order of precedence and a rotating schedule of each user's turn to receive the water and how his turn lasted. Local custom of administering the acequias became the law for expediency since the prevailing law, the Crown, was absent. The *mayordomo* apportioned the irrigation waters based on principles of equity and need. All users shared in the labor to repair and clean the acequia prorated to the number and size of their individual *suertes*, or irrigated plots. Id @ P. 7. The Spanish Crown's policy was to reward beneficial use of water for the "tilling of land and rearing of cattle" by granting a property interest in the water used for development. Id @ p. 9.

The settlers and the Pueblos installed many acequias jointly and separately for 151 years from the resettlement of Santa Fe and Santa Cruz in 1695 until General Stephen Kearny occupied the Territory of New Mexico in 1846. The process of cleaning and maintaining the

acequias was repeated annually in the Basin for all those years until it became a culture then a common law system for governing the community. See Forest Service publication *Water in New Mexico: A History of Its Management and Use* , pp. 9-23, Ira G. Clark, UNM Press. ISBN 0-8263-0923-2.

In 1846, the law of the acequias resulting from the customs and rules that developed from 1598 to govern the administration of the acequias and the apportionment of water were recognized and preserved in the Kearny Code by General Kearny on September 22, 1846 for the New Mexico Territory. *Water: pp. 24-43.*

On February 2, 1848, the USA acquired the Territory of New Mexico under the doctrine of manifest destiny and agreed to protect all the property then owned by Mexicans in the Territory, which included the Indians. ***Treaty of Guadalupe Hidalgo*, Article 8.** "[A]ll property" includes the land and appurtenant water rights acquired by the Indians and non-Indians through centuries of developing the N-P-T-SI Basin up to the date of the acquisition of the Territory of New Mexico by the United States.

The same law applied to all users.

It is clear that the non- Indians residing in the Pojoaque Basin also acquired water rights before 1956 and before 1848.

4. Pre-1848 Non-Pueblo Water Rights Are Omitted From The Settlement Agreement.

The settlement agreement addresses rights by dates as follows:

The settlement agreement ranks wells by increasing priority into post-1983 wells, pre-1983 wells, pre-1956 wells and Pueblo wells.

All post-1983 wells are reduced from 3.0 AFY to 0.5 AFY and are restrained from using the well for outdoor irrigation.

The pre-1983 wells are reduced from 3.0 AFY to 0.5 AFY, unless you want to keep your well, then the amount permitted to be used is reduced by 90% to 0.3 AFY.

The pre-1956 wells are reduced from no limit to 3.0 AFY.

And before 1956, the next group is the Pueblos, so that Pueblos are given the highest priority for all Pueblo rights before 1956. The non-Pueblos' roles in the development of the Pojoaque Basin between the resettlement of Santa Fe in 1695 until 1848 when the Basin became a territory of the U. S. are not recognized in the settlement agreement. The development of the Basin from 1695 to the present has been a joint effort by the entire community of Pueblos and non- Pueblos through the acequia system to survive and prosper. The water rights appurtenant to those lands were and are at least equal to the Pueblos' rights for that period. There are records of that development.

Not all Pueblo rights are equal. Some Pueblo rights were developed after 1695.

The Court's decision that all Pueblo water rights in the Basin are superior to any non-Pueblo water rights is clear error.

5. Applying State Water Law To The Pueblos.

The Federal reserved water rights determination is very much like New Mexico law in that water rights are appurtenant to the land. Water rights for irrigation remain appurtenant to land until severed. ***Turner v. Bassett***, 2005-NMSC-009, 137 N.M. 381, 111 P.3d 701; ***Hydro Res. Corp. v. Gray***, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 . When land is acquired,

the water rights are acquired, albeit inchoate in nature. The rights are vested when the water is diverted from its natural source and put to beneficial use. The date the water is first diverted is used as the measure of the priority of the right. §72-12-2 NMSA 1978 (as amended). In times of water shortage, the priority date is used to determine the hierarchy of right to receive the water the land owner is entitled to use – the older the date, the higher the priority. Thus, the Pueblos have the highest priority to receive up to the amount of water they were using at the time the first Europeans settled in the Pojoaque Basin. After that time, the ownership and development of land is shared by the Pueblos and non-Pueblos and are of record.

