CASE NO. 17-2147

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AAMODT, et al.,	)	
Appellants,	)	
v.	)	(oral argument requested)
STATE OF NEW MEXICO, et al.,	)	
Appellees.	)	

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge William P. Johnson
D.C. No. 6:66-cv-06639

RESPONSE BRIEF OF APPELLEE THE RIO DE TESUQUE ASSOCIATION, INC.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rule 26.1, The Rio de Tesuque Association, Inc. states that it is a New Mexico non-profit corporation and that it has no parent corporation nor does any publicly held corporation have any ownership interest therein.

PRELIMINARY STATEMENT

Appellee, The Rio de Tesuque Association, Inc. (Association), is an association of the Acequia Madre, Acequia Chiquita, Acequia del Medio, Acequia del Cajon Grande, Mitchell and Cy More Community Ditches, which are all political subdivisions of the State of New Mexico and are the majority of the non-Pueblo community ditches diverting water from the Rio de Tesuque within the Pojoaque Basin.

To the extent not inconsistent with the arguments set forth below, the Association adopts the arguments and authorities set forth in responses filed by other Appellees in this appeal.

I. STATEMENT OF PRIOR OR RELATED APPEALS.

Pursuant to 10th Circuit Rule 28.2(C)(1), the Association states that the following prior appeals relate to this matter:

1. *New Mexico v. Defendant-Objectors Group 1*, No. 16-2253 (10th Cir.

Jan. 9, 2017);

2. *New Mexico ex rel. State Eng'r v. Trujillo*, 813 F.3d 1308 (10th Cir. 2016);

3. *New Mexico ex rel. Reynolds v. Gutierrez*, 440 Fed. App'x 633 (10th Cir. 2011) (unpublished); and

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

5. *Aamodt v. State*, Petitions for Interlocutory Appeal; Nos. 85-8071 and 85-8072, denied December 1, 1987 (Supp App 277)

II. STATEMENT OF JURISDICTION.

The United States District Court for the District of New Mexico had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the underlying suit involved water rights that arise under and are protected by federal law.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the Appellants 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.[1]

III. STATEMENT OF THE ISSUES

[1] Although the July 14, 2017 Final Judgement and Decree refers to Fed. R. Civ. 54(b), it is in fact a final judgment addressing all water rights within the Pojoaque Basin.

The Rio de Tesuque Association, Inc. (Association) does not contest this Court's jurisdiction over the Dunn Parties' appeal and therefore will not further address Dunn Parties' Statement of Issue 1. The Dunn Parties' arguments throughout their *Opening Brief* are confusing to the Association. Other than their argument that the Settlement Agreement "effectively re-write[s] New Mexico water law because … it will so drastically alter[s] parties' water rights …" and therefore it required legislative approval (*Opening Brief* at 30-31), the Association is unable to reconcile Dunn Parties' Statement of Issues 2-4 with many of the arguments and the conclusion in the Dunn Parties' *Opening Brief.* The heading of Point III(A)(1) states: "Executive Branch officials are not authorized to approve settlements adjudicating water rights," presumably "in general." Dunn Parties' issue 4 is "whether the Settlement Agreement as entered by the lower court was entered in error as contrary to law." *Id*. at 2. In their conclusion, they state:

> This court should remand the matter back to the District Court with instructions to require the New Mexico executive branch officers to obtain the required state legislative approval of the Settlement Agreement and require any settlement agreement fully comply with all provisions of relevant law including both the US and NM constitutions before final decree and judgment may be entered.

It is not clear to the Association whether mere ratification by the legislative branch would resolve the Dunn Parties issues or whether more is required. Throughout the Dunn Parties' *Opening Brief,* as the Association believes other

appellees will address, the Dunn Parties fail to demonstrate where and why the district court committed error, making conclusory statements instead, e.g., that the Settlement Agreement violates equal protection and due process under both the New Mexico and United States Constitutions. *Id*. at 44 – 49. Consequently, the Association will set forth the issues as it sees them, which are "Did the District Court commit reversible error in determining that:

1. The objectors (Dunn Parties) did not meet their burden of demonstrating that the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law." *March 21, 2016 Opinion* at 22-23 (Dunn App at 956-957);

2. The Dunn Parties' argument that the Settlement Agreement violated state law by changing priorities, was speculative and premature. *March 21, 2016 Opinion* at 18-19 (Dunn App at 952-953); or that

3. The executive branch had authority to execute the Settlement Agreement on behalf of the State of New Mexico and that approval by the legislature was not required. District court's *March 21, 2016 Memorandum and Opinion and Order Approving Settlement Agreement (March 21, 2016 Opinion)* at 6-7 (Dunn App at 940-941)."

