No. 17-2147

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee, and

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

v.

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

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

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

JOINT ANSWER BRIEF OF DEFENDANTS-APPELLEES SANTA FE COUNTY AND CITY OF SANTA FE

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I. STATEMENT OF PRIOR OR RELATED APPEALS

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 App'x 633 (10th Cir. 2011) (unpublished);

4. *Aamodt v. New Mexico ex rel. Reynolds*, No. 85-8071 & -8072 (10th Cir. 1987); and

5. *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

II. STATEMENT OF JURISDICTION

The City and the County agree with the other parties that this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The Appellants ("Dunn Parties") are challenging the District Court's final judgment, dated July 14, 2017, that disposed of all the claims below, and they timely filed a notice of appeal on September 6, 2017.

III. STATEMENT OF THE ISSUES

1. Whether the Dunn Parties have standing to challenge a settlement agreement to which they are not signatories and from which they do not plead any specific injury.

2. Whether the District Court correctly determined that New Mexico Statute § 36-1-22 delegates authority to the New Mexico Attorney General to settle any claim in any lawsuit on behalf of the State and that, as a result, the Attorney General did not exceed lawful executive powers by signing the *Settlement Agreement* (Apr. 19, 2012) ("Settlement Agreement"), which resolved the claims of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (collectively "Pueblos") in the adjudication below of the Nambe-Pojoaque-Tesuque stream system ("Pojoaque Basin"), within Santa Fe County and neighboring the City of Santa Fe.

3. Whether the District Court correctly determined that the Settlement Agreement is consistent with state law, which affords the State Engineer significant discretion over water rights administration, because it does not alter administration of state law water rights pursuant to the doctrine of prior appropriation.

4. Whether the District Court correctly determined that the Settlement Agreement was fair and reasonable and does not prejudice non-settling parties.

IV. STATEMENT OF THE CASE

The County and City adopt the State of New Mexico's Statement of the Case. Fed. R. App. Rule 28(i).

V. SUMMARY OF THE ARGUMENT

The District Court carefully considered and overruled objections raised by the Dunn Parties. On appeal, the Dunn Parties do not explain how the District Court ruled in error and simply recite the same arguments made below. The Dunn Parties attack the Settlement Agreement using sweeping and polemic language but, when it comes to demonstrating any harm or prejudice to them from the District Court's approval of the Settlement Agreement and entry of the Partial Final Judgment and Decree of the Pueblos' water rights, they cannot point to any inury. Given the lack of harm to these appellants, the County and City question whether Appellants have standing to lodge a challenge to a Settlement Agreement that does not bind them, does not harm them and in fact benefits them. Their claim that they suffer a burden from the Pueblos' agreement to forbear certain priority calls is false. In fact, in many ways, as described below, state-based water right holders benefit from the Settlement Agreement even if they do not join it. Without the protections afforded by the Settlement Agreement and the additional water brought into the Pojoaque Basin by the new Regional Water System, water users in the Basin would face a much bleaker future when confronted by strict priority administration of substantial

senior Pueblo water rights, all looking to meet their needs from the same limited local water resource. Finally, the County and the City join in and adopt the State's briefing that it had lawful authority to enter into the Settlement Agreement. The County and the City note that at the same time the Dunn Parties claim violations of equal protection they argue that only settlements of Indian water rights are required to be approved by the New Mexico Legislature.

VI. ARGUMENT

On appeal, the Dunn Parties merely recycle the arguments made before the District Court and do not attempt to explain how the District Court was in error. They contest the authority of the New Mexico executive branch to sign the Settlement Agreement on behalf of the State. Appellant Br. at 18-35. They complain that the Settlement Agreement somehow harms third party water rights and violates public policy, federal equal protection and due process requirements. *Id.* at 35-49. Underlying each argument is the Dunn Parties' hypothetical claim that the Settlement Agreement creates or modifies state law by changing water right priorities between settling and non-settling parties. *Id.* at 2-4; *see* Aplt. App. at 821-47, 1017-19, 1038-40. In response, the County and City state the following:

A. STANDARD OF REVIEW.

The County and City adopt the State of New Mexico's statement of Standard of Review. Fed. R. App. Rule 28(i).

B. APPELLANTS LACK STANDING TO CHALLENGE THE SETTLEMENT AGREEMENT.

The Dunn Parties fail to establish one of the most basic requirements of justiciability, standing. The Supreme Court recently observed that standing is an "irreducible constitutional minimum":

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id*., at 560–561, 112 S.Ct. 2130; *Friends of the Earth, Inc*., 528 U.S., at 180–181, 120 S.Ct. 693. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The Dunn Parties cannot establish any of these elements, but first among these defects is that the Dunn Parties cannot establish injury-in-fact ("injury in fact, the '[f]irst and foremost' of standing's three elements." *Id*.)

Moreover, standing relates to subject-matter-jurisdiction: "Under Article III of the Constitution, standing is a prerequisite to subject matter jurisdiction that we must address, *sua sponte* if necessary, when the record reveals a colorable standing issue." *Rivera v. Internal Revenue Serv.*, 120 A.F.T.R.2d 2017-5796, 2017-2 USTC P 50341 (10th Cir. Sept. 18, 2017). Consequently, Appellees may raise the issue for the first time on appeal. "Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction

over the controversy." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). *See also, New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008). ("It is well established that any party, including the court *sua sponte*, can raise the issue of standing for the first time at any stage of the litigation, including on appeal.")

