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,	)	**NO. 66cv6639 WJ/WPL**
Plaintiffs-in-Intervention.	)	

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

I. Introduction

On November 6, 2014, the State of New Mexico *ex rel.* State Engineer ("State"), Santa Fe County ("County") and City of Santa Fe ("City") filed their *Memorandum in Support of Settlement* ("*Memorandum*") (No. 9913) pursuant to the Court's August 8, 2014 *Case Management Order* (No. 9506). The *Memorandum* addressed each of the previously filed objections to the Settlement Agreement, Partial Final Decree and Interim Administrative Order by category and explained why each category of objection should be overruled or dismissed. The Court allowed sixty days for those parties who had filed objections to respond to all memoranda filed in support of the Settlement. Parties filing responses were required to "describe the specific harm the Objectors would suffer by entry of the Partial Final Decree, [and] address with specificity why approval of the Settlement Agreement and entry of the Partial Final Decree is

'not fair, adequate, reasonable, is not in the public interest, or is not consistent with applicable law.'" August 8, 2014 *Case Management Order* at 7-8 (No. 9506). On January 5, 2015, two Responses were filed, one by the objectors represented by attorney Blair Dunn ("Dunn Objectors") and the other by the objectors represented by attorney Lorenzo Atencio ("Atencio Objectors"). See January 5, 2015 *Response in Opposition to Motion to Approve Settlement Agreement and Entry of Proposed Partial Final Judgment and Decree* ("*Dunn Response*") (No. 9972) and January 7, 2015 *Objectors' Response to Motions in Support of Entry of Partial Final Judgment and Decree* ("*Atencio Response*") (No. 9973). No other responses were filed.

II. Application of the "Fair and Reasonable" Standard in this Expedited *Inter Se* Proceeding

In 2006, the Settlement Parties moved the Court to consider, hear argument upon, and establish the standard to be applied by the Court in determining whether to approve the Settlement Parties' anticipated request that the Court approve the parties' Settlement Agreement and enter a Partial Final Judgment and Decree on the Pueblos' water rights. On March 24, 2007, the Court, after consideration of the Settlement Parties' arguments and objections thereto, entered its *Memorandum Opinion and Order* adopting the "fair and reasonable" standard:

> The burden will be on the objectors to prove that the settlement is not fair, adequate or reasonable. *See, Jones v. Nuclear Pharmacy, Inc.* [cit. omit.] (trial court must approve a settlement if it is fair, reasonable and adequate; listing factors the trial court should consider).

Id. (Doc. 6236), at 6. The undersigned parties note that the Court's decision is fully consistent with the recent determination and recommendation by the Special Master in the Rio Taos/Rio Hondo consolidated stream adjudication in her *Special Master's Report and Recommendations Regarding Objections to Partial Final Judgment and Decree on the Water Rights of Taos Pueblo,* Case 6:69-cv-07896-MV-WPL, Doc. 5927, filed January 23, 2015). As in this case, and

as noted by the Special Master, the Taos movants argued for, and the Special Master adopted and analyzed objections based upon, the "fair and reasonable" standard, as further broken down into the four factors analyzed by the Tenth Circuit in *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). With regard to third parties, movants, including the State and United States, argued that the settlement effects on third parties must be "neither unreasonable nor proscribed," citing *United States v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981) and the Special Master agreed, also noting that no objector disagreed with this formulation.

The requirement that the effects be "not proscribed," means, essentially, that they must be in accordance with law, that a third parties' legal right cannot be taken away, e.g. *See, New England Healthcare Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (A party "suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross-claim or the right to present relevant evidence at trial.") Of course, the recognition of senior water rights in an adjudication, whether in a settlement or in a litigated outcome, does not cause a proscribed effect on other water rights in the adjudication. A senior water right, by definition, has the right to affect the exercise of a junior water right, under times of shortage. This right is in accordance with the constitutional mandate that "priority in time shall give the better right."

