UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-2147

AAMODT, *et al*.,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*
Appellees,

and,

UNITED STATES OF AMERICA, PUEBLO DE NAMBE,
PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO,
TESUQUE PUEBLO and SANTA FE COUNTY,
Appellees in intervention.

On Appeal from the United States District Court
For the District of New Mexico (Hon. William P. Johnson)
District Case No. 6:66-cv-06639

APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S APRIL 5, 2018 ORDER

A. Blair Dunn, Esq.
Dori E. Richards, Esq.
WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP
400 Gold Ave. SW. Suite 1000
Albuquerque, NM 87102
(505) 750-3060

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DISCUSSION

I. STANDING WAS NOT AN ISSUE RAISED BY ANY DEFENDANT IN RESPONDING TO APPELLANTS' OBJECTIONS AS ALL PARTIES WERE AWARE AND UNDERSTOOD THAT NEW MEXICO WATER LAW PROVIDES STANDING TO THOSE SUCH AS APPELLANTS.

No Defendant, nor the assigned District Court Judge in this long-standing matter, raised the issue of standing as being even a legitimate question of concern as to the Objectors/Appellants. Such is the case because the adjudication of water rights in New Mexico necessarily effects the rights of other water users and rights holders. Thus, the adjudication of water rights of the Pueblos evinced by the Settlement Agreement, in part, (and in which the State Engineer – the adjudicator of water rights in New Mexico - played a significant role) impacts the rights of all other water right holders in the basin.

Water rights adjudications in New Mexico are lawsuits that take place in state or federal court to resolve all claims to water use in the state of New Mexico. Such cases are required by statute to create a formal inventory of water uses and water rights to facilitate administration of New Mexico's surface and groundwater. The geographic scope of each adjudication is generally described by a stream system or by a groundwater basin. The water rights adjudication serves to formally identify and recognize *all* valid water rights in each area being adjudicated.

The New Mexico adjudication process consists of seven general phases: 1) the filing of the complaint, 2) the hydrographic survey, 3) the subfile phase, 4) the stream-wide issues phase, 5) the errors and omissions phase, 6) the *inter se* phase, and 7) the entry of the final decree. A complaint may be filed by any interested party and initiates

the adjudication. The stage at issue here is the *inter se* phase, Latin for "among themselves." The *inter se* phase is the time in a water rights adjudication when any claimant may challenge the water rights of any other claimant. While a claimant may challenge the rights of other claimants, the claimant cannot generally revisit his/her own subfile at this phase. *Inter se* phase challenges are by their very nature intended to resolve issues arising between water right owners. By resolving the challenges of any member of a community, the water rights are made final as to every other right, as well as the State. Finally, entry of a final decree concludes the water rights challenges for all impacted water rights holders.

It is well-settled per New Mexico law that by NMSA §72-4-17 Appellants first as water rights claimants, and then as owners of adjudicated water rights, were proper parties to the water rights adjudication, including *inter se* phase. Appellants thus possessed standing to challenge *inter se*, "relative rights of the parties, one toward the other." *See New Mexico ex rel., Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967). Consequently, Appellants are authorized by New Mexico law to timely object to the settlement (as they did), object *inter se* to rights adjudicated pursuant to the Settlement Agreement (as they did) and appeal the decision of the District Court that overruled Appellants' objections, *i.e.* the present matter before this Tribunal.

Appellees Santa Fe County and City of Santa Fe, and the United States, in a typical "throw every legal discussion on the sink" filing, suggested for the very first time, at this appellate stage, that water rights holders at the *inter se* phase might lack standing – an issue not raised or argued below as lacking realism and one which the lower Court

knowingly left by the wayside. Very arguably, a kitchen sink approach such as engaged in here, merely interjects a wild goose chase (and untimely so) into the substantive legal arguments raised in the appeal.

Quite simply, New Mexico law does not merely inform on this issue, it controls. Appellants have the statutory right in water right adjudications to address *inter se* their rights relative to the rights sought to be adjudicated by settlement through the agreement of the Settling Parties. *See New Mexico ex rel., Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967). This is especially true when the issue includes the authority of New Mexico executive branch officials to impact the Appellants water rights by entering into an agreement with other sovereign governments that impact such rights.