IV. STATEMENT OF THE CASE

The Dunn parties' Statement of the Case fails to apprise this Court of the more than three decades (1966-2000) of attempts to resolve, through litigation, the complex issues of what law governs the Pueblos' water rights and how their water rights should be quantified thereunder. Those more than three decades of litigation demonstrate that the policy in favor of settlements is particularly apropos here. Further, only by understanding the claims of the various parties, the compromises made by the Pueblos during the settlement negotiations, the issues remaining when settlement negotiations began, and the benefits to all parties under the Settlement Agreement, can this Court properly evaluate the district court's determination that the Dunn parties failed to show that the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law." *Id*.

A. Litigation 1966 – September 2000 When Mediation Began

Aamodt was filed by the State of New Mexico in 1966 in order to adjudicate water rights in the Rio Tesuque-Nambe-Pojoaque stream systems ("Pojoaque Basin"). The United States intervened as a Plaintiff and asserted claims of prior and paramount water rights on behalf of these four Pueblos. In 1974, pursuant to motions for partial summary judgment, the district court ruled that the Pueblos' rights were governed by New Mexico law. The US/Pueblos appealed that ruling to

this Court, which, in 1976 held that the Pueblos' rights were not governed by New Mexico state law and remanded the case to the district court for a determination of what law did govern Pueblo water rights and quantification thereunder. State v. Aamodt, 537 F.2d 1102, 1113 (10th Cir. 1976).

After remand, proceedings ensued primarily between the State and the US/Pueblos before Special Master Ed Yudin. In his November 23, 1982 *Recommended Findings*, Special Master Yudin found and concluded that the four Pueblos had first priority to irrigate all of their "practicably irrigable acreage" (PIA), which he found to be 10,045 acres, minus 10% for roads, etcetera. (Doc. 627, Finding 4). This was approximately 10 times what the district court later found had been historically irrigated by these Pueblos (1094 acres) between 1846 and 1924, referred to as their "Historically Irrigated Acreage" (HIA), *infra*.

There were three significant developments in 1983. First certain defendants challenged the US/Pueblos' claims that the Pueblos had Winters rights quantified by PIA with first priority on their grant lands. The district court's June 10, 1983 *Memorandum Opinion and Order* (Doc. 728 at 8-10, Supp. App. 10-12; 18-19) rejected the US/Pueblos' claims that the Pueblos had Winters rights with a first priority on their grant lands. Second, the US/Pueblos filed *interse* challenges to the quantity of water adjudicated to defendants in 535 sub-files, which challenges were stayed pending a determination of the Pueblos' rights. (Doc. 1459; Supp. App. 20-

21). Third, in support of their objections to Special Master Yudin's findings, defendants did extensive briefing on the legal issues and had almost 3 additional weeks of trial on Spanish and Mexican Law in October 1983. The Special Master made findings of fact and conclusions of law based thereon, which the district court adopted in part and modified in part. State v. Aamodt, 618 F. Supp. 993, 996-999 (D.C.N.M. 1985). The district court determined that the Pueblos' had first or "aboriginal" priority to irrigate only those lands which had been irrigated by them between 1846 and 1924. Id. at 1010. It rejected claims of Winters rights measured by PIA on the Pueblos' grant lands. Id. Also see, April 28, 1987 *Findings of Fact and Conclusions of Law* (Supp. App. 72-73). The court quantified those rights in 1987 at 1094 acres (241.5 acres for Tesuque Pueblo) based on all acreage irrigated by the Pueblos between 1846 and 1924. April 28, 1987 *Findings of Fact and Conclusions of Law* (Doc. 3035), as amended September 9, 1987, *Amended Findings… and Conclusions…* (Doc. 3074; Supp. App. 81-82). This quantification has been referred to as the Pueblos "Historically Irrigated Acreage" (HIA) on their grant lands.

In addition to the Pueblos' HIA on grant lands, the district court ruled that the Pueblos had "replacement" rights acquired with "compensation" funds pursuant to the 1924 Pueblo Lands Act; "reserved" rights on their "reservation" lands; rights otherwise "acquired" but which did not have first priority; and domestic and

livestock rights. *Memorandum Opinion and Order*, filed February 26, 1987 (Doc. 2977; Supp. App. 22-33). The district court further elaborated on those rights in its May 1, 1987 *Memorandum Opinion and Order* (Doc. 3038; Supp. App. 74-79). From 1987 until mediation began in September 2000, extensive briefing and hearings occurred both before the Special Master and the Court pertaining to the Pueblos' rights in those various categories. The status of each of these remaining categories at the time mediation began is set forth below.