In contrast to the above question of whether a settlement agreement may be made binding among the settling parties, the question of whether the Partial Final Decree is binding on all parties after it is entered does not depend on the Court's evaluation of the settlement agreement and its effects on others – and instead occurs by operation of law in the New Mexico process of *inter se*. In New Mexico water rights adjudications, the State is responsible for prosecuting the adjudication and, in the first instance, litigating or settling water rights claims. Claims that have

been adjudicated by the court in subfile orders as between the State and the claimant are then subject to objection from all other water rights owners on the basis that the water rights in the subfile orders are not in accordance with law, either as to priority, quantity, or the other elements of the water right, a proceeding known as *inter se*. In *State of New Mexico ex rel. Office of State Engineer v. Lewis*, 2007-NMCA, 141 N.M. 1, 17, 150 P.3d 375, 391, the Court of Appeals approved the district court's *inter se* procedure which required objectors to the proposed settlement to show "how the[ir] water rights will be adversely affected by the priority, amount, purpose, periods of use, or other matters as set forth in the Proposed Partial Final Decree." *Id.* 141 N.M. at 7, 150 P.3d at 381. In an expedited *inter se* proceeding, as in this case, the burden of production is on all potential objectors to come forward with evidence of particularized legally cognizable harm, as this Court has required. *Memorandum Opinion and Order*, *supra*, at 2 ("The Court will require that any person objecting to the settlement agreement must state in their objection how the objector will be injured or harmed by the settlement agreement in a legally cognizable way.").

In *Lewis*, *supra*, the New Mexico Supreme Court recognized the special role of the State in general stream adjudications. That special role also serves to satisfy the Tenth Circuit's requirements that movants show that the proposed settlement is fair and reasonable and not the product of collusion. *Jones v. Nuclear Pharmacy*, *supra*. The State, through the Attorney General, is statutorily charged with prosecuting general stream adjudications to final judgments on the water rights of all claimants in a process that has been defined by statute.

Neither the Dunn Objectors nor the Atencio Objectors have objected to the quantification, priority, purposes of use, or other elements of the Pueblo water rights set forth in the proposed Partial Final Decree, or the legal bases for them. Rather, most

objections claim that the groundwater administration provisions of the Settlement Agreement will result in illegal preferences for junior settlors. For example, the Dunn Objectors have made this objection, which is addressed in detail in Section III below. Thus, the only contested question before the Court is whether to approve the Settlement Agreement and make it binding among the settling parties, and no objector has questioned whether the Partial Final Decree should be entered with binding effect on all.

Therefore, the Court should apply the fair and reasonable standard, as described above, to determine whether the Settlement Agreement is fair, reasonable and adequate among the settling parties and whether it will have an unreasonable or proscribed effect on any objecting non-settling party[1]. As noted above, the effect of the Settlement Agreement on a non-settlor cannot be to take away a legal right. However, as this Court has required, objectors must show a particularized harm in order to prevent other parties from entering into their settlement.

III. The Dunn Objectors Offer No Legal Or Factual Basis For Precluding Entry of the Decree or Approval of the Settlement Agreement

The Dunn Objectors argue that the Settlement Agreement and the proposed Partial Final Judgment and Decree violate New Mexico law because: (a) the Settlement Agreement is a

1 As noted, the undersigned parties find that the law in New Mexico is that the process and effect of *inter se* in New Mexico is governed by *Lewis*, *supra*. In particular, the binding effect of the Partial Final Decree on all parties is ensured as a matter of law – no particular evidentiary standard must be met. In this limited respect, these parties disagree with the analysis set forth in *Certain Non-Pueblo Defendants' Memorandum In Support Of Entry Of Partial Final Judgment And Decree Incorporating Settlement Agreement And Adjudicating Pueblos' Water Rights* (Doc. 9912, filed November 6, 2014), at 11-12, where it is argued that, in addition to the "fair and reasonable" standard already adopted by this Court, the Court should require that movants show that the Pueblo water rights to be recognized pursuant to the Settlement Agreement and Partial Final Decree "are **no more extensive** than the Pueblos would have been able to prove at trial." Such an addition to the fair and reasonable standard is neither legally required nor factually necessary. In addition, no New Mexico appellate court has imposed such a requirement. However, even if such an additional requirement were imposed, movants have already abundantly satisfied it in this case.

"compact" that must be approved by the New Mexico Legislature; and (b) the settlement is contrary to state law priority administration. As discussed below, the settlement conforms to state law, and respondents can show no factual or legal basis for their claims.

A. The Settlement Agreement is Not a Compact Requiring Approval by the New Mexico Legislature.

The Dunn Objectors repeat and restate the objection that the Settlement Agreement is invalid because it was not approved by the Legislature. *Dunn Response* at 19-27. The State, County and City explained in detail in their opening brief that this contention has no merit. *Memorandum* at 39-41. Settlement of this litigation squarely falls within the purview of the New Mexico Attorney General. Instead of responding to this opening argument, however, the Dunn Objectors simply continue to rely on the inapposite case of *State ex rel. Clark v. Johnson*, 120 N.M. 562, 574, 904 P.2d 11, 23, 1995-NMSC-048 (1995). As described in the opening brief, that case simply does not apply here. In *Clark v. Johnson*, the court found the Governor had no express or implied authority to bind the State to terms of a gaming compact falling within an area regulated by the Legislature, inconsistent with existing statutory law. 120 N.M. at 574-76, 904 P.2d at 23-25.