In the case of ***Cappaert v. United States,*** 426 U.S. 128, 138, the Supreme Court confirmed the ***Winters*** doctrine regarding reserved water rights and held that when the United States withdraws land from the public domain to be used for a federal purpose, it impliedly reserves appurtenant *unappropriated* water from appropriation under state and territorial law sufficient in amount to achieve the primary purpose of the reservation. Thus, water rights existing at the time the water is reserved would not be affected by the reservation of water.

Three cases were brought by the Federal Government to adjudicate Indian water rights, then non-Indians brought suit in state court and moved to dismiss the federal court suits. The three cases were before the U.S. Supreme Court in ***Arizona v. San Carlos Apache Tribe Of Arizona***. 463 US 545, 103 S.Ct. 3201, 77 L.Ed.2 837 (1983). The Supreme Court held that, (1) assuming that the state adjudications were adequate to quantify the rights at issue in the federal suits, (2) and taking into account the McCarran Amendment policies, (3) the expertise and administrative machinery available to the state courts, (4) the infancy of the federal suits, (5) the general judicial bias against piecemeal litigation, and (6) the convenience to the parties, *the district courts were correct in deferring to the state proceedings*.

The settlement agreement proposes to apply two separate codes of law to the quantification and administration of water rights in this case in violation of Congressional intent in enacting the McCarran Amendment. The settlement agreement is illegal and the motion to enter a partial final decree to order it effective should be denied.

6. The Present State of the Law Regarding Pueblo Water Rights.

The present State of Federal water rights, including the Pueblos', is that the Pueblos are subject to State court jurisdiction in a comprehensive adjudication of water rights and Pueblo water rights are governed by State law and State court may apply the Federal reserve doctrine in determining the quantity of water rights.

III. THE SETTLEMENT AGREEMENT VIOLATES OBJECTOR'S CONSTITUTIONAL RIGHTS.

1. Objectors Have A Property Interest In The Permit.

A threshold issue is whether the defendants have a property interest in the permit issued to them pursuant to the Domestic Well Statute. The State Engineer admits by its offer of 0.5 AFY to settle post-1983 claims that Defendants have some property interest in the permit to drill a domestic well and use up to 3.0 AFY of Basin groundwater, if its available.

In the motion for summary judgment and objections to special master's order denying Defendants' motion for summary judgment, Defendants argue that a permit to drill a domestic well is an inchoate interest on the date it is issued. It is a promise to allow the permitee to use up to 3.0 AFY of underground water, if it is available, for domestic uses. The property right vests when the water is put to beneficial use.

The State Engineer Rules require that the well be drilled and the well record filed within one year of date the permit is issued. Clearly the assumption is that the water will be put to beneficial

use when the well is completed. The well record is cogent proof that the water is being put to beneficial use. The filing of the well record is the final step in perfecting a water right to drill a well and have water for the family. The State Engineer argues that he has the authority to set water rights by assuming that all domestic well users consume less than 0.5 AFY. But the Legislature has already made the assumption that a domestic well user will use enough water to irrigate up to one acre of non-commercial trees, lawns and gardens. That amount in the Pojoaque Basin is up to 3.0 AFY and has set that amount in the permits as the amount of groundwater that will be put to beneficial use. The State Engineer does not have authority to modify or amend the legislation.

The permit grants a usufruct to use up to 3.0 AFY for domestic purposes, if the water is available. The permit does not guarantee that the owner will receive the corpus of the water. In this case the usufruct is valuable property because the water is available. Once vested, that right does not expire. (Vince Chavez deposition, 40:9-23**,** Dkt. #7982**,** Exhibit 4). That right may be sold or otherwise transferred or assigned. Section 72-5-22 NMSA 1978; ***Mathers v. Texaco, Inc.,*** 77 N.M. 239, 421 P.2d 771 (1966).

The Settling Parties' time and resources expended to convince the Objectors to accept the settlement agreement and reduce their right to divert groundwater down to 0.5 AFY speak to the value of that right. (See Response to motion for partial Stay, filed April 14, 2014, Dkt. # 9299, pp. 3-5). If the water right that Defendant and other claimants acquired by the permit had no value, there would be nothing to be gained by reducing Defendant's permitted amount by up to 2.5 AFY. In fact, the State Engineer's offer of judgment in the amount of 0.5 AFY is an admission that the permit is protected property in *some* amount.

A water right or an interest in water is real property and is treated as real property under laws pertaining to real property, including the Statute of Frauds. ***Posey V. Dove***, 1953-NMSC-019, 57 N.M. 200,210, 257 P.2d 541 (S. Ct. 1953) citing ***New Mexico Prods. Co. V. New Mexico Power Co.***, 1937-NMSC-048, 42 N.M. 3.

