No. 17-2147

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee, and

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

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

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

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

JOINT SUPPLEMENTAL BRIEF OF APPELLEES STATE OF NEW MEXICO, SANTA FE COUNTY, CITY OF SANTA FE AND RIO DE TESUQUE ASSOCIATION, INC.

(ORAL ARGUMENT SCHEDULED MAY 15, 2018)

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I. INTRODUCTION

This Joint Supplemental Brief is submitted by Plaintiff-Appellee State of New Mexico and Defendants-Appellees County of Santa Fe, City of Santa Fe and Rio de Tesuque Association, Inc. ("State Appellees"). In response to the Dunn Parties' Opening Brief, the City of Santa Fe (City) and Santa Fe County (County) drew the Court's attention to the fact that the Dunn Parties had failed to allege any specific harm resulting from the settlement, and consequently the Dunn Parties lacked standing to challenge the settlement. This Court recognized the importance of the issue of standing and directed the Dunn Parties to address five specific issues. The Dunn Parties have inadequately addressed each of the issues raised by Court. Critically, the Dunn Parties have failed to establish either plain legal prejudice or injury-in-fact. Hence, the Court should dismiss the appeal.

II. ARGUMENT

A. Whether the Plain-Legal-Prejudice Test Applies in this Context

Rather than address the question posed by the Court, the Dunn Parties point out, unhelpfully, that "the cases cited by Appellees for their premise of a required 'plain legal prejudice' are class action suits." Supplemental Brief at 6-7. Dunn Parties, however, are incorrect. The authority cited by the City and County make clear that the plain legal prejudice test is not limited to class actions. *In re Integra*

Realty Resources, Inc., 262 F.3d 1089, 1103 (10th Cir. 2001); *Agretti v. ANR Freight System, Inc*., 982 F.2d 242, 247 (7th Cir. 1992) (explaining that plain legal prejudice does not depend on whether the settlement involves a class action). Federal courts in this and other circuits have applied the plain legal prejudice test in the context of ordinary litigation. *Quad/ Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983) (non-settling party must demonstrate plain legal prejudice to have standing to challenge a partial settlement in a contact dispute); *Wildearth Guardians v. U.S. Forest Service*, 778 F.Supp. 2d 1143, 1149 (10th Cir. 2011) (non-consenting party may object to the approval of a settlement agreement, "if the decree adversely affects its legal rights or interests.") (quoting *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1107 (10th Cir. 2004)).

The district court was correct in 2007 when it explicitly required that a non-settling party would only have standing if the objector could 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.' *Waller v. Financial Corp. of America,* 828 F.2d at 583. 'Prejudice' means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.' " *In re Integra Resources v. Fidelity Capital Appreciation Fund,* 262 F.3d at 1102 (it is not sufficient to show merely the loss of some practical or strategic advantage in litigating the case).

New Mexico ex rel. State Engr. v. Aamodt, 582 F. Supp. 2d 1313, 1315 (D.N.M. 2007). The district court notified all parties, including the Dunn Parties, of the need for standing to object: "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." *Id*. Further, the district court stated the general rule that non-settling parties lack standing: "Non-settling defendants, in general, lack standing to object to a partial settlement." *Id*. Finally, the district court stated the exception to that rule, i.e., demonstration of prejudice caused by the settlement. *Id*.

The Dunn Parties were given every opportunity by the district court to establish how the settlement has caused them to suffer any plain legal prejudice and they failed to do so. As the district court found: "The objection that the Settlement Agreement effectively changes priority dates is speculative and premature." *New Mexico ex rel. State Engr. v. Aamodt*, 171 F. Supp. 3d 1171, 1187 (D.N.M. 2016). Further, they have failed to do so in their Opening, Reply or Supplemental briefs in this Court.

B. Whether, if the plain-legal-prejudice test does apply, Dunn Parties have suffered plain legal prejudice as the 10th Circuit has defined it.

The Dunn Parties effectively concede the plain-legal-prejudice test applies, and that they have suffered none. This concession is inherent in their request for remand to the district court to do discovery to make the necessary showing.