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

The Dunn Objectors give no explanation or reasoning showing how or why the Attorney General lacked authority on behalf of the State of New Mexico to enter into the Settlement Agreement.

B. The Settlement Complies with New Mexico Law Governing Priority Administration.

New Mexico is a prior appropriation state. Under both state constitutional and statutory law, priority in time "shall give the better right." *See* N.M. Const. art. XVI, § 2; NMSA 1978, § 72-1-2 (1907). Appropriation of water for beneficial use establishes the priority date of a water right in relation to other water rights, and the full right of an earlier appropriator will be protected, to the extent of that appropriator's use, against a later appropriator. *See State of N.M. ex rel. State Engineer v. Commissioner of Public Lands*, 145 N.M. 433, 441, 200 P.3d 86, 91 (Ct. App. 2008), *certiorari* denied 145 N.M. 531, 202 P.3d 124, (2008), *certiorari* denied 129 S.Ct. 2075, 556 U.S. 1208, 173 L.Ed.2d 1134 (2009) (citing N.M. Const. art. XVI, § 2). The Tenth Circuit summarized this essential tenet of New Mexico water law as follows:

> In New Mexico, state law provides for a hierarchy of water users along a river such as the Rio Grande. Those who first appropriate water for beneficial use have rights superior to those who appropriate water later. *See* N.M. Const. art. XVI, § 2; *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044, 1048 (1914) (affirming that New Mexico follows the "prior appropriation" doctrine). In years of drought or when the water level is otherwise low, those with priority use their appropriation as they wish; those with inferior rights may be left without.

U.S. v. City of Las Cruces, 289 F.3d 1170, 1176 (10th Cir. 2002) (further citing *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 Nat. Resources J. 347, 350 (1989)). This hierarchy also applies to use of water from domestic wells. *See Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 466, 2013-NMSC-037 (2013) (curtailment by priority administration authorizes the State Engineer to limit domestic well use administratively in times of water shortage to protect senior water rights).

The Settlement Agreement and the proposed Partial Final Judgment and Decree conform to New Mexico's water laws, and federal law when applicable, governing adjudication and administration of water right priorities. This Court has determined that the historic prior water rights of the Pueblos are entitled to a first or time immemorial priority. *See State of New Mexico v. Aamodt*, 618 F.Supp. 993, 1005-1010, (Dist. Ct. N.M. 1985) *(Aamodt II)*; Mem. Op & Order, May 1, 1987 at 3-5; Mem. Op & Order, Apr. 14, 2000 at 8-9 (Dkt. No. 5596). Furthermore, priority dates for water use on Indian reservation lands are based on respective dates of reservation (1939 for 4.82 AFY for San Ildefonso Pueblo and 1902 for 302 AFY for Nambe Pueblo), in compliance with the Federal Reserved or *Winters* Doctrine. *See Aamodt II* at 1010. *See also Memorandum* at 23-25 & n.3. Based on their response briefs, it appears that respondents do not contest the priority dates proposed for the Pueblos' water rights.[2]

Although the settlement does not propose to adjudicate any non-Pueblo water rights, the Dunn Objectors argue the priority administration provisions of the Settlement Agreement violate their rights under state law. They complain "certain non-Pueblo junior rights will become elevated from priority calls irrespective of their priority relation to other non-Pueblo rights[,]" *see Dunn Response* at 2, and will "escape priority administration between non-Pueblo water rights holders in times of shortage." *Id*. at 3. This will force non-settling parties "to bear the curtailment of future priority calls by the Pueblos while rights that are junior are excepted[.]" *Id*. at 10.

These objections are not valid. The Court should reject them for a number of reasons. As discussed below, (1) nothing on the face of the Settlement Agreement can be reasonably

2 The Dunn Objectors state: "Defendant-Objectors do not contest that water rights of the Pueblos are and should be adjudicated in accordance with previous decisions of this Court and the 10th

construed to deprive non-settling parties of a right they hold, (2) the forbearance and shortage sharing provisions of the Settlement Agreement can and will be implemented both to conform with the Settlement Agreement and to comply with state law, and (3) any challenge to implementation of regulations that have not yet been promulgated or applied is premature at this time.

1. <u>The Settlement Agreement is valid on its face</u>.

