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

STATE OF NEW MEXICO, *ex rel*. STATE ENGINEER, Plaintiff, v. R. LEE AAMODT, et al., Defendants, and UNITED STATES OF AMERICA, PUEBLO DE NAMBÉ, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE, Plaintiffs-in-Intervention.	)	No. 66-CV-6639 WJ/WPL

CERTAIN NON-PUEBLO DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE

On behalf of the members of the Rio Pojoaque Acequia and Water Well Association who have accepted the Settlement Agreement, undersigned counsel filed a Memorandum in Support of Entry of Partial Final Judgment and Decree Incorporating Settlement Agreement and Adjudicating Pueblos' Water Rights on November 6, 2014, Doc. 9912 ("Certain Non-Pueblo Defendants' Memorandum"). The memorandum sets forth the proper legal framework for this Court's consideration of entry of the Partial Final Judgment and Decree. On the same date, the Pueblos and the United States, on behalf of the Pueblos, filed a Memorandum of Points and Authorities in Support of Entry of Partial Final Judgment and Decree, Doc. 9910 ("US/Pueblos Memorandum"), and the State of New Mexico, County of Santa Fe and City of Santa Fe filed a

Joint Memorandum in Support of Settlement, Doc. 9913 ("State Memorandum"). On January 5, 2015 and January 7, 2015, two groups of objectors identified, respectively, as Group 1 and the Atencio Group (collectively, "the Objectors"), filed responses in opposition to entry of the Proposed Partial Final Judgment and Decree, Doc. 9972 ("Group 1 Response") and Doc. 9973 ("Atencio Group Response"). The following memorandum replies to the Objectors' Responses to demonstrate that under the proper legal framework the US/Pueblos and State Memoranda have made a sufficient showing that the Settlement Agreement to be incorporated into the Proposed Partial Final Judgment and Decree is fair and reasonable. This reply further demonstrates that the Objectors' Responses have failed to show that the Settlement Agreement will adversely affect their legal rights or interests. Accordingly, the Court should approve the Proposed Partial Final Judgment and Decree in so far as it incorporates the Settlement Agreement by and among the Settling Parties.

INTRODUCTION

As Certain Non-Pueblo Defendants have shown, in this proceeding, the Court must decide two questions: *first*, whether to approve and enter the Proposed Partial Final Judgment and Decree (Doc. 7970-3) ("PFJD"), in so far as it incorporates the Settlement Agreement dated April 19, 2012 (Doc. 7970-1) ("Settlement Agreement" or "Agreement") by and among the Settlement Parties as defined therein, *see* Certain Non-Pueblo Defendants' Memorandum, Doc. 9912 at 3-8; and *second*, whether to enter the PFJD in so far as it adjudicates the Pueblos' water rights on the merits as to all parties to this adjudication, including the non-settling parties who object to the adjudication of Pueblos' water rights as set forth in the PFJD, *see Id.* at 8-13.

With respect to the first question, the Court may enter the PFJD in so far as it incorporates the Settlement Agreement as binding between and among the Settlement Parties, provided the Agreement is fair and reasonable, and provided further, that the Agreement does not adversely affect the legal rights or interests of the non-settling parties. With respect to the second question, Certain Non-Pueblo Defendants stand on the argument in their memorandum, which the Objectors have not addressed. As shown, the Court should be circumspect about the finality of a consent judgment with respect to parties who have not consented to it. To be preclusive, such a judgment must satisfy the requirements of a judgment on the merits. *See Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *see also United States v. Skokomish Indian Tribe*, 764 F.2d 670, 671-673 (9th Cir. 1985).