In the proceedings before the District Court to consider approval of the Settlement Agreement and entry of the Partial Final Judgment and Decree of the Pueblos' water rights, the County and the City believe it was correct to allow all water rights defendants in the case to participate and to file objections. All parties to the Aamodt adjudication had a legal interest in determination of the senior and sizeable water rights of the Pueblos in such a shared stream system. In fact, as early as 2007, the District Court recognized that parties to the adjudication had a choice to join the settlement:

> Those claimants objecting to the settlement will not be forced to join the settlement but instead will be permitted to adjudicate their water rights via litigation. *See Kothe v. Smith*, 771 F.2d 667, 669 (2nd Cir. 1985) (court cannot coerce a party to settle). Furthermore, as discussed elsewhere in this Order, those who believe that the settlement agreement will cause them harm will have the opportunity to present their objections to the Court.

Joint Supp. App. at 211.

Thus, it was not surprising that the District Court later provided parties an opportunity to object to the agreement and demonstrate prejudice in its Order to Show Cause:

> **This proceeding will not adjudicate your water rights, but it is your only opportunity to object to the Agreement and the determination of the Pueblos' water rights in the Pojoaque Basin.** If you claim water rights in the Pojoaque Basin, you have the right to sign the Agreement or file an objection to the Agreement and Proposed Decree, but you must exercise that right in the manner, and within the deadlines, established by the Court.

Joint Supp. App. at 231 (bold in original).

The Dunn Parties, however, make clear that they do not object to the quantities, priority dates or any other elements of the Pueblos' water rights set forth in the Partial Final Judgment and Decree: "Appellants do not contest that water rights of the Pueblos are and should be adjudicated in accordance with previous decisions of this Court and the 10th Circuit Court of Appeals…." Appellant Br. at 3. Consequently, their challenge only concerns administrative provisions of the Settlement Agreement that are not binding on them, and as argued below, cannot legally harm them.

The District Court considered the objections and then approved the Settlement Agreement. Without demonstrating legal prejudice, the non-settling parties cannot now object to the State's authority to enter into the settlement or to shortage–sharing agreements among and only affecting settling parties.

1. Appellants are not Parties to the Settlement Agreement.

Despite repetitive and dubious arguments against the Settlement Agreement, the Dunn Parties do not claim to be and are not parties to the agreement. "While the Settlement Agreement itself cannot bind non-settling parties, it purports to do so by its implementation and in punishment for not agreeing to the settlement." Appellant Br. at 3-4. Nonetheless, the Dunn Parties attempt to challenge the authority of the settling parties to enter into the Settlement Agreement itself:

> The Court is not being asked to decide on the merits of any party's water rights in this appeal. Rather, the question is whether certain state actors had the authority to enter into a Settlement Agreement with federal and tribal entities over water. The primary legal issue is a question of state-law separation of powers.

Appellant Br. at 16. However, without being a settling party, the Dunn Parties lack standing to complain about the Settlement Agreement or question the authority of the parties who have entered into it, since the the Dunn Parties are not members of the settling group:

> '[N]on-settling defendants generally have no standing to complain about a settlement, since they are not members of the settling class.' 'This rule advances the policy of encouraging the voluntary settlement of lawsuits.' 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.'

In re Integra Realty Res., Inc., 262 F.3d 1089, 1102 (10th Cir. 2001) (internal citations omitted). *See also, In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1110 (10th Cir. 2017), "Non-settling defendants like Speedway 'generally have no standing to complain about a settlement.'" (internal citations omitted).

In fact, in the instant case, the District Court explicitly noted that, in general, non-settling parties lack standing: "The Court will require that any person objecting to the settlement agreement must state in their objection how the objector will be injured or harmed by the settlement agreement in a legally cognizable way. Non-settling defendants, in general, lack standing to object to a partial settlement." *New Mexico ex rel. State Eng'r v. Aamodt*, 582 F. Supp. 2d 1313, 1315 (D.N.M. 2007).

2. <u>Appellants are not prejudiced by the Settlement</u>.

The general rule is that non-settling parties do not have standing to object to a settlement. Nonetheless, courts have recognized an exception to that rule, when the non-settling party is *legally* prejudiced. "In order to have standing to challenge a settlement, non-settling parties must demonstrate that they have been prejudiced by the settlement." *New England Health Care,* 512 F.3d at 1288. Similarly, the District Court in this case, recognized this exception and found that a non-settling party may have standing if the objector can demonstrate legal prejudice:

> Courts have, however, recognized a limited exception to this rule where non-settling parties can demonstrate they are prejudiced by a

> settlement. *Id.* 'This standard strikes a balance between the desire to promote settlements and the interests of justice.' 'Prejudice' means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.' (it is not sufficient to show merely the loss of some practical or strategic advantage in litigating the case).
>
> Requiring objectors to describe how they will be injured or harmed by the settlement agreement in a legally cognizable way is also consistent with New Mexico water law.

New Mexico ex rel. State Eng'r, 582 F. Supp. 2d at 1315. (internal citations omitted). One reason why prejudice is required to qualify as an exception to the rule against non-party standing is that prejudice is closely related to the injury-in-fact element of standing:

> Non-settling defendants like Speedway "generally have no standing to complain about a settlement." That's because they lack "a legally protected interest in the settlement" and therefore can't satisfy Article III's injury-in-fact requirement. But as Speedway points out, "[c]ourts have recognized a limited exception to this rule where nonsettling parties can demonstrate they are 'prejudiced' by a settlement." *Id.* "[P]rejudice" in this context means "plain legal prejudice," as when "the settlement strips the party of a legal claim or cause of action."