Respondents can point to no provision of the Settlement Agreement that will violate state law or deprive them of a right they hold. The groundwater provisions opposed by respondents will not apply to them and will not affect them. In Section 4 of the Settlement Agreement, the Pueblos agree to forbear enforcement of their senior rights against junior groundwater users who join the settlement. Section 4.4 provides in pertinent part:

> **4.4 Additional Protection for Non-Pueblo Well Users:**
> The Pueblos rights defined in Sections 2.1, 2.2, 2.5, 2.6, and 2.7 shall not be enforced against:
>
> **4.4.1** A Settlement Party who has made an election under Section 3.1.7.2 and is in compliance with that election, to the extent of the use set forth in Sections 3.1.7.4 and 3.1.7.2.5;

Settlement Agreement at 35.

The Dunn Objectors claim the Pueblos' agreement to forbear enforcement of their first priority against settling parties penalizes non-settling parties. This belief, however, misapprehends the terms and effect of the Settlement Agreement. Section 4.4 was included in the terms of settlement after groundwater users obtained agreement from the Pueblos to forbear making priority calls against them in exchange for joining the settlement and making one of the three elections under Section 3.1.7.2. The State, County and City believe this Section 4 priority

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Circuit Court of Appeals…." *Dunn Response* at 2.

protection provides an important benefit to settling groundwater users. But in no way does it "extort" or "force" other parties to settle.

In support of their argument, the only specific provision cited by the Dunn Objectors is Section 2.4.4.2.2 of the Settlement Agreement. They claim: "the Agreement is patently against public interest as it includes penalties against non-settling parties, in its effort to extort a Settlement agreement. (See Settlement Agreement at 2.4.4.2.2 in conjunction with Section 4)." *Dunn Response* at 7. They fail, however, to show how Section 2.4.4.2.2 will operate to compel them to settle, or affects them in any way at all. Section 2.4.4.2.2 falls under the broader topic of *Future Basin Use Rights*, Section 2.4. Section 2.4 defines the quantity of each Pueblo's First Priority Rights for various uses, for example, 2.4.3 addresses 1) new community uses, 2) new domestic uses, and 3) new livestock uses. Section 2.4.4.2 addresses *Other Future Basin Uses on Pueblo Land*. Finally, 2.4.4.2.2, states that the Pueblo "initiating such Future Basin Use shall offset any resulting interference with Non-Pueblo surface water rights entitled to Section 4 protection including any resulting increased stream depletions." In no way do these sections penalize non-settling parties.

There is nothing on the face of the Settlement Agreement and specifically the forbearance provisions that shifts a new or greater burden to non-settling parties. Respondents merely speculate that the State Engineer will administer the forbearance provisions in a way that will prejudice them. In the *Bounds* case, the New Mexico Supreme Court considered a facial challenge to the state statute that directs the State Engineer to issue permits for domestic wells, finding that "speculation about what the State Engineer may or may not do in the future cannot form the basis of a facial challenge in the present." 306 P.2d at 467. The court reasoned:

> Without specific facts supporting an as-applied challenge, we must assume that domestic wells will be administered as the permits themselves are written: "subject to curtailment by priority administration." 19.27.5.13(B)(11) NMAC. In

> the absence of a record to the contrary, we must assume that the State Engineer will fulfill the responsibility and exercise the authority bestowed on that office by law.

Bounds 306 P.2d at 467. The Dunn Objectors likewise show no facts supporting their assumption that implementation of the settlement forbearance provisions cannot be achieved in compliance with state law, including the administration of non-settling water rights in priority.

The flaw in the Dunn Objectors' theory is their mere assumption that an agreement between a senior and junior to forbear priority administration necessarily will violate the rights of non-agreeing parties whose priority dates fall between the dates of the agreeing parties. In approving the Carlsbad Irrigation District's settlement over objections of non-settling parties in the Pecos River adjudication, the New Mexico Court of Appeals held that alternatives to strict application of priority may be lawful, so long as non-settling seniors are protected:

> We do not find in the language of the Constitution [N.M. Const. art. XVI, § 2] or the Compact an exclusive right to a priority call. The relevant provisions do not by their terms require strict priority enforcement through a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods.
>
> Although priority calls have been and continue to be on the table to protect senior water 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 ex rel. Office of State Engineer v. Lewis, 141 N.M. 1, 12, 150 P.3d 375, 386 (Ct. App. 2006).

