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 THE UNITED STATES, PUEBLO OF NAMBÉ, PUEBLO OF POJOAQUE, PUEBLO DE SAN ILDEFONSO, AND PUEBLO DE TESUQUE

(ORAL ARGUMENT SCHEDULED MAY 15, 2018)

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INTRODUCTION

Appellees the United States and the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (collectively, "Pueblos") respectfully submit this joint supplemental brief in response to the Court's April 5, 2018 order and the Appellants' (Objectors') Supplemental Brief filed on April 13, 2018. As explained in the Appellees' answering briefs and herein, Objectors have not demonstrated either "plain legal prejudice" or any other injury from the Settlement Agreement ("Settlement") that resolved the water rights claims of the Pueblos. For this reason, Objectors lack standing to prosecute their present appeal *and* their primary objection to the Settlement lacks merit. We begin with an overview and then proceed to answer each of the five questions posed in the Court's order.

ARGUMENT

A. Overview

Objectors were defendants below in an action initiated by the State of New Mexico for the determination of all rights to use water in the Pojoaque River Basin. In any general stream adjudication to determine all rights in a water system or source, "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)). Accordingly, any claimant "[g]enerally . . . has standing to challenge any [other] water right granted in that source." *See Matter of Application for*

Change of Appropriation Water Rights, 249 Mont. 425, 430, 816 P.2d 1054, 1059 (1991) (applying Montana law).

In the proceedings below, Appellees moved the district court to resolve and declare the Pueblos' water rights as determined by the Settlement. As junior claimants of water rights within the Pojoaque Basin, Objectors were potentially impacted by this proposed determination of the Pueblos' senior water rights. Therefore, Objectors were entitled to notice and the opportunity to object, and they had standing to challenge any part of the proposed Settlement decree (e.g., as to the existence, priority dates, and amount of the Pueblos' rights) that might impact the availability of water to satisfy Objectors' claims. *See generally State ex rel. Reynolds v. Allman*, 78 N.M. 1, 3, 427 P.2d 886, 888 (1967) ("There can be no doubt that due process requires all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court.")

It does not follow, however, that Objectors had standing to challenge the Settlement on any and all grounds: "standing is not dispensed in gross." *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 551 (10th Cir. 2016) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n. 6, (1996). "Rather, 'a plaintiff must demonstrate standing for each claim he [or she] seeks to press.'" *Davis v. FEC*, 554 U.S. 724, 734, (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

In this appeal, Objectors pressed essentially two claims: (1) that the district court's approval of the Settlement was contrary to law because the Settlement substantively alters New Mexico law on priority administration and impairs Objectors' rights to priority enforcement, *see* Objectors' Opening Br. at 3-4, 8, 47;[1] and (2) that the Settlement (regardless of substance) was not authorized in accordance with a purported New Mexico statutory requirement that the New Mexico Legislature authorize all "Indian water rights settlements." *See id*. at 29-35 (relying on N.M. Stat. Ann. § 72-1-12)); Objectors' Reply Br. at 1-10. Objectors fail to demonstrate standing to assert either claim.

As to the former, if Objectors' interpretation of the Settlement and related district court orders were correct, and if the Settlement actually altered Objectors' rights to priority administration, then Objectors might have a viable injury claim and standing to object. *Cf. Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1092-94 (10th Cir. 2006) (presuming merits of constitutional objection for purposes of determining standing). But New Mexico law allows water users to enter agreements for alternative (non-priority) water-rights administration among themselves. *See* N.M. Admin. Code § 19.25.13.7(C)(4); U.S. Br. at 26; State Br. at 23-27. As the regulations promulgated in accordance with the Settlement make

[1] Objectors argued that the alleged change in New Mexico law relating to priority administration is contrary to constitutional principles of separation of powers, equal protection, and due process, and that it is unfair and contrary to public policy. *See generally* Objectors' Opening Brief at 18-29, 35-49.

clear, moreover, non-parties to the Settlement (like Objectors) are not bound by the provisions on alternative administration, but instead retain all water "rights and benefits" including rights to "priority administration" "that would be available without the settlement agreement." N.M. Admin. Code § 19.25.20.119(E).[2] For these reasons, Objectors lack standing to challenge the Settlement provisions on alternative administration, *and* their objection regarding those provisions fails on the merits.

As for Objectors' second (statutory) claim, Objectors' standing and the claim's merits are *not* intertwined. Objectors argue that, regardless of substantive content, "Indian water rights settlements" require approval by the state legislature under N.M. Stat. Ann. § 72-1-12, and that the Settlement was not so approved. Even if true, these allegations show no injury to Objectors. The Settlement did not determine the Objectors' water rights, the Objectors do not challenge the Pueblos' water rights, and Objectors are not bound by the Settlement's other provisions.