In re: Motor Fuel Temperature Sales Practices Litig., 872 F.3d at 1110 (internal citations omitted). As this Court has explained, prejudice, is not an empty term into which appellants may supply any meaning. As this Court has instructed, prejudice means the settlement strips the party of a legal claim or cause of action.

The Dunn Parties have not demonstrated and cannot demonstrate that the Settlement Agreement has stripped them of a legal claim or cause of action. At best,

they reprimand the District Court for failing to consider other policy considerations when the District Court approved the Settlement Agreement:

> The policy to be assessed and reviewed in determining whether to approve a settlement by entry of judgment goes beyond the concept of merely settling, but goes to the overall impacts of those settling and those not. Such policy assessment must look to the underlying law, the rights of impacted parties and whether the rights of non-settling parties are prejudiced by such settlement as is the case here.

Appellant Br. at 5-6. This generalized complaint does not actually articulate how the Settlement Agreement prejudices the Dunn Parties by denying them a legal claim or cause of action. Although they offer a couple of hypothetical examples, they fail to describe how they have lost a claim or cause of action: "Thus, a junior water rights holder who acquired such right in 1950 and signed on to the government's drafted agreement, will be given priority over a senior user having acquired water rights in 1940, if the latter did not sign onto the Settlement Agreement." Appellant Br. at 47. Indeed, their chief complaint appears to be that they want the legal benefits of the Settlement Agreement without any legal detriments:

> Even still, an agreement that offered consideration of funds for hooking up to the regional water system in exchange for voluntary reductions of rights would have been equitable and in keeping with the law, but creating a new system that effectively punishes objecting water rights owners for failing to agree to settlement by forcing them to bear the curtailment of future priority calls by the Pueblos while rights that are junior are excepted is unjust.

Appellant Br. at 8. The quid pro quo for settling parties is protection from priority enforcement, in exchange for making a groundwater well election, which may include connecting to the Regional Water System. *New Mexico ex rel. State Eng'r v. Aamodt*, 171 F. Supp. 3d 1171, 1183 (D.N.M. 2016). As described in section D below, the Settlement Agreement contains no provision shifting any burden or any greater quantity of curtailment to non-settling parties. The rules adopted by the State Engineer to administer water rights in the Pojoaque Basin, N.M. CODE R. § 19.25.20 (Sept. 12. 2017) ("The Rules"), explicitly prohibit such a burden shifting. Thus, the Dunn Parties have no basis for asserting legal prejudice.

In the *Motor Fuel Temperature* case, Speedway argued that "the settlements prejudice [its] legal right to conduct business as [it has] historically done and as currently authorized by law," and (2) the settlements burden its speech. *In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d at 1110. The Court held that this argument did not qualify as legal prejudice:

> [P]lain legal prejudice 'include[s] any interference with a party's contract rights or a party's ability to seek contribution or indemnification,' and that '[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.'

Id. Likewise, the Dunn Parties have identified no legal claims that they have lost as a result of the Settlement Agreement. As such, they cannot show prejudice. Having

failed to show legal prejudice, they lack standing to object to the Settlement Agreement.

This Court should dismiss the Dunn Parties' appeal because they, as non-parties to the Settlement Agreement, lack standing to challenge it. Moreover, the Dunn Parties have not argued or articulated that the Settlement Agreement will legally prejudice them. Consequently, the City and County respectfully request that the Court dismiss the appeal.

C. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE NEW MEXICO ATTORNEY GENERAL IS AUTHORIZED TO SIGN THE SETTLEMENT AGREEMENT ON BEHALF OF THE STATE.

The District Court correctly determined that the New Mexico legislature delegated authority to the Attorney General to execute the Settlement Agreement. 171 F. Supp.3d at 1179-80 & Aplt. App. at 1042-43, 1045. The Dunn Parties' assertions that the New Mexico executive branch infringed on the powers of the legislative branch by signing the Settlement Agreement, Appellant Br. at 18-35; Aplt. App. at 827-30, 838-46, ignore the broad powers delegated to the Attorney General and mischaracterize the legal effects of the Settlement Agreement on non-settling parties. The District Court correctly relied on New Mexico Statute § 36-1-22 to reject the Dunn Parties' separation of powers argument. 171 F. Supp.3d at 1179-80 & Aplt. App. 1042-43, 1045. *See also* N.M. STAT. § § 72-4-15 (requiring Attorney General to "enter suit on behalf of the state" in stream adjudications).

"Absent a showing of fraud or misdealing, it is not for the courts to second-guess the Attorney General in the exercise of his authority in compromising this matter." *State ex rel. Prop. Appraisal Dep't v. Sierra Life Ins. Co.*, 562 P.2d 829, 832 (N.M. 1977) (citing *Lyle v. Luna*, 338 P.2d 1060 (N.M. 1959); *State v. State Inv. Co.*, 239 P. 741 (N.M. 1925)).