Among settling parties, Section 4's forbearance of enforcement of Pueblo senior rights is an agreement in lieu of strict enforcement of priority. It is an agreement to share shortages: the Pueblos agree their senior rights won't be enforced against participating groundwater users and those parties in turn agree to make an election under Section 3.1.7.2, which may include

agreement to connect to the regional water system or to reduce or maintain use below specified levels. The State, County and City acknowledge that Section 4's forbearance and shortage sharing provisions may not be implemented in a way that would cause non-settling parties to suffer greater or more frequent calls than they would otherwise. Under Section 5.3 of the Settlement Agreement the State Engineer will adopt rules and regulations for the administration of water in the basin and under Section 5.2 will serve as Water Master responsible for applying these rules. The State Engineer has not completed and adopted the rules and regulations and they are not before this Court. Nonetheless, the State affirms to this Court that the regulations and rules can and will be structured to respect the priorities of non-settling parties and to assure administration of the shortage sharing provisions so as not to infringe on the rights of non-settling parties. If the State Engineer fails to promulgate and apply the rules in compliance with state law, water users in the basin will have the right at that time to challenge the rules or the Water Master's application of them, as discussed in section III.B.3 below.

2. **Forbearance of priority enforcement can and will be implemented both in conformance with the Settlement Agreement and compliance with state law.**

Implementation of the settlement will require designation and administration of two distinct groups of groundwater users: those who settle and receive Section 4 protection and those who choose not to settle and are still subject to priority enforcement for the benefit of Pueblo senior uses. This latter group will be subject to priority enforcement if a Pueblo senior use is short, but only to the extent such enforcement would apply in the absence of the settlement forbearance and shortage sharing provisions. This will require the Water Master to perform accounting of water use and supply and to structure the call accordingly. In most instances this may simply require calculating the quantity associated with Pueblo forbearance and subtracting it

from the call.

Even though the rules and regulations have not yet been promulgated and certainly have not yet been applied, a simple accounting example may help illustrate how they can be applied both to conform to the Settlement Agreement and to comply with state law. To do this, the example below compares two scenarios. Scenario 1 is a simple illustration of curtailment of junior groundwater uses during shortage with no forbearance or shortage sharing agreements in place, i.e., there is no settlement and strict priority administration applies. Scenario 2 illustrates administration of rights under the settlement, where there are two categories of junior groundwater rights holders, those with enforcement protection under Section 4 and those who have not settled and do not have protection from priority enforcement. Both scenarios assume a total of ten non-Pueblo water users with priority dates spanning from the earliest date 1930 to the most junior date of 2010. Also, both scenarios assume the Water Master has determined that a senior Pueblo surface use is short by 5 acre-feet and is entitled to curtailment of junior groundwater uses to satisfy the senior use.

Scenario 1. Strict Priority Administration (no settlement shortage sharing or forbearance)

priority date	junior pumping effects on senior supply (acre-feet)	curtailment running total (acre-feet)
2010	0.5	0.5
2002	1.0	1.5
1995	0.5	2.0
1981	0.5	2.5
1978	1.5	4.0
1970	1.0	5.0
call satisfied / end of curtailment		
1965	3.0	---
1950	0.3	---
1945	1.5	---
1930	1.0	---

Scenario 2. Settlement Priority Administration (two groups: one exempt from enforcement and the other subject to curtailment)

priority date	junior pumping effects on senior supply (acre-feet)	exempt from Pueblo call	Replace-ment water (acre-feet)	curtailment running total (acre-feet)
2010	0.5	yes	0.5	0.5
2002	1.0	no	none	1.5
1995	0.5	yes	0.5	2.0
1981	0.5	no	none	2.5
1978	1.5	no	none	4.5
1970	1.0	yes	1.0	5.0
call satisfied / end of curtailment				
1965	3.0	no	none	---
1950	0.3	yes	0.3	---
1945	1.5	no	none	---
1930	1.0	yes	1.0	---

This comparison illustrates how administration of the Settlement Agreement's shortage sharing provisions may be implemented with no detrimental effects to non-settling parties. It also shows how settling parties will receive the protection from call they settled for without shifting any burden to non-settling parties. In the example, the non-settling parties are not called upon to curtail their use to any greater extent than they would without any settlement or shortage sharing. For instance, the 1978 water right choosing not to settle is curtailed to the same extent and by the same method with or without settlement. The settlement provisions do not cause the quantity of the call to be shifted to non-settling rights. In both scenarios, the non-settling 1965 right is the first right to be spared from enforcement.