B. Response to Court's Questions

1. Question: "whether the plain-legal-prejudice test applies in this context." Answer: YES

Contrary to Objectors' argument (Supplemental Brief at 6), the "doctrine of plain legal prejudice does not depend upon whether the settlement involves a class

[2] *See also* U.S. Br. at 17-18, 29, 33; State Br. at 28-29; Pueblos Br. at 21, 43-44; Santa Fe Br. at 26; Rio de Tesuque Br. at 22-23.

action or simply ordinary litigation." *Agretti v. ANR Freight System, Inc.*, 982 F.2d 242, 247 (7th Cir. 1992); *see also In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001) (relying on *Agretti*). Rather, the doctrine applies to any settlement agreement involving fewer than all defendants in a "multiple defendant case." *See Agretti*, 982 F.2d at 246-47; *see also Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983). "Non-settling defendants * * * 'generally have no standing to complain about a settlement.'" because the legal rights of non-settling parties ordinarily cannot or will not be compromised by a settlement they do not join. *In re Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1110 (10th Cir. 2017) (quoting *In re Integra Realty*, 262 F.3d at 1102). Absent the "invasion of a legally protected interest," a non-settling party cannot show the "injury in fact" necessary to create a "case or controversy" for Article III jurisdiction. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

In *In re Integra Realty*, for example, the "opt-out" defendants in a bankruptcy class action argued that a settlement with "opt-in" defendants would leave the bankruptcy trustee with a "war chest of funds which would inevitably make it more difficult for the opt-out [defendants] to defend their cases." 262 F.3d at 1102. This Court held that the mere "loss of some practical or strategic advantage in litigating [a] case" was not sufficient to confer standing. *Id.* Rather,

to challenge a settlement, non-settling parties must show "plain legal prejudice," such as the actual loss or impairment of a legal claim or cause of action. *Id.* (quoting *Agretti*, 982 F.2d at 246); *see also Agretti*, 982 F.2d at 247 (holding that "plain legal prejudice" requires "interference" with a party's legal rights).

Objectors argue here (Supplemental Brief at 6) that, if this "plain legal prejudice" requirement were applied to settlements in general stream adjudications, "no party would ever have standing to challenge a settlement agreement, even when it potentially harms the rights" of non-settling parties. But as explained above, and as Objectors themselves observe (Supplemental Brief at 3-4), given the nature of water rights, any claim in a general stream adjudication potentially affects the water available to all other claimants. *See also Nevada*, 463 U.S. at 140. Thus, whenever the state (as plaintiff) proposes to settle the water-rights claim of any defendant in a general stream adjudication, a non-settling claimant generally would be able to show "plain legal prejudice" based on an objection to the existence, priority, or amount of the stipulated right, or any other term of the settlement agreement that would adversely impact the non-settling parties' water right. *See generally Allman*, 78 N.M. at 3, 427 P.2d at 888.

In the present case, however, Objectors do not challenge the priority dates, quantities, or other attributes of the Pueblos' water rights as determined by the Settlement. *See* Objectors Br. at 9-49; *see also* U.S. Br. at 23-24; Santa Fe Br. at 7.

Instead, to the extent Objectors challenge the terms of the Settlement—as opposed to the authority of the New Mexico Attorney General to enter into "Indian water rights settlements" generally—Objectors challenge only the Settlement parties' agreements to alternative water-rights administration. *See* Objectors' Opening Br. at 3-4, 8, 47. These settlement terms are not binding on Objectors and do not alter their rights to priority enforcement. *See* U.S. Brief at 27-31; Santa Fe Br. at 8-13. Objectors imply (Objectors' Supplemental Brief at 3-4) that their standing to challenge any aspect of the Settlement "go[es] without saying," because they are bound by the district court's final determination of the Pueblos' water rights and priorities in accordance with the Settlement. But Objectors' argument is contrary to this Court's precedent that standing is to be determined on a claim-specific basis. *Colorado Outfitters Ass'n*, 823 F.3d at 551. [3]

Alternatively, if this Court were to determine that any claimant in a general stream adjudication has standing to object on any ground to a settlement of claims among the State and other parties, the absence of a showing of injury to the objector's legal rights must inform the Court's substantive review. When

[3] *See also New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1289 (10th Cir. 2008) (applying plain-legal-prejudice test to specific parts of settlement); *but see New England Health Care Employees Pension Fund v. Woodruff*, 520 F.3d 1255, 1256-58 (10th Cir. 2008) (Baldock, J., dissenting from denial of rehearing en banc) (expressing view that "once [non-settling] parties demonstrate 'plain legal prejudice' under any provision of [a] settlement agreement, they have standing to challenge the district court's approval of [the] settlement on any ground.")

reviewing a proposed consent decree, a district court asks whether the decree is "fair, adequate, and reasonable," consistent with the public interest, and not contrary to law. *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). A consent judgment that does not impair an objectors' legal rights cannot be deemed "unfair" to the objector.