The Dunn Parties misconstrue New Mexico Statute § 72-1-12 in contending that legislative approval of Indian water right settlements is required. Appellant Br. at 29-35; Aplt. App. at 1017-18. As the District Court held, this law is concerned with the Indian Water Rights Settlement Fund, which provides state monies for Indian water rights settlements, and does not constitute a reservation by the legislature of exclusive authority to approve Indian water rights settlements. Aplt. App. at 1044. This statute simply establishes the legislature's role in authorizing the expenditure of state funds, upon notification from the State Engineer, to implement Indian water rights settlements; it "does not reserve the power to approve Indian water rights settlements." Aplt. App. at 1044-45.

If the Dunn Parties' are correct, it would mean New Mexico law requires legislative approval of Indian water rights settlements while not requiring such approval for settlement of any other claims, which are routinely settled in the various adjudication proceedings across New Mexico. A requirement of state legislative approval of an Indian water rights settlement would place a substantial burden on

Indian tribes based only on their tribal status. The District Court has already held in this case that the Pueblos are not sovereign states. *State of New Mexico v. Aamodt,* 618 F.Supp. 993, 1005 (Dist. Ct. N.M. 1985) *(Aamodt II)*. *See Arizona v. California*, 460 U.S. 605, 616, 103 S. Ct. 1382, 1390, 75 L. Ed. 2d 318 (1983), *decision supplemented, Arizona v. California*, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984) (Court rejected Arizona's argument that each Indian reservation is like a State that its rights to water should be determined by the doctrine of equitable apportionment). Thus, the Court should reject any contention that an Indian water rights settlement is a compact requiring approval by the state legislature.

Because the State of New Mexico is best positioned to brief this issue, the County and City have limited their argument and adopt the State's argument on this point. Fed. R. App. Rule 28(i).

D. THE DISTRICT COURT WAS CORRECT IN HOLDING THE SETTLEMENT AGREEMENT COMPLIES WITH NEW MEXICO LAW GOVERNING PRIORITY ADMINISTRATION.

On appeal, the Dunn Parties continue to make unsupported allegations that the Settlement Agreement changes state law by modifying the priorities of non-Pueblo water rights. Aplt. App. at 2-8, 22-24, 28-33, 36, 39, 47-48. The District Court found the Settlement Agreement does not change priority dates and rejected as speculative and premature the Dunn Parties' assertion the State Engineer will ignore priorities in administering water rights pursuant to the Settlement Agreement.

171 F. Supp.3d at 1186-87. The District Court concluded that assertions that implementation of the Settlement Agreement will violate state or federal laws are based on incorrect interpretations of those laws. *Id.* at 1189.

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

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

U.S. v. City of Las Cruces, 289 F.3d 1170, 1176 (10th Cir. 2002) (further citing *A Survey of the Evolution of Western Water Law in Response to Changing Economic*

and Public Interest Demands, 29 Nat. Resources J. 347, 350 (1989)). This hierarchy also applies to use of water from domestic wells. *See Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 466 (N.M. 2013) (curtailment by priority administration authorizes the State Engineer to limit domestic well use administratively in times of water shortage to protect senior water rights).

The Settlement Agreement and the Partial Final Judgment and Decree conform to New Mexico's water laws, and federal law when applicable, governing adjudication and administration of water right priorities. Over the decades of this water rights adjudication, the District Court determined that the historic prior water rights of the Pueblos are entitled to a first or time immemorial priority. *See Aamodt II*, 618 F.Supp. at 1005-1010; Mem. Op & Order, Apr. 14, 2000 at 8-9 (Doc. No. 5596); Joint Supp. App. at 152-153. Furthermore, priority dates for water use on Indian reservation lands are based on respective dates of reservation (1939 for 4.82 acre-feet per year (AFY) for San Ildefonso Pueblo and 1902 for 302 AFY for Nambe Pueblo), in compliance with the Federal Reserved or *Winters* Doctrine. *See Aamodt II* at 1010. The Dunn Parties do not contest the priority dates adjudicated by the Partial Final Judgment and Decree for the Pueblos' water rights: "Appellants do not contest that water rights of the Pueblos are and should be adjudicated in accordance with previous decisions of this Court and the 10th Circuit Court of Appeals…." Aplt. App. at 3.

Although neither the Settlement Agreement nor the Partial Final Decree adjudicated any non-Pueblo water rights, the Dunn Parties argue the priority administration provisions of the Settlement Agreement violate their rights under state law. They complain "certain non-Pueblo junior rights will become elevated and exempt from priority calls irrespective of their priority relation to other non-Pueblo rights[,]" Aplt. App. at 3, and will "escape priority administration between non-Pueblo water rights holders in times of shortage." *Id*. This creates "a new system that effectively punishes objecting water rights owners for failing to agree to settlement by forcing them to bear the curtailment of future priority calls by the Pueblos while rights that are junior are excepted[.]" *Id*. at 8.

This was the precise objection, in virtually identical language, (Dunn Objectors' Response in Opposition at 2, 3 & 10; Aplt. App. at 821, 822 & 829), considered and overruled by the District Court. 171 F. Supp.3d at 1186-87. On Appeal, the Dunn Parties repeat the same statements and provide no justification for overturning the District Court. Rather than attempting to explain why the District Court's reasoning was wrong and without any citation to the Settlement Agreement or the record below, the Dunn Parties merely restate the same unfounded hypothetical in which a junior settling party will receive water during a Pueblo priority call at the expense of a senior, non-settling party. Appellants Br. at 3, 47.