The droll proposition belatedly raised by a few Appellees, that the Appellants *may* lack standing to appeal the District Court's decision to overrule their legal objections to the entry of the Settlement Agreement, flies in the face of New Mexico water law. The very premise of the *inter se* phase is that because water (and rights to thereto) exist in a system, the rights of one user effects all. Consequently, New Mexico water law is premised on an absolute assumption of legal prejudice when determining use or ownership rights of a finite and bounded resource. Agreeing with these Appellees' wing and a prayer premise would require this Court to determine that Appellants lacked standing to object or challenge the Settling Parties' rights *inter se* in the first instance – a theory contrary to existing State water law.

As to Article III standing and the question raised as to injury in fact referencing *Colorado Outfitters*, it should ultimately go without saying that in a water adjudication,

the rights of one party can and does directly impact or impair the water rights of another. It is this injury and potential for injury that provides the basis for standing with respect to *inter se* challenges in water rights adjudications – an acknowledged impact that largely forms the bases for water law in New Mexico. Thus, for more than half a century, water adjudications operate per the basic tenet that, "approval of the application would impair existing rights. In reaching a decision in connection with the application, the State Engineer has the positive duty to determine whether existing rights would be impaired." *Heine v. Reynolds*, 69 N.M. 398, 367 P.2d 708 (1962). The principles underlying the statutory requirement of application, notice and hearing when water rights are to be determined, is to ensure that the change proposed in the application to determine rights or uses will not impair the rights and uses of other appropriators. *Application of Brown*, 65 N.M. 74, 332 P.2d 475 (1958)." *City of Roswell v. Berry*, 1969-NMSC-033, ¶ 5, 80 N.M. 110, 112, 452 P.2d 179, 181.

A. The United States Discussion, Answering Brief At P. 26

The United States Response brief in one sentence and a footnote suggest for the first time, that "third-party water users whose rights are unimpaired by such agreements [referencing "shortage sharing" agreements specifically] lack standing to object to alternative administration." Answering Brief for the United States of America, p. 26. Yet, the tacit admission and salient statement by the United States establishes the potential harm and standing of the Objectors, *i.e.* "there is a possibility that the Pueblos' water rights could be enforced against non-settling groundwater users [the Objectors], at times when settling groundwater users with rights junior to non-settling parties are able to

continue water use under the settlement." Id. at 28. While the United States attempt to explain this away by giving an example of when harm may not *actually* happen (*Id.* at 28-29), the example provided is solely based on a water rights settlement unique and wholly unrelated to the pending settlement or issues raised and does not negate that the Appellants rights here may actually happen.[1]

Moreover, even the case cited by the United States to support its position was premised on the fact that non-settling parties may have water rights curtailed by water settlement agreements (*State ex rel. Office of State Eng'r v. Lewis*) demonstrates just the opposite, and at least in *Lewis*, the settlement agreement was approved by the Legislature – the exact relief requested here. *State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 12, 141 N.M. 1, 5, 150 P.3d 375, 379("The plan was essentially endorsed when the Legislature enacted NMSA 1978, § 72–1–2.4 (2002) (the compliance statute), for the express purpose of achieving compliance with New Mexico's obligations under the Compact.") The United States essentially admits that there will be "future enforcement actions" related to water rights, but such would be "fair" because settling

[1] Several of the United States' representations make little sense in the water world of priority calls, such as "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." Such representation makes many factual assumptions, none of which were developed below because standing was not challenged in light of the clearly denominated potential impacts to water rights holders in the same water system. The example given here lacks any bearing without fleshing out the senior and junior water users and their relation to each other. Simply put, water rights and the impacts to those holding them cannot be determined to have no impact based on such generalities, hence the *inter se* process.

parties have sacrificed their rights currently by agreeing to the settlement. Answering Brief for the United States of America, p. 31.