2. Question: whether Objectors "have suffered plain legal prejudice." Answer: NO.

In their Supplemental Brief, Objectors make just one attempt to show standing specific to their claims on appeal, arguing (Brief at 4) that an "admission" in the United States' answering brief regarding the Settlement's alternative administration provisions shows that Objectors face "potential harm" from the Settlement and that Objectors consequently have standing to challenge the settlement. This argument misconstrues the United States' answering brief.

Under the law of prior appropriation, in times of water shortage (when the available water supply is insufficient to meet all claims) a senior water-rights holder may "call" on junior rights; i.e., demand nonuse by junior water-rights holders until the senior rights are satisfied. *See generally State ex rel. State Engineer v. Lewis*, 141 N.M.1, 9, 150 P.3d 375, 383 (App. 2006). Under the Settlement, the Pueblos (and United States on their behalf) agreed that the water rights of groundwater users who opt into the Settlement (via any one of three options for limiting or curtailing groundwater use) will not be subject to priority

enforcement of the Pueblos' senior rights. *See* U.S. Br. at 16. Because the Pueblos (and United States) did not make the same commitment to non-settling groundwater users, this leaves non-settling users (including Objectors) potentially subject to priority enforcement of the Pueblos' senior rights, even though the non-settlers' water rights might be senior to those of settling groundwater users whose rights (under the Settlement) are not subject to such priority enforcement. As stated in the United States' answering brief (at 28), this leaves the "possibility that the Pueblos' rights could be enforced against non-settling groundwater users [including Objectors], at times when settling groundwater users with rights junior to non-settling parties are able to continue water use."

But as the United States further explained (U.S. Br. at 28-29), this possibility does not demonstrate per se injury. Per the example provided in the United States' brief (*id.*), a water user with a priority date of 1900 would not lose priority if, during a time of shortage, water users with priority dates of 1850, 1853, and 1856 seek priority enforcement that results in the curtailment of the 1900 right, and the 1850s users then share the called water with the 1910 user *within the limits of the combined 1850s rights*. This is so because the 1900 right would be subject to senior call in any event. To be sure, as the United States also explained, "the circumstances of groundwater use in the Pojoaque Basin and the terms of the present Settlement are more complex than in the foregoing example." U.S. Br. at

29.[4] In the event of a water shortage and call for enforcement of senior Pueblo rights against groundwater users, the State Engineer will need to account for water usage and to administer impacted water rights in a manner that reconciles the terms of the Settlement with the non-settling parties' rights to priority administration.

Contrary to Objectors' arguments, however, the Settlement does not mandate any particular water rights enforcement. And the regulations promulgated in accordance with the Settlement expressly preserve the Objectors' rights to "priority administration," and they expressly preclude enforcement that would curtail the Objectors' water use in any way not possible without the Settlement. N.M. Admin. Code §§ 19.25.20.119(D), 19.25.20.119(E). As a result, the Pueblos and the United States *may not* seek to enforce or demand enforcement of the Pueblos' water rights in a manner that would change the Objectors' priority of use or rights to priority administration. Further, if the State Engineer undertakes a future enforcement action that Objectors believe to be contrary to their rights of priority administration, Objectors will be able to challenge such action at such

[4] Among other things, the Settlement calls for water to be imported to the Pojoaque River Basin. *See* U.S. Br. at 10, 30; Pueblos' Br. at 5, 22; Santa Fe Br. at 33-34. The imported water is subject to priority claims at its source on the Rio Grande River, but not to priorities of use in the Pojoaque Basin. The example herein (previously provided in the United States answering brief) is not intended to illustrate specifically how the State Engineer will conduct water rights accounting for all uses in the Pojoaque Basin.

time. This means that the Objectors cannot show "plain legal prejudice" from the Settlement's alternative-administrative provisions.

> *3. Question: "whether, if the plain-legal prejudice test does not apply in this context, [Objectors] have suffered an injury in fact." Answer: NO. Objectors fail to show injury sufficient for Article III standing under any articulation of the test.*

As explained above, the "plain legal prejudice" test is derived from law on regarding Article III standing; it is the standard that non-settling defendants must meet to establish an "injury in fact" that is sufficiently "concrete, particularized, and actual or imminent" for purposes of challenging a settlement agreement among other parties in multi-party litigation. *See In re Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d at 1110. Objectors have not demonstrated injury under any articulation of the Article III standard.