Contrary to the Dunn Parties' unsupported argument, this Court has defined plain legal prejudice as stripping the party of a legal claim or cause of action. The Dunn Parties were required therefore to articulate what claim or cause of action they have lost. Such an explanation only requires the Dunn Parties to describe the cause of action of which the settlement deprives them, and does not require discovery or fact-finding by the district court. Both the district court and this Court have given the Dunn Parties the opportunity to state what claims or causes of action they have lost resulting from the settlement. They have failed to do so.

C. Even if the Plain-Legal-Prejudice Test Does Not apply in this Context, the Dunn Parties Demonstrate No Injury in fact.

The State Appellees contend that the plain-legal-prejudice rule applies. However, assuming *arguendo* that it does not, the Dunn Parties still have not demonstrated any injury in fact that is sufficiently concrete, particularized, actual, or imminent to satisfy Article III's case or controversy requirement. Under Article III of the U.S. Constitution, federal courts are courts of limited jurisdiction, though plenary in their sphere. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). It is for this reason that the party invoking federal jurisdiction bears the burden of establishing the elements of standing:

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner

> and degree of evidence required at the successive stages of the litigation.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

Rather than describe an actual injury, the Dunn Parties simply assert that potential injury is a sufficient basis for their standing to file *inter se* challenges in a general stream adjudication in New Mexico. Supplemental Brief at 3-4. The Dunn Parties then cite cases purporting to impose a burden upon the State Engineer in adjudications to determine impairment to other water rights, asserting that New Mexico adjudications "operate per the basic tenet 'that approval of the application would impair existing rights," citing *Heine v. Reynolds*, 69 N.M. 398, 367 P.2d 708 (1962). However, the cases the Dunn Parties cite for the alleged requirement that the State Engineer must determine whether existing rights would be impaired all concern a statutory requirement in the State Engineer's consideration of applications to change the location of a well or the use of water under NMSA 1978, § 72-12-7 (1967). They do not apply to adjudications, nor is there any such requirement in the statutes addressing adjudications. *See Section D*, below.

Once again, the Dunn Parties have failed to address the question posed by the Court, "whether the Dunn Parties have suffered an injury in fact that is sufficiently "concrete, particularized, and actual or imminent to satisfy Article III's requirements." Supplemental Briefing Order at 2. The Dunn Parties have failed,

both below and on their appeal, to describe any concrete, particularized, actual or imminent injury-in-fact.

D. Legal principles under New Mexico Water Law Inform the Issue of Standing in the Case on Appeal

Water rights adjudications in New Mexico are special statutory proceedings in which the State, as plaintiff represented by the Attorney General, prosecutes the judicial determination of water rights in a stream system. NMSA 1978, §§ 72-4-15 (1907), -17 (1965). The State Engineer conducts a hydrographic survey and provides it to the Attorney General along with all associated data necessary to determine individual water rights in the stream system. NMSA 1978, §§ 72-4-13 (1982), -15. After determining the elements of each water right between the State and the water right owner, the adjudication court conducts an *inter se* proceeding to allow all owners of water rights in an adjudication the opportunity to object to the determination of any other water right to the same source. *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 4, 663 P.2d 358, 359 (1983) (following the adjudication of the rights of each claimant as against the state, adjudication courts typically provide an opportunity for contest *inter se* of any individually adjudicated rights before a final decree is entered that adopts each of the individual decrees); *see also State ex rel. Reynolds v. Allman*, 1967-NMSC-078, ¶¶ 9, 14-16, 78 N.M. 1, 3–4, 427 P.2d 886, 888–89.

In conducting *inter se* proceedings, New Mexico adjudication courts have applied a broad standard for standing, recognizing that, as the United States Supreme Court observed, "the determination of [any] one claim necessarily affects the amount [of water] available for the other claims." *Nevada v. United States*, 463 U.S. 110, 140 (1983) (quoting *City of Pasadena v. City of Alhambra*, 180 P.2d 699, 715 (Cal. App. 1947)); *see also Allman*, 1967-NMSC-078, ¶ 15, 78 N.M. 4, 427 P.2d 889 (before entry of final decree, due process requires opportunity for each water right owner to present evidence on determination of relative rights of all parties, one toward the other).