B. City and County of Santa Fe's Brief at 5-13.

The City and County of Santa Fe suggest that any person or entity who has not engaged in a settlement agreement lacks standing to challenge the agreement as to harms it may cause the latter, *In re Integra Realty Res., Inc*. 262 F.3d 1089 (10th Cir. 2001). They raise such issue despite in 2007, the lower court advising all parties that they had the right to be heard as to objections in a future settlement, if such could impact their water rights. Joint Answer Brief of Defendants-Appellees Santa Fe County and City of Santa Fe, at 6, Joint Supp. App. at 211.

In this chicken and egg argument, if you are a settling party you cannot object to settlement because you voluntarily entered into the contract, but if you do not enter into a settlement you lack standing to challenge it, even if it may impair your water rights. If the City and County of Santa Fe's theory stands, no party would ever have standing to challenge a settlement agreement, even when it potentially harms the rights of those declining to engage in settlement in the unique world of New Mexico water rights.

Of initial significance is that the cases cited by Appellees for their premise of a required "plain legal prejudice" are class action suits. Class action litigation is unique, with unique protections for class or potential class members through the litigation process. *See* Fed. R. Civ. Pro., Rule 23. Class action litigation, certification and procedures have little or no bearing or relation to water rights litigation and historic water use/rights. Indeed every case referenced as to the plain legal prejudice test in *In re*

Integra Realty Res.,, Inc. 262 F.3d 1089, and relied upon by the City and County - as well as *Integra* itself - solely involved class litigation and litigants.[2] *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102–03 (10th Cir. 2001)("Plain legal prejudice [sufficient to confer standing **upon a non-settling litigant in a class action**] has been found to include any interference with a party's contract rights or a party's ability to seek contribution or indemnification. A party also 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.")

Prejudice in the context of class action litigation settlement means "plain legal prejudice," as when a "settlement strips the party of a legal claim or cause of action." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001)(internal citations omitted). "Non-settling class defendants also have standing to object [to a class settlement agreement] if they can show some formal legal prejudice to them, apart from

[2] "'[N]on-settling defendants generally have no standing to complain about a settlement, since they are not members of the settling class.' *Transamerican Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir.1992); *see also In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir.1979); *Darrow v. Southdown, Inc.*, 574 F.2d 1333, 1336 n. 3 (5th Cir.1978); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C.Cir.2000); *Mayfield v. Barr*, 985 F.2d 1090, 1092–93 (D.C.Cir.1993). 'This rule advances the policy of encouraging the voluntary settlement of lawsuits.' *Waller v. Fin. Corp.*, 828 F.2d 579, 583 (9th Cir.1987). Thus, '[w]hen the partial settlement reflects settlement by some defendants, appeals by nonsettling defendants have been dismissed, on grounds that mingle concerns of standing with finality concerns.' 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3914.19 (2d ed. 1991 & 2001 Supp.) (footnote omitted)." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001).

the loss of contribution or indemnity rights." *Id.* at 1103. The City and County's theory in this regard, then, is that the plain legal prejudice test for standing to challenge a class action settlement agreement should apply in the present water rights settlement, *despite the lack of a class and individual rights of each water right holder identified and defined by state law*, and that each objector must also demonstrate "plain legal prejudice" as defined by class litigation precedents. There is simply no procedural precedent or similarity in cases between class actions and individual water rights to warrant application of the plain legal prejudice test. And, even if there was sufficient similarity to warrant importing the plain legal prejudice test, Appellants have standing to raise issues in the water rights *inter se* context per New Mexico water law, as discussed

Finally, should the Court determine that the plain legal prejudice test should be imported to the present litigation, it would be appropriate to remand the proceeding to the District Court with direction to engage in discovery, so that Appellants can develop expert testimony about the potential impacts to their water rights based on the provisions the settlement agreement includes, future threat of litigation and enforcement efforts, as identified by the United States, discussed *supra*. at I. A. Such discovery is generally not afforded to or part of water rights litigation, but importation of the class action standards would warrant such.

II. THERE IS NO WAIVER AS TO STANDING BASED ON COLORADO OUTFITTERS NOR THE UNPUBLISHED CAYETANO DECISION.

The lawsuit from which this appeal arises has been pending since 1966, more than half a century. In recent procedural history, there has never been a question of standing

raised as to a party seeking to protect their water rights impacted by this litigation and ensure that state law is adhered to in the adjudication and determination of those water rights. There has never been a suggestion that both procedural and substantive due process rights are impacted in water adjudications, and New Mexico law governing such adjudications includes due process protections, as discussed *supra*. The *inter se* process is one of those procedural protections designed and intended to ensure that the determination of the water rights of one party consider the water rights of another. Hence, any individual with a water right in an identified basin or stream system may challenge the rights of another seeking a water right determination.

