No. 17-2147

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

UNITED STATES OFAMERICA, *et al*.,
Intervenors Plaintiffs-Appellees, 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
(D.C. No. 6:66-cv-06639) (Hon. William P. Johnson)

APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(C)(1), the County and City state that the following prior appeals relate to this matter: (1) *New Mexico v. Defendant-Objectors Group 1*, No. 16-2253 (10th Cir. Jan. 9, 2017); (2) *New Mexico ex rel. State Eng'r v. Trujillo*, 813 F.3d 1308 (10th Cir. 2016); (3) *New Mexico ex rel. Reynolds v. Gutierrez*, 440 Fed. App'x 633 (10th Cir. 2011) (unpublished); and (4) *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

JURISDICTIONAL STATEMENT

This Court asked the parties "to address in their merits briefs the jurisdictional question of finality for purposes of appellate review, including whether the document titled as a 'final judgment' satisfies the requirements of Rule 54(b) certification.'" Court's Order of 9/21/17. Federal Rule of Civil Procedure 54(b) is not the basis for this Court's jurisdiction over this appeal.

This Court has jurisdiction to review the Final Judgment and Decree on appeal in this case under 28 U.S.C. § 1291 (1988). The Final Judgment and Decree included language that incorrectly stated that it was a final judgment under Rule 54(b). Rule 54(b) applies only where the court directs "entry of a final judgment as to one or more, but fewer than all claims or parties." No analysis is needed under Rule 54(b) because that rule no longer applies since all water rights claims were finally adjudicated in the Final Judgment and Decree.

The Final Judgment and Decree is a final decision because it "terminates all matters as to all parties and causes of action and leaves nothing for the district court to do but execute the judgment." *New Mexico v. Defendant-Objectors Group 1*, 2017 WL 3725306 (10th Cir. Jan. 9, 2017) (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (unpublished); *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F. 3d 1533, 1541 (10th Cir. 1996). All water rights within the scope of this adjudication have been determined as between the State and the

claimants, and *inter se* has been conducted between all water rights. There is nothing left for the lower court to determine within the scope of the water rights adjudication. This case has been closed on the docket sheet of the district court.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined that the Settlement Agreement does not violate New Mexico state law.

2. Whether the District court correctly determined that the New Mexico Attorney General has the authority to settle claims resolving the adjudication of water rights.

3. Whether the District court correctly determined that the Dunn Group presented no claim for the denial the constitutional protections of equal protection and substantive due process.

STANDARD OF REVIEW

As far as the district court's approval of the Settlement Agreement is concerned, the district court may approve a settlement agreement "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This Court reviews a district court's approval of a settlement agreement under Rule 23(e)(2) for an abuse of discretion. But it reviews any factual findings for clear error. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186-87 (10th Cir. 2002).

To the extent that the Appellants challenge the decision of the district court overruling their objections to the constitutionality of the Settlement Agreement, such determinations are reviewed *de novo* by this Court. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193 (10th Cir.2000), as cited in *ClearOne Commc'ns, Inc. v. Bowers*, 651 F.3d 1200, 1216 (10th Cir. 2011). Reviewing Appellants' challenge to the Settlement Agreement as a violation of New Mexico law (power of the Attorney General to settle, violation of the Indian Water Rights Settlement fund statute, change of state law regarding priority administration), the district court's determination of compliance with New Mexico law is also reviewed *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Western Heritage Ins. Co. v. Chava Trucking, Inc.*, 991 F.2d 651, 653 (10th Cir.1993).

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

A. Overview of the Litigation and the Settlement Agreement

The State of New Mexico filed its complaint to determine the rights to the use of water in the Nambe-Pojoaque-Tesuque River system ("NPT"), which is a tributary to the Rio Grande, in 1966 in accordance with statutes governing water rights adjudications, Chapter 75, Article 4, NMSA (1953) (now Chapter 72, Article 4, NMSA 1978). Complaint (April 20, 1966) (identified in Appellants' Appendix ("App.") at 103. The NPT area includes land within four Pueblos (the Pueblo of San Ildefonso, the Pojoaque Pueblo, Nambé Pueblo and Tesuque Pueblo), lands owned and managed by the United States, and privately held land.[1]

The complexity of the Pueblo water rights led to litigation between the State and the Pueblos (and United States as trustee) within the adjudication over the elements of the Pueblos water rights from the 1960s until 1999, when the parties began mediation. Joint Supplemental Appendix for Appellees ("S.App.") at 141-142. A settlement was reached in 2006, and the final judgment and decree for the entire adjudication was entered on July 15, 2017. S.App. at 199, 1046-1050. The State completed the adjudication of the non-Pueblo surface water rights by 1983 (except for priority date), as between the State and the individual non-Pueblo

[1] Throughout this litigation, the court and the parties have referred to water rights that belong on lands that are not part of one of the four Pueblo's lands as "non-Pueblo water rights," and water rights that are on one of the Pueblo's lands as

defendants. S.App. at 20-21. However, the Pueblos filed objections in *inter se* that raised issues regarding the non-Pueblo water rights. The objections focused on the amount of irrigated acreage recognized in the subfile orders and on groundwater use, leading to an adjudication of all non-Pueblo groundwater rights, including domestic and livestock wells[2] in the NPT, in additional to all other water rights. S.App. at 20-21.

Mediation to resolve the Pueblos' water rights began in 1999 and resulted in a Settlement Agreement signed by the following "settlement parties:" the United States (Department of the Interior), Pueblo of Nambé, Pueblo of Tesuque, Pueblo of Pojoaque, Pueblo of San Ildefonso, County of Santa Fe, City of Santa Fe, and the State of New Mexico (by the Governor, the Attorney General, and the State Engineer). S.App. at 131-142, 190. All defendants have been given, and continue to have, the opportunity to become a settlement party to the Settlement Agreement. The Settlement Agreement benefits not only the signatories, but addresses how to ameliorate impacts to junior water users from the Pueblos' recognized senior water rights. S.App. at 1085-87. Because the Pueblos have senior priority dates, they have priority to exercise their water rights over junior water users, should there be a water shortage in the basin and should the State Engineer curtail junior water

[2] **72-12-1.1 Underground waters; domestic use; permit.** A person, firm or corporation desiring to use public underground waters described in this section for irrigation of not to exceed one acre of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer . . . ."

rights under a priority call. Because the Pueblos have senior water rights, in times of shortage, they can request a priority call from the State Engineer, requiring all those with junior water rights to theirs (all non-Pueblo water rights) to curtail their water use until the Pueblos get their full supply.

B. The State Negotiated Significant Benefits for All State Water Rights in the Settlement Agreement

While non-settlement parties are not bound by the Settlement Agreement, they benefit from most of its provisions. First, the Settlement Agreement provides that the United States will acquire an additional 2,500 acre-feet per year ("afy") of water for the NPT basin, which reduces the demand on surface water or native water and the occurrence of potential shortages of supply for all junior water rights. App. at 1068-70, § 2.8; 1098, § 9.7. This benefits settlement and non-settlement parties because there will be consistent administration within the NPT. Second, the Settlement Agreement reduces the quantity of Pueblos' water rights for which they may exercise their right to a priority call in times of shortage ("Pueblo alternative administration"), protecting all surface water rights from curtailment in times of shortage. App. at 1063-1067, § 2.4; 1085-86, § 4. Third, the Pueblos waived their *inter se* objections to all groundwater rights. App. at 1072, § 3.1.3.

