No. 17-2147

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, ex rel. State Engineer,
Plaintiff-Appellees, and

UNITED STATES OF AMERICA,
Plaintiff-Appellee, and

SANTA FE COUNTY, *et al.*,
Defendants-Appellees
v.

NANSY CARSON, *et al.*,
Defendants-Appellants, and

BG & CO, LLC, *et al.*,
Appellants

Appeal from the United States District Court for the District of New Mexico,
Case No. 6:66-cv-6639-WJ/WPL

ANSWERING BRIEF FOR THE UNITED STATES OF AMERICA
(ORAL ARGUMENT REQUESTED)

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STATEMENT OF RELATED CASES

This court has heard one prior interlocutory appeal in this general stream adjudication: *New Mexico ex rel. State Engineer v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

This court denied a petition for interlocutory review of the district court's opinion in *New Mexico ex rel. State Engineer v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985). Supp. App. 277.

This court has also dismissed, for lack of jurisdiction, an earlier interlocutory appeal filed by Appellants Nansy Carson et al. regarding objections now before the Court on final judgment. *See New Mexico ex rel. State Engineer v. Aamodt*, No. 16-2253, 2017 WL 3725306 (Jan.9, 2017).

INTRODUCTION

The State of New Mexico ("State") initiated this general adjudication of all rights to use water within the Pojoaque River Basin in 1966. The district court issued a final judgment as to all parties and all claims on July 14, 2017. The judgment adjudicated the water rights of the Pueblo de Nambé, the Pueblo de Pojoaque, the Pueblo de San Ildefonso, and the Pueblo de Tesuque (collectively, the "Pueblos") in accordance with the terms of a Congressionally-approved Settlement Agreement ("Settlement") among the State, the United States, the Pueblos, the County of Santa Fe, the City of Santa Fe, and numerous private water users. Appellants ("Objectors") are private water users and parties to the general adjudication who objected to the Settlement. Objectors do not challenge the amounts and priorities decreed in favor of the Pueblos. Rather, Objectors challenge Settlement terms that call for alternative (non-priority) water-rights administration among settling parties. Objectors contend that these agreements alter the priority of water rights of non-settling parties and that this purported change in New Mexico law goes beyond the settlement authority of the State's executive-branch officials. As explained herein, Objectors fundamentally misconstrue the Settlement and Final Decree, which do not alter the rights of non-settling parties. Non-settling parties retain all rights of priority enforcement that they would possess without the Settlement. The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction because the United States joined the action as Plaintiff, 28 U.S.C. § 1345, and because the action involved water rights arising under federal law, 28 U.S.C. § 1331; *see also New Mexico ex rel. State Engineer v. Aamodt*, 537 F.2d 1102, 1105, 1109-13 (10th Cir. 1976) ("*Aamodt I*").

(b) This Court has jurisdiction under 28 U.S.C. § 1291. The district court's judgment is final because it resolved all claims by all parties. App. 1046-50, 1048 (¶ 9); *see also infra*, pp 18-20.[1]

(c) The district court issued its final judgment on July 14, 2017. App. 591, 1050. Objectors filed a notice of appeal on September 6, 2017. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(i) and 4(a)(2); *see also* 28 U.S.C. § 2107(b)(3).

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[1] In its final judgment, the district court also found "no just reason for delay" and directed "entry of the Final Judgment and Decree pursuant to Fed. R. Civ. P. 54(b)." App. 1046, 1048-49 (¶ 13), 1050 (¶ 7). Rule 54(b) certification was unnecessary because the judgment resolved all claims by all parties. While the final judgment notes that the "water rights herein may in the future be subject to general inter se proceedings involving all adjudicated rights of the Rio Grande stream system and its tributaries," App. 1048 (¶ 12), such inter se claims involving claimants outside the Pojoaque Basin would be beyond the scope of the present adjudication, which was limited to the Pojoaque Basin. *See* App. 1048 (¶ 9) ("this Decree . . . finally adjudicates all water rights in the Pojoaque Basin and binds all claimants of water rights of any type in the Pojoaque Basin"). To the extent that the final judgment fails to conform to the requirements of Federal Rule 58(a) that "every judgment must be set out in a separate document," 150 days have elapsed since the judgment was entered on the civil docket, App. 591 (Document No. 11560), resulting in the entry of final judgment by rule. *See* Fed. R. Civ. P. 58(c)(2)(B).

ISSUES PRESENTED

1. Whether the final judgment and decree of water rights for the Pojoaque River Basin, in accordance with the Pueblo Water Rights Settlement, is contrary to New Mexico water law, or constitutes a substantive change in New Mexico law that can be accomplished (lawfully) only via State legislative enactment; and

2. Whether the New Mexico Attorney General, State Engineer, and Governor violated a New Mexico statute establishing an Indian water rights settlement fund, N.M. Stat. Ann. § 72-1-12, when executing the Settlement without advance legislative authorization.

STATEMENT OF THE CASE

A. Background

1. Pojoaque Basin

The Rio Pojoaque is a short tributary (approximately seven miles long) of the Rio Grande. *See New Mexico ex. rel. State Engineer v. Aamodt*, 618 F. Supp. 993, 995 (D.N.M. 1985) ("*Aamodt II*"). The Rio Pojoaque is formed by the confluence of the Rio Nambé (approximately 15-miles long) and the Rio Tesuque (approximately 19 miles long), which originate on the western slope of the Sangre de Cristo Mountains in the Santa Fe National Forest. *Id.* As defined in the settlement discussed below, the Pojoaque Basin comprises all tributaries and lands that drain to the Rio Pojoaque, as well as specified lands that drain to the Rio Grande near its

confluence with the Rio Pojoaque. *See* Aamodt Litigation Settlement Act ("Settlement Act"), Pub. L. No. 291-111, § 602(13), 124 Stat. 3064, 3135 (2010).

Most lands within the Pojoaque Basin are within the exterior boundaries of the Pueblos. *Aamodt I*, 537 F.2d at 1105. The Pueblo de Nambé and Pueblo de Tesuque lie along stretches of their namesake rivers. *Aamodt II*, 618 F. Supp. at 995-96. The Pueblo de Pojoaque lies at the confluence of the Rio Nambé and Rio Tesuque, where they join to form the Rio Pojoaque. *Id.* The Pueblo de San Ildefonso lies on the Rio Grande, where it is joined by the Rio Pojoaque. *Id.* The Pueblos have existed in these locations and have irrigated from the named rivers since at least 1540. *Id.* at 996.