B. Unresolved Issues When Mediation Began in September 2000

When mediation began in September 2000, only the Pueblos' aboriginal rights based upon historically irrigated acreage had been quantified by the district court. Remaining for determination, were the Pueblos' "replacement rights;" reserved rights on the Nambe Pueblo's reservation; the Pueblos' domestic and livestock rights; and rights they may have acquired under state law. Absent the settlement, the status of each of these categories is set forth below.

Pueblos' Replacement Rights. Hearings on the Pueblos' "replacement" rights were held October 1-11, 1991. The 200-page *Special Master's Report Pertaining to Replacement Water Rights of the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque* was filed July 20, 1993 (Doc. 4197; Supp. App. 90) and Objections were filed September 30, 1993. The district court heard oral argument on April 19, 1994 and additional briefing by all parties was completed in 1994. In its April 14,

2000 *Memorandum Opinion and Order* (Doc. 5596, Supp. App. 145-154) the court "modified, expanded and amended" its prior rulings pertaining to the elements the US/Pueblos were required to prove in order to establish replacement rights, rejected the Special Master's July 30, 1993 report, and recommitted the determination of the Pueblos' replacement rights to the Special Master in view of that *Memorandum Opinion*. (Supp. App. 146, 148).

Pueblos' Reserved Rights. In its *Memorandum Opinion and Order*, filed February 26, 1987 (Doc. 2977; Supp. App. 29-32) the district court opined that Nambe Pueblo also had reserved rights with a first priority to new uses of water on its reserved lands. Substantial briefing ensued before the Special Master who agreed in his August 14, 1992 Report. Pursuant to objections and further briefing, the court rejected the Special Master's report and, contrary to its 1987 opinion, concluded that any reserved rights had a "date of reservation" (1902) priority. December 29, 1993 *Memorandum Opinion and Order* (Doc. 4267 at 7-8, Supp. App. 28-29). A trial segment on Nambe Pueblo's "practically irrigable acreage" (PIA) was held in June and August, 1998. Ultimately the Special Master filed his final report on December 8, 1999 recommending "no right" for Nambe Pueblo's reserved right claim. *Memorandum Opinion and Order re Special Master's Report on Nambe Reserved Rights*, filed July 10, 2001 (Doc. 5916; Supp. App. 169-1790. The district court vacated the Special Master's Report. *Id*.

The Pueblos' Domestic and Livestock Rights. The Pueblos' asserted claims that they have the right, with a first priority, to use as much groundwater as they desire for domestic, livestock, and municipal (i.e. industrial and commercial) uses. The Special Master filed his final report and recommendations pertaining to the threshold legal issues on the Pueblos' domestic and livestock claims on September 3, 1996. Objections to that report were subsequently filed. During the mediation, the district court issued its January 31, 2001 *Memorandum Opinion and Order* (Doc. 5642; Supp. App. 158-168) determining that the Pueblos were entitled to "aboriginal" domestic rights based upon their domestic use from 1848-1924; and that further domestic and livestock rights thereafter would have to be acquired under state law.

With respect to Defendants' surface water rights, all elements except priority had been adjudicated in sub-file orders when, in 1983 the US/Pueblos filed *interse* objections challenging the acreage adjudicated in approximately 535 sub-files, which *interse* objections were stayed by the district court. October 27, 1983 *Order* (Doc. 1459, Supp. App. 20-21). With respect to priority, the district court ruled that defendants would have to prove their priorities on a "tract by tract" basis and were not entitled to "ditch wide" priorities (where all irrigated lands under a particular ditch have the same priority) previously offered by the State. February 26, 1987 *Memorandum Opinion and Order* (Doc. 2978; Supp. App. 55-61). As of

the beginning of mediation in September 2000, no further action had been taken by the district court pertaining to defendants' priorities and the Pueblos' 1983 *interse* acreage challenges remained pending, subject to the 1983 stay of proceedings thereon.