True, it is an appellants burden to raise legal theories to invoke legal authority to hear an appeal (*Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998), and to adequately brief those issues appellants so raise (*Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016)). But, it is also an attorney's professional responsibility to not raise meritless arguments left by the wayside decades earlier in litigation, in a hodge-podge of theories added to a response brief to divert attention from the salient issues. Appellants did not raise standing as an issue on appeal. The lower court did not raise standing as an issue below, nor did Appellees. Rather, Appellants appeal is on narrow issues properly preserved in the Court below.

Also true is that an appellate court has "jurisdiction to determine the district court's jurisdiction." *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016), *citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)(explaining that when a lower federal court lacks jurisdiction, a

reviewing court nevertheless has jurisdiction to "correct [ ] the error of the lower court in entertaining the suit" in the first instance (quoting *United States v. Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 80 L.Ed. 1263 (1936))). And while questions of standing are reviewed de novo by an appellate court as to the applicable legal standards, those standards are guided by the development of factual record as to standing below. *See Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016); *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236, 1241 (10th Cir.2008). Thus, the appropriate action, if this Court felt that New Mexico water law is not sufficiently clear as to the right (standing) of a water rights holder to bring challenges to the determination of water rights of others in the same system, *inter se*, would be to remand the action to the lower court to develop the *factual bases* that supports standing for each objector.

While the Circuit court may have "*discretion* to decline to consider waived arguments that might have supported such jurisdiction," *United States. ex rel. Ramseyer v. Century Healthcare Corp.,* 90 F.3d 1514, 1518 n. 2 (10th Cir.1996), such discretion should not be employed as to non-issues, especially when those issues have been raised for the first time by an appellee in a kitchen-sink briefing. Such would dangerously open the door for appellees who were not diligent in lower court proceedings, who did not raise legal issues or brief those issues, that the lower court did not have the opportunity to fully address - to suddenly raise such theories on appeal. Such allowance would work inapposite to the concept of waiver of issues not raised in appeal. In addition, encouragement of such behavior by the Circuit Court would result in broad briefing of a myriad of issues lacking genuine materiality, instead of briefing narrowly tailored to

legitimate issues properly preserved below and as part of the appeal process. Further still, such discretion should be informed by whether the issues were raised or addressed in any way below to provide this Court with a record to rely on in their de novo review.

Colorado Outfitters, while providing guiding principles on standing, is not on point with the procedural posture of this case, nor can a waiver premise stand based on that inapposite posture. In *Colorado Outfitters*, the lower court had actually addressed standing, "repeatedly" explaining that it "would adopt and apply this two-part test for purposes of the plaintiffs' claims" in addressing the injury component of standing. *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544-5 (10th Cir. 2016). In finding that the Appellants had waived its argument as to standing on appeal, the Court expressly found that "plaintiffs do not directly challenge this ruling on appeal" had failed to "even acknowledge that the district court adopted the credible-threat-of-prosecution test" and that the Appellants did not "address the obvious tension between [the lower Court's] decision and the non-binding authority they cite, without elaboration, to support their suggestion" that standing was satisfied. *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016). Thus, the dictum discussion of *Colorado Outfitters* stands for the premise that if an appellant fails to directly challenge a ruling of the lower court – in that instance a finding of lack of standing – and provide appreciable discussion and law to support that a challenge has been made, it is waived. Such is not a novel premise.