The Objectors perfected their water rights when they applied for a DWS permit to drill a well, then drilled it and filed the well record signed by a licensed well driller. The Rules require nothing else of the domestic well owner to perfect his title to the water rights.

The Objectors have vested property rights in their DWS permits.

The Order to Show Cause filed by the Court orders the defendants to show why the Court should not adjudicated the defendants water rights at 0.5 AFY.

The following are some reasons for not adjudicating the Objectors rights at 0.5 AFY:

2. The Domestic Well Statute Creates An Entitlement.

The Legislature declared the measure of groundwater that each applicant for a permit is entitled to is enough to irrigate one acre of trees, lawns and gardens. In the N-P-T-SI Basin, that quantity is 3.0AFY.

The duty of water in the Basin is 3.0 AFY per acre so the amount of water required to irrigate one acre in the N-P-T-SI Basin is 3.0 AFY. (34:10-16, Dkt. #9299**,** Exhibit 6).

The permits do not set a time limit for the use of 3.0 AFY as the State Engineer seeks to impose. The right to beneficial use of groundwater is in perpetuity just like property rights in land.

Defendants have complied with the State Engineer's requirements for perfecting their domestic well water right with the drilling of a well and filing the well record. The permit has no

requirement to measure usage. There is no notice to the domestic well owner that, in the future, water rights would be measured by proof of actual historical use.

The permit has economic and commercial value. The settling parties spent significant resources to put "lipstick" on the settlement agreement. And yet, 792 people rejected the settlement agreement. See Plaintiff's Response on motion for partial stay, filed April 4, 2014. Dkt. # 9299, pp. 3-5).

3. The Permit Creates an Entitlement.

The State Engineer uses the dates the Defendants filed their applications for a domestic well permit as the priority dates. Because the water rights run with the land, the priority dates are the same as the priority dates of the surface water. The Constitution of New Mexico does not distinguish between surface waters and groundwaters in applying the doctrine of prior appropriations. But whatever method is used to set the priority date for wells, the same method of determining the priority date must be applied to all parties, including the Pueblo**s.**

4. NMAC 19.27.5.9(D) Creates An Entitlement to 3.0 AFY.

NMA**C** 19.27.5.9(D) provides that a person who can prove that the combined use of domestic wells in the Basin does not impair senior rights is entitled to use 3.0 AFY. The amount of water in the Basin and whether any senior rights owner has complained of impairment are directly relevant to the issues of whether there is sufficient groundwater to service all claimants without impairment. ***New Mexico v. Gen. Elec. Co.***, 467 F.3d 1223, 1251-52 (10th Cir. 2006). They are also relevant to the likelihood of a priority call which is being touted as a reason for accepting the settlement agreement. Yet, discovery on the amounts of groundwater and use amounts has been severely restricted. See Dkt. # 7967.

N.M.A.C. 19.27.5.9(D)[1] provides defendants an opportunity to be awarded 3.0 AFY if the defendant is able to prove that the combined diversion from domestic wells will not impair existing water rights, the defendants are entitled to 3.0 AFY. The amount of water in the N-P-T-SI aquifer becomes an issue. The Defendants' expert hydrologist states that the Pojoaque Basin aquifer holds 55 million acre-feet of water and that domestic wells are having a *de minimus* effect on surface water. See affidavit of Francis West attached hereto as Exhibit 1. That is uncontroverted evidence that the Pojoaque Basin contains sufficient groundwater to service all domestic wells without impairing existing water rights and thereby entitle Defendants to 3.0 AFY of groundwater.

5. The State Engineer Has No Authority To Reduce Water Rights Permanently.

The Court cites N.M.A.C. § 19.27.5.13(B), N.M.A.C. § 19.27.5.13(B)(6) , N.M.A.C. §19.27.5.13(B)(11), and N.M.A.C. § 19.27.5.14 to decide that the State Engineer is authorized to curtail the Defendants' amounts and uses of groundwater.

A recent Supreme Court of New Mexico decision also relates to the State Engineer's authority. See ***Bounds V. State Ex Rel. D'Antonio,*** 2013-NMSC-037, 306 P.3d 457 (2013).