The additional benefits available to parties who sign the Settlement Agreement, do not change any aspect of the water rights of non-settlement parties.

First, under Pueblo alternative administration, groundwater rights whose owners have signed the on to the Settlement Agreement will not be curtailed. App. at 1075-76, § 3.1.7.2; 1086, § 4.4.1. Second, non-Pueblo settlement parties with domestic well water rights for indoor use only can use their domestic well water rights outdoors if they reduce their overall use. App. at 1077-79, § 3.1.7.4. Third, the Pueblos agreed to waive their *inter* se objection to the surface water rights of non-Pueblo parties who joined the Settlement Agreement. App. at 1093, § 6.1. Fourth, the Settlement Agreement established the creation of a regional water utility, which will allow residents within its reach to connect to a consistent source of drinking water. App. at 1097-98, § 9.5. Non-settlement parties have no obligation to connect to it.

A key fact in analyzing the issues raised is that pursuant to state law, the Office of the State Engineer promulgated rules governing the administration of water rights in the NPT that applies to all water rights in the NPT, effective on September 12, 2017. 19.25.20 NMAC ("Nambé-Pojoaque-Tesuque Water Master District: Active Water Resource Management") ("NPT Rules"). Section 120 of the NPT Rule provides that:

> [E]ssential indoor household uses from domestic wells shall not be curtailed under prior or Pueblo alternative administration. Essential household uses include drinking, cooking, indoor cleaning, sanitary, and cooling purposes, and exclude all uses made outside of a building.

19.25.20.120 NMAC. This limitation means that should "Pueblo alternative administration," as defined in the NPT Rules at 19.25.20.7(LL),[3] be applied to domestic wells by the State Engineer, no person who relies upon a domestic well for essential indoor household use will be curtailed or prevented from using his or her well for such purposes. Wells that were permitted after January 13, 1983 (with a priority date after that date) are already limited to indoor use only by the terms of the permit. S.App. 1-2. For example, Subfile No.: PM-90596 is a "post-1982 domestic well water right" that was adjudicated to Appellants Dalila Archuleta and Jose P. Archuleta. Doc. 9550 (August 27, 2014) (identified in App. at 464.). The order adjudicating that right states that the use of that well

> shall be limited strictly to household, drinking and sanitary purposes; water shall be conveyed from the well to the place of use in closed conduit and the effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized.

Doc. 9550 at 3. The provisions relating to the use of domestic wells during Pueblo alternative administration is the only one that the Dunn Group challenges.

[3] The NPT Rules define Pueblo alternative administration as "the form of alternative administration whereby the Pueblos agree to share water pursuant to section 4 of the settlement agreement." 19.25.20.7(LL) NMAC; *see also* 19.25.20.119(C) NMAC.

C. Timeline of the Adjudication and Key Events

1. The 1970s: Adjudication of Non-Pueblo Surface Water Rights and Litigation of Pueblo Water Rights

The State process for adjudicating the water rights in the NPT began with a hydrographic survey map prepared by the Office of the State Engineer, which identified and mapped irrigated land for both Pueblos and non-Pueblos and any associated identifiable water rights. Complaint, identified in App. at 103; NMSA 1978, § 72-4-13 (1982). By the late 1970s, orders adjudicating the majority of non-Pueblo surface water rights and associated water rights (which included some domestic and livestock wells), as between the State and the individual claimants ("subfile orders"), had been entered by the Court.[4] The only element that had not been adjudicated in the subfile orders for these water rights was the priority date for surface irrigation water rights. S.App. at 34-61.

While adjudication of non-Pueblo water rights was proceeding, litigation over many issues related to the Pueblos' water rights was ongoing. *See, e.g.*, S.App. at 62-73. Initially, the United States intervened on its own behalf and on behalf of the Pueblos, but after a ruling by this Court, the Pueblos intervened on their own behalf and obtained their own counsel. *New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976). This Court also held that the water rights of the

[4] The State adjudicated the water rights of the United States in its proprietary status and *inter se* was completed in 1986.

Pueblos were defined by federal law. *Id.* The State and the Pueblos proceeded to litigate issues related to the elements of the Pueblos' water rights. S.App. at 22-33. While some elements of certain categories of the Pueblos' water rights resulted in a court determination, S.App. at 74-79, as of 1999, many issues remained unresolved. *See, e.g.*, S.App. at 131-138.

2. The 1980s: *Inter Se* Proceedings on Non-Pueblo Surface Water Rights and Litigation Over Non-Pueblo Wells

In 1983, *inter se* proceedings began on non-Pueblo surface water rights (and related rights) that had been adjudicated in individual subfiles. This process allowed for parties to file objections to the elements of the water rights adjudicated as between the State and the defendant associated with each subfile. Doc. 1459, identified in App. at 20-21. The only element that had not been adjudicated was the priority date for surface water rights. S.App. at 20-21. At the same time that *inter* se was proceeding, the Court issued an Order to Show Cause for parties to demonstrate why each subfile's surface water irrigation priority water rights should not be adjudicated on a ditch wide basis. S.App. at 20-21. The issue of whether to proceed on a ditch-by-ditch basis or to adjudicate subfiles individually was debated until 2014, when the court issued an order determining priority dates and listing the dates on a ditch-by-ditch basis. S.App. at 238-246.

The United States and the four Pueblos filed objections in *inter se* to the acreage determinations in over 600 subfiles. Doc. 758a (7/8/83); App. 935 (stating

approximately 800 objections were filed). Other issues raised by the United States and the Pueblos that affected the adjudication was whether groundwater rights should be adjudicated and a request that the State be enjoined from issuing new groundwater permits. *See* Doc. 7579, identified in App. at 319; S.App. at 1 (order granting motion re: permits). The Pueblos alleged that continued permitting would have an adverse affect on the ability of the Pueblos to use their water rights by decreasing the available water. In 1983, the State focused on adjudicating all domestic and livestock wells in the NPT. The court also directed the State Engineer to limit permits issued for domestic use under Section 72-12-1 to indoor use only. S.App. at 1-2. Thereafter the State Engineer issued domestic well permits limited to indoor use only. The court stayed the proceedings on the Pueblos' objections to the amount of surface water rights of the non-Pueblos adjudicated in the subfile orders until after the adjudication of the Pueblos' water rights. S.App. at 20-21.