ARGUMENT

I. THE PFJD APPROVING THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE.

Before the Court may enter the PFJD in so far as it incorporates the Settlement Agreement between and among the Settlement Parties, it must first determine that the Agreement is fair and reasonable. This test requires judicial assessment of the following factors: (i) whether the Settlement Agreement is tainted by improper collusion or corruption of some kind, (ii) whether the Agreement reflects a resolution of the actual claims in the complaint, (iii) whether the terms of the Agreement are clear, and (iv) the basic legality of the Settlement Agreement. *SEC v. Citigroup Global Markets*, *Inc.*, 752 F.3d 285, 294-95 (2nd Cir. 2014). In addition, when a consent decree provides for injunctive relief, the public interest must not be disserved by the proposed injunction. *Id*. at 296. Each of these requirements has been met. Both the facts of

record and the law fully support the conclusion that the Settlement Agreement is fair and reasonable.

A. The Settlement Agreement Is Not Tainted by Improper Collusion or Corruption.

There is no evidence that the Settlement Agreement to be incorporated in the PFJD is tainted by improper collusion or corruption. Neither the Group 1 Response nor the Atencio Group Response makes such a charge. Indeed, the opposite is the case, as this Court has already found: "The numerous oral and written status reports from the Settlement Parties over the past several years support the Settlement Parties' contention that the settlement agreement is the product of good faith arms-length negotiations." *State of New Mexico ex rel. State Engineer v. Aamodt*, 582 F. Supp. 2d 1313, 1317 (D.N.M. 2007) ("*Aamodt III*"); *id.* at 1320 ("Based upon the previous proceedings in this adjudication, the nature of the water rights claims of the various parties, the identity of the parties involved with the settlement, and the numerous settlement negotiation status reports, the Court concludes that the negotiations were conducted at 'arms length,' meaning that the negotiations were conducted by unrelated parties, each acting in their own self interest."). In this regard, the US/Pueblos Memorandum summarizes the history of the negotiations leading up to the Settlement Agreement now before the Court. Doc. 9910 at 22-26. As that summary shows, this Court "closely supervised the status of the settlement negotiations" for the seven years preceding its order of May 27, 2007. *Aamodt III*, 582 F. Supp. 2d at 1319. In addition, after the entry of the Court's 2007 order, Congress authorized the settlement of this action by statute passed in 2010. 124 Stat. 3149. Thereafter, the parties modified the Settlement Agreement to conform to the authorizing legislation in meetings *open to the public*. There is not a hint that the Settlement Agreement is the product of any improper collusion or corruption.

B. The Settlement Agreement Resolves Actual Claims in the Complaint Among the Settling Parties.

There is no question that the Settlement Agreement to be incorporated into the PFJD resolves actual claims in this action by and among the Settlement Parties. The US/Pueblos Memorandum recounts both the history of this litigation, Doc. 9910 at 14-21, and the terms of the Settlement Agreement, *id.* at 3-11. As their memorandum makes clear, "the Settlement Agreement defines the Pueblo water rights," Doc. 9910 at 3, which is the subject matter of the Pueblos' claims in this action. As important, the Settlement Agreement "is intended to be binding upon the Settlement Parties (that is, on all persons or entities who sign the Agreement, *see* Settlement Agreement, § 1.6.35), and to resolve their objections to each other's water rights." Settlement Agreement, § 1.1.3. The Agreement therefore resolves actual claims subject to the complaint in this case.

C. The Terms of Settlement Agreement Are Clear.

Because it defines the key terms, *see* Settlement Agreement at §§ 1.6.1 – 1.6.32, and outlines the agreed upon administration and enforcement mechanisms, *see id.* at §§ 1.5 and 5.1 – 5.9, the Agreement to be incorporated into the PFJD does not lack any necessary clarity. *United States v. IBM Corp.*, 2014 WL 3057960, at *3 (S.D.N.Y. July 7, 2014) (consent decree defining key terms and outlining enforcement mechanisms is "sufficiently specific"). In this regard, the Settlement Agreement provides that it is to be given a neutral construction based on the four-corners of the instrument, *see* Settlement Agreement at § 1.3, and further provides that the Court "shall retain continuing jurisdiction to interpret and enforce the terms, provisions and conditions of the Agreement." *Id.* at § 1.5. The Court therefore has the authority to resolve any future claims that may raise a question of the Agreement's clarity. As such, the Settlement Agreement