While the standard for *inter se* standing in New Mexico may be very broad, water law in New Mexico does not, as the Dunn Parties assert, confer standing "on any person with water rights that may be impacted by a claim to water right by another [sic]." Appellants' Supplemental Brief p. 13. As the cases above show, standing exists only to object to the **determination** of another water right, not to object to the **existence** of another water right, which may, as a senior or upstream water right, legally impact them.

But while New Mexico courts have applied a broad standard for standing to assert *inter se* objections to the determination of other claimants' water rights, they have not applied that same standard to approving a settlement of water rights. There is no law specific to New Mexico water law for approving a settlement

within a water rights adjudication *inter se* proceeding. Courts have applied the general standard for reviewing settlements: whether the settlement is fair, reasonable, adequate and in the public interest, but have varied in the burdens placed upon objectors to show standing. Most New Mexico courts have required, as the district court did here, that the objectors must show legal prejudice in order to assert an objection to a water rights settlement. In *State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 16, 141 N.M. 1, 7, 150 P.3d 375, 381, the objectors had the "initial burden to make a *prima facie* case showing how the[ir] water rights ... will be adversely affected by the priority, amount, purpose, periods and place of use, or other matters as set forth in the Proposed Partial Final Decree."

In considering approval of the settlement of the water rights of the Jicarilla Apache Nation in the San Juan adjudication, the state district court applied the standard of whether the decree is "fair, adequate, and reasonable, and consistent with the public interest and applicable law," and placed the burden on objectors to "state with particularity, what aspect or aspects of the proposed decree are objectionable and specifically how you will be harmed if the Court enters the decree as proposed." *Scheduling Order for Proceedings on Objections to the Entry of the Jicarilla Apache Tribe Partial Final Decree*, Eleventh Judicial District Court, No. D-1116-CV-197500184, August 11, 1998. And New Mexico courts

have denied objections to a settlement where the objectors have failed to show any injury. So even where, as in the San Juan adjudication's *inter se* proceeding on the settlement of the Navajo Nation's water rights, the district court imposed the evidentiary burden upon the settlement parties, rather than the objectors, to show that the settlement of the Navajo Nation's water rights was fair, adequate, reasonable and in the public interest, the court denied the objections, finding that the non-settling parties failed to rebut the settlement parties' *prima facie* showing "in a manner that either raises a genuine issue of material fact or that precludes judgment as a matter of law." *Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation*, Eleventh Judicial District Court, No. D-1116-CV-197500184, August 16, 2013, p. 64.

The Dunn Parties confuse standing to raise *inter se* challenges with standing to object to a settlement. The State Appellees do not question the standing of the Dunn Parties to challenge the determination of the Pueblos' water rights in the *inter se* proceedings in the adjudication. But the Dunn Parties are not challenging in this appeal the final decree adjudicating the Pueblos' water rights. "The Court is not being asked to decide on the merits of any party's water rights in this appeal." Appellant Brief at 16. The Dunn Parties' plain statement in this appeal that they have no objection to the determination of the Pueblos' or any party's water rights removes any basis for *inter se* standing on appeal deriving merely from their claim

of water rights from the same source. Hence their entire discussion of *inter se* procedure is beside the point.

And the Dunn Parties are wrong when they assert that the broad standard for standing in an adjudication *inter se* proceeding also governs their standing to raise legal objections to the entry of the Settlement Agreement in this appeal. Supplemental Brief at 3, 6. The Dunn Parties' standing to raise *inter se* objections does not give them Article III standing to challenge aspects of the Settlement Agreement that do not impact their rights. *See Colorado Outfitters Ass'n*, 823 F.3d at 551 (standing is determined on a claim by claim basis). The Dunn Parties themselves have narrowed the inquiry of the basis for their standing to whether they have standing to object to the Settlement Agreement in this Court. And in that inquiry, the Dunn Parties have not asserted an injury in fact sufficient to be a "plain legal prejudice."