3. The 1990s: Litigation Over Non-Pueblo Domestic Well and Continued Litigation of Pueblo Water Rights; Mediation Begins

The issue of how much water each non-Pueblo domestic and livestock well should be adjudicated became an issue that was briefed extensively in the 1990s. S.App. at 129-130. The State presented evidence that the estimated average use for domestic wells in the NPT was 0.4 acre feet per year per household. Doc. 6824-2, identified in App. at 270. In 1999, a separate agreement regarding

beneficial use for domestic wells was signed by some non-Pueblo well owners, to which parties were invited to join. S.App. at 143-144. The state continued to adjudicate the non-Pueblo water rights through 2016. *See, e.g.*, Doc. 9946, identified in App. at 484.

Realizing the hurdles left to be resolved in the NPT adjudication, the Pueblos, the United States and the State began discussions about settling the water rights of the Pueblos in 1999 and how to complete the adjudication. S.App. at 141-42. In 2000, the court appointed a mediator and confidential negotiations to settle the entire case began among the State, the United States, the Pueblos of Nambé, Tesuque, Pojoaque and San Ildefonso, the City of Santa Fe, Santa Fe County, and attorneys representing more than 1,000 non-Pueblo water right owners. S.App. at 155-157. The case was stayed while mediation continued. *Id.*

4. 2000 to 2017: The Settlement Agreement; Passage of the Aamodt Litigation Settlement Act and; Final Adjudication of Pueblo and Non-Pueblo Groundwater Rights

Some of the key issues to be resolved during the settlement negotiations were how to define all of the Pueblos' water rights, how to meet the needs of the all defendants in the NPT basin, how to protect existing users, and how to ensure that groundwater uses would not affect or impair senior water rights. S.App. at 131-138. As part of the Settlement Agreement, the United States agreed to increase the water supply to the NPT, by acquiring 2,500 acre feet of additional

water for the Pueblos' economic development. App. at 1067, § 2; 1098, § 9.7. The Pueblos agreed to forebear from making priority calls against non-Pueblo surface water users except under certain circumstances, thereby preserving existing surface water uses in the NPT. App. at 1085-1087, § 4. In addition, a pipeline would be constructed, originally proposed to be funded by the United States (but now funded by the United States, the State and Santa Fe County), to deliver water to Pueblo and non-Pueblo users in the basin from the Rio Grande. App. at 1058, § 1.6.31.

The Settlement Agreement was initially signed by the settlement parties in 2006. Doc. 6157, identified in App. at 235. Subsequently, Congress was required to pass legislation and an appropriation authorizing the expenditure of funds and recognizing the United States' obligations and authority to agree to and implement the terms of the Settlement Agreement through a federal act. S.App. at 184-188. While the process of obtaining Congressional approval was continuing, the district court entered an order establishing a procedure for allowing parties to object to the court's approval of the proposed Partial Final Judgment and Decree on the Pueblos' water rights and the Settlement Agreement on December 18, 2007. S.App. 217-221; 222-226. The Court's procedural order provided that after the Federal government approval process, required by law, had been completed and the Court received the notification of federal approval or completion of the process

to address any required modification of the Settlement Agreement, the Court would enter an order to show cause why the proposed Partial Final Judgment and Decree and the Settlement Agreement, should not be approved.

Beginning in 2006, the State re-commenced adjudicating non-Pueblo groundwater rights, guided by three orders to show cause that established a default amount for beneficial use for groundwater for different categories of wells. Doc. 6194, identified in App. at 239; Doc. 7861, indentified in App. at 337; Doc. 10119, identified in App. at 494. All elements of the non-Pueblo groundwater rights were adjudicated through subfiles orders that were completed in 2016.

Congress enacted the Aamodt Litigation Settlement Act on December 8, 2010. Pub. L. No. 111-291 §§ 601 *et. seq.*, 124 Stat. 3134 (the "Settlement Act"). The Settlement Act authorized the Settlement Agreement, but only if the court approved a partial final decree setting forth the water rights of the Pueblos and a final decree setting forth the water rights of all parties in the NPT by September 15, 2017. Settlement Act, §§ 621(e), 623(a)(2)(G), (H). The Settlement Act authorized the design and construction of a Regional Water System to distribute water to the Pueblos and the Santa Fe County Water Utility for users in the NPT. Settlement Act § 611(a). The parties conformed the Settlement Agreement to the terms of the Act, and signed the final Settlement Agreement in 2013. App. 1101-1108; *see* S.App. at 227-229.

The *Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambé, and San Ildefonso* was sent to the parties in December of 2013. S.App. at 230-237. The show cause order gave three options for responding to the Show Cause Order. S.App. at 235-236. In Option 1, the parties could agree to become a settlement party and agree to the terms of the Settlement Agreement. S.App. at 235. Option 2 was to file an objection to the Settlement Agreement and the Proposed Partial Final Judgment and Decree by a certain date. This process was the *inter se* process for the adjudication of the Pueblo's water rights. S.App. at 236. Option 3 pertained to those water rights owners who did nothing in response to the Order to Show Cause and who would become "non-responding owners." *Id.* The court received objections and extensive briefing on the entry of the proposed Partial Final Judgment and Decree occurred through February of 2015. App. at 593-596; 935-958.

The district court entered a Partial Judgment and Decree adjudicating the water rights of the Pueblos and approving the Settlement Agreement and rejecting the objections on March 23, 2016. App. at 959-1015. Objectors, the Dunn Group here, filed a motion below asking for reconsideration of the entry of the Partial Final Judgment and Decree, which the court denied. App. at 1050, 1017-1020.

The Dunn Group then filed an appeal of the entry of the Partial Final Judgment and Decree and the denial of their motion for reconsideration, which was dismissed for lack of jurisdiction. S.App. at 277 (*New Mexico v. Defendant-Objectors Group 1*, No. 16-2253 (10th Cir. Jan. 9, 2017)).

The Final Judgment and Decree was entered on July 14, 2017. App. at 1046. The settlement parties signed and filed a "Notice of Certification of Satisfaction of Settlement Agreement Conditions." Doc. 11556, identified at App. 591.

5. The State Engineer Promulgates Rules Governing Water Rights Administration in the NPT in September, 2017

In order to more effectively administer water rights in the NPT, the State Engineer promulgated the NPT Rules under his statutory authority. NMSA 1978, § 72-2-9.1 (2003); 19.25.13.2 NMAC; 19.25.20 NMAC. The NPT Rules applies to all water rights in the NPT and are consistent with the provisions in the Settlement Agreement.

The NPT Rules establish procedures and guidelines for priority administration, including the Pueblo alternative administration that was accepted by the state engineer "as between the Pueblos' first priority rights and the water rights of the non-Pueblo settlement parties." 19.25.20.122(C) NMAC. The Rules recognize that "[n]on-settlement parties' water rights shall only be curtailed under Pueblo alternative administration to the extent such curtailment would occur

without the settlement agreement." 19.25.20.122(D) NMAC. Moreover, the Rules state: "[n]on-settlement parties seeking priority administration shall have the same rights and benefits that would be available without the settlement agreement." 19.25.20.122(E) NMAC. The Rules provide additional protections for groundwater uses, as follows:

> [E]ssential indoor household uses from domestic wells shall not be curtailed under prior or Pueblo alternative administration. Essential household uses include drinking, cooking, indoor cleaning, sanitary, and cooling purposes, and exclude all uses made outside of a building.