In that case, the court was clear that the State Engineer has extensive authority and presumption of being correct in his decisions. See §72-2-8 and §72-2-9.1. But in each case, the

[1] "The maximum permitted diversion of water from a 72-12-1.1 domestic well permitted to serve one household shall be1.0 acre-foot per annum, *except* in hydrological units where applicant can demonstrate to the satisfaction of the state engineer states plainly and clearly that: "The maximum permitted diversion of water from a 72-12-1.1 domestic well permitted to serve one household shall be1.0 acre-foot per annum, *except* in hydrological units where applicant can demonstrate to the satisfaction of the state engineer that the combined diversion from domestic wells will not impair existing water rights, then the maximum permitted diversion of water from a 72-12-1.1 domestic well permitted to serve one household shall be **3.0 acre-foot per annum."** (emphasis added)

State Engineer's power to curtail water rights as part of performing his duties according to priority administration is only invoked by a concrete risk of impairment of senior water rights. Id at **{15}**. Thus, the State Engineer is given the duties of the mayardomo, i.e. to distribute the water according to the priority date in the amount owned, and in times of water shortage, to cut off all junior users until the senior user has receive full measure - to enforce the priority dates. The State Engineer is not authorized to adjudicate rights.

Section 72-2-9.1 NMSA 1978 further authorizes the State Engineer to promulgate rules to administer water allocations in accordance with the water right priorities. But the statute also limits that authority by prohibiting the State Engineer from adopting rules "…so as not to interfere with a future or pending adjudication; so as to create no impairment of water rights, **other than what is required to enforce priorities…"**

The statute places responsibility on the State Engineer to protect all water rights by enforcing priorities. The rules cited by the Court as the State Engineer's authority have interfered with this litigation significantly. The rules impair the Objectors' water rights by reducing the right from 3.0 AFY and add nothing to the State Engineer's ability to administer water rights by priority.

The State Engineer has not shown either a water shortage or a risk of impairment to invoke subject matter jurisdiction to reduce the Objectors' water rights, and has objected to the production of information regarding water quantities and uses. The State Engineer acts arbitrarily and without authority.

IV. OBJECTORS ARE DENIED DUE PROCESS AND EQUAL PROTECTION.

1. Equal Protection of the Law.

The non-Indian Objectors and the Pueblos are similarly situated as claimants to the Pojoaque Basin water. Yet, the settlement agreement intends to treat each very differently. (Sect. 2.0, 3.0

5.3). The Court has denied a motion to reject the settlement agreement because it denies the non-Indians Equal Protection of the Law. (Dkt. 7579) The motion was denied with a finding that the two groups are not similarly situated because the Pueblos' water rights are governed by Federal laws and non-Pueblos water rights are governed by State laws.

The result of the double standard is that the Pueblos and the non-Indians are treated differently by the settlement agreement. The non-Indians' water rights are reduced but the Pueblos' water rights are increased. The Pueblos get water rights that are not available to non-Pueblos. Forfeiture applies to the non-Pueblos' water rights while Pueblo rights are protected from forfeiture. The non-Indians are being discriminated against based on race.

There can be no compelling reason for a double standard because Congress has waived sovereign immunity for the U.S. in general water adjudication cases where the U.S. has a claim. The U.S. allows to be sued in State court and be bound by a State court judgment by the enactment of the McCarran Amendment.

The McCarran Amendment applies to the U.S.A. and Tribes in state general water adjudications such as the one at bar. See ***Colorado River Conservation District v. U.S.,*** 424 U.S. 800, 96 S.Ct. 1236 (1976).

It is not reasonable to have two standards that violate constitutionally protected property rights in the face of the McCarran Amendment. All claimants have to be treated equally.

The settlement agreement on its face distinguishes between Pueblos and non-Pueblos in its quantification and administration of water rights despite their similar standing as claimants. The McCarran Amendment waiver of sovereign immunity makes the U.S.A. and the Pueblo claimants like all other claimants - subject to State court jurisdiction.

As the Supreme Court observed in Eagle County, "Indeed, Eagle County spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for the purposes of the Amendment." ***United States v. District Court for Eagle County***, 401 U.S. 520,523 91 S.Ct. 998,1002 28 L.Ed.2d 268 (1971).

The Plaintiffs in Intervention are actually defendants and should be realigned. That would eliminate the division by race. (Dkt. #7148).

2. The Objectors Are Deprived of Their Property Without Due Process Of Law.

The Objectors own water rights in the Pojoaque Basin, be they 3.0 AFY as they claim or 0.5 AFY as the State Engineer claims. The issue of how much water the defendants are entitled to use is presently pending before the Court. See (Dkt.# 8223, Dkt. # 8233 and Dkt. # 8250).