See Nixon v. City & County of Denver, 784 F.3d 1364, 1366 (10th Cir. 2015) (appellant's argument waived because it did not challenge district court's reasoning).

Although it is true that a non-settling party may be subject to a priority call, while a junior settlement party may not because of agreement by the Pueblos to forbear making priority calls under the Settlement Agreement, the Dunn Parties cannot show that any non-settling party is made worse off. The Dunn Parties present no facts and fail to identify any water users that might find themselves in such a situation. The administrative Rules implementing the Settlement Agreement, discussed below, specifically prohibit the very hypothetical the Dunn Parties imagine. Moreover, courts in New Mexico have recognized that the State needs flexibility to resolve water shortages: "Thus, although priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means." *New Mexico ex rel. Reynolds v. Lewis*, 150 P.3d 375, 386 (N.M. Ct. App. 2007).

The flaw in the Dunn Parties' theory is their mere assumption that an agreement between a senior and junior to forbear priority administration necessarily will violate the rights of non-agreeing parties whose priority dates fall between the dates of the agreeing parties. As discussed below, (1) nothing on the face of the

Settlement Agreement can be reasonably construed to deprive non-settling parties of a right they hold, and (2) the administrative Rules implementing the Settlement Agreement's priority administration protections explicitly disallow the very scenario the Dunn Parties hypothesize.

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

The District Court overruled the Dunn Parties' objection below that the Settlement Agreement modifies priority dates. The District Court succinctly explained: "The Settlement Agreement does not change priority dates. *See* Sections 3.1.1.1 and 3.1.2.1 (priorities for wells "shall be the priority adjudicated in the sub-file order for each such well"); Section 3.2.1 (priorities for surface rights shall be that agreed to by, or adjudicated between, the State and the owner of the right, subject to *inter se* challenges by other parties)." 171 F. Supp.3d at 1187.

On appeal the Dunn Parties do not cite any provision of the Settlement Agreement that they claim will violate state law or deprive them of a right they hold.[1]

[1] Before the District Court, the Dunn Parties cited only Section 2.4.4.2.2 of the Settlement Agreement, claiming: "the Agreement is patently against public interest as it includes penalties against non-settling parties, in its effort to extort a Settlement agreement. (*See* Settlement Agreement at 2.4.4.2.2 in conjunction with Section 4)." Dunn Objectors' Response in Opposition at 7; Aplt. App. at 826. They did not show then and do not even attempt to show now how Section 2.4.4.2.2 operates to compel them to settle or how it affects them in any way at all. Section 2.4.4.2.2 falls under the broader topic of *Future Basin Use Rights*, Section 2.4. Section 2.4 defines the quantity of each Pueblo's First Priority Rights for various uses, for example, 2.4.3 addresses 1) new community uses, 2) new domestic uses, and 3) new livestock uses. Settlement Agreement at 12, Aplt. App.

The Dunn Parties claim the Pueblos' agreement to forbear enforcement of their first priority and to participate in shortage sharing with settling parties penalizes non-settling parties. This belief, however, misapprehends the terms and effect of the Settlement Agreement.

In Section 4 of the Settlement Agreement, the Pueblos agreed to forbear enforcement of their senior rights to accomplish shortage sharing with junior groundwater users who join the settlement. Section 4.4 provides in pertinent part:

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

Settlement Agreement at 35, Aplt. App. at 1086. Section 4.4 was included in the terms of settlement after groundwater users obtained agreement from the Pueblos to limit priority calls in exchange for joining the settlement and making one of the three

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at 1063. Section 2.4.4.2 addresses *Other Future Basin Uses on Pueblo Land*. *Id.* at 13, Aplt. App. at 1064. Finally, 2.4.4.2.2, states that the Pueblo "initiating such Future Basin Use shall offset any resulting interference with Non-Pueblo surface water rights entitled to Section 4 protection including any resulting increased stream depletions." *Id.* As discussed in section E.2 below, under Section 4 Pueblo forbearance from a call of Future Basin Use Rights applies equally to and reduces potential curtailment of non-Pueblo surface water diverters, whether or not they are settling parties. These sections do not penalize non-settling parties.

elections under Section 3.1.7.2. Settlement Agreement at 24, 35; Aplt. App. at 1075, 1086.

The County and City believe Section 4's priority protection provides an important benefit to settling groundwater users. But in no way does it "extort" or "force" other parties to settle. Appellant Br. at 6, 8 & 43. By agreeing to share shortages with settling junior groundwater users, the Pueblos have effectively agreed to reduce the magnitude of their call. *See State, County and City Joint Reply to Response to Memorandum in in Support of Settlement* (Filed 02/04/15) (Doc. 10012) at 12-16; Aplt. App at 921-925 (for illustration of how reduced call allows shortage sharing and does not shift curtailment to other parties). As a result, non-settling parties are unharmed.

There is nothing on the face of the Settlement Agreement and specifically its forbearance provisions contained in Section 4 that shifts a new or greater burden to non-settling parties. Respondents merely speculate that the State Engineer will administer the forbearance provisions in a way that will prejudice them. In the *Bounds* case, the New Mexico Supreme Court considered a facial challenge to the state statute directing the State Engineer to issue permits for domestic wells, finding that "speculation about what the State Engineer may or may not do in the future cannot form the basis of a facial challenge in the present." 306 P.2d at 467. The court reasoned:

> Without specific facts supporting an as-applied challenge, we must assume that domestic wells will be administered as the permits themselves are written: 'subject to curtailment by priority administration.' 19.27.5.13(B)(11) NMAC. In the absence of a record to the contrary, we must assume that the State Engineer will fulfill the responsibility and exercise the authority bestowed on that office by law.