Settling parties avoid curtailment because of the Pueblos' agreement to share shortages. In effect, the Pueblo call will be reduced by the amount of shortage sharing, and junior settling

parties will be credited with replacement water under the State Engineer rules and regulations. This is illustrated by Scenario 2, in which three of the groundwater rights, 2010, 1995 and 1970, are exempt from call and are credited with a total of 2.0 acre-feet of replacement water. This has the effect of reducing the total Pueblo call from 5.0 acre-feet to 3.0 acre-feet. Because the 2002, 1981 and 1978 rights did not agree to shortage sharing and will not be credited with replacement water, they are subject to curtailment to meet the 3.0 acre-feet, the same amount they would owe without any settlement, as shown in Scenario 1.

Junior settling rights, such as the 1995 right would also be protected from a rebound call by a more senior non-settling right that is curtailed because of a Pueblo call. Neither the non-settling 1978 nor 1981 rights could call on the 1995 right's replacement water, even though they are curtailed and the 1995 right may continue pumping its replacement water. This, however, does not mean a senior non-Pueblo right, regardless of settlement status, could not request enforcement of priority because of its own shortage. The settlement agreement has no bearing on priority administration between and among non-Pueblo users who suffer hydrologic shortage to their supply, as opposed to curtailment as described above.

Undoubtedly, actual administration will be more complex than the example described above. This example, however, illustrates how "reasonable and acceptable management methods" can be employed to implement Section 4 of the Settlement Agreement while also protecting non-settling "senior users' rights." *Lewis*, 141 N.M. at 12, 150 P.3d at 386. Although they may not benefit from the settlement, non-settling parties such as the Dunn Objectors have shown no "plain legal prejudice" and their objections should be overruled. *See New England Healthcare Employees Pension Fund v. Woodruff*, *supra*, at 1288; *In Re Integra Realty Resources*, 262 F.3d 1089, 1102 (10th Cir. 2001). Furthermore, because they can show no

deprivation of liberty or property, they also fail to show any violation of equal protection or due process, either under federal or state law. *See Bounds*, 306 P.2d at 469 (because petitioner did not show any actual impairment of his water rights, he also could not show deprivation of liberty or property).

3. **Any challenge to implementation of regulations that have not yet been promulgated or applied is premature at this time.**

The State Engineer will promulgate the rules and regulations necessary to administer the Section 4 provisions "pursuant to NMSA 1978, § 72-2-8." *See Settlement Agreement*, § 5.3. In carrying out this function, the State Engineer will provide public notice of the proposed rules and regulations and will 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). If objectors or any other parties believe the proposed rules would violate their rights in any way, they are free to participate and assert what challenges they deem appropriate. Furthermore, if they disagree with the State Engineer's rulemaking, they are entitled to seek judicial review. *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. The Settlement Agreement in no way prohibits anyone from participating in the rulemaking or seeking judicial review at that time.

But a request at this time, of this Court, to review the legality of regulations yet to be promulgated is premature and misplaced. Any review of the regulations will be conducted upon final rulemaking and by state court. If state court review of the State Engineer rules were to find a legal defect in the administration provisions contemplated by the Settlement Agreement, Section 5.9 provides: "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."

This Court should decline the Dunn Objectors' request for the federal adjudication court to issue advisory opinions on the legality of future State Engineer rulemaking and regarding state court administrative review. Only entry of the proposed Partial Final Judgment and Decree and approval of the Settlement Agreement are before this Court at this time.

IV. The Atencio Group Objections Are Meritless and Have Been Rejected Repeatedly By this Court.

A. Each response must describe the specific harm the Objectors would suffer by entry of the Partial Final Decree

The Atencio Objectors have failed to describe any specific harm the Settlement Agreement or the Partial Final Judgment and Decree would cause them. The allegations in the *Atencio Response*, that they will be harmed by the Settlement Agreement because it will cause their water rights to be reduced, will limit their right to irrigate, and will negatively impact their property values, have already been raised in the objections, and addressed by the State, County and City. The State, County and City addressed these objections in their *Memorandum*, pp. 47-50, and specifically explained that "[t]he only reduction of use required under the Settlement Agreement is voluntary – a Settlement Party can voluntarily agree to reduce their use in return for receiving certain benefits of the Settlement Agreement." *Id.* at 49.

Indeed, the Atencio Objectors' perception that their water rights are somehow "reduced" appears to derive from the fact that the amount adjudicated as a domestic well water right is always the amount of beneficial use, as opposed to the permit limit, which is most often a significantly larger number. However, a permit is not a water right. See e.g., April 17, 2013 *Memorandum Opinion and Order* at 5 (No. 7870) ("New Mexico law is clear that a water right is

based on the amount of water beneficially used, not on the amount permitted."). As such, the Atencio Objectors' water rights are not "reduced" as a result of the adjudication, and as objectors, not Settlement Parties, the Atencio Group Objectors are not required to reduce their use of water by the Settlement Agreement.