This is an adjudication, so a judgment adjudicating those water rights will ultimately result. Those adjudicated rights are protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution as applied through the Fourteenth Amendment. If the settlement agreement is approved, the Objectors will be required to transfer all those adjudicated rights to the County of Santa Fe by 2024 (Sec. 3.0), unless they decide to keep their wells and reduce their use by 90% to 0.3 AFY.

The Court's Memorandum Opinion and Order (Dkt. # 6236, May 24, 2007) assures the claimants that "[t]he Settlement Parties' Motion does not violate due process because it does not deprive any person of their property rights. *See Mitchell v. City of Moore*, 218 F.3d 1190, 1198 (10th Cir. 2000)." The Court has assured the claimants that "Those claimants objecting to the settlement will not be forced to join the settlement but instead will be permitted to adjudicate their water rights via litigation. *See* ***Kothe v. Smith***, 771 F.2d 667, 669 (2nd Cir. 1985) (court cannot coerce a party to settle). Furthermore, as discussed elsewhere in this Order, those who

believe that the settlement agreement will cause them harm will have the opportunity to present their objections to the Court." Id.

The Court's statement that, "the modified procedure will identify and serve all persons entitled to notice, so far as they can be ascertained with reasonable diligence, serve notice on unknown claimants by publication, and afford all claimants the opportunity to be heard by the Court **before it approves the settlement agreement**" (emphasis added), suggests that the Court has already decided that it will approve the settlement agreement.

Since the Court cannot lawfully deny the Objectors *some* water rights, the settlement agreement is the device used to dispossess the Objectors of all their water rights by requiring that the objector "agree" to commit to transfer all adjudicated water rights to the county water authority immediately upon approval of the settlement agreement and allow the county water authority to begin using the water. (Sect. 3) The taking of water rights is shown by the fact that without the settlement agreement the permit owner has at least 0.5 AFY of water rights, and with the approval of the settlement agreement the county will own all non-Pueblo post 1983 domestic water rights by 2024.

The settlement agreement orders the domestic well owner to "agree" to transfer ownership of those rights to the County of Santa Fe or be penalized by only receiving ten percent (0.3 AFY) of the 3.0 AFY of groundwater that the owner is permitted to divert. (Sec. 3). The governmental action to take those rights invokes the Due Process protections as embodied in the Federal Rules of Civil Procedure for the District Courts.

The water rights are property. The adjudication process to resolve conflicts in ownership of property normally involve a summons and complaint, the right to discovery, and a judgment on the merits by an impartial trier of fact.

Legal questions regarding ownership of water rights in this case include whether filing of the well drilling record perfects the permit to drill a domestic well; and whether the State Engineer is authorized to declare water rights quantities without the Legislature's approval. These issues relate to property and are therefore state court issues and should be certified to the New Mexico Supreme Court.

The order setting the procedure for getting approval of the settlement agreement in this case (Dkt. #6236, May 24, 2007) is a hybrid procedure that attempts to replace the Federal Rules of Civil Procedure in its stated goal of obtaining approval of the settlement agreement. Whereas the Federal Rules provide a tested procedure for fair resolutions of competing claims by seeking truth, the hybrid procedure has the goal of approving the settlement agreement before the September 15, 2017 deadline.

It might seem that the Federal Rules don't apply to the approval of the settlement agreement. It purports to be a motion, but it is more like a plan to enforce a judgment already entered. The hybrid system presumes that the proposed settlement agreement is approved by the Court and the process now is to cram it down the Objectors' collective throats.

Congress presumed the settlement agreement was already a judgment when it enacted the Settlement Act. The Secretary of the Interior and the representatives of the several sovereign governments that are parties herein assumed that the settlement agreement was a judgment when they met on April 19, 2012 and signed it. No one signed the settlement agreement for the non-Pueblo Objectors.

The hybrid system is designed to expedite the settlement agreement approval process by allowing the State Engineer to devise a method of summarily eliminating the objections. But the hybrid procedure did not anticipate 792 objections.

The hybrid procedure assumes that service of its order to show cause is accomplished by saturating the community with pro-acceptance propaganda to replace the requirements for proof of service of its Order to Show Cause dated December 6, 2013 as set forth in Federal Rules 1 through 4. Any domestic well Owner who did not receive the order to show cause is assumed to be a non-responding owner who agrees with the settlement agreement. (Sec. 3.1.9).