Finally, while there are no statutory provisions regarding standing in *inter se* proceedings in New Mexico, provisions in the New Mexico water code governing administrative proceedings before the State Engineer also may inform the issue of standing in the case on appeal. The district court noted in 2007:

> 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. Any person objecting that the granting of a surface or groundwater permit application will be contrary to the conservation of water within the state or detrimental to the public

> welfare of the state must show "that the objector will be substantially and specifically affected by the granting of the application" to have standing to file an objection. N.M. Stat. Ann. §§ 72–5–5.B. and 72–12–3.D.

Aamodt, 582 F. Supp. 2d at 1315.

Sections 72–5–5 (surface water) and 72–12–3 (groundwater) explicitly address standing to file objections or protests to applications filed with the State Engineer for permits to make new appropriations of water or to change existing water rights. NMSA 1978, §§ 72–5–5 (B) (1985) and 72–12–3 (D) (2001). Both statutes distinguish between 1) standing of other water right owners to file protests on grounds that the granting of the application would impair or be detrimental to the objector's water right, and 2) standing of persons to file protests on grounds that the granting of the application would be contrary to the conservation of water within the state or detrimental to the public welfare of the state. *Id.* They provide that water right owners claiming impairment or detriment to their water right have standing, while persons objecting on the more general grounds of conservation of water or public welfare must also make an additional showing "that the objector will be substantially and specifically affected by the granting of the application" in order to have standing. *Id.* These statutes address questions of standing in the context of administrative proceedings, not water rights adjudications. But they do require a showing of some injury for a protestant to have standing to object to an application to the State Engineer for a water right.

E. The Dunn Parties Have Waived Standing Arguments by Failing to Advance Those Arguments in their Reply Brief.

Despite the fact that this Court gave the Dunn Parties the opportunity to address their standing, they failed to do so in any meaningful way in their supplemental brief, much less in their brief in chief. Indeed, by failing to address the issue of standing in their reply brief, the Dunn Parties have waived their arguments now. As the 10th Circuit has noted and the Order on supplemental briefing pointed out:

> [W]e consider only those arguments in favor of standing that the plaintiffs have adequately briefed. ('It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear her appeal.')

Colorado Outfitters Ass'n v. Hickenlooper, 823 F.3d 537, 544 (10th Cir. 2016). (internal citations omitted).

The rule is that arguments not briefed in the opening brief are waived. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998). See also, Fed. R. App. P. 28(a)(4),(6). In addition to not addressing the argument in their opening brief, the Dunn Parties also did not address standing in their reply brief. Finally, despite further direction from this Court, the Dunn Parties have failed to address each of the issues that the Court specifically raised. **"**In particular, Dunn Parties shall address [issues] (1) [through] (5)." Order on Supplemental Briefing at 2.

III. CONCLUSION

The Court should hold that the Dunn Parties lack standing to object to the settlement because: 1) the Dunn Parties are not settling parties; 2) the Dunn Parties have failed to demonstrate plain legal prejudice; 3) the Dunn Parties have demonstrated no injury in fact, and 4) the Dunn Parties waived any arguments for standing by not addressing it in their opening or reply briefs.

Respectfully submitted this 23rd day of April, 2018, by

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IV. 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 3,088 words, as calculated pursuant to Federal Rule of Appellate Procedure 32(f) with Microsoft Office Word 2016.

V. Certificate of Service and Digital Submission

I HEREBY CERTIFY that on April 23rd, 2018, a true and complete copy of this JOINT SUPPLEMENTAL BRIEF OF APPELLEES STATE OF NEW MEXICO, SANTA FE COUNTY, CITY OF SANTA FE AND RIO DE TESUQUE ASSOCIATION, INC. 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 and that:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the hard copies submitted to the clerk's office and the digital submission are exactly the same; and

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