The Pueblos hold fee simple title to their original grant lands and water rights, subject to federal restrictions on alienation. *Aamodt I*, 537 F.2d at 1111. The United States is the trustee of Pueblo lands and water rights in accordance with the federal government's relationship with Indian tribes. *Id.* at 1111-1113. The United States also owns water rights on National Forest lands within the Pojoaque Basin. *Aamodt II*, 618 F. Supp. at 995-96. In addition, there are private lands within the Basin, including a relatively heavily-developed area of private land on the Rio Tesuque drainage just north of Santa Fe. *Id.* Some of these private lands are on former Pueblo lands as a result of the Pueblo Lands Act of 1924, which recognitzed certain private claims within the Pueblos. *Aamodt I*, 537 F.2d at 1005.

2. *New Mexico Water Law*

Under New Mexico law, the State Engineer "has general supervision of waters of the state," including the "measurement, appropriation, [and] distribution" of such water. N.M. Stat. Ann. § 72-2-1. The waters of the state include surface waters "flowing in streams and watercourses," *id.* § 72-1-1, and "underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries," *id.* § 72-12-1; *see also id.* §§ 72-12-18, 20. Any person may appropriate state waters for beneficial use, subject to principles of prior appropriation and applicable statutory requirements. *See Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 463-65 (N.M. 2013); N.M. Const. Art. XVI, §§ 2-3.

Since 1907, New Mexico has required any water user to obtain a permit from the State Engineer before appropriating surface water. 1907 N.M. Laws, ch. 49, § 24; *see also* N.M. Stat. Ann. § 72-5-1 (present codification). In 1931, New Mexico enacted a similar requirement for groundwater. 1931 N.M. Laws, c. 131, § 3; *see also* N.M. Stat. Ann. §§ 72-12-3.[2] Although the permitting regimes differ, rights in surface streams and groundwater are substantively "identical" and jointly

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[2] In 1953, New Mexico limited this requirement to "basins declared by the State Engineer to have reasonably ascertainable boundaries." 1953 N.M. Laws, c. 65, § 3; *see also* N.M. Stat. Ann. § 72-12-20 (present codification). The State Engineer has since declared individual groundwater basins throughout most of the State. *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372, 376 (N.M. App. 1993).

administered where they are hydrologically interconnected. *City of Albuquerque v. S.E. Reynolds*, 379 P.2d 73, 79-80 (N.M. 1963).

The New Mexico statutes requiring permits for water appropriation did not apply to water rights perfected by appropriation and beneficial use before the enactment of the relevant statute. *See* N.M. Stat. Ann., §§ 72-5-31, 75-12-4; *see also* N.M. Const. Art. XVI, § 1; *State v. Elephant Butte Irrigation District*, 287 P.3d 324, 327 (N.M. App. 2012). To enable the determination of such preexisting water rights, and to facilitate the joint administration of all water rights on common stream systems, the 1907 Act also contained provisions for general stream adjudications. *See* 1907 N.M. Laws, ch. 49, §§ 20-22; *see also State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 663 P.2d 358, 359 (1983)).

As amended, the statute directs the State Engineer to "make hydrographic surveys and investigations of each stream system," for the purposes of "obtaining and recording all available data for the determination, development, and adjudication" of such system. N.M. Stat. Ann. § 72-4-13. The statute directs the State Attorney General, after the completion of a hydrographic survey and request by the State Engineer, to "enter suit on behalf of the state for the determination of all rights to the use of such water." *Id*. § 72-4-15); *see also Reynolds*, 663 P.2d at 359. Under New Mexico law, the State Engineer shall supervise apportionment of waters

within any stream system "according to the licenses issued by him and his predecessors and the adjudications of the courts." N.M. Stat. Ann. § 72-2-9.

3. Pojoaque Basin Adjudication

In 1966, pursuant to the above statutes, New Mexico initiated the present general stream adjudication to determine all rights to the use of water in the Pojoaque Basin. *See Aamodt I*, 537 F.2d at 1105-6. To foreclose any issue of sovereign immunity, the United States intervened as plaintiff to protect its own proprietary rights and in its capacity as trustee for the Pueblos. *Id.* at 1105. The Pueblos also sought to intervene on their own behalves through private counsel and this Court held that they were so entitled. *Id.* at 1106-07. The County of Santa Fe and City of Santa Fe were named defendants, as were thousands of individual water users. *Id.*

Early proceedings in the district court focused on the legal basis of the Pueblos' water rights. The district court initially held that the Pueblos' rights are governed by the state law of prior appropriation, but in an interlocutory appeal, this Court reversed. *Id.* at 1108-14. In accordance with the Treaty of Guadalupe Hidalgo, Congress confirmed in 1858 that the Pueblos hold fee simple title to specified lands, as first recognized by Spain and Mexico. *Id.* at 1105, 1111. Because this confirmation of preexisting rights did not constitute a federal reservation of public lands for the Pueblos, this Court deemed precedent on

federally-reserved water rights to be "technically" inapplicable. *Id.* at 1108-09, 1111 (referring to *Winters v. United States*, 207 U.S. 564 (1912)). Nonetheless, because the United States has never "relinquished jurisdiction and control over the Pueblos" or "placed their water rights under New Mexico law," this Court held that the Pueblos' water rights appurtenant to their grant lands are governed by federal law. *Id.* at 1111-13.

On remand, the district court held that the Pueblos have "aboriginal" or "prior rights"—ahead of all other claimants—"to use all of the water of the stream system necessary for their domestic uses and . . . to irrigate their [original title] lands," excluding only land and appurtenant water rights terminated by the 1924 Pueblo Lands Act. *Aamodt II*, 618 F. Supp. at 1010. Such rights, the district court held, are in "the surface waters of the stream systems" and in the hydrologically related groundwater. *Id.* In later orders, the district court held that the Pueblos' also have aboriginal water rights on "restored" lands, *i.e.*, lands within the original title areas that were terminated by the Pueblo Lands Act but reacquired by the Pueblos. *See* Supp. App. 149-154; *see also* Supp. App. 90-120. In addition, the district court acknowledged federally-reserved or "*Winters*" water rights on additional lands set aside by a 1902 Executive Order for the Pueblo de Nambé. *Aamodt II*, 618 F. Supp. at 1010; *see also* Supp. App. 169-172 (vacating special master's report declining to find *Winters* right).