is consistent with the norm for incorporation of settlement agreements in a consent decree. *EEOC v. Product Fabricators*, *Inc.*, 666 F.3d 1170, 1173 (8th Cir. 2012) ("Continuing jurisdiction is the norm (and often the motivation) for consent decrees."). As the Supreme Court has specifically noted, "[p]ublic law settlements are often complicated documents designed to be carried out over a period of years, . . . so any purely out-of-court settlement would suffer the decisive handicap of not being subject to continuing oversight and interpretation by the court." *Local 93*, *Int'l Ass'n of Firefighters v. City of Cleveland* ("*Firefighters*"), 478 U.S. 501, 524 n.13 (1986) (internal quotations and citations omitted).

The fact that certain matters contemplated by the Settlement Agreement, such as a Joint Powers Agreement to govern the Regional Water Authority, Water Master Rules, an Operating Agreement for the Regional Water System, an Environmental Impact Statement and Record of Decision for the Regional Water System, and acquisition of rights-of-way, *see* US/Pueblos Memorandum, Doc. 9910 at 65-68 and State Memorandum, Doc. 9913 at 60-65, involve future performance does not create any uncertainty to prevent incorporation of the Settlement Agreement in the PFJD. Rather, each matter is subject to discrete legal requirements that implicate distinct rights and remedies to govern its actualization. *See e.g.* NMSA 1978, § 11-1-1 *et seq.*, Joint Powers Agreements Act; NMSA 1978, §§ 72-3-2 – 72-3-5, Water Masters, *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, 306 P.3d 457 (explaining the State Engineer's broad authority to regulate domestic wells) and NMAC § 19.27.5 (State Engineer domestic well regulations); NMSA 1978, § 72-2-8 (regulations to govern State Engineer's administration of non-Pueblo water rights); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508 (NEPA environmental impact statements); NMSA 1978, § 4-37-1, § 4-36-8, § 4-36-10, § 3-27-1 (A) and (B), § 72-4-2,

and § 72-4-3 (authority of county to own and operate water system, including power of eminent domain to acquire rights-of-way).

As important, incorporation of the Settlement Agreement in the PFJD does not impose any obligation on the Objectors or other non-settling parties with respect to any of these matters. Settlement Agreement at § 1.1.3 ("This Agreement is intended to be binding on the Settlement Parties"); *Firefighters*, 478 U.S. at 529 ("a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree"); *Aamodt III*, 582 F.Supp.2d at 1319 ("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."). Accordingly, the non-settling parties may exercise all of their legal rights and remedies with respect to any matter in the Agreement subject to future performance.

D. The Settlement Agreement to Be Incorporated into the PFJD Meets the Test of Basic Legality.

In *Firefighters*, 478 U.S. 501, 525-26 (1986), the Supreme Court established four requirements for a consent decree to meet the test of basic legality. *First*, the court must have subject matter jurisdiction over the underlying dispute. *Id*. at 525 ("a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction"). Here, there is no dispute over the Court's subject matter jurisdiction. *Second*, the decree must "com[e] within the general scope of the case made by the pleadings." *Id.* (internal quotations and citation omitted). Here, the Settlement Agreement easily satisfies this requirement because, as shown in Section I. B., above, the Agreement resolves the Pueblos' actual water rights claims in the complaint.