> *4. Question: "whether there are legal principles under New Mexico water law that inform the issue of standing in the case on appeal." Answer: NO. There are legal principles specific to general stream adjudications that inform the standing issue, but these principles are not unique to New Mexico law.*

As Objectors observe (Supplemental Brief at 9), any person whose water rights might be affected by a water-rights adjudication or settlement has a due process right under New Mexico law to participate in the proceedings. *See generally Reynolds v. Allman*, 78 N.M. at 3, 427 P.2d at 888. But contrary to Objectors' arguments (Supplemental Brief at 3, 6), this principle is not unique to New Mexico and does not "control" this case. As explained above, Objectors' due

process right to participate in the inter se proceedings for the determination of water rights in the Pojoaque Basin does not give Objectors Article III standing to challenge the portions of the Settlement 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). Nor have Objectors identified any other principle of New Mexico water law that informs the standing issue in the present appeal.

5. *Question: "whether Objectors "have waived any arguments they might make in favor of standing by failing to advance those arguments in their reply brief." Answer: YES. Objectors failed to present any argument or evidence in support of standing to bring their statutory claim.*

Standing is a jurisdictional prerequisite that "cannot be waived." *Colorado Outfitters Ass'n*, 823 F.3d at 544. Accordingly, Objectors' argument (Supplemental Brief at 2, 4) that Appellees raised the issue of Objectors' standing "for the very first time" on appeal is irrelevant.[5] In contrast, this Court has no obligation sua sponte to consider evidence or arguments in support of standing that Objectors failed to raise or did not raise in a timely fashion. *Id.*

In their briefs below and in their opening brief on appeal, Objectors principally argued that the Settlement (as approved by the district court) stripped Objectors of their rights to priority administration. *See* Objectors' Opening Br. at

[5] Objectors' standing was challenged by other parties in the proceedings below. *See* Certain Non-Pueblo Defendants' Reply Memorandum in Support of Entry of Partial Final Judgment and Decree at 12-17 (Feb. 4, 2015) (Docket Entry No. 10010).

3-4, 8, 47. As noted above, if this interpretation were correct, Objectors seemingly could show some legal injury. Although Objectors did not in their reply brief address Appellees' arguments on standing, this Court may consider Objectors' alleged injury (alleged loss of rights of priority administration) to the extent consideration of the merits and standing issues overlap. *Cf. Initiative and Referendum Institute*, 450 F.3d at 1092-94 (presuming correctness of legal argument for standing purposes). Significantly, however, after Appellees demonstrated that Objectors' rights of priority administration are expressly protected by the regulations promulgated in accordance with the Settlement, N.M. Admin Code § 19.25.20.119(E), Objectors all but abandoned their claim that the Settlement stripped them of such rights, making no such argument in their reply brief.

In their reply, Objectors instead focused solely on their claim that the Settlement was not approved by the New Mexico Legislature as allegedly required by N.M. Stat. Ann. § 72-1-12. *See* Objectors' Reply Br. at 1-10. In so doing, Objectors made no effort to establish standing specific to this stand-alone statutory claim. Nor have they made any such attempt in their supplemental brief. Absent some showing that the Settlement in substance affected Objectors' water rights, Objectors' interest in protecting the New Mexico Legislature's statutory prerogatives (vis-à-vis Indian water rights settlements generally) is no different

from that of any other New Mexico citizen. An injury "suffered in some indefinite way in common with people generally" is not sufficient to confer Article III standing. *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 135 (2011) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). For this reason, although Objectors' statutory claim is readily rejected on the merits, this Court can and should dismiss the claim for lack of standing.[6]

CONCLUSION

For the foregoing reasons and the reasons previously stated in the Appellees' answering briefs, the judgment of the district court should be affirmed, either because Objectors lack standing or because their objections lack merit.

[6] As explained in Appellees' answering briefs, the statute establishes a dedicated fund for Indian water rights settlements and requires legislative approval for the release of funds for any settlement. The New Mexico legislature has repeatedly authorized the use of such funds for the Settlement in this case. *See* U.S. Br. at 35-38; State Br. at 37-42; Pueblos Br. at 34-37; Santa Fe Br. at 14-15; Rio de Tesuque Answering Br. at 12.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Joint Supplemental Brief for the Appellees* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **April 23, 2018.**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF DIGITAL SUBMISSION

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