The parties initiated and ultimately completed settlement negotiations before the district court had the opportunity to finally determine and quantify all of the Pueblos' water rights, for irrigation, livestock, domestic, or other uses. The district court did hold, however, that the Pueblos' "first priority" irrigation rights are based on lands irrigated between 1846 and 1924, *Aamodt II*, 618 F. Supp. at 1010, and the district court preliminarily determined such "historically-irrigated acreage" for each Pueblo. *See* Supp. App. 80-82; *see also* Supp. App. 149-154. These and other preliminary rulings indicated: (1) that the Pueblos possessed first-priority rights to divert, for irrigation purposes alone, a substantial majority of the entire average annual surface flow in the Pojoaque Basin, *see* Supp. App. 255 (¶¶ C & D); (2) that the Pueblos' first priority irrigation rights in the Rio Tesuque equal or exceed the average annual flow of that river, *id.*; and (3) that Pueblo and non-Pueblo irrigation rights combined are more than double the average annual surface flows in the Pojoaque Basin, *id.* (¶ D); *see also* App. 731-33.

4. Settlement

Around 1999, the State, the Pueblos, the United States, the County of Santa Fe, and the City of Santa Fe began settlement discussions, in an effort to obtain a comprehensive resolution of the Pueblos' water rights that would also protect existing private rights. *See* Supp. App. 131-142, 155-57, 173-74. The district court appointed a mediator to facilitate these discussions and generally supervised the

settlement efforts. *See* Supp. App. 174 (¶ 2). Representatives of various private water users also participated in the negotiations. Supp. App. 133, 138, 156, 177. The parties reached a preliminary settlement in 2006. Supp. App. 182-188. The settlement was made possible by commitments from the United States and Santa Fe County to acquire and deliver additional water from outside the Pojoaque Basin to Basin water users, via a Regional Water System. *See generally* App. 1066, 1068-70, 1098 (Settlement, §§ 2.5, 2.8, 9.6, 9.7)

In 2010, Congress approved the settlement, subject to various conditions and conforming amendments. *See* Aamodt Litigation Settlement Act, Pub. L. 111-291, §§ 601-626, 124 Stat. 3134-3156. Congress authorized the Secretary of the Interior, through the Bureau of Reclamation ("Reclamation"), to design and construct a Regional Water System, to be funded primarily by the United States. *Id.*, § 611, 124 Stat. 3137-40. The system is to have the capacity to supply up to 4,000 acre feet of water per year—2,500 acre feet to the Pueblos and 1,500 acre feet to private water users—through diversions from the Rio Grande, at facilities to be constructed on the Pueblo de San Ildefonso. *Id.* §§ 611(a), 611(f), 614(a), 124 Stat. at 3137-38, 3143.

To supply the Pueblos' water for the Regional Water System, Congress authorized the Secretary: (1) to expend $5.4 million to purchase 1,141 acre feet of water rights, which the County had acquired from the "Top of the World Farm," *id.* §§ 613(a)(1)(B), 617(b), 124 Stat. at 3142, 3147; (2) to provide 1,079 acre feet of

water, by contract, from the existing San Juan-Chama Project, *id.* § 613(a)(2), 124 Stat. at 3142; and (3) to acquire the Nambé Pueblo's reserved water right of 302 acre, *id.* § 613(a)(1)(A), 124 Stat. at 3142. Congress also authorized more than $100 million in federal funding for design and construction costs, as well as additional funding for operations and maintenance and infrastructure improvement. *Id.* §§ 617(a), (c), 124 Stat. at 3147-48. As a condition of the federal funding, Congress specified that the County and State pay the costs of constructing the distribution system for non-Pueblo users. *Id.* § 611(f)(3), 124 Stat. at 3138. The County also agreed to provide additional "Top of the World" water rights to non-Pueblo users. App. 1098 (Settlement § 9.6.4).

The Settlement Act authorized the Secretary to execute the Settlement and waive all water-rights claims on behalf of the Pueblos "except to the extent . . . recognized in the Settlement." Pub. L. No. 291-111, §§ 621(b), 624(a), 124 Stat. at 3149, 3154. Under the act, the Settlement and waivers would have ceased to be effective if specified "conditions precedent"—including the approval of the Settlement by the district court and the entry of a final judgment in the present adjudication—were not completed by September 15, 2017. *Id.* § 623, 124 Stat. at 3150-51. As discussed below, that deadline was met. *See* 82 Fed. Reg. 43,400 (Sept. 15, 2017) (Secretary of Interior's certification that all conditions precedent to settlement had been met).

In October 2013, the State submitted the Settlement to the district court for approval, along with a certification that all necessary conforming amendments had been made. *See* App. 937. In December 2013, the district court issued a "show cause" order, providing all water claimants in the Pojoaque Basin notice of the terms of Settlement and the opportunity to object to a proposed Partial Final Decree that would adjudicate the Pueblos' rights in accordance with the Settlement. *Id.*

B. Settlement Terms

1. Pueblo Water Rights

Consistent with the district court's preliminary rulings on the nature and extent of the Pueblos' water rights, the Settlement establishes, for each Pueblo, a "time immemorial" or "first priority" right, senior to all other users, to use consumptively a specified maximum amount of water from combined surface and groundwater diversions. App. 1059-1060 (§§ 2.1.1, 2.1.2, 2.1.4). The Settlement then divides these first-priority rights into "Existing" and "Future" basin use rights, for purposes of implementing various forbearance agreements, i.e., agreements to limit the exercise of the Pueblos' water rights in specified circumstances. App. 1062-1066 (§ 2.3, 2.4).[3]

[3] The terms "Existing Basin Use Right" and "Future Basin Use Right" are constructs developed for the Settlement. *See* App. 1062-66. These terms do not represent limitations on the Pueblos' first-priority rights that would apply absent the Settlement. *See generally Aamodt II*, 618 F.Supp. at 1005-11 (discussing legal basis and nature of Pueblos' water rights).

Under the Settlement, the Pueblos (and the United States as their trustee) agreed to significant restrictions on the Future Basin Use rights. App. 1063-66 (§ 2.4), App. 1086 (§ 4.2). The Pueblos may develop new water uses, App. 1063-64 (§ 2.4.3, 2.4.4), but the Pueblos' Future Basin Use rights generally may not be enforced, in priority, against non-Pueblos users. App. 1086 (§ 4.2); *see also* App. 1063-65 (§§ 2.4.3, 2.4.4). The Pueblos may not make priority calls for new agricultural or commercial uses and must offset any interference with non-Pueblo surface-water rights. App. 1063-64 (§ 2.4.3, 2.4.4). In addition, the Settlement establishes a fund to compensate non-Pueblo groundwater users whose groundwater rights are impaired by new water uses by the Pueblos or changes by the Pueblos in the use of existing rights. App. 1062 (§ 2.3.3); App. 1063-1065 (§§ 2.4.3, 2.4.4.2.3, 2.4.4.4.4); App. 1089 (§ 5.5).