Federal Rule 8(d)(1) provides, "In General. Each allegation must be simple, concise, and direct. No technical form is required." Substance is considered over form.

The case management order sets technical requirements on the form of the objections that would not be cause for dismissal of a claim under the Federal Rules. The hybrid procedure makes the objections susceptible to dismissal for technical deficits.

The Federal Rules provide a process for commencing a lawsuit: file and serve a complaint. Filing an answer puts the allegations of the complaint at issue. The parties are then allowed to discover the other parties' evidence in support of their allegations. The hybrid system does not provide for an answer to the settlement agreement. Instead it provides for objections to the settlement agreement, discovery is optional with the court and difficult to acquire. See (Dkt. # 7967; Dkt. # 9506, p. 8)

The hybrid procedure allows the court to enter an order of protection on its own motion. The hybrid procedure has different rules for implementation of the settlement agreement for Pueblos and non-Pueblos.

The Federal Rules provide an opportunity to be heard subject to the Rules of Evidence, the Rules of Civil Procedure and the Bill of Rights. In the hybrid procedure, the Objectors' "opportunity to be heard" is the right to file an objection to the settlement agreement which the Court need not respond to individually. The objections are required to be in a precise format that makes them susceptible to dismissal without a hearing.

This is not a class action so the Federal rules require the judge to consider all the evidence and enter a decision on the merits for each individual's objections. The hybrid procedure allows the court to treat the claimants as a class and apply its orders *en masse*.

The motion before the Court is a concerted effort to take the domestic well owners' water rights, as much as they are, without providing a *meaningful* opportunity to be heard or just compensation, offering instead non-binding representations of a regional water system and increased water availability in the Basin from water rights to be acquired in Taos County. However, Objectors do not accept the presumption that their rights are inconsequential and demand their rights.

If the settlement agreement is approved, the Objectors will be required to immediately transfer equitable title to their water rights to the County of Santa Fe, and to commit to transfer their ownership of all water rights to the County, or agree to reduce their use to 0.3 AFY. The Objectors are entitled to a trial on the merits of their objections they apply to them or to opt out of the settlement agreement and not be bound by it. The hybrid procedure replaces the hearing on the merits with the objections process.

The hybrid procedure allows a partial final decree without an *inter se* hearing. The Federal Rules prohibit a judgment unless each party has had an opportunity to challenge any other party's claim.

The hybrid procedure's objective clearly is to approve the settlement agreement and enter a partial final decree by the September 15, 2017 deadline for entering a judgment or purportedly lose millions of dollars in funding. See Memorandum Opinion and Order (Dkt. #9964). The objective of the Federal Rules of Civil Procedure is to arrive at a judgment on the merits. The touchstone of the Federal Rules is fairness***. Graves v. Thomas***, 450 F.3d 1215, 1220 (10th Cir. 2006)(citing County of ***Sacramento v. Lewis***, 523 U.S. 833, 845-46 (1998). The polestar of the hybrid procedure is the Settlement Act funding.

Objectors invoke the Federal Rules of Civil Procedure.

3. The Proposed Settlement Agreement Does Not Bind Objectors.

Plaintiff Parties cite several Memoranda and Orders of the Court entered before the Objectors were joined as parties to this lawsuit as bases for their claims that the issues regarding the quantity and administration of Pueblo water rights have been decided. (Dkt. # 9910, pp. 14-15.)

Objectors were not joined as parties at the time that those orders of the Court were filed and did not have notice of the motions or an opportunity to be heard on the applicability of Federal law. In ***Sanguine, LTD v. United States Department of Interior,*** 798 F.2d 389 (Cir. 10, 1986) tribal members who owned oil and gas-producing restricted Indian lands sought to intervene as of right in an action by a lessee against the U.S.A. The trial court granted the Tribe's motion to vacate a prior judgment. The court held that to bind the Tribal members to judgments entered prior to intervening violates Due Process because they were non-parties at the time the judgment adopting the consent decree was entered.

A partial final decree is not binding on all non-Pueblo domestic well owners unless all have participated in the *inter se* portion of the adjudication process. ***State Ex Rel. Reynolds V. Pecos Valley Artesian Conservancy Dist.***, 1983-NMSC-044, 99 N.M. 699, 701, 663 P.2d 358 (S. Ct. 1983); ***Sanguine, LTD v. United States Department of Interior,*** 798 F.2d 389 (Cir. 10, 1986).