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

In approving the Carlsbad Irrigation District's settlement over objections of non-settling parties in the Pecos River adjudication, the New Mexico Court of Appeals held that alternatives to strict application of priority may be lawful, so long as non-settling seniors are protected:

> We do not find in the language of the Constitution [N.M. Const. art. XVI, § 2] or the Compact an exclusive right to a priority call. The relevant provisions do not by their terms require strict priority enforcement through a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods.
>
> Although priority calls have been and continue to be on the table to protect senior water users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means.

Lewis, 150 P.3d at 386.

As in the Pecos settlement, Section 4's forbearance of enforcement of Pueblo senior rights is an agreement in lieu of strict enforcement of priority among settling parties. It is an agreement to share shortages: the Pueblos agree their senior rights will not be administered to curtail settling groundwater users and those parties in turn agree to make an election under Section 3.1.7.2, which may include agreement to connect to the Regional Water System or to reduce or maintain use below specified levels. Settlement Agreement at 24, Aplt. App. at 1075. The County and City concur that Section 4's forbearance and shortage sharing provisions cannot lawfully be implemented in a way that would cause non-settling parties to suffer greater or more frequent calls than they would otherwise. As discussed directly below, regarding Sections 5.2 and 5.3 of the Settlement Agreement, 36-37, Aplt. App. at 1087-88, the State Engineer adopted the Rules to govern administration of water in the Basin, which the State Engineer will apply as Water Master. The Rules expressly forbid administration of the Settlement Agreement that could infringe on the rights of non-settling parties.

2. The Rules implementing the Settlement Agreement preclude the Dunn Parties' objection.

As the District Court described, "Section 5.3 of the Settlement Agreement provides that counsel for the State Engineer, the United States, and the Pueblos, in consultation with counsel for the other Settlement Parties, shall agree on a set of rules to be proposed for adoption by the State Engineer to govern his responsibilities

in administering the non-Pueblo water rights." 171 F. Supp.3d at 1187. Section 5.2 of the Settlement Agreement further provides that the State Engineer must "perform the functions of Water Master" with respect to Pueblo rights in accordance with the Settlement Agreement, Final Decree, and further orders of the District Court. Settlement Agreement at 37-38, Aplt. App. at 1087-88. At the time the District Court issued its Order Approving the Settlement Agreement, the State Engineer had not yet promulgated the Rules. The District Court found: "Those rules have not yet been adopted. The objection that the Settlement Agreement effectively changes priority dates is speculative and premature." 171 F. Supp.3d at 1187.

The Dunn Parties do not challenge the District Court's conclusion that their objection to the Rules is speculative and premature. Instead the Appellant's Brief merely cites sections of the New Mexico statutes for the unremarkable proposition that the State Engineer must comply with state law in administering waters of the state. Aplt. App. at 43-44 (citing N.M. STAT. §§ 72-2-1, 72-2-8, 72-2-9 & 72-9-1). The Dunn Parties do not argue on appeal that the District Court's determination was incorrect.

The State Engineer adopted the Nambé-Pojoaque-Tesuque Water Master District: Active Water Resource Management effective on September 12, 2017. ("Rules"). *See* N.M. CODE R. § 19.25.20. Although no party has challenged or appealed the Rules, any such challenge would be made in state district court. *See*

Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 249 P.3d 924, 930 (N.M. Ct. App. 2011) (challenge to State Engineer regulations must be made by filing a complaint for declaratory judgment with the state district court.)

Even though validity of the Rules is not before this Court, it is noteworthy that the Rules, like the Settlement Agreement, comply on their face with state law and contain no provision that modifies priority dates or deprives non-settling parties of rights they hold, nor could they. Under the heading "Priority Administration," section 19.25.20.119 of the Rules expressly addresses the Dunn Parties' principal concern:

> D. Non-settlement parties' water rights shall only be curtailed under Pueblo alternative administration to the extent such curtailment would occur without the settlement agreement.
>
> E. Non-settlement parties seeking priority administration shall have the same rights and benefits that would be available without the settlement agreement.

§ 19.25.20.119(D)-(E).

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

E. THE SETTLEMENT IS FAIR AND REASONABLE AND BENEFITS BOTH SETTLING AND NON-SETTLING PARTIES.

The District Court approved the Settlement Agreement pursuant to the "fair and reasonable" standard. 171 F.Supp.3d at 1178-79 & 1189-90. In overruling objections, the District Court found that the objections do not "state how the claimant's water rights will be injured or harmed in a legally cognizable way by the Settlement Agreement…." *Id.* at 1189. The District Court further found:

> The fact that quantification of the Pueblos' rights was not resolved through litigation in the 24 years between the Tenth Circuit's statement in 1976 … and the beginning of settlement negotiations in 2000, and the fact that the Settlement Parties were able to agree on settlement of the Pueblos' rights in six years, and worked together for seven more years to obtain Congressional authorization of the Settlement Agreement and to revise the Settlement Agreement to conform to the Settlement Act, leads the Court to two additional conclusions. First, the Court concludes that the value of resolving the Pueblos' water rights now by approving the Settlement Agreement outweighs the possibility of an alternative resolution after protracted and expensive litigation. Second, the Court concludes that the Settlement Parties have determined that the Settlement is fair and reasonable.