In contrast, the Pueblos' Existing Basin Use rights—which are based on current consumptive use for irrigation, domestic and community, livestock, commercial, and industrial purposes—generally may be enforced in priority against non-Pueblo water users. App. 1059 (§ 2.1); App. 1062 (§ 2.3.1, n.1); App. 1085 (§ 4.1.1). But there are significant exceptions to this rule. First, the Settlement imposes use limitations and protections for non-Pueblo users relating to changes in existing uses by the Pueblos. App. 1062 (§§ 2.32-2.34). Second, with respect to surface-water diversions from the Rio Tesuque, the Settlement limits priority

enforcement of the Tesuque Pueblo's Existing Basin Use rights, as against upstream non-Pueblo users, to diversions necessary to irrigate 71 acres of the Tesuque Pueblo. App. 1085 (§ 4.1.2). Third, all Pueblos (and the United States as their trustee) agreed that Pueblo water rights will not be enforced against non-Pueblo groundwater users who agree to limit their own basin water use in accordance with specified terms. *See infra*, p. 16.

The Pueblos' stipulated first-priority rights, in terms of consumptive use in acre feet per year ("AFY"), are summarized as follows:

	Nambé	Pojoaque	San Ildefonso	Tesuque
First-Priority Rights	1,459	236	1,246	719
Existing Basin Use	522	236	288	345
Future Basin Use	937	0	958	374

App. 1059, 1071 (§§ 2.1.2, 2.11). The Settlement also recognizes a reserved water right for Pueblo de Nambé (302 AFY with a priority date of 1902) to be used for the Regional Water System, App. 1066-67 (§ 2.6.2), and a reserved water right for Pueblo de San Ildefonso (4.82 AFY with a priority date of 1939) to be used for grazing on the San Ildefonso Eastern Reservation. App. 1066 (§ 2.6.1). In addition, the Settlement contains provisions governing the Pueblos' use of "acquired" water from outside the Pojoaque Basin, to be delivered through the Regional Water System. *See generally* App. 1060 (§ 2.2), 1066-70 (§§ 2.6-2.8).

2. *Non-Pueblo Water Rights*

The Settlement did not determine the extent or priority of existing non-Pueblo water rights, leaving those matters for determination in the general adjudication. For groundwater rights, the Settlement generally provides that priority dates and quantities shall be "as adjudicated in the sub-file order for each well." *See* App. 1072 (§§ 3.1.1, 3.1.2). Sub-file adjudications are between a water user and the State and are subject to later inter se challenges by other users. *See Reynolds*, 663 P.2d at 700. In the Settlement, the Pueblos and United States as trustee for the Pueblos agreed *not* to make inter se challenges to the sub-file adjudications on groundwater rights. App. 1072 (§ 3.1.3). For surface-water rights, the Settlement provides that quantities shall be as adjudicated in the sub-file, App. 1084 (§ 3.2.2), and that priority dates shall be as agreed to between the user and the State or as adjudicated by the Court, subject to inter se challenges. App. 1083 (§ 3.2.1).

Under the Settlement, the United States is a "non-Pueblo" water user in its "proprietary capacity" as owner of water rights on National Forest lands. App. 1057 (§ 1.6.22). The Settlement acknowledges these federal rights, as earlier adjudicated by the district court. App. 1085 (§ 3.4).

3. *Additional Protections for Well Users*

For the most part, the forbearance agreements described above apply to all existing non-Pueblo water uses, whether or not the users join the Settlement.[4] *See* App. 1057, 1059 (§§ 1.6.21, 1.6.33) (defining "non-Pueblos" and "Section 4 Protection" afforded to "non-Pueblo water rights"); *see also* App. 1081 (§ 3.1.7.5) (non-Pueblo agricultural uses from wells protected whether or not user makes election). As also noted above, however, the Settlement contains added protections for non-Pueblo well users who join the Settlement by electing any one of three options. App. 1075-82 (§ 3.1.7); App. 1086-87 (§ 4.4). Specifically, a well user's water rights will not be subject to priority enforcement—in relation to *any* Pueblo water rights—if the user agrees: (1) to connect to the County Water Utility ("CWU"), the part of the Regional Water System for non-Pueblo users, as soon as service is available; (2) to retain well-rights in perpetuity with specified permanent use limits; or (3) to connect to the CWU upon a transfer of the subject property, subject to interim use limits. App. 1075-1076 (§ 3.1.7.2). The Settlement establishes a fund to assist users who elect to connect upon first availability, App. 1076-77 (§ 3.1.7.3), and provides for the relinquishment and transfer of groundwater rights to the CWU after a user connects. App. 1082 (§ 3.1.8.3).

[4] In recognition that "the Pojoaque Basin is fully appropriated," the Settlement provides that "there shall be no new appropriations in the basin after the [Settlement's] Enforcement Date." App. 1087 (¶. 5.1.1).

4. Administration

The Settlement provides that the State Engineer will administer non-Pueblo water rights under State statutory authorities and will function as "Water Master" for purposes of administering the Pueblos' rights and in relation to non-Pueblo rights. App. 1087, 1090-91 (§§ 5.2, 5.6). The State Engineer, the United States, and the Pueblos agreed to develop rules, in consultation with the other settling parties, to govern the State Engineer's authorities as Water Master. App. 1088-89 (§ 5.3).

The State Engineer had already promulgated "Active Water Resource Management" rules for the administration of State-law water rights. N.M. Admin Code § 19.25.13; *see also* N.M. Stat. Ann. § 72-2-8 (authority to issue regulations). Those rules provide for specified forms of priority administration, including "direct flow administration," under which junior surface water rights may be curtailed to enable diversions by senior rights, *see* N.M. Admin. Code, § 19.25.13.7(C)(1), and "depletion limit administration," under which junior groundwater rights may be curtailed to protect senior surface flows, *see id.* § 19.25.13.7(C)(3). The general rules also allow for "alternative administration" based on a "water sharing agreement among affected water rights owners." *Id.* § 19.25.13.7(C)(4).

In September 2017, the State Engineer, with the agreement of the United States and the Pueblos, promulgated rules for the Pojoaque Basin. *Id.* § 19.25.20. The Pojoaque Basin rules provide that the State Engineer may implement priority

administration in the Basin, as well as the alternative administration agreed to in the Settlement. *Id.* §§ 19.25.20.119(A)-(C). The rules further provide that non-settling parties "have the same rights and benefits" including rights to priority administration "that would be available without the settlement agreement" and that their rights "shall only be curtailed under Pueblo alternative administration to the extent such curtailment would occur without the settlement agreement." *Id.* §§ 19.25.20.119(D)-(E).