Third, the decree "must further the objectives of the law upon which the complaint was based." *Id.* (citations omitted). Since the Tenth Circuit's decision in this case in 1976, it has been clear that the Pueblos' water rights are to be determined under *federal*, not state law. *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976) ("*Aamodt I*") ("the United States [ ] has not placed [the Pueblos'] water rights under New Mexico law."). Thus, in *Aamodt I*, the court concluded that whatever the Pueblos' rights may have been under the prior sovereigns, Spain and Mexico, they were validated in an act of Congress passed in 1858, following the cession in 1848 of New Mexico to the United States. *Id.* The law on which the Pueblos' complaint is based is federal law governing the determination of their water rights. Following remand of *Aamodt I*, this Court concluded in 1985 that the Pueblos' water rights, validated by the 1858 Act, are derived under the *federal* Indian law doctrine of aboriginal title, as modified by Spanish and Mexican law, and were subsequently fixed by another act of Congress, the 1924 Pueblo Lands Act. *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) ("*Aamodt II*"). What the Settlement Agreement before the Court indisputably does is to further the objectives of establishing the priority and quantity of the Pueblos' water rights through a compromise that is consistent with the law of this case established in *Aamodt I*, and followed in *Aamodt II* and the subsequent orders of this Court building on that decision. US/Pueblos Memorandum, Doc. 9910 at 14-21.

Fourth, and perhaps most importantly in light of the Objectors' Responses, a settlement agreement to be incorporated in a consent decree may not require or sanction the parties to engage in unlawful action. *Firefighters*, 478 U.S. at 525-26. Thus, in *Firefighters*, the Supreme Court explained that the consent decree in that case could not authorize the parties "to take action

that conflicts with or violates" the underlying federal statute upon which the complaint was based. *Id.* at 526. At the same time, however, the Court recognized that "it is the agreement of the parties, rather than *the force of the law upon which the complaint was originally based*, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522 (emphasis added). Accordingly, in deciding whether to approve a settlement agreement to be incorporated in a consent decree, the court does not determine whether "the plaintiff has established his factual claims and legal theories." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Nor does the court "reach and resolve the merits of the claims or controversy." *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983). In addition, the court "is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Firefighters*, 478 U.S. at 525. Rather, the decree must be "*otherwise* shown to be unlawful." *Id.* at 526 (emphasis added). In other words, to fail the test of *basic* legality, the Settlement Agreement *itself* must affirmatively require or sanction unlawful action by the Settlement Parties.

Here, the Settlement Agreement does no such thing. Both the US/Pueblos Memorandum and the State Memorandum have clearly shown that the Settlement Agreement neither requires nor sanctions violation by the Settlement Parties of the Constitution, or any federal or state law. US/Pueblos Memorandum, Doc. 9910 at 48-64; State Memorandum, Doc. 9913 at 5-60. By contrast, most, if not all, of the Objectors' arguments in opposition to approval of the Settlement Agreement are directed, *incorrectly*, at the *merits* of the claims upon which the Pueblos' complaint was based, *see, e.g.,* Atencio Group Response at 7-19, and the *relief* provided by the

Settlement Agreement, *see id.* at 32-34, which is well within the scope of the rule announced in *Firefighters*.

E. Incorporation of the Settlement Agreement in the PFJD Will Not Disserve the Public Interest.

If a consent decree provides for injunctive relief, the Court "must also consider the public interest in deciding whether to grant the injunction." *Citigroup Global Markets*, *Inc.*, 752 F.3d at 295. The Court "must assure itself 'the public interest would not be disserved' by issuance of a permanent injunction." *Id*. at 296 (citing *eBay*, *Inc. v. MercExchange*, 547 U.S. 388, 391 (2006). Here, the PFJD provides that "[e]ach 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."[1] PFJD at § 3.E.2. The inclusion of that injunction in the PFJD certainly does not disserve the public interest. Indeed, both state and federal law provide for injunctive relief to prohibit the diversion of water without a valid right to do so. NMSA 1978, § 72-5-39, § 72-12-15, and *United States v. Cappaert*, 426 U.S. 128, 141 (1976) (affirming district court injunction limiting junior groundwater diversions adversely affecting senior federal reserved water rights). It is therefore not contrary to the public interest for the PFJD to enjoin the Pueblos' use of water except in accordance with the Settlement Agreement.