Id. at 1189-90.

For almost two decades, the County and the City have actively participated in negotiation and implementation of the Settlement Agreement. Both of these local governments have devoted considerable financial resources to secure settlement. In addition, the County will be contributing $7.4 million (measured in 2006 dollars) towards construction of the Regional Water System pursuant to the Cost-Sharing

Agreement approved by Congress, Aamodt Litigation Settlement Act, Pub. L. No. 111-291, §§ 601-26, 124 Stat. 3064, 3134-56 (2010) ("Settlement Act"). The County and the City support the Settlement Agreement not merely because it is fair and reasonable and settles long-standing litigation, but also because it will benefit residents of the basin, whether or not they elect to join the settlement.

1. The Pueblos claim the most senior water rights

Absent settlement, the Pueblos' first priority and extensive water right claims would in many instances leave other water users with no or severely curtailed supply. Although the District Court did not determine all of the pending Pueblo claims prior to commencement of settlement negotiations, the District Court did determine that the Pueblos historic irrigation and other historic uses have a time immemorial water right, superior to all other water uses in the basin. *See Aamodt II,* 618 F.Supp. at 996, 1005-1010; Mem. Op & Order, Apr. 14, 2000 at 8-9 (Doc. 5596); Joint Supp. App. at 152-153. "[The Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, saving and excepting land ownership and appurtenant water rights terminated by operation of the 1924 Pueblos Land Act." *Aamodt II*, 618 F. Supp. at 1010 (internal citations omitted). The District Court further held that the source of supply to satisfy the Pueblos is not limited to surface water and includes groundwater. *Id.* Pursuant to these holdings, the District Court determined the amount of historically

irrigated acreage for each Pueblo between 1846 and 1924. *Findings of Fact and Conclusions of Law* (Apr. 28, 1987) (Doc. 3035); Joint Supp. App. at 62-73, *as amended* (Sept. 9, 1987) (Doc. 3074); Joint Supp. App. at 80-82.

Based on the District Court's rulings the Pueblos could assert the first call on approximately 7,000 AFY out of a limited average surface supply of less than 9,500 AFY in the entire Pojoaque Basin. *See The Rio de Tesuque Association, Inc.'s Memorandum in Support of Settlement Agreement and Entry of a Partial Final Decree on the Pueblos' Rights* (Nov. 6, 2014) *Exhibit A* (Doc. 9911-1), p. 2; Joint Supp. App. at 255. In dry times, the Pueblos' senior right can easily exceed the surface flow. The District Court explained the legal effect of the Pueblos' senior priority on other water users: "[i]f there is not enough water in the stream system to serve both, the junior users must forgo the use of water." *Memorandum Opinion and Order* (Jan. 31, 2001) (Doc. 5642) at 9; Joint Supp. App. at 166.

2. <u>Protection of State law rights under the Settlement Agreement</u>.

The Settlement Agreement contains extensive provisions to protect the rights of state law surface and groundwater users in the Basin. Settlement Agreement §§ 3-4, pp. 21-36; Aplt. App. at 1072-87. Without these provisions, junior state-based water rights would be subject to strict priority administration to satisfy senior Pueblo demands. Under the Settlement Agreement junior groundwater users may invoke any of three options to avoid a Pueblo priority call: (1) voluntarily connect to the

Regional Water System; (2) continue to use their wells but agree to a cap on annual usage; or (3) agree that upon transfer of their property the new owners will connect to the Regional Water System. *Id.* §§ 3.1.7.2.1 to .3, pp. 24-25; Aplt. App. at 1075-76.

With respect to surface water, the Pueblos agree to limit priority calls to satisfy only a portion of their historic first priority water rights. Under the Settlement Agreement and Partial Final Judgment and Decree, the Pueblos' total First Priority Rights are 3,660 AFY. *See* Settlement Agreement § 2.1.2, p.8; Aplt. App. at 1059. This number is based on the District Court's prior findings of the amount of the Pueblos' historically irrigated agriculture and on settlement of the Pueblos' claims for replacement water rights and other historic beneficial uses based on the opinions of the Court. *The Rio de Tesuque Association, Inc.'s Memorandum in Support of Settlement Agreement and Entry of a Partial Final Decree on the Pueblos' Rights* (Nov. 6, 2014) at §§ B & C, pp. 509; Aplt. App. at 731-735. The Partial Final Judgment and Decree and the Settlement Agreement separate the Pueblos' First Priority Rights into two categories: "Existing Basin Use Rights," which are that portion in use as of the year 2000, s*ee id*. at § 2.3, pp. 11-12; Aplt. App. at 1062-63; and "Future Basin Use Rights" which are the remainder, *id*. at § 2.4, pp.12-15; Aplt. App. at 1063-66. The following table breaks down these two categories of the Pueblos' First Priority Rights.