C. Settlement Approval and Final Judgment

Approximately 800 objections were filed in response to the district court's show cause order. *See* App. 937. The district court held the objecting parties to the burden of showing that the Pueblos' rights "should not be quantified and administered" as set out in the Settlement. App. 938. To make this showing, the district court determined that any objector had to show that the Settlement terms were: (1) "not fair, adequate, [or] reasonable," (2) "not in the public interest," or (3) "not consistent with applicable law." *Id.* The district court also required any objector to show how his or her rights would be "injured or harmed by the Settlement . . . in a legally cognizable way." *Id.*; *see also New Mexico ex rel. State Engineer v. Aamodt*, 582 F.Supp.2d 1313, 1317-18 (D.N.M. 2007) (earlier opinion setting out standard for review of settlement).

The present Objectors (identified in the district court as the "Dunn group") principally argued that the Settlement is contrary to law because it alters the State-law priority system and because the Attorney General and other State officials who executed the Settlement lacked authority to make that change without the approval of the New Mexico legislature. App. 820, 827-30, 838-47; *see also* App. 1108 (Settlement signatures, on behalf of New Mexico, by the Governor, Attorney General, and State Engineer). In an opinion issued on March 21, 2016, the district court held that the Attorney General had the power to execute the Settlement pursuant to his power to "compromise or settle" any civil proceeding in which the State is party. App. 940-41 (quoting N.M. Stat. Ann. § 36-1-22), *published at New Mexico ex rel. State Engineer v. Aamodt*, 171 F. Supp. 3d 1171 (D.N.M. 2016). The district court observed that the Settlement does not change priority dates, and that the agreements regarding non-priority administration were subject to the rules to be agreed upon by the State Engineer, the United States, and the Pueblos, which had then not yet been promulgated. App. 952-53. For these reasons, the district court deemed Objectors' argument regarding the alleged change to priority administration to be "speculative and premature." App. 953.

The district court issued a partial final judgment and decree, finally adjudicating the water rights of the Pueblos, on March 23, 2016. App. 959. The partial decree sets out the extent, priority, and other elements of the Pueblos' water

rights in accordance with the Settlement, and it directs that the administration of the Pueblos' rights, including priority enforcement against non-Pueblo rights, "shall be in accordance with the Settlement." App. 961-70. Objectors filed a motion to alter or amend, arguing, for the first time, that a New Mexico statute—N.M. Stat. Ann. § 72-1-12, which established an Indian water rights settlement fund—mandates State legislative approval for all Indian water-rights settlements. App. 1017-20. Rejecting Objectors' statutory interpretation, the district court denied the motion. App. 1044-45.

On December 9, 2016, the State moved for the entry of a final judgment and decree of water rights for the Pojoaque Basin, subject only to the resolution of final inter se proceedings on non-Pueblo water rights. Supp. App. 262-65. On June 30, 2017, the court-appointed special master reported that all inter se objections to non-Pueblo rights had been withdrawn or dismissed, without any appeals having been filed. Supp. App. 274-76. Thereafter, on July 14, 2017, the district court issued its final judgment and decree ("Final Decree" or "Decree"), bringing to close more than fifty years of trial proceedings. App. 1046-50. The Final Decree incorporates the prior rulings setting out the Pueblos' rights and the United States' proprietary rights, App. 1047 (¶¶ 3-4); App. 1049 (¶¶ 2-3), and it sets out all non-Pueblo rights (including the rights of Objectors) in an addendum, App. 1047 (¶ 5); App. 1049 (¶ 4).

SUMMARY OF ARGUMENT

Objectors' arguments are based on a fundamental misunderstanding of the Settlement. Objectors presume, incorrectly, that the Settlement mandates alternative (non-priority) administration for all water users in the Pojoaque Basin. Based on this misconception, Objectors argue that the Settlement violates State law on prior appropriation and is void without State legislative approval. But the Settlement provisions on alternative administration are binding only on parties who opt to join the Settlement. As stated in the administrative rules for the Pojoaque Basin adopted pursuant to the Settlement, non-settlement parties retain all "rights and benefits," including rights of priority administration, that they would have "without the Settlement." In contrast, the Final Decree does finally adjudicate the amounts and priorities of all water rights in the Pojoaque Basin, including the Pueblos' Water Rights, as stipulated in the Settlement. But Objectors do not challenge those rulings.

Objectors also misconstrue the 2005 New Mexico statute (N.M. Stat. Ann. 72-1-12) creating the Indian Water Rights Settlement Fund. That statute does *not* reserve, to the State legislature, general authority to approve all Indian water rights settlements involving the State. Rather, the statute requires State legislative approval prior to the expenditure of State money from the settlement fund. The New Mexico legislature has repeatedly authorized the use of such funds for the Settlement in the present case.

STANDARD OF REVIEW

When reviewing a proposed consent decree, a district court asks whether the decree is "fair, adequate, and reasonable," consistent with the public interest, and not contrary to law. *United States v. State of Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). This Court reviews a district court's decision to approve a consent decree for abuse of discretion. *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1102 (10th Cir. 2004). Whether a consent decree "affects rights derived from state law" is an issue of law reviewed de novo. *Id.*

ARGUMENT

I. THE FINAL DECREE DOES NOT CHANGE STATE LAW ON PRIORITY ADMINISTRATION

Objectors argue (Brief at 24-44) that the Settlement and Final Decree are contrary to law—or void without State legislative approval—because they allegedly change State law on priority administration. This argument fails for three reasons: (a) Objectors did not make or preserve any challenge to the actual amounts and priorities of the Pueblos' water rights; (b) State law allows agreements among water users for alternative (non-priority) administration that do not impair the rights of other users; and (c) Objectors have not shown, and cannot show, that their water rights will be impaired by the Settlement's provisions on alternative administration.

A. Objectors Did Not Make or Preserve Any Challenge to the Water Rights and Priorities Set Out in the Final Decree

As explained above (pp. 7-9, 12), the Pueblos' decreed water rights in the Pojoaque Basin—i.e., the "first priority" water rights of each Pueblo and the reserved water rights for Pueblo de Nambé and Pueblo de San Ildefonso—are based on preliminary rulings by this Court and the district court on the nature and extent of the Pueblos' rights under applicable law, and on arms-length negotiations between the settling parties that completed the quantification of the Pueblos' rights in accordance with the preliminary rulings. As further explained above (pp. 15, 20), the decreed rights and priorities of all non-Pueblo water claimants (including Objectors) were separately adjudicated by the district court, via sub-file and inter se proceedings outside of the Settlement. As the district court correctly observed, the Settlement and Final Decree did "not change priority dates." App. 952. The Final Decree declared the preexisting rights and priorities of the Pueblos and all other claimants in the Pojoaque Basin, consistent with applicable law.