[1] Certain Non-Pueblo Defendants' Memorandum inadvertently and mistakenly stated that the proposed PFJD does not provide for injunctive relief. Doc. 9912 at 4. That mistake is corrected here.

F. Consideration of Other Factors Confirm That the Settlement Agreement is Fair and Reasonable.

In *Citigroup*, the court recognized the foregoing as minimum requirements for a settlement to satisfy the fairness and reasonableness necessary for incorporation of the agreement in a consent decree. But the court also noted that "depending on the decree a district court may need to make additional inquiry[.]" *Citigroup*, 752 F.3d at 295. In this case, the Court has cited *Jones v. Nuclear Pharmacy*, *Inc.*, 741 F.2d 322, 324 (10th Cir. 1984), as listing factors to consider with respect to court approval of the Settlement Agreement. *Aamodt III*, 582 F. Supp. 2d at 1317. Although *Jones* involved the settlement of a shareholder's derivative suit, not approval of a settlement agreement to be incorporated in a consent decree, the decision has been cited in this district in circumstances involving the latter situation, which also is the case here. *See Wildearth Guardians v. United States Forest Service*, 778 F. Supp. 2d 1143, 1148 (D.N.M. 2011); *cf United States v. State of Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) (stating generally that the court has "the duty to decide whether the [consent] decree is fair, adequate, and reasonable before it is approved"). The Court may, therefore, in the exercise of its discretion, consider the *Jones* factors in deciding whether the Settlement Agreement is fair and reasonable. To the extent it chooses to do so, the US/Pueblos Memorandum establishes that the Settlement Agreement satisfies each of those factors. US/Pueblos Memorandum, Doc. 9910 at 28-36.

Finally, as Certain Non-Pueblo Defendants' Memorandum pointed out, where, as here, many, but not all parties, in multi-party litigation have entered into a settlement agreement to be incorporated in a consent decree, the Court's review of the agreement for fairness and reasonableness is in part "intended to protect those who did not participate in negotiating the compromise[.]" *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). Of course, doing

so is subject to the sound exercise of the Court's discretion, which here is subject to a significant cautionary note. In this case, both the United States and the State of New Mexico are parties to the Settlement Agreement to be incorporated in the PFJD. *See* Settlement Agreement, signature pages at 49 etc. As a result, "sound policy would strongly lead [the Court] to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961). In sum, the facts of record and controlling principles of law establish that the Settlement Agreement is fair and reasonable.

II. THE SETTLEMENT AGREEMENT DOES NOT PREJUDICE THE LEGAL RIGHTS OR INTERESTS OF THE OBJECTORS.

In *In Re Integra Realty Resources*, 262 F.3d 1089 (10th Cir. 2001), the Tenth Circuit held that non-settling parties, like the Objectors here, have standing to object to a settlement entered into by some, but not all, parties in multi-party litigation *only* if they will suffer "plain legal prejudice" resulting from the settlement. *Id*. at 1102. This standard applies in strictly "ordinary litigation," like this case, as well as in class actions. Q*uad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983). The court explained in *Integra Realty* that "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice." *Id*. at 1103 (quoting *Agretti v. ANR Freight Sys.,* 982 F.2d 242, 247 (7th Cir. 1992) (italics omitted). As applicable here, the decision in *Integra Realty* makes clear that the Objectors must show that "the settlement strips the party of a legal claim or cause of action, such as a *cross-claim* or the right to present relevant evidence at trial." *Id.* at 1102-03 (quoting

Agretti, 982 F.2d at 247) (emphasis added). In this case, the Objectors have not made and cannot make such a showing.