19.25.20.120 NMAC.

D. The Settlement Agreement Provision Challenged by the Dunn Group: The Settlement Parties Agreed to Alternative Administration in Times of Shortage

Instead of proceeding with a priority call, the Pueblos have agreed that for certain types of water rights, if a water shortage exists, the Pueblo will forego its right to take its amount of water subject to its senior priority date, and instead, allow those junior users who signed on to the Settlement Agreement to use the Pueblos' water supply. App. at 1085-1087, § 4. Those non-Pueblo groundwater users who did not sign on the Settlement Agreement would be treated exactly the same as before the Settlement Agreement was entered into. App. at 1087, § 5.2.

The provision at issue in the Settlement Agreement here is Section 4.4.1. App. at 1086-1087, § 4.4.1. For non-Pueblo settlement parties (like the Dunn Group), which states:

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; . . . .

Sections 3.1.7.2, 3.1.7.4 and 3.1.7.2.5 establish limitations on the use of wells for non-Pueblo settlement parties. Sections 2.1, 2.2, 2.5, 2.6, and 2.7 define the types of Pueblo water rights. The non-settlement parties are not subject to any of these restrictions in the Settlement Agreement. They are, however, subject to the NPT Rules.

SUMMARY OF THE ARGUMENT

The Dunn Group challenges only one provision of the Settlement Agreement that addresses administrative protections offered junior non-Pueblo groundwater rights whose owners choose to become parties to the Settlement Agreement. This challenge at its core concerns the authority of the State Engineer under New Mexico law to administer water right allocations in times of shortage. The Final Judgment and Decree from which the Dunn Group appeals, however, does not address the State Engineer's administration of water rights, nor is it the district court's role to administer water rights.

While the State Engineer has the power to allocate water in priority in times of shortage, New Mexico's water laws also authorize him to implement forms of alternative administration, like that included in the Settlement Agreement, to protect senior water rights. The Dunn Group's claims are not ripe, are speculative, and seek remedies from the federal courts that are already provided in the State Engineer rules for administering non-Pueblo water rights in the Nambe-Pojoaque-Tesuque stream system in times of shortage.

The district court correctly overruled the Dunn Group's objections claiming that the Settlement Agreement effects a change in state water law, that it requires legislative approval, and that it violates their constitutional rights to equal protection and substantive due process. The Settlement Agreement is neither a

compact nor a law, but a settlement of claims in litigation, entered into by the State of New Mexico, the four Pueblos, the United States, the City of Santa Fe, and Santa Fe County not only to address the nature and extent of Pueblo water rights being adjudicated in the case, but also to ameliorate the effect of the exercise of those water rights on water rights held by non-Pueblo defendants. The Dunn Group does not dispute the Court's adjudication of the Pueblos' water rights.

The provision challenged by the Dunn Group is not implemented by the court's approval of the Settlement Agreement, but by the State Engineer's adoption of administrative rules governing the administration of all water rights in the NPT basin. Any challenge to that provision as implemented in the Rules must be made, in the first instance, through the administrative remedies provided both in the Rules and under state law, not by appeal to this Court.

The district court correctly overruled the Dunn Group's objection alleging that the Settlement Agreement violates state law by changing priority dates. First, the Settlement Agreement does not change the adjudicated priority date for any water rights. Second, the district court correctly ruled that the issue is speculative and premature because curtailment of a water right can only be achieved through administration by the State Engineer through the procedures set forth in the administrative rules which were promulgated by the State Engineer in September, 2017, the *Nambé-Pojoaque-Tesuque Water Master District: Active Water*

Resource Management District Specific Rules (19.15.20 NMAC) ("NPT Rules")). No water rights have been curtailed under the NPT Rules. The Dunn Group has demonstrated no injury. Any injury that may possibly occur in the future should be addressed under the administrative remedies available in the NPT Rules or other state law. This Court need not and should not address issues of administrative law that are speculative and not ripe, and for which there are available state law remedies.

The Settlement Agreement settles claims asserted in a comprehensive water rights adjudication, and need only be approved by the New Mexico Attorney General, which occurred here. The Legislature is not required to approve the Settlement Agreement, but has funded it under the Indian Water Rights Settlement Act.

The Dunn Group has not presented a colorable claim for a violation of their constitutional rights of substantive due process or equal protection. Non-settlement parties are not bound by the Settlement Agreement, and nothing contained therein affects their rights.

ARGUMENT

I. THE SETTLEMENT AGREEMENT COMPLIES WITH STATE LAW GOVERNING ADMINISTRATION OF NON-INDIAN WATER RIGHTS.

The district court correctly denied the crux of the Dunn Group's argument: that no exception to priority administration exists in New Mexico law that would allow implementation of the shortage sharing or alternative administration provisions in the Settlement Agreement, and that the Settlement Agreement and Final Judgment and Decree therefore impermissibly change New Mexico law without a delegation of authority to the State Engineer from the legislature. BIC at 8. The district court was correct because the New Mexico legislature has expressly delegated to the State Engineer specific authority to promulgate rules for the administration of water allocations in times of shortage. NMSA 1978, § 72-2-9.1 (2003). In December 2004, the State Engineer promulgated comprehensive rules and regulations to supervise "the physical distribution of water, to prevent waste, and to administer the available water supply of water by priority date or by alternative administration, as appropriate." 19.25.13.2 NMAC. These rules "provide the framework for the promulgation of specific water master district rules and regulations." 19.25.13.9 NMAC. In December of 2017, the State Engineer promulgated specific water master district rules and regulations for the Nambé–Pojoaque–Tesuque basin that addressed both strict priority administration and alternative priority administration. 19.25.20 NMAC. The NPT Rules adopted the

alternative priority administration scheme included in the Settlement Agreement as "Pueblo alternative administration." 19.25.20.119 NMAC; Subsection LL of 19.25.20.7 NMAC. The district court correctly overruled the Dunn Group's objection because the alternative priority administration contemplated in the Settlement Agreement is permissible under New Mexico law.

A. The Settlement Agreement is a Settlement of Claims in a Statutory Water Rights Adjudication that Includes an Agreement for Alternative Administration in Compliance With New Mexico Law.

The district court correctly ruled that the Settlement Agreement does not violate state law governing administration of non-Pueblo water rights. The court correctly recognized that the Dunn Group's assertions that the Settlement Agreement changes priority dates of non-Pueblo water rights have no basis in fact. App. 952. The Settlement Agreement states that the priority for "each pre-basin or permitted well . . . shall be the priority adjudicated in the sub-file order for each such well" and that priority for domestic wells" (or Section 72-12-1 wells) "shall be the priority adjudicated in the sub-file order for each such well" or "the date of filing of the application to drill such well if priority is not adjudicated in a subfile order" for domestic wells. App. at 1072, §§ 3.1.1.1, 3.1.2.1.