In the Settlement-review proceedings in the district court, Objectors did not challenge the amounts and priorities assigned to the Pueblos' water rights or contend that such amounts and priorities are contrary to law, or unsupported by record evidence. *See* App. 820-48. Nor do Objectors attempt (belatedly) to raise such arguments now. *See Objectors' Brief* at 9-49. Consequently, the amounts and priorities of the Pueblos' water rights are no longer subject to review. *Schrock v.*

Wyeth Inc., 727 F.3d 1273, 1284 (10th Cir. 2013) (arguments not raised in district court are forfeited); *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n. 7 (10th Cir. 2009) (arguments not raised in opening brief are forfeited).

In their opening brief, Objectors do repeat one argument summarily made below, namely, that the Pueblos' decreed water rights are not in accordance with New Mexico law because those rights were "not established by beneficial use prior to 1907." *Compare Brief* at 44 *and* App. 847.[5] But that argument mistakenly assumes that State law governs the Pueblos' rights. This Court has already held that the Pueblos' water rights are based on federal law and not on New Mexico's law of prior appropriation. *Aamodt I*, 537 F.2d at 1111-13. In the district court, moreover, Objectors declared that they "do not contest that [the] water rights of the Pueblos are and should be adjudicated in accordance with previous decisions of this Court [district court] and the 10th Circuit Court of Appeals." App. 821. Similarly, in this Court (Brief at 46), Objectors assert that "the Pueblos' senior rights to water have

[5] Objectors cite "N.M.S.A. § 19.26.2.8" (Brief at 44), a probable reference to Section 19.26.2.8 of the New Mexico Administrative Code. That rule notes that New Mexico law protects historic water rights acquired by appropriation and beneficial use before the State enacted a permit requirement in 1907. By statute, the holder of a pre-1907 water right may file a declaration with the State Engineer to evidence that right (in lieu of a permit). *See* N.M. Stat. Ann. § 72-1-3. The rule cited by Objectors (N.M. Admin. Code § 19.26.2.8) was promulgated by the State Engineer to implement the statute (N.M. Stat. Ann. § 72-1-3). Both are irrelevant to the issues before the Court.

already been determined" and that the "Pueblos have an aboriginal right to use water to support all acreage irrigated by the Pueblos between 1846 and 1924." On this record, Objectors may not be heard to challenge the Pueblos' decreed water rights and priorities. Rather, Objectors' complaint (*id.*) concerns the Settlement provisions that allegedly "derogate[e] . . . the priority system established by State law."

B. New Mexico Law Permits Agreements on Non-Priority Administration of Water Rights

As a general rule, State-law water rights in New Mexico are administered and enforced in priority. *See Bounds*, 306 P.3d at 463; *see also* N.M. Const. Art. XVI, § 2 ("Priority of appropriation shall give the better right"). Federal reserved rights, and the Pueblos' similar first-priority rights, also "have the attributes of priority and quantity, allowing such rights to be administered within the hierarchy of state water rights." *State ex rel. State Engineer v. Commissioner of Public Lands*, 200 P.3d 86, 94 (N.M. App. 2008).

It does not follow, however, that State-law water rights and federal water rights must be administered exclusively under a strict priority call system. Under the Constitution and statutes of New Mexico, "priority calls" are not the "sole or exclusive means to resolve water shortages" among water rights holders. *State ex rel. State Engineer v. Lewis*, 150 P.3d 375, 386 (N.M. App. 2006). Rather, senior

water rights holders may be "supplied their adjudicated water entitlement by other reasonable and acceptable management methods." *Id.*[6]

Moreover, as acknowledged by the State Engineer's water-resource-management regulations, water rights owners may enter "shortage sharing" agreements for the distribution of water among themselves on an "alternative" or non-priority basis. N.M. Admin. Code § 19.25.13.7(C)(4). Such agreements may include, for example, agreements for "pro rata allocation, rotation of water use, [or] reduced diversions." *Id.* Third-party water users whose rights are unimpaired by such agreements lack standing to object to the alternative administration. *See In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102-03 (10th Cir. 2011); *Murken v. Solv-Ex Corp.*, 136 P.3d 1043, 1045 (N.M. 2006).[7]

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[6] In *Lewis*, non-settling parties within an irrigation district challenged a legislatively-authorized settlement in which the district agreed (over their objections) to forego priority calls in exchange for other assurances regarding water supply. 150 P.3d at 379-82. In holding that the settlement did not violate State constitutional provisions that protect water rights acquired by prior appropriation, the court did not address whether the Attorney General and State Engineer could have executed the settlement, on behalf of the State, without authorizing legislation. *Id.* at 383-89. In contrast to the objectors in *Lewis*, who lost the ability to make priority calls, *id.* at 381-82 (limiting individual users' rights to the diversion and deliver rights agreed to by the district), the non-settling parties in the present case retain all "rights and benefits," including rights to priority administration, "that would be available without the settlement agreement." N.M. Admin. Code § 19.25.20.119(E); *see also infra*, pp. 27-31.

[7] Objectors have Article III standing to assert injury from the Final Decree, which is binding on all parties. For reasons explained herein, however, Objectors have not suffered legal injury from the district court's approval of alternative administrative

C. The Settlement Does Not Impair Objectors' Water Rights

Objectors appear to acknowledge (Brief at 3) that the alternative-administration provisions of the Settlement are not binding on Objectors or other non-settling parties.[8] Nonetheless, Objectors contend (*id.* at 8, 42) that the Settlement "negatively impacts" and "punishes" non-settling parties, by altering their priorities vis a vis non-Pueblo settling parties, as a penalty for declining to settle. This contention misconstrues the Settlement and Final Decree.

As described above (pp. 12-14, 16), the Settlement includes two types of forbearance agreements. First, the Pueblos (and the United States as their trustee) agreed to substantial limitations on the exercise of the Pueblos' "Future Basin Use" rights and certain additional limitations on the exercise of "Existing Basin Use" rights, including limitations on surface-water diversions. These limitations do not depend upon agreements by non-Pueblo water users to limit their surface diversions

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provisions for the water rights of settling parties, and thus lack standing to object to the Final Decree on that basis.

[8] As Objectors observe (Brief at 42), they are bound by the Final Decree's declaration of rights and priorities, *see* App. 961-70, 1048 (¶9), 1049-50, and thus may be impacted by priority enforcement. Impacts to water rights that result from the enforcement of water-rights priorities, however, do not constitute unlawful impairment. *Cf.* N.M. Stat. Ann. § 72-2-9.1 (directing State Engineer to adopt rules for priority administration that ensure "no impairment of water rights, other than what is required to enforce priorities.").

or groundwater use, and these limitations will generally benefit *all* users within the Pojoaque Basin. Objectors are not injured by self-imposed diversion limits on the Pueblos' water rights.