C. Resolution of Pueblos' Water Rights and Protection of non-Pueblo Water Rights in the Settlement Agreement

As discussed, *infra*, the Settlement Agreement (also referred to herein as the "settlement") resolves quantification of the Pueblos' rights in in all the various categories of the Pueblos' water rights. Further it forecloses any appeal by the Pueblos that the district court wrongfully rejected their claims that they were entitled to first priority quantified by their PIA as recommended by Special Master Yudin in his November 23, 1982 Report, *supra*. Further, the Settlement Agreement also relieves the non-Pueblo surface right owners of proving tract by tract priorities (SA, § 3.2.1, Dunn App 1083) and provides for the dismissal of all pending *interse* challenges (including the Pueblos 1983 *interse* challenges) among the settlement parties. (SA, § 6.1; Dunn App. 1093).

In the Dunn Parties' *Opening Brief*, they assert that: "The Settlement Agreement as drafted largely by the United States demands that water right holders not make waves in its implementation…. A more transparent attempt to coerce parties to agree to an unwanted settlement is difficult to fathom; *Id*. at 4; "the proffered settlement violates this policy [leaving management of state resources to

the states], as it changes the standards for determining of water rights for junior rights holders – based on whether they succumbed to the federal and State Executive branch officials' pressure to enter into the settlement. This violates New Mexico water law and is akin to extortion;" *Id*. 6; and that: "However you slice the settlement the United States has reached here with the Pueblos, it negatively harms and impacts non-settling parties by flowing water to the former while damming the property rights and interests of the latter;" *Id*. at 42.

In making those assertions, the Dunn Parties misrepresent the almost six years of negotiation before mediation Judge Michael Nelson which led to a Settlement Agreement in 2006 (Dunn App at 935-936), which, with exception of minor changes which were made to make it conform to the Aamodt Litigation Settlement Act, 124 Stat. 3064 (2010) is identical to the April 19, 2012 Settlement Agreement approved by the district court in its March 21, 2016 *Memorandum Opinion, supra.*

Contrary to Dunn Parties' assertions, an attorney from the Department of Justice acted primarily as a "scribe" for the various drafts of the negotiations culminating in the 2006 Settlement Agreement. The terms of the settlement, however were not primarily negotiated by the State's and the United States' attorneys, but rather by attorneys on behalf of the water right owners in the Pojoaque Basin, namely the four Pueblos and various non-Pueblo parties,

including the undersigned representing the Association.

The negotiating attorneys began settlement discussions by first determining the extent of the Pueblos' first priority rights under the various district court decisions referenced above. Such began with the determination of the Pueblos' "aboriginal rights" pursuant to the *1985 Opinion*, and its adoption of the HIA standard and rejection of the PIA standard addressed by Special Master Yudin in his November 23, 1982 Report, *supra*. The Pueblos HIA was quantified in 1987 at 1094 acres for the four Pueblos (Supp. App at 82). As stated above, only the Pueblos' aboriginal rights on their grant lands had been quantified. The attorneys negotiating the settlement extrapolated quantities based upon the various court opinions on the Pueblos' replacement rights, reserved rights and domestic and livestock rights. The extrapolations of those first priority rights based upon those prior opinions, plus the consumptive use associated with the Pueblos' HIA rights (1094 acres), were quantified in § 2.1.2 of the Settlement Agreement. (Dunn App 1059). Seeking to preserve the *status quo*, the undersigned along with other attorneys representing other non-Pueblo parties, negotiated for protection of non-Pueblo surface right users from the enforcement of the Pueblos total first priority rights, which protections were accomplished by splitting the Pueblos' total first priority right into 2 components, "existing basin use rights" and "future basin use rights." The quantity of each is set forth in §§ 2.3 and 2.4 of the Settlement

Agreement, respectively. (Dunn App 1062-1063). Section 4 of the Settlement Agreement (Dunn App 1085-1087) conceptually provides that the Pueblos' existing basin use rights may be enforced against all non-Pueblo rights but that non-Pueblo rights are protected from the enforcement of the Pueblos' future basin use rights.

As set forth in *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) (Dunn APP 727-736, 734) the four Pueblos can only enforce their existing basin use rights of 1391 afy consumptive use, out of their total first priority right of 3660 afy consumptive use, against non-Pueblo existing uses. Conceptually non-Pueblo existing uses have "2nd Priority" and the Pueblos' Future Basin portion of their "first priority right," in the amount of 2269 afy consumptive use, have a 3rd priority. As pointed out in the *Association's Memorandum*, without the protections provided to the upstream acequias on the Rio de Tesuque, there would be no water in those upstream ditches if Tesuque Pueblo enforced its total first priority right against them. (Dunn App 731-733). While the Rio de Tesuque is more chronically short than the Rio Pojoaque or Rio Nambe, the benefits of the Settlement Agreement's Section 4 protection of non-Pueblo surface rights are significant throughout the Pojoaque Basin. The Association submits that there can be no doubt that the Settlement Agreement

provides significant protection for non-Pueblo surface right owners.