The provision in the Settlement Agreement challenged by the Dunn Group provides that the Pueblos agree to forebear from making priority calls for certain categories of Pueblo water rights on non-Pueblo settlement party wells. This

provision is an agreement for alternative administration of non-Pueblo water rights that complies with New Mexico water law. New Mexico law allows parties to enter into agreements for alternative administration. This is not the first time that a scheme for administration of water rights other than priority administration has been included in a settlement agreement. As the district court correctly noted, in *New Mexico ex rel. Reynolds v. Lewis*, 2007-NMCA-008, 150 P.3d 375, the Court of Appeals considered and overruled an objection that the New Mexico Constitution and New Mexico's adjudication statutes require application of priority enforcement through a priority call. In times of shortage, water rights holders with a senior priority date who are not receiving their share of water are entitled to request the State Engineer to curtail junior water rights, a request known as a "priority call." N.M. Const. art. XVI, § 2. While "priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means." *Lewis*, ¶ 39. Most recently, the New Mexico Supreme Court upheld the State Engineer's authority to adopt the Active Water Resource Management ("AWRM") regulations governing the State Engineer's administration of water rights in times of shortage prior to a final court decree adjudicating water rights. *See Tri-State Generation & Transmission Ass'n, Inc. v.*

D'Antonio, 2012-NMSC-039, ¶ 61, 289 P.3d 1232, 1241 (holding that AWRM does not violate constitutional separation of powers limitations; that AWRM does not violate due process; and that AWRM is not unconstitutionally vague).

In Pueblo Alternative Administration in the NPT Rules, the Pueblos agreed to share Pueblo water with non-Pueblo settlement parties in times of shortage. In Section 4.4.1 of the Settlement Agreement, the Pueblos agreed to forebear enforcement of their senior water rights against junior groundwater rights held by settlement parties. Section 4.4.1 states:

> **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;

Sections 3.1.7.2, 3.1.7.4 and 3.1.7.2.5 establish limitations on the use of wells for non-Pueblo settlement parties that are not relevant here. App. at 1075-1076. Sections 2.1, 2.2, 2.5, 2.6, and 2.7 define the types of Pueblo water rights, each of which have a senior priority date to the non-Pueblo water rights. App. at 1059-1067. The Pueblos agree that in times of shortage, they will not use water from these defined categories, but instead will allow the non-Pueblo Settlement parties to use the Pueblos' available amount of water. Essentially, the Pueblos agree to

give up their water in times of shortage, and share it with the non-Pueblo settlement parties.

The Dunn Group can show no harm from Pueblo Alternative Administration. Imagining a situation where a senior water right owned by a non-settlement party was curtailed in a shortage, but a junior water right owned by a settlement party was not, the Dunn Group argues that the Settlement Agreement changes New Mexico law regarding priority of senior rights and harms them. It does not. The Dunn Group cites to no provision in the Settlement Agreement that would deprive them of any right that they hold. They also fail to show any facts that support their conclusion that the forbearance provisions in the Settlement Agreement would operate to their disadvantage and must necessarily violate state law. Because there is no change to any aspect of the Dunn Group's water rights, there is no harm.

The Dunn Group's attempt to challenge the implementation of Pueblo alternative administration by appealing the Settlement Agreement and Final Judgment and Decree is not ripe. For a claim to be justiciable under Article III of the U.S. Constitution, "it must be shown to be a ripe controversy." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1496, 1499 (10th Cir. 1995); *Gerhardt v. Mares*, 179 F. Supp. 3d 1006 (D.N.M. 2016); U.S. Const. art. III, § 2. The doctrine of ripeness "aims to prevent courts from entangling themselves in abstract

disagreements by avoiding premature adjudication." *Martinez v. City of Rio Rancho*, 197 F.Supp.3d 1294 (D.N.M. 2016) (quoting *Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG*, 762 F.3d 1016, 1029 (10th Cir. 2014)). The test for determining whether a case is ripe is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *MedImmune, Inc. v. Genentech, Inc.* , 549 U.S. 118, 127 (2007). Appellants raise a hypothetical situation that has only prospective application. Any curtailment of water rights requested under Pueblo alternative administration would occur under the exercise of the State Engineer's authority through the NPT Rules.

B. Any Attempt by the Dunn Group to Challenge State Engineer Administration of Non-Pueblo Water Rights Fails.

Pueblo alternative administration is implemented by NPT Rules promulgated in 2017 by the State Engineer. The Settlement Agreement terms are to be implemented and administered by the State Engineer under his statutory authority. Specifically, the Settlement Agreement recognizes that the State Engineer has the authority to appoint a water master to administer the non-Pueblo water rights under state law, App. at 1087, § 5.2, and that the Settlement Agreement terms are to be implemented and administered by the State Engineer under his statutory authority. *See* NMSA 1978, §72-2-9 (1907); *see also* NMSA 1978, § 72-2-1 (1982) (providing that the State Engineer "has general supervision

of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required"). The court recognized that rules governing administration of non-Pueblo water rights would govern the State Engineer's "responsibilities in administering the non-Pueblo water rights," and not the Settlement Agreement itself. App at 953; App. 1088, § 5.3.

The NPT Rules expressly ensure that the State Engineer implementation of Pueblo alternative administration will have no adverse effect on non-Pueblo water rights held by non-settlement parties. The Rule recognizes that "[n]on-settlement parties' water rights shall only be curtailed under Pueblo alternative administration to the extent such curtailment would occur without the settlement agreement." 19.25.20.119(D) NMAC. Moreover, the Rule states: "[n]on-settlement parties seeking priority administration shall have the same rights and benefits that would be available without the settlement agreement." 19.25.20.119(E) NMAC. The NPT Rules provides additional protections for groundwater uses, as follows:

> [E]ssential indoor household uses from domestic wells shall not be curtailed under prior or Pueblo alternative administration. Essential household uses include drinking, cooking, indoor cleaning, sanitary, and cooling purposes, and exclude all uses made outside of a building.

19.25.20.120 NMAC. As a result, no person will be prevented from using water for indoor use even if Pueblo alternative administration were implemented. Moreover, wells that were permitted after January 13, 1983 are already limited to indoor use only by the terms of the permit. This limitation means that should

Pueblo alternative administration be applied to domestic wells by the State Engineer, a person with a post-1983 well limited to indoor use by the terms of the permit or subfile order would not be impacted at all by Pueblo alternative administration.

The Dunn Group has not demonstrated any harm from implementation of Pueblo alternative administration through the NPT Rules. The Rules leave non-settlement parties in exactly the same position as they would be without the Settlement Agreement. Under the Rules, the non-settlement parties may seek priority administration to the same extent in the event their rights are harmed. Because there is no change to any aspect of the Dunn Group's water rights, there is no harm.

Appellants' claims regarding the State Engineer's implementation of Pueblo alternative administration in the NPT Rules are not ripe. The district court overruled the objection and responded that the contention that the non-settlement parties' water rights would be subordinated to settlement parties' junior water rights contrary to law during Pueblo alternative administration was an issue to be addressed once the State Engineer promulgated rules governing administration in the NPT. App. at 952-953. At the time, the court stated, "[t]hose rules have not yet been adopted. The objection that the Settlement Agreement effectively changes priority dates is speculative and premature." App. at 953. Those rules

have since been promulgated and Appellants' argument on appeal is still speculative and premature. There is nothing in the record to support Appellants' claims of harm or injury. There has been no priority call, and there has been no curtailment taken under Pueblo alternative administration.