Second, the Pueblos (and the United States as their trustee) further agreed that "the Pueblos' rights . . . shall not be enforced against [any] Settlement Party" who elects to cease or limit groundwater use in compliance with one of the three options specified in the Settlement. App. 1086 (§ 4.4). As Objectors observe (Brief at 3-4, 8, 47), this latter commitment does not apply to groundwater users who decline to make an election under the Settlement. Thus, there is a possibility that the Pueblos' water rights could be enforced against non-settling groundwater users, at times when settling groundwater users with rights junior to non-settling parties are able to continue water use under the Settlement.

Nonetheless, contrary to Objectors' arguments (*id.*), this prospect by itself does not demonstrate an impairment of non-settlers' rights or violate State-law priorities. Objectors assume that any agreement among water users to share water shortages necessarily will impact priority rights of users not party to the agreement. That is not correct. For example, users on a ditch who have water rights with priority dates of 1850, 1853, 1856, and 1910 might enter an agreement to share water on a pro rata basis. If, during a water shortage, the ditch users are able to call, to the extent of their 1850s priorities, on an upstream right with a priority date of

1900, the 1900 user is not injured or impaired if the 1850s users share such water with the 1910 user, per the terms of their agreement. This is so because the rules of priority use would provide for a call against the 1900 right in any event. Although the circumstances of groundwater use in the Pojoaque Basin and the terms of the present Settlement are more complex than in the foregoing example, the same general rule applies. If the water rights of non-settling groundwater users would be curtailed under priority enforcement notwithstanding the Settlement, such users will suffer no injury if junior groundwater users are able to continue water use under the Settlement.

Moreover, the administrative rules adopted for the Pojoaque Basin under the Settlement firmly embrace this no-impairment principle. *See* N.M. Admin Code § 19.25.20.119(D); *see also* App. 1088 (§ 5.3) (Settlement requirement). Under the rules, non-settlers' water rights "shall *only* be curtailed under Pueblo alternative administration *to the extent such curtailment would occur without the settlement agreement*." N.M. Admin Code § 19.25.20.119(D) (emphasis added). Conversely, if a non-settler's water right would be curtailed by priority enforcement without the Settlement, water administration under the Settlement will have no impact on the non-settler's rights.

Ultimately, whether any non-settler's groundwater rights will be subject to priority enforcement under the Settlement and Final Decree—as implemented

through the administrative rules—will depend on the particular circumstances of the non-settler's water use in relation to Pueblo water use and future water development in the Pojoaque Basin. By importing surface water from the Rio Grande into the Pojoaque Basin and encouraging limitations on groundwater use, the Settlement is designed to reduce the demand for groundwater in the Basin, which should decrease the need for priority administration and thereby benefit all parties, including non-settling parties. Because future enforcement scenarios depend on facts not yet developed, and because the administrative rules mandated by Settlement expressly preclude impairment of non-settler's rights, any complaints that Objectors might have about future enforcement are "speculative and premature," as the district court determined. App. 953; *cf. Bounds*, 306 P.3d at 467 ("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").

In arguing that the Settlement will cause "disparate access to water" as between settling and non-settling groundwater users (Brief at 41), and that such "disparate impacts" implicate "due process" and "equal protection" violations (Brief at 44-49), Objectors completely disregard the commitments made by settling groundwater users. To obtain a guarantee against priority enforcement, Settling groundwater users must either relinquish their groundwater rights in exchange for municipal water (in which case priority enforcement becomes irrelevant) or

permanently limit groundwater usage at all times, including when their rights (without the Settlement) would not be curtailed by senior priorities. In contrast, non-settling parties may continue to use water to the full extent of their rights except "to the extent . . . curtailment would occur without the [S]ettlement." N.M. Admin Code § 19.25.20.119(D).

In short, the non-settling parties who voluntarily chose to forego the benefits of Settlement are not bound by the Final Decree to reduce or alter their present water usage in any way (assuming usage within their decreed rights) and can suffer no impairment from future priority enforcement that would not occur without the Settlement. Any future enforcement action that holds Objectors to their choice, and correspondingly denies benefits to groundwater users who (unlike Objectors) have made sacrifices under the Settlement, would not be unreasonable or unfair.

II. THE SETTLEMENT DID NOT REQUIRE STATE LEGISLATIVE APPROVAL

Objectors argue that the Settlement is void without State legislative approval: (a) because the Settlement terms are legislative in character, and (b) because a State statute (N.M. Stat. Ann. § 72-1-12) requires State legislative approval for any Indian water rights settlement. Neither argument has merit.

A. New Mexico Law Empowers State Officials to Enter Water Rights Settlements

The New Mexico Attorney General initiated the present general stream adjudication, upon request from the State Engineer, pursuant the State's general adjudication statute. *Aamodt I*, 537 F.2d at 1105-6; N.M. Stat. Ann. § 72-4-15. New Mexico law expressly acknowledges the Attorney General's "power to compromise or settle" "any civil proceedings . . . in which the state may be a party . . ." N.M. Stat. Ann. § 36-1-22. Contrary to Objectors' argument (Brief at 19, 24, 28), this power is not limited to so-called "ordinary suit[s]." N.M. Stat. Ann. § 36-1-22. The statute refers to "*any* civil proceedings . . . *whether the same be* an ordinary suit, scire facias proceedings . . . *or otherwise*." *Id.* (emphasis added). In context, the reference to "ordinary suits" is not a limiting phrase. *Id.* The operative phrase is "any civil proceeding." *Id.*

In any event, Objectors do not argue that general stream adjudications are not "ordinary suits," or that the Attorney General may never settle claims in general stream adjudications. *See Brief* at 19, 24, 28. The State routinely stipulates to the rights of private parties, and Objectors do not challenge that practice. Rather, Objectors argue (*id.* at 19, 28) that the Attorney general lacked authority to enter the present Settlement of the Pueblos' water rights, in light of the Settlement's *substance*, which, in Objectors' view, "changes or creates new law regarding water

rights," "seeks to take property rights of impacted state citizens," and thus raises "separation of powers issues."

As just explained (*supra*, pp. 27-31), this description of the Settlement is inaccurate. The Settlement establishes detailed rules for the administration of the Pueblos' water rights and the rights of other settling parties, which rules apply in lieu of strict priority administration. But, as explained, the State Engineer may accept forms of alternative administration agreed to by "affected water rights owners." N.M. Admin Code § 19.25.13.7(C)(4). And when accepting the "alternative administration" established in the Settlement, *see* N.M. Admin. Code § 19.25.20.119(C), the State Engineer made it clear that non-settling parties "seeking priority enforcement shall have the *same rights and benefits* that would be available without the [S]ettlement." *Id.* § 19.25.20.119(E) (emphasis added).