Finally, the Atencio Objectors assert that they will be harmed because "[a]ll property that does not presently have a well will be reduced in value." *Atencio Response* at 34. The Atencio Objectors do not explain why or how the property will be reduced in value, or how the reduction in value is connected to the Settlement Agreement. Nor do they provide any citation to authority or evidence, expert or otherwise, in support of the assertion. Nonetheless, their argument here appears to be that property owners without a well have no water rights, and that this – not having a water right – would be the cause of the alleged possible reduction in the value of their property. However, persons who do not have water rights are not parties to this adjudication lawsuit, and the Atencio Objectors do not have standing to raise objections on behalf of these possible third parties. Their arguments on this issue should be disregarded.

In sum, the Atencio Objectors have failed to show any facts or law to support their allegations of harm.

B. Each response must address with specificity why approval of the Settlement Agreement and entry of the Partial Final Decree is "not fair, adequate, reasonable, is not in the public interest, or is not consistent with applicable law"

The Atencio Objectors restate many of their original objections, but fail to address the State, County and City's response to them in their *Memorandum*. The arguments contained in their *Response* assert that the Settlement Agreement is not fair and not consistent with applicable law. As discussed below, none of their arguments are new, in many cases they have already been rejected by the Court, and in every case they should be denied.

1. The Settlement Agreement is Consistent With Applicable Law

The *Atencio Response* argues the Settlement Agreement fails to comply with applicable law because: 1) the Preliminary Injunction violates the Anti-Injunction Act; 2) the Settlement Agreement violates the McCarran Amendment; and 3) the domestic well statute is being violated. As previously demonstrated in the State, County and City's *Memorandum*, none of the Atencio Objectors' arguments here are correct. The Settlement Agreement is consistent with applicable law.

This Court's 1983 Preliminary Injunction is not part of the Settlement Agreement or the Partial Final Judgment and Decree, and is not within the scope of this expedited subproceeding. The Anti-Injunction Act is therefore not applicable law. Further, the State, County and City have already addressed objections relating to the 1983 Injunction in their *Memorandum*, citing the numerous times that the Court has already ruled on the validity of the 1983 preliminary injunction. *Memorandum* at 52-53. The Atencio Objectors do not present any evidence or law to address the arguments of, and authority cited by the City, County and State.

Similarly, the Atencio Objectors' assertion that the Settlement Agreement violates the McCarran Amendment because Pueblo water rights should be decided under state law, has no basis in law, and also has already been addressed in the State, County and City's *Memorandum* at 33-34. The McCarran Amendment is a procedural law. The McCarran Amendment does not require the Pueblos' water rights be adjudicated pursuant to New Mexico law. The Atencio Objectors ignore the *Memorandum*, and the Court record in this case. Their objections should be denied.

Finally, the *Atencio Response* alleges that the Settlement Agreement violates the New Mexico Domestic Well Statute, but fails to state how the Settlement Agreement affects the

statute, or any provisions of the statute, or how the statute is applicable. *Atencio Response* at 7. Apparently in support of this argument, the Atencio Objectors mischaracterize the Settlement Agreement as it pertains to domestic wells by asserting that "[t]he Settlement Agreement calls for the non-Indians' water rights to be reduced while the Pueblos' water rights are increased" and "vested non-Indian water rights are being taken from non-Indians and awarded to Pueblos . . . via the water master rules and regulations, the operating agreement, the Joint Powers Agreement." *Atencio Response* at 9-10. This is untrue. The Settlement Agreement does not do this, and Atencio Objectors cannot cite to any section of it that supports these assertions. Nevertheless, the Atencio Objectors go on to claim that "[t]he settlement agreement will transfer ownership of the Basin water to the Pueblos" and "[t]he preference claim[3] is the legal device used in the settlement agreement to take control of all or almost all the water in the Basin." *Id.* at 10-11. In fact, the Pueblos' water rights have been determined by the Court to be defined by federal law, and their senior priority is based on historical priority and use. See *Memorandum* at pp. 46-49.