Moreover, should Appellants be curtailed in the future, they would have an administrative remedy to seek relief from any application of Pueblo alternative administration. The district court was charged with adjudicating water rights, not administering them. Limiting judicial review to actual cases or controversies prevents courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." *Gerhard v. Mares*, 179 F.Supp.3d at 1053-4 (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

Whether in state court or in federal court, a party must exhaust available administrative remedies. "It is fundamental that the plaintiff who seeks federal court relief from a state regulatory scheme must first exhaust remedies which are provided by the state law." *Martinez v. Members of Judicial Standards Comm'n of State of N. M.*, 386 F. Supp. 169, 172–73 (D.N.M. 1974); *see also U.S. West Commc'ns, Inc. v. N.M. State Corp. Comm'n*, 1998-NMSC-032, ¶ 9, 965 P.2d 917

("[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.").

Significantly, the relief sought by Appellants is not to address their alleged harm, but for this Court to tell the district court to instruct the State to submit the Settlement Agreement for approval by the New Mexico Legislature, not to change or eliminate the claimed illegal provision in the Settlement Agreement. Even if this remedy were appropriate and this Court or the district court on remand had authority to do so, it would not redress Appellants' alleged injury that their water rights could be improperly curtailed.

If and when an injury occurs to any non-settlement party, then that party may take action. The is simply no need for this Court to address an injury that has not happened, may never happen, and for which there are available administrative remedies in the first instance. The district court correctly overruled the Dunn Group's objection that the Settlement Agreement changed state law and ignores priority administration.

III. THE SETTLEMENT AGREEMENT IS A SETTLEMENT OF WATER RIGHTS CLAIMS BETWEEN PARTIES TO THE ADJUDICATION THAT DOES NOT REQUIRE LEGISLATIVE APPROVAL.[5]

A. The State through the Attorney General has the statutory authority to settle litigation including adjudication of water right claims without approval of the Legislature.

The Dunn Group argues that the executive branch officials are not authorized to approve settlements adjudicating water rights. The district court in the *Taos* Adjudication overruled the same objection on the basis that the objectors ignored New Mexico law, specifically NMSA 1978, Section 36-1-22 (1876). *See* Mem. Op. and Order at 7–8, Doc. 5958, filed July 30,2015, in *New Mexico v. Abeyta*, No. 69cv7896 (D.N.M.) (Vázquez, J.). Not only has the New Mexico Legislature charged the Attorney General with the general duty to "prosecute and defend in any other court or tribunal [in addition to the New Mexico Supreme Court] all actions and proceedings, civil or criminal, in which the state may be a party," NMSA 1978, Section 8-5-2(B) (1975), it has explicitly and unmistakably authorized the Attorney General to act on behalf of the State to adjudicate water rights and to enter into settlements of claims.

By passage of the 1907 water code, the Territorial Legislature set forth the procedures and requirements for determination of rights to use waters within the

[5] This same issue was raised by three legislators as *Amici Curiae* in *State ex rel. State Engineer v. San Juan Agricultural Water Users Assn.*, No. 33,535, now pending before the New Mexico Court of Appeals.

State of New Mexico. *See* NMSA 1978, §§ 72-4-13 to -19 (1907 and as amended through 1982). The adjudication statutes authorize and direct the territorial [now state] engineer to conduct hydrographic survey work necessary for the determination of rights, (§ 72-4-13), and direct the attorney general to "enter suit on behalf of the state for the determination of all rights to the use of such water….and [the attorney general] shall diligently prosecute the same to a final adjudication . . . ." § 72-4-15.

The Legislature also specifically charged the Attorney General with the power to compromise or settle any suit or proceedings in NMSA 1978, Section 36-1-22. That section provides:

> **The attorney general** and district attorneys of this state in their respective districts, when any civil proceedings may be pending in their respective districts, in the district court, in which the state or any county may be a party, whether the same be an ordinary suit, *scire facias* proceedings, proceedings growing out of any criminal prosecution, or otherwise, **shall have power to compromise or settle said suit or proceedings**, or grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; **and all such civil suits and proceedings shall be entirely under the management and control of the said attorney general or district attorneys, and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified.**

[Emphasis added.] The Dunn Group cites to nothing that changes the attorney general's authority to approve the settlement of water rights claims.

B. The Settlement Agreement is not a compact requiring Legislative approval.

The Dunn Group asserts that the settlement with the Pueblos is like a gaming compact and requires legislative approval, citing *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 904 P.2d 11. BIC 26-29. The Supreme Court in *Clark v. Johnson* considered whether by signing Indian gaming compacts the Governor had infringed on powers properly belonging to the Legislature, in particular the Legislature's power to regulate gambling. The Court determined that a violation of separation of powers occurs when an action by one branch of government disrupts the proper balance with another branch, and thereby prevents the other branch from accomplishing its constitutionally assigned functions. 1995-NMSC-048, ¶¶ 31-38. Then-Governor Johnson had executed gaming compacts with the Pojoaque Pueblo that authorized all forms of "casino-style" gambling on tribal property. The Governor argued that New Mexico law permits charities to conduct all forms of gaming, including "casino-style" gaming under the provisions of the permissive lottery exception to New Mexico's gambling laws. *See* NMSA 1978, § 30-19-6 (2009).

With respect to the effect of the executive branch action's on legislative functions the Court noted:

> One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative

> action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement.

Clark v. Johnson, ¶ 37. Because the Governor had no express or implied authority to bind the State to terms of a gaming compact that fell squarely within an area regulated by the Legislature and was inconsistent with existing statutory law, the Governor's action violated constitutional separation of powers. *Id.*

The decision in *Clark v. Johnson* has little, if any, application to this settlement of water rights. The Settlement Agreement is not a gaming compact under the Indian Gaming Regulatory Act, nor is it an interstate compact. 25 U.S.C. § 2703 (1988). It does not divide the waters of the rivers between States, nor does it affect any provision of any interstate compact. The Settlement Agreement and the Final Decree do not create new law, rather, they define existing rights to the use of the waters of the state in accordance with the law. There is no similarity between changing the existing law to permit prohibited gambling activities and adjudicating the water rights of a tribal entity pursuant to long-standing statutory authority to litigate, settle and adjudicate water rights.

In contrast to the finding of infringement on an area directly regulated by the Legislature without either an express or implied legislative grant of authority to the executive in *Clark v. Johnson* and *Pueblo of Santa Ana v. Kelly*, 932 F.Supp. 1284 (D.N.M. 1996), aff'd 104 F.3d 1546 (10th Cir. 1997), no further legislative

approval is needed in order for the Attorney General to execute the Settlement Agreement here. Nor does the Indian Water Rights Settlement Fund statute, NMSA 1978, Sections 72-1-11 and -12, require express approval of the legislature of settlement agreements. It applies to actions of the Legislature, not the Attorney General, in the funding of Indian water rights settlement agreements. Under the plain language of the statute, there is no act required by the Attorney General or any executive branch official. 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, discussed above. NMSA 1978, § 36-1-22. The Attorney General acted squarely within his authority in signing this Settlement Agreement.