Nor does the unpublished decision in *Cayetano-Castillo v. Lynch* support the premise here. It is initially noted that per Fed. R. App. Pro, Rule 32.1, *Cayetano-Castillo*

is limited to any persuasive value it may have, based on the similarity of issues determined by the Court. In *Cayetano-Castillo*, this Court upheld the determination of the Board of Immigration Appeals (upholding an immigration judge's decision) to deny the Plaintiff's application for asylum, denying restrictions on removal and relief under the Convention Against Torture Act based on substantial evidence. As to the denial of administrative closure decision, the government had argued in the second appeal, that there was a lack of meaningful standards by which the reviewing court could review the agency decision and thus a lack of jurisdiction to do so – an issue on which Circuit Courts had split. In declining to further assess the administrative closure issue in the Tenth Circuit, the Court found that Appellant had not addressed the issue in his reply and thus "he waives, as a practical matter anyway, any objection not obvious to the court to specific points urged by the appellee." *Cayetano-Castillo v. Lynch*, 630 Fed. Appx. 788 (2015)

Of the five appellee responses, only 2 even broached standing, the majority of Appellees acting with a reasonable and obvious hat-tilt to the history of this case and applicable New Mexico Water law. Additionally, if *Cayetano* had persuasive value here, it would be limited by the Court's caution that it should not turn a case on its head, i.e. any waiver cannot go beyond practicality and what is or should be obvious to the Court.

Indeed, the 3 cases found citing to this aspect of *Cayetano-Catillo* at this time, while noting a lack of response/reply to an argument made in briefing in the lower courts, also undertook the substantive review of the issue raised, ostensibly to ensure that an appellate court had a sufficient record on review. *Torgerson v. LCC Int'l, Inc.*, 227 F.

Supp. 3d 1224, 1229 (D. Kan. 2017)(internal citation omitted)(A party "waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the appellee . . . . But beyond that, the court agrees with defendants' argument."); *Radiologix, Inc. v. Radiology & Nuclear Med., LLC*, No. 15-4927-DDC-KGS, 2017 WL 5007143, at *28 (D. Kan. Nov. 2, 2017)("[b]ut, the court also can conclude that RNM has alleged standing sufficiently. "Standing to sue means that a party has a sufficient stake in an otherwise justiciable controversy as to obtain judicial resolution of that controversy." *Varney Business Servs., Inc. v. Pottroff*, 59 P.3d 1003, 1012 (Kan. 2002) (citation omitted); *see also In Re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362 n.55 (Del. Ch. 2008)"); *Little v. Budd Co.*, No. 16-4170-DDC-KGG, 2018 WL 398458, at *10, FN 4 (D. Kan. Jan. 12, 2018)("Arguably, defendant's failure to address these arguments amounts to a waiver of this issue. *See In re FCC 11-161*, 753 F.3d 1015, 1100–01 (10th Cir. 2014) . . . ; *see also Cayetano-Castillo v. Lynch*, 630 Fed.Appx. 788, 794 (10th Cir. 2015) (holding that an appellant, who does not respond to an argument in its reply brief, "'waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the appellee'" . . . Nevertheless, the court addresses them above.")

Here, the issue of standing was not asserted nor briefed in the lower court. No challenge to standing was presented to nor determined by the lower court. There has been no discovery on standing issues or briefings below, because water law in New Mexico confers standing on any person with water rights that may be impacted by a claim to water right by another. Standing is, and has always been, a non-issue in this suit because of the very nature of the water rights at issue. The premises behind standing in the

context of water rights litigation meets the standard of obviousness for this Court's consideration is it did in the lower court.

CONCLUSION

The ability of state actors to enter into a water rights settlement, that realistically impacts Appellants' water rights because it provides for who, when and how water will be used or diverted and provides for future challenges to Appellants' water rights.

Respectfully submitted this 16TH day of April 2018.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

/s/ Dori E. Richards
Dori E. Richards, Esq.

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES
Attorneys for Appellant
400 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
Warba.llp@gmail.com

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing submitted in digital form via the Court's ECF does not require a paper copy filed with the Clerk of the Court.

I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Windows Defender Security Center, Antivirus version: 1.255.250.0 updated October 30, 2017 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

CERTIFICATE OF SERVICE

I certify that on April 16, 2018, I filed Appellant's Brief through the United States Court of Appeals for the Tenth Circuit's ECF System, causing each counsel of record to be served

April 16, 2018.

/s/ Dori E. Richards
Dori E. Richards, Esq.

/s/ A. Blair Dunn
A Blair Dunn, Esq.