The "crux" of the Objectors' "prejudice" argument is that the Settlement Agreement excepts settling non-Pueblo water rights owners from priority enforcement of the Pueblos' water rights, while subjecting non-settling parties' water rights to such enforcement. Group 1 Response at 2-3. According to the Objectors, the result is "a new system that effectively punishes objecting water rights owners for failing to agree to settlement by forcing them to bear the curtailment of future priority calls by the Pueblos[,] while rights [of settling owners] that are junior [to the Objectors] are excepted[.]" *Id*. at 10. This argument falls far short of demonstrating "plain legal prejudice."

To be sure, the Pueblos have agreed in Section 4 of the Agreement to refrain from enforcement of their first priority against settling non-Pueblo groundwater rights owners. Settlement Agreement § 4. But no law or regulation prohibits such an agreement between senior and junior water rights owners, and the Objectors have cited none. Moreover, quite apart from the Settlement Agreement, the law also does not require a senior appropriator, suing for injunctive relief to enforce its priority, to join all junior appropriators who might be wrongfully diverting water away from the senior's lawfully entitled use. Rather, it is clear that a senior appropriator's claim for injunctive relief "can be maintained without joinder of all stream users[.]" *La Madera Community Ditch Ass'n v. Sandia Peak Ski Co.*, 1995-NMCA-025, ¶ 6, 893 P.2d 487; *accord Twin Forks Ranch, Inc. v. Brooks*, 1995-NMCA-128, ¶ 3, 907 P.2d 1013 ("priority of water rights between two competing users may be adjudicated without joinder of all other users in system.") This New Mexico case law is consistent with western water law

generally, which recognizes that a senior water rights holder need not be "concerned in settling the relative priorities between [those] whose rights are junior to its own[.]" *Rogers v. Nevada Canal Co.*, 151 P.2d 923, 927 (Colo. 1915). Rather, "that is a matter which they must settle between themselves." *Id*.

Here, if a non-settling non-Pueblo water rights owner were to be subjected to a Pueblo priority enforcement action, which is the "prejudice" the Objectors claim, nothing in the Settlement Agreement prohibits the non-settling non-Pueblo defendant from seeking to join as additional defendants other non-Pueblo water rights owners whose rights are junior to its own. Indeed, addressing "the rights of a prior appropriator to join as defendants those whose rights [are] junior" in a priority enforcement action, the Colorado Supreme Court unequivocally has stated that the prior appropriator "may bring and maintain an action jointly against all parties junior in right to himself, whenever the result of their acts, either joint or several, deprives him of his water right to the use of the water, or substantially interferes therewith." *Rogers,* 151 P. at 927. Thus, the Objectors have not made, and cannot make, any showing that the Settlement Agreement precludes them from exercising their right to bring such a *cross-claim*. As a result, the Objectors have failed to demonstrate they are "prejudiced" by the Settlement Agreement. As the Tenth Circuit has held, a party "suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross-claim," which the Agreement before the Court *does not do*. *Integra Realty*, 262 F.3d at 1102-03.

The Objectors also apparently contend that their legal rights or interests are adversely affected purportedly because "[t]he State Engineer as a settling party has agreed to the exception to priority administration" of the water rights of settling *versus* non-settling non-Pueblo

defendants, Group 1 Response at 3, in violation of "current state water law." *Id.* at 10. But contrary to the Objectors' argument, the State Engineer has made no such agreement, nor does the Agreement deprive the Objectors of the right to make any such claim.

Under Section 5.3 of the Settlement Agreement, the State Engineer is required to promulgate *rules* for the administration of non-Pueblo water rights in accordance with the Settlement Agreement. Such *rule-making* is to be conducted pursuant to statute, *see* Settlement Agreement at § 5.3, which gives the State Engineer authority to adopt *regulations* to implement any provision of law administered by him. NMSA 1978, § 72-2-8. But in doing so, the State Engineer is duty bound to give public notice of the proposed regulations and to conduct a public hearing at which "any person who is or may be affected by the proposed regulation [] may appear and testify." NMSA 1978, § 72-2-8(D); *see also* NMSA 1978, § 72-2-8(G). And nothing in the Settlement Agreement deprives the Objectors of the right to assert any claim they may have regarding the lawfulness of any regulation the State Engineer may propose as an "exception to priority administration." Nor does the Settlement Agreement deprive the Objectors of the right to judicial review of any purportedly illegal regulation the State Engineer might adopt. *See Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-015, ¶ 2, 249 P.3d 932, *rev'd* 2012-NMSC-039, ¶¶ 8-10, 289 P.3d 1232.