Finally, it is the Dunn Group, rather, who seek to have this Court exceed its authority by asking the Court to improperly restrict the Attorney General's statutory authority. Adopting their position would "disrupt the proper balance with another branch," the executive and the legislative, and prevent the other branch, here, the executive branch, from accomplishing its constitutionally assigned functions. *Clark v. Johnson*, 1995-NMSC-048, ¶ 34. The district court properly overruled this objection.

C. NMSA 1978, Sections 72-1-11 And 72-1-12 Do Not Restrict The Authority Of The Attorney General Or The Court But Provide A Mechanism For The Legislature To Follow To Fund Indian Water Rights Settlements.

The Dunn Group also allege that the Settlement Agreement violates state law because it provides for the "appropriation and expenditure of state funds without legislative review and approval." BIC at 23. But although the Settlement Agreement calls for the State to share in costs of settlement implementation, nowhere does it bind the State to provide funding. Instead, Article 13.11 of the Settlement Agreement expressly conditions funding on appropriations by the Legislature, and exempts the State from liability in the event the Legislature fails to appropriate the funds. In fact, in 2005 the New Mexico Legislature enacted NMSA 1978, Sections 72-1-11 and -12 to establish a formal process for the Legislature to be briefed on pending Indian water rights settlements and a mechanism for the Legislature to maintain its express responsibility for overseeing appropriation of state funds to implement these settlements through appropriations to the Indian Water Rights Settlement Fund.

Section 72-1-11 provides, in pertinent part, as follows:

> **72-1-11. Indian water rights settlements; approval of settlements; reports.**
>
> A. Upon congressional authorization of funding of the federal government's portion of the costs of an Indian water rights settlement, the state engineer shall notify the legislature of the amount of the state's portion of the costs necessary to implement the settlement.

> Upon joint resolution of the legislature, the interstate stream commission may expend money in the Indian water rights settlement fund to implement the terms of the approved settlement.
>
> B. On or before November 15 of each year, the state engineer and the interstate stream commission shall report to the appropriate legislative interim committee dealing with Indian affairs and to the legislative finance committee on:
>
> (1) the status of proposed Indian water rights settlements requiring state financing;
>
> (2) the distribution of funds from the Indian water rights settlement fund to implement approved settlements; and
>
> (3) recommendations on the level of funding for the Indian water rights settlement fund necessary to timely implement Indian water rights settlements.
>
> C. As used in Sections 1 and 2 of this act:
>
> (1) "Indian water rights settlement" means an agreement between the state and a tribe, but not exclusive of any other party as appropriate, that resolves all of the tribe's water rights claims and that has been approved by the United States congress; and
>
> (2) "tribe" means a federally recognized Indian nation, tribe or pueblo.

NMSA 1978, § 72-1-11 (2005).

Contrary to the Dunn Group's allegations, lawmakers review Indian water rights settlements through an Indian Water Rights Settlement Report, which the State Engineer and the Interstate Stream Commission Director provide annually to lawmakers. The State Engineer and staff as well as the Interstate Stream Commission Director also have briefed members of the New Mexico Legislature

extensively on the details of the Aamodt Settlement and the other Indian water rights settlements over the last several years. In response, the lawmakers have made multiple appropriations to the Indian Water Rights Settlement Fund to implement the Indian water rights settlements, including *Aamodt*, and have expressed their approval of the *Aamodt* settlement, as well as the *Navajo Nation* and the *Taos Pueblo* (*Abeyta*) settlements, in multiple Memorials passed by the House and the Senate both before and after federal legislation authorizing the settlements was enacted by Congress in 2009 and 2010. In 2006, in House Memorial 3, the House noted the benefits of implementing the settlement in the *Aamodt* case and requested the Governor to include in the Governor's capital outlay appropriations for fiscal year 2007 "significant funding for the Indian water rights settlement fund as a matter of statewide importance." H.M. 3, Native American Water Rights Settlement Funds, Reg. Sess. (N.M. 2006).

In 2009, both the House and the Senate passed Memorials requesting continued funding of the Indian water rights settlements. In House Memorial 66, the House observed that settlement of disputes regarding Indian water rights is "for the benefit of all the state's residents, Indian and non-Indian alike" in approving a resolution "that the governor and legislature be requested to continue to support funding for the Indian water rights settlements through contributions to the Indian water rights settlement fund." H.M. 66, Native American Water Rights Settlement

Funds, Reg. Sess. (N.M. 2009). In Senate Memorial 64, the Senate specifically noted the execution of the *Aamodt* Settlement Agreement by the State in its request that the Governor and the Legislature continue to support funding for the Indian Water Rights Settlement Fund. S.M. 64, Native American Water Rights Settlement Funds, Reg. Sess. (N.M. 2009).

In 2013, after the federal authorization of the *Aamodt* and *Taos Pueblo* Settlements in 2010, the Legislature passed House Joint Memorial 22, declaring that "the New Mexico legislature created the Indian water rights settlement fund to aid the implementation of the state's portion of Indian water rights settlements based on the cost-sharing proportions of the *Aamodt*, *Taos* and *Navajo Nation* waters settlements" in support of its request that Congress provide full funding for its cost share of the settlements. H.J.M. 22, Indian Water Rights Disputes Funding, Reg. Sess. (N.M. 2013).

Not only has the Legislature been informed of the *Aamodt* and other federally authorized Indian water rights settlements, it has taken the affirmative acts of authorizing multiple appropriations to the Indian Water Rights Settlement Fund to implement these Indian water rights settlements, including the *Aamodt* settlement. In 2007, the Legislature authorized the issuance of severance tax bonds (STB) in the amount of $10 million for deposit in the Indian Water Rights Settlement Fund, which was reauthorized in House Bill 9 in 2009. *See* S.B. 827,

Severance Tax Bond Projects, Reg. Sess. (N.M. 2007), section 88, p. 384; and H.B. 9, Capital Outlay Cuts and Reauthorization, Reg. Sess. (N.M. 2009), section 2, paragraph 45B(11), pp. 30-1. At the special session in 2011, the Legislature appropriated an additional $15 million in STB authorization to the Fund. S.B. 10, Severance Tax Fund Projects, 1st Spec. Sess. (N.M. 2011) section 16, pp. 19-20. During its 2013 regular session, the Legislature appropriated an additional $10 million in STB authorization to the Fund. *See* S.B. 60, Severance Tax Bond Projects, Reg. Sess. (N.M. 2013), section 22, p. 61. Most recently, the Legislature appropriated $8.2 million in STB authorization to the Fund in the 2015 special session. S.B. 1, Severance Tax Bond Projects, 1st Spec. Sess. (N.M. 2015), section 19, p. 88.