V. THE SETTLEMENT AGREEMENT IS NOT FAIR.

The settlement agreement would close the basin to new permits for a domestic well. It is not fair to land owners who have not installed a domestic well on their property or land owners who divide their property among their heirs who will then require a domestic well permit. If the settlement agreement is approved, the land owner will be obligated to purchase water rights from someone in the Basin and the only ones with water rights to lease will be the Pueblos.

The settlement agreement provision to close the Basin to new permits is not fair because there is no showing that the Basin water is completely appropriated. And even if it is completely appropriated, the New Mexico Supreme Court has held that the State Engineer is required to issue the permit anyway and enforce the priority system, ***Bounds,*** *supra.*, thereby making it illegal to close the Basin to new domestic well permits.

However, after converting groundwater from being appropriated in the amount of 3.0 AFY to 0.5 AFY, there are significant newly unappropriated waters in the Pojoaque Basin. The settlement agreement is silent as to what becomes of the newly unappropriated water. That water is public water and is under the responsibility of the State Engineer, but the State Engineer is supporting the closing of the Basin. The State Engineer is abdicating his duty to administer the water. Instead, the State Engineer allows the Pueblos to take the newly unappropriated water in violation of N.M. Const. Art. IX, Section 14 – the Anti-Donation Clause.

It is not fair that the initial design of the regional water system by HKM used to estimate the cost of the proposed regional water system omits large areas of the Basin from service but does not exclude them from operation of the settlement agreement.

It is not fair that the feasibility of the regional water system is not a condition precedent to approval of the settlement agreement because it is presented as consideration for accepting the settlement agreement. It is possible that a user will accept the settlement agreement because of the proposed water system and commit to transferring all water rights to the County, and then have the regional water system be abandoned as too costly or for lack of funding. The user's water rights are committed to the county water authority at that point. The settlement agreement unfairly places the burden on the user to quiet the title to her water rights if the regional water system fails to materialize. (Sect. 3.1.8.4).

It is unfair that the Court restrains the domestic well owner from using domestic wells for outdoor irrigation then sets the owner's rights at the owner's actual use. The domestic well owner is prevented from proving his actual use.

It is unfair that the prohibition of outdoor irrigation is based on a temporary preliminary injunction but the restriction against outdoor irrigation is made permanent in the permit without a hearing.

It is not fair that the Basin water will be leased to the City and County of Santa Fe for economic development – a public concern. If the sovereigns decide that the Basin groundwater is better utilized in Santa Fe, they all have the power to take the water by eminent domain. That would require just compensation.

VI. Damages.

The Objectors will be damaged by approval of the settlement agreement by the reduction in the amount of water they will be permitted to use. The settlement agreement ranks wells by increasing priority into post-1983 wells, pre-1983 wells, pre-1956 wells and Pueblo wells.

All post-1983 wells are reduced from 3.0 AFY to 0.5 AFY and are restrained from using the well for outdoor irrigation.

The pre-1983 wells are reduced from 3.0 AFY to 0.5 AFY, unless you want to keep your well, then the amount permitted to be used is reduced by 90% to 0.3 AFY.

The pre-1956 wells are reduced from no limit to 0.5 AFY.

The settlement agreement reduces all domestic water use amounts. The amount of water that is lost is a function of the priority date and the Court's ultimate decision whether the Objectors' permit is property and its measure.

The loss of use of the water for outdoor irrigation means loss of fruit trees and vegetables gardens and birthday parties in the back yard and a way of life. All property that does not presently have a well will be reduced in value.

The motion for three judge court presently pending before the Court can mitigate the damages by stopping the harm.

VII. Conclusion.

The Objectors respectfully submit that the issue in this motion is *whether* the settlement agreement should be approved, not *how* it will be approved. The hybrid procedure for approving the settlement agreement has resulted in 792 Objectors to the settlement agreement. That fact alone is sufficient to conclude that the settlement agreement is not fair, not adequate, not

reasonable, not in the public interest and does not comply with applicable law. For the reasons stated herein and in prior legal briefs, Objectors request the Court to deny the motion for partial final decree.

Respectfully Submitted,

_ Filed electronically
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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2015, I caused the foregoing to be filed electronically through the CM/ECF system which caused parties on the electronic service list to be served as described in the Notice of Electronic Filing.

Filed electronically
LORENZO ATENCIO