In sum, the allegations the Atencio Objectors make here – that they are constitutionally entitled to 3 afy for a domestic well, and that the adjudication reduces that amount – are contrary to law. The amount adjudicated is constitutionally based on beneficial use. A permit is does not create an entitlement, it allows permittees to develop a water right up to the amount on the permit. The water right developed under the permit is defined by the amount of actual beneficial use, not the amount on the permit. There is no taking of any non-Pueblos' water rights under the Settlement Agreement.

The Atencio Objectors also assert that they will be deprived of their property in violation of due process because "[t]he Objectors will be required to transfer all [their] adjudicated rights

[3] It is not entirely clear what the Atencio Objectors mean by "preference claim."

to the County of Santa Fe by 2024," citing generally to Section 3 of the Settlement Agreement. *Atencio Response* at 26. Section 3 describes the protections available for non-Indian Settlement Parties, but does not contain any provision that requires objectors to the Settlement Agreement to transfer their water rights to the County. Settling Parties – not objectors – may elect to transfer their water rights to the County Water Utility when service becomes available, but such a choice for them is wholly voluntary. See *Aamodt* Settlement Agreement, Section 3.1.7.4.1 ("Election to Connect to CWU").

The Atencio Objectors also complain that due process is being violated because objections are susceptible to dismissal for technical deficits, domestic well owners are not being provided a meaningful opportunity to be heard and the procedures the Court has adopted allow a partial final decree to be entered without an *inter se* hearing. *Atencio Response* at 29, 30 and 31. No objections have been dismissed, this very proceeding is the domestic well owners' opportunity to be heard, and this is the objectors' opportunity to support their position that further proceedings are required by submitting evidence and detailing the procedures required. See August 8, 2014 *Case Management Order*, pp. 7-8 (No. 9506). The *Case Management Order* provides that:

> Objectors should also describe with specificity which of the Settlement Parties' allegations are disputed, state why their objections should be sustained or not overruled at this time, support their legal positions with materials which demonstrate either that (1) the factual position at issue is not disputed or (2) further proceedings are required to address relevant factual matter. <u>If any party filing a response asserts that additional procedures are required before the Court addresses his/her objections to approval of the Settlement Agreement, those parties shall set forth those procedures and the reasons those procedures are required.</u>

Id. (emphasis added). The Atencio Objectors have failed to provide any support for their position.

2. The Settlement Agreement is Fair

The Atencio Objectors complain in Section V of their *Response* – entitled "The Settlement Agreement is Not Fair" – that the Settlement Agreement is unfair to those who do not presently have a water right. As discussed above, those who do not have a water right have no standing in this water rights adjudication lawsuit to object to the Settlement Agreement, and the Atencio Objectors have no standing to speak for them.

The Atencio Objectors further argue that the Settlement Agreement is unfair because the regional water system omits portions of the Nambe-Pojoaque-Tesuque stream system from service and the feasibility of the Regional Water System is not a condition precedent to approval of the Settlement Agreement. As already discussed in the State, County and City's *Memorandum*, and as already held by the Court, issues involving the design or feasibility of the Regional Water System are not presented by the Settlement Agreement, Partial Final Decree or Interim Administrative Order. See *Memorandum* at 61-62 and September 12, 2014 *Memorandum Opinion and Order Overruling Objection to Magistrate Judge's order Denying Motion for Partial Stay* at 3 ("Defendants have not shown that the requested documents are relevant to the determination of whether the Settlement Agreement is fair, adequate, reasonable, in the public interest, or consistent with applicable law.") (9674).

In sum, the Atencio Objectors have failed to meet the standard set by the court. They have not shown the Settlement Agreement is inconsistent with applicable law, nor have they demonstrated the Settlement Agreement is unfair, and they have not objected on any other basis. Moreover, they have failed to establish that they would be harmed by the Court's approval of the Settlement Agreement and entry of the Partial Final Decree and Interim Administrative Order. As such, they have no standing to object, and the arguments contained in their *Response* should

all be rejected.

V. Conclusions.

Both the *Dunn Response* and *Atencio Response* fail to describe any specific harm the Objectors would suffer by entry of the Partial Final Decree. They further fail to address with specificity why approval of the Settlement Agreement is "not fair, adequate, reasonable, is not in the public interest, or is not consistent with applicable law." The State, County and City have met the fair and reasonable standard for approval of the Settlement Agreement, and no party has objected to the Pueblos' water rights described in the Settlement Agreement and in the Partial Final Decree, which are in any case no more extensive than could have been arrived at by litigation. The Court should therefore approve the Settlement Agreement and enter the Partial Final Decree and Interim Administrative Order.

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

Respectfully submitted this 4th day of February, 2015.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on February 4, 2015 I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.