Each of these legislative appropriation actions contains the following language:

> Notwithstanding the requirement for a joint resolution of the legislature in subsection (A) 72-1-11 NMSA 1978, if corresponding commitments have been made for the federal portion of the settlement in the *Navajo Nation*, *Taos*, and *Aamodt* cases, the money may be expended by the interstate stream commission…to implement the state's portion of the settlement….

By this exception, the Legislature bypassed whatever condition the language of the statute appeared to provide for approval beyond Congressional approval of Indian Water Rights settlement. These Resolutions and appropriations were all passed after the State Engineer and the Interstate Stream Commission Director fulfilled

their duties to report to the Indian Affairs Committee as described in subsection B of section 72-1-11. The Legislature's actions accomplished the true intent of the statute: to provide for the necessary means (funding) to accomplish the settlements.

III. THE SETTLEMENT AGREEMENT COMPLIES WITH ALL CONSTITUTIONAL RIGHTS OF BOTH SETTLEMENT AND NON-SETTLEMENT PARTIES.

The primary argument of the Dunn Group is that the Settlement Agreement changes the priority dates of the water rights of non-settlement parties and subordinates them to other non-Pueblo junior water rights owners. Therefore, the Dunn Group reasons, the agreement violates their constitutional rights to equal protection and substantive due process. U.S. Const. amends. V, XIV; BIC 46-9. This argument is not supported by the facts or the law.

Instead of citing to any provisions of the agreement that might support their argument, the Dunn Group relies on an example that purports to represent a fictitious situation where the State Engineer bypasses priority administration and curtails the water right of a non-settlement senior owner while a settlement junior water rights owner receives its full, reduced amount. BIC 3. The district court found that the Settlement Agreement did not change priority dates. App. at 952-953. It deferred questions about administration of the agreement until a set of rules could be adopted by the State Engineer to govern his responsibilities in administering the non-Pueblo water rights. Because those rules had not been

adopted at the time of the decision, the court found the objection to be speculative and premature. *Id.*

Those rules have now been adopted and establish that no rights or priority dates of non-settlement parties have been changed. *See* 19.25.20.119 NMAC. Although non-settlement parties may not benefit from the agreement by their choice and not from any claimed extortion by any party, they are left in the same position *vis a vis* the Pueblos as if there was no settlement agreement. They are not deprived of property or of protection of any laws.

A. The Settlement Agreement Does Not Violate Equal Protection.

The Dunn Group now argues that settlement junior water rights owners are being treated differently than non-settlement senior water rights owners in violation of the Equal Protection guarantee. The settlement and non-settlement parties are not similarly situated. The settlement parties who own water rights in a well agreed to either cease using the well and connect to the county water utility, or agree to a reduction in the amount of water from an existing well, in exchange for protection from the enforcement of priorities in the Pojoaque Basin. In essence, the Pueblos agree to share any shortage with these users. Non-settlement parties do not agree to any such reduction in their adjudicated use or to cease use of a well and connect to any water utility. They will continue on as if there was no settlement agreement in the event of a shortage. Under the NPT Rules, they may

exercise their senior rights against any junior water rights owner under priority administration. 19.25.20.119(E) NMAC.

The Dunn Parties charge that this procedure treats them differently under the priority appropriation system of the New Mexico Water Code than the settlement parties in the event of a water shortage. Priority administration, however, is not the sole means of dealing with water shortages. Like the settlement agreement in *State ex rel. Office of the State Engineer v. Lewis*, ¶ 32, "the negotiating parties sought to cut the water shortage Gordian knot through a process more flexible than strict priority enforcement, yet still comply with the doctrine of prior appropriation."

> We do not find in the language of the Constitution 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.

Id., ¶ 38. Similarly, the Pueblos do not have to exercise their right only through strict priority enforcement. The Pueblos have agreed with the settlement parties to share shortages in exchange for their agreement to reduce their water usage or give up their wells. While junior settlement parties are not subject to a priority call by the Pueblos, they are still subject to a priority call by non-settlement senior parties.

In addition to the fact that there is no exclusive right to strict priority enforcement, the distinction between settlement and non-settlement parties is rationally related to a legitimate governmental interest. All governmental parties

in this litigation have a legitimate interest in seeing this protracted litigation come to a conclusion that provides an assured supply of water for all the NPT's inhabitants. In this way, this case is much like the situation in *KT & G Corp v. Attorney Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008), in which certain tobacco manufacturers who signed the master settlement agreement were treated differently than those who did not. Non-participating manufacturers argued that they had to place more money in escrow than participating manufacturers who made annual payments to a fund to insure future health related costs and that this violated Equal Protection guarantees. The district court dismissed the claim and this Court upheld the dismissal, finding that the distinction is rationally related to the States' legitimate government purpose of insuring an adequate escrow fund to insure such costs.

B. The Settlement Agreement does not violate substantive due process.

"Procedural due process ensures that a state will not deprive a person of life, liberty or property unless fair procedures are used in making that decision; substantive due process, on the other hand, guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used in making the decision. *Archuleta v. Colorado Dep't of Institutions, Div. of Youth Services,* 936 F.2d 483, 490 (10th Cir.1991). Both serve as safeguards against abusive state action. *Id.* at 491.

As shown in the section above, there was a rational reason for the State to enter into the Settlement Agreement – to bring the oldest case in the district courts of New Mexico to an end in a way that would benefit all residents of the Basin. The Dunn Group has failed to show any arbitrary action that deprives them of due process, especially in light of the NPT Rules' guarantee that they have the same rights and benefits as they would have without the Settlement Agreement and may exercise their senior rights against any junior rights. 19.25.20.119(D) and (E) NMAC.

While the Dunn Group uses charges such as "extortion," "coercion," "overreaching," BIC 4, 5, 6, the Dunn Group simply produced no evidence of any such activities. Nor do they produce any evidence of abusive or arbitrary state action. For whatever reason, they did not want to accept the benefits of the Settlement Agreement. Their refusal does not change the character of an agreement that the district court found to fair and reasonable. Nor did the Dunn Group demonstrate any government action that exceeded any officer's authority. Finally, the Dunn Group has failed to cite any supporting authority for any of these contentions. BIC 48-9. This Court should reject this argument.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to deny this appeal and affirm the District Court's Final Decree in its entirety.

Submitted this 2nd day of February, 2018.

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ORAL ARGUMENT STATEMENT

Pursuant to 10th Circuit Rule 28.2(C)(4), undersigned counsel request oral argument in this matter in light of the extensive record below and the Dunn Parties' failure to relate their arguments in their opening brief to that record.

CERTIFICATE OF COMPLIANCE

As required by F.R.App.P. 32(a)(7)(c), I certify that this brief is proportionally spaced in 14-point font and contains 10,666 words, as calculated with Microsoft Office Word 2007. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: *s/ Kelly Brooks Smith*

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that a copy of the foregoing Appellee State of New Mexico's Answer Brief, as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses on February 2, 2018, and according to the program, McAfee 16.7, is free of viruses. In addition, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that all participants in the case are registered CM/ECF users and that service of the Appellee State of New Mexico's Answer Brief will be accomplished by the appellate CM/ECF system on February 2, 2018.

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