With respect to groundwater, the first "public release" of the settlement agreement that had been negotiated between the Pueblos' attorneys and attorneys for the non-Pueblos, was in early 2004. At that time, the settlement required all non-Pueblo domestic well users to connect to the Regional Water System (RWS) and cease any use of their domestic wells. Such met with tremendous opposition in the Pojoaque Basin and numerous of those opposing parties hired attorney, Fred Waltz, to "come to the table" on their behalf. See, e.g., Fred Waltz's entries of appearance (Docs. 6110, 6121, 6123, 6133, 6144, 6155; Dunn App Vol. 1, 230 – 236).[2] Mr. Waltz, in negotiating on behalf of his clients, was largely responsible for the modifications contained in § 3.1.7 of the Settlement Agreement. (Dunn App 1075). Under § 3.1.7.1 of the Settlement Agreement, no one is required to either hook up to the RWS or reduce use of their well. In such case those domestic well rights would be subject to a possible Pueblo priority call under state law, just as they would be without the settlement, except that without the settlement, those wells would be subject to a priority call for the entire Pueblo first priority right. Although the Dunn Parties claim "extortion" for the provisions in § 3.1.7.2, which allows well owners to keep their wells in perpetuity and be free of priority calls

[2]Numerous of the individuals represented by Mr. Waltz are currently represented by Mr. Dunn and are Appellants herein.

from the Pueblos if they reduce use out of their well by 15%; such was viewed as a significant victory by Mr. Waltz and his clients, and many of the non-Pueblo domestic well owners were greatly relieved that they didn't have to hook up to the RWS and cease use of their well.

Finally, as noted by the Dunn Parties, the settlement allows non-Pueblo owners of a water right from a well, to "buy" peace against a Pueblo priority call by reducing usage out of their well as set forth therein. (SA, § 3.1.7.2; Dunn App 1075). Presumably it is this provision that forms the basis of the Dunn Parties' assertion that the Settlement Agreement impermissibly "modifies or changes New Mexico law." In effect those juniors have already curtailed their uses and the "senior – non-settling party" will only have to curtail use when and if, a priority call by the Pueblos is asserted against ground water users and such call would not be futile.

V. SUMMARY OF THE ARGUMENT

The Dunn Parties entire argument is based upon a hypothetical example they contend would be a "re-writing of New Mexico water law." The protection given to a settling well owner who reduces use by 15% from a priority call does not re-write New Mexico water law. Not only did the non-settling well owner have that same option, the Rules and Regulations promulgated pursuant to the Settlement Agreement, protect the non-settling party to the same position he would be in

without the settlement. The Attorney General had unequivocal authority to enter into the Settlement Agreement. The district court did not commit reversible error in determining that the Dunn Parties failed to show that the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law." The district court's approval of the Settlement Agreement, Partial Final Judgment and Decree of the [Pueblos'] Water Rights and its Final Judgment and Decree of the Water Rights of the Nambe, Pojoaque and Tesuque Stream System should be affirmed and the Dunn Parties' appeal be dismissed.

A. The Standard of Review

The Association adopts the Appellee Pueblos' statement and authorities concerning the standard of review; i.e., the issues of law involving the interpretation of New Mexico Statutes and the authority of the Attorney General to enter into the Settlement Agreement thereunder, are reviewed *de novo*. The district court's determination that the Dunn Parties' objections were speculative, failed to show how they were harmed in a legally cognizable way or that they failed to show that "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law," are reviewed under a "clearly erroneous" standard.

B. The District Court's determination that the Dunn Parties failed to meet their burden of demonstrating that the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law," should be affirmed

As stated above in its "Statement of Issues," the Association has difficulty discerning the Dunn Parties' primary contention for, presumably, setting the settlement aside. It is not clear to the Association whether the Dunn Parties contend that 1) merely because the settlement involves either the Pueblos or the adjudication of water rights, it must be approved by the legislative branch (Dunn Parties *Opening Brief* at 25 -"Executive Branch officials are not authorized to approve settlements adjudicating water rights"), or 2) because the protections from Pueblos' priority calls are provided well owners who either agree to hook onto the

County Water System when service is available or keep their well and reduce use, such changes New Mexico law of strict priority enforcement, which change can only be accomplished or ratified by the legislative branch.