Unable to show that the Settlement Agreement *strips* them of any legal claim, what the Objectors actually want from this Court are two impermissible advisory opinions. *First*, the Objectors want the Court to adjudicate the merits of a hypothetical Pueblo priority enforcement action for injunctive relief against a hypothetical non-settling non-Pueblo defendant, including the merits of a hypothetical unasserted cross-claim against a hypothetical settling non-Pueblo

water rights owner. They want the Court to hold that in such an action, the "junior" non-Pueblo water rights holder who signs on to the Settlement "will be given priority over a senior user [] if the latter did not sign onto the Settlement [A]greement." Group 1 Response at 17. But this Court adjudicates only *actual* controversies, not *hypothetical* lawsuits.

Moreover, a suit for such injunctive relief is an extraordinary remedy that lies *in equity* and requires proof not only of the parties' relative priorities, but also that the movant will suffer irreparable injury unless an injunction is issued; that the threatened harm to the movant outweighs whatever damage the injunction may cause to the party to be enjoined; and that issuance of the injunction will not be adverse to the public interest. *Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009); *see also Resource Associates Grant Writing and Evacuation Services, Inc. v. Maberry*, 2008 WL 4820754 at * 5-6 (D.N.M. July 14, 2008). Yet, the Objectors want the Court to make this ruling in the absence of any proof of any facts on any of these issues. In other words, what the Objectors want is a decision today that they will not suffer in the future "the loss of some practical or strategic advantage in litigating their [Pueblo priority enforcement] case," a question that presents this Court with no concrete controversy, and which is insufficient to constitute plain legal prejudice in any event. *Integra Realty*, 262 F.3d at 1102.

Second, the Objectors want the Court to hold that the State Engineer will be incapable of adopting regulations to implement his duties for the administration of non-Pueblo water rights in accordance with the Settlement Agreement because any such regulations necessarily will conflict with New Mexico law of prior appropriation. But that too is not for this Court to pre-judge. As New Mexico law recognizes, "although priority calls have been and continue to be on the table

to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means." *State of New Mexico ex rel. Office of the State Engineer v. Lewis*, 2007 – NMCA – 008, ¶ 39, 150 P.3d 375. Thus, the Settlement Agreement requires the State Engineer to adopt regulations to ensure compliance of his priority administration with the terms of the Agreement. Settlement Agreement, §§ 5.2-5.3. And, as shown, the Objectors have the right to challenge the legality of any such regulation, which is a matter of state law committed to the New Mexico courts to decide.

As important, even if a regulation adopted by the State Engineer to implement priority administration of non-Pueblo water rights, as provided in Section 5 of the Settlement Agreement, ultimately were held to be unlawful, the Settling Parties nonetheless have agreed "that the remaining provisions of this Agreement shall remain in full and force and effect notwithstanding a declaration by any court that Section 5, or any provision thereof, is invalid or contrary to law." *Id.* at 5.9. There is therefore no reason for this Court to speculate, as the Objectors do, about the legality of regulations that will not and cannot affect the validity of the Settlement Agreement between and among the Settling Parties.

For the foregoing reasons, the Court should hold that the Settlement Agreement is fair and reasonable and that it does not adversely affect the Objectors' legal rights or interests, and it should approve the Proposed Partial Final Judgment and Decree in so far as it incorporates the Settlement Agreement by and among the Settlement Parties.

Dated this 4th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I filed the foregoing electronically through the CM/ELF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and to the following person(s) by United States Mail:

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