Pueblo First Priority Historic Rights: Acre-Feet per Year			
Pueblo	**Existing Basin Use**	**Future Basin Use**	**Total First Priority Right**
Nambe	522	937	1,459
Pojoaque	236	0	236
San Ildefonso	288	958	1,246
Tesuque	345	374	719
Totals	**1,391**	**2,269**	**3,660**

The Pueblos agree that their Future Basin Use Rights, which are the largest category of their First Priority Rights, will not be administered to curtail non-Pueblo water right that continue in beneficial use, whether or not the holders of those rights elect to join the Settlement Agreement. *See* Settlement Agreement at § 4.2, p. 35; Aplt. App. at 1086. Accordingly, of the Pueblos' total First Priority Rights of 3,660 AFY, only the "Existing Basin Use Rights" of 1,391 AFY will be exercised and administered with a first priority against eligible non-Pueblo water right owners. This provision means that 62 percent of the Pueblos' First Priority rights, in the amount of 2,269 AFY, is effectively made a third or subordinate priority. Under the Settlement Agreement this Pueblo forbearance applies to settling and non-settling parties alike and affords protection from surface water curtailment to all active irrigators.

The Settlement Agreement contains a number of additional protections for

state-based water rights. For example, each Pueblo agrees to use water from the Regional Water System "to the maximum extent feasible prior to exercising its Future Basin Use Rights described in Section 2.4," which decreases the likelihood of in-basin shortages. *Id.* § 2.5.3, p. 15; Aplt. App. at1066. Furthermore, the Pueblos and the United States agreed not to contest the final adjudication of state-law rights, including the priority and the quantification of any non-Pueblo groundwater rights. *Id.* at § 3.1.3, p. 21; Aplt. App. at 1072. Consequently, the Pueblos and United States did not challenge the attributes of any state law rights during the final *inter se* stage of the case before entry of the Final Decree. Also, the Settlement Agreement requires the State to establish a fund to "mitigate impairment to non-Pueblo groundwater rights as a result of new Pueblo water use." *Id.* § 5.5, p. 38; Aplt. App. at 1089.

Although the Dunn Parties object to the Settlement Agreement, hundreds of other individual water right holders have joined the Settlement Agreement and the two largest non-Pueblo irrigation associations supported approval of the Settlement Agreement. One of those, the Rio de Tesuque Association, an association representing the majority of community ditches diverting from the Rio Tesuque, described to the District Court how, without the protections afforded by the Settlement Agreement, strict priority administration would devastate junior state-based rights in the Basin. *The Rio de Tesuque Association, Inc.'s Memorandum in*

Support of Settlement Agreement and Entry of a Partial Final Decree on the Pueblos' Rights (Nov. 6, 2014); Aplt. App. at 727-36. For example, in times of shortage, a call by Tesuque Pueblo of its full senior right would require curtailment of all the upstream community ditches. *Id.* at 7, Aplt. App. at 733. The Rio Pojoaque Acequia and Water Well Association, comprised of the majority of community ditches on the Rio Pojoaque, also supported approval of the Settlement Agreement. *Certain Non-Pueblo Defendants' Reply Memorandum in Support of Entry of Partial Final Judgment and Decree*, (March 4, 2015) (Doc.10010); Aplt. App. at 853-870.

3. <u>The Regional Water System will benefit residents of the Basin</u>.

At the heart of the settlement is construction of a Regional Water System. The agreement by the United States, State and County to fund and construct a public water system that will deliver water into the Basin from the Rio Grande provides the mechanism for settling the Pueblos' claims. The Regional Water System will bring up to 4,000 AFY into the Basin, based on an allocation of 2,500 AFY to the four Pueblos and up to 1,500 AFY to the County water utility. Settlement Act at §§ 611(a) & 614(a).

In approving the Settlement Agreement, Congress authorized construction of the Regional Water System and appropriated $56,400,000 and authorized another $50,000,000 for a total of $106,400,000 for construction of the Regional Water System. Aamodt Litigation Settlement Act, Pub. L. No. 111-291, §§ 601-26, 124

Stat. 3064, 3134-56 (2010) ("Settlement Act") at §§ 611 & 617. In addition, the State is contributing $49,500,000 and the County $7,400,000 to pay the non-federal share of construction costs, as required by the Cost-Sharing and System Integration Agreement approved by Congress. Settlement Act § 621.

Because of the obligation to provide this additional supply, the Pueblos were willing to settle their claims and agree to forbearance of priority calls and the other protections afforded junior state-based water users under the Settlement Agreement, as described above. Without the settlement, the water system would not be built and the Pueblos would look to meet all of their claims from the water resources of the Basin; and the Pueblos would continue to claim an expanding federal water right. By contrast the settlement ends the litigation and gives all parties greater certainty and reliability in their water supply.

VII. CONCLUSION

For all of the foregoing reasons, the County and the City respectfully ask the Court to deny this appeal and affirm the District Court's approval of the Settlement Agreement and entry of the Final Judgment and Decree, including the Partial Final Judgment and Decree of the Pueblos' water rights.

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 and complexity of the issues decided below.

Respectfully submitted this 2nd day of February 2018, by

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Certificate of Compliance

As required by Federal Rules of Appellate Procedure 28(a)(10) and 32(g)(1) and 10th Circuit Rule 32(a), undersigned counsel for Santa Fe County certifies that this brief is proportionally spaced in 14-point font and contains 8,454 words, as calculated pursuant to Federal Rule of Appellate Procedure 32(f) with Microsoft Office Word 2016.

Certificate of Service and Digital Submission

I HEREBY CERTIFY that on February 2, 2018, a true and complete copy of this *Joint Answer Brief of Santa Fe County and City of Santa Fe* was electronically transmitted to the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the parties of record.

JOHN W. UTTON