Curiously, the Dunn Parties state:

> 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…. Rather, the major issue of this group of Appellants is that the settlement was designed such that, absent complete agreement of all of the parties, certain non-Pueblo junior rights will be elevated and exempt from a priority calls irrespective of their priority relation to other non-Pueblo rights.

Dunn Brief at 3, emphasis by the Association. As stated above, as a starting point for negotiations, the parties extrapolated from various district court opinions to come up with the entire Pueblo First Priority Right set forth in the Settlement Agreement in the amount of 3660 afy consumptive use. With the protections of non-Pueblo rights provided in the Settlement Agreement, the Pueblos could only enforce their existing basin use right against non-Pueblos in the amount of 1391 afy consumptive use or 38% of their total first priority right. If the Dunn Parties were successful in setting aside the settlement, the Pueblos could enforce their entire first priority right of 3660 afy consumptive use, against the non-Pueblo water rights, rather than only for their existing use amount of 1391 afy consumptive use. Hence, the Dunn Parties appear willing to give up protection from approximately 60% of the Pueblos' first priority right, which they likely

would enforce absent the settlement. The Dunn Parties appear willing to do this on the basis that at some time in the future if the Pueblos may make a priority call against domestic wells, that they may be curtailed whereas a junior, who has voluntarily curtailed use, is not further curtailed. Such is not only speculative as found by the district court, but in considering the protections provided to non-Pueblos' rights under the settlement agreement, such is literally nothing and, the Association submits, is only theoretical.

The speculative nuance with respect to priority enforcement among well owners, the Dunn Parties equate with "effectively re-write New Mexico water law because …it will so drastically alters parties' water rights is something that requires lawmaking authority that the Attorney General does not have." *Dunn Opening Brief* at 30-31. Further, e.g., "The Final Judgment was essentially the sanctification of a plan [the Settlement Agreement] to provide benefits to Pueblo-water users to the detriment of other non-Pueblo water users in the very same locality, performed at the 12th-hour." *Id*. at 37. And, "However you slice the settlement the United States has reached here with the Pueblos, it negatively harms and impacts non-settling parties by flowing water to the former while damming the property rights and interests of the latter." *Id*. at 42. The Dunn Parties' entire argument is premised upon a hypothetical wherein a junior, settling well owner who reduces use out of his well, is protected from further curtailment upon a

Pueblo priority call, whereas the senior, non-settling well owner who did not reduce use out of his well is not protected from curtailment in a Pueblo priority call. *Id*. at 3, 47.

As noted by the district court, the objectors were required to "state the specific legal and factual basis for your objection," and to 'state how your water rights will be injured or harmed in a legally cognizable way by the Settlement Agreement and the entry of the proposed decree and interim order.'" (Dunn App at 936). Dunn Parties do not cite to either the record or provisions in the Settlement Agreement in support of their hypothetical, nor do they identify any actual water users who might be so affected.

Based upon the foregoing history of the proceedings in this case, the complex legal issues involved, the status of the quantification of the Pueblos' rights at the time negotiations began, the length of those negotiations before mediation Judge Michael Nelson, and the protections given non-pueblo rights from priority enforcement of the full Pueblos' First Priority Right, the district court's finding that the Settlement Agreement was fairly and honestly negotiated, serious questions of law and fact existed, and the settlement outweighed future relief after many more years of expensive litigation, was not clearly erroneous. Nor was the district court's determination that the Dunn Parties failed to show that

the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law," clearly erroneous.

C. The District Court's Determination that the Dunn Parties' argument that the settlement violated state law by changing priorities was speculative and premature, should be affirmed.

The district court properly found that the Dunn Parties' argument that the protection provided to a settling well owner who made an election to keep the well and reduce usage therefrom by 15%, violated state law by changing priorities, was speculative and premature. (Dunn App at 952-953). Further, as the district court noted, under New Mexico v. Lewis, 150 P.3d 375, 388 (N.M. Ct. App. 2006) ("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." (Dunn App 953). Finally, as will be noted by other Appellees in this proceeding, the rules and regulations called for by § 5.3 of the Settlement Agreement have been promulgated. The Dunn Parties concerns are addressed under N.M. CODE R. § 19.25.20.119(D)-(E) which provide 1) that non-settling parties water rights may only be curtailed to the extent such curtailment would occur without the settlement and 2