Thus, when entering the Settlement, State officials did not "make or change law" or legislate new rules for non-settling parties, as Objectors allege (Brief at 22-24). Rather, the Attorney General stipulated to rights and priorities under applicable law, pursuant to the Attorney General's authority to initiate and settle general stream adjudications. *See* N.M. Stat. Ann. §§ 72-4-15, 36-1-22. And the State Engineer accepted agreed-upon methods of "alternative" administration, pursuant to the State Engineer's supervisory authority over the appropriation and distribution of State waters. N.M. Stat. Ann. §§ 72-2-2, 72-2-9.

Contrary to Objectors' argument (Brief at 22-23, 26-29), the present case is not controlled by *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995). That case involved a compact executed by the Governor to authorize casino-style gaming on Indian land. *Id.* at 15. Under the Indian Gaming Regulatory Act, "Class III" or casino-style gaming is "lawful on Indian lands only if" "located in a State that permits such gaming for any purpose by any persons, organization, or entity," and "conducted in conformance with a Tribal-State compact" between the tribe and the State. *Id.* (quoting 25 U.S.C. §§ 2710(d)(1)(B)-(C)). Because the New Mexico legislature had not authorized the Governor to enter such compacts and had mostly criminalized for-profit gambling, the New Mexico Supreme Court held that the Governor lacked authority to approve the Compact unilaterally. *Id.* at 23-24. The court reasoned that the Governor's action "disrupt[ed] the proper balance between the executive and legislative branches," because it was an "attempt to create new law" that "contravened the legislature's expressed aversion to commercial gambling." *Id.* at 22-24.

In the present case, even if the approval of the Settlement by the executive branch officials could be construed as an "attempt to create new law" (as opposed to implementing an agreement among water users in accordance with existing law), such effort "in itself" would not be "dispositive" of an executive-branch overreach. *Id.* at 23. Here, State officials acted in accordance with specific statutory authority

and not in contravention of any expressed legislative intent. *Cf. id.* at 22-24. Thus, even if construed as "new law," the Settlement does not "disrupt" legislative functions and does not raise separation-of-powers issues. *Id.*

B. The New Mexico Legislature Has Not Reserved, For Itself, the Authority to Settle Indian Water-Rights Litigation

In 2005, the New Mexico legislature enacted legislation (hereinafter, the "Funding Act" or "Act") to create an "Indian water rights settlement fund" to "facilitate the implementation" of State funding commitments in "Indian water rights settlements." N.M. Stat. Ann. § 72-1-12. The Act directs the State Engineer to "notify the legislature of the amount of the state's portion of the costs necessary to implement" an Indian water rights settlement, once Congress approves a settlement with a cost-sharing arrangement. *Id.* § 72-1-11(A). "Upon joint resolution of the legislature," the interstate stream commission may then expend money from the settlement fund to satisfy the State's commitment. *Id.* The Funding Act provides that "[m]oney in the . . . fund shall be used to pay the state's portion of the costs necessary to implement Indian water rights settlements *approved by the legislature* and the United States congress." *Id.* § 72-1-12 (emphasis added).

Citing the foregoing italicized phrase, Objectors argue (Brief at 29-35) that the Funding Act made State legislative approval a precondition of any "Indian water rights settlement" involving the State. As the district court correctly held, however (App. 1044-45), Objector's interpretation does not follow from the language of the

statute as a whole. *See WildEarth Guardians v. National Park Service*, 703 F.3d 1178, 1189 (10th Cir. 2013) (statute must be read as a whole); *Matter of Estate of McElveny*, 399 P.3d 919, 924 (N.M. 2017). The manifest purpose of the Act was to create a mechanism to fund the State's share of costs agreed to in Indian water rights settlements. N.M. Stat. Ann. § 72-1-12. The Act does not establish procedures for approving Indian water rights settlements, and does not expressly reserve advance approval authority to the State legislature. *Id.*, §§ 72-1-11, 72-1-12.

Indeed, the Act defines "Indian water rights settlement" to mean "any agreement between the state and a tribe . . . that resolves all of the tribe's water rights claims and *that has been approved by the United States congress.*" *Id.* § 72-1-11(C)(1) (emphasis added). This definition does not mention approval by the New Mexico legislature. And it specifically refers to an agreement between a tribe and "the state," an evident reference to State executive-branch officials. *Id.* Had the legislature intended to reserve its own review and approval authority for all Indian water rights settlements—separate and apart from the funding approval specifically addressed in the Funding Act—the legislature would have said so.

Properly construed, therefore, the reference in Section 72-1-12 to "settlements approved by the legislature" is a reference to the specific funding-approval requirement contained in the Act: namely, the "joint resolution of the legislature"

that is required prior to any expenditure by the interstate stream commission from the Indian water rights settlement fund. *See* N.M. Stat. Ann. § 72-1-11(A).

Objectors do not argue and cannot show that this Funding Act requirement has not been met for the Settlement in the present case. The New Mexico legislature has repeatedly authorized the interstate stream commission to spend money from the Indian water rights settlement fund, specifically for the settlement in the "Aamodt case[]." *See*, *e.g.*, 2011 N.M. Laws (1st Spec. Sess.), ch. 5, § 16 (appropriating $15,000,000 for the "state's portion of the settlement[s]" "in the *Navajo Nation*, *Taos*, and *Aamodt* cases"); *see also* 2015 N.M. Laws (1st Spec. Sess.), ch. 3, §§ 84, 89 ($4,000,000 for same purpose); 2013 N.M. Laws, ch. 226, § 22 ($10,000,000 for same purpose).

Although these enactments were not "joint resolutions" per § 72-1-11, they served the same function. Each of these enactments authorized expenditures for the Aamodt case settlement and other named settlements, "notwithstanding the requirement for a joint resolution of the legislature in Subsection A of Section 72-1-11 NMSA 1978," as long as "corresponding commitments have been made for the federal portion of the settlements." 2015 N.M. Laws (1st Spec. Sess.), ch. 3, §§ 84, 89; 2013 N.M. Laws, Ch. 226, § 22; 2011 N.M. Laws (1st Spec. Sess.), ch. 5, § 16. Through these enactments, the State legislature plainly approved the Settlement in this case, which was also executed by the Attorney General, State Engineer, and

Governor pursuant to their statutory authorities. No further State approval was required.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. This case began in 1966, has an extensive procedural history, and involves a complex water rights settlement. Oral argument could assist the Court in identifying and understanding those parts of the record relevant to the arguments on appeal.

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I hereby certify that I electronically filed the foregoing *Answering Brief for the United States of America* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **February 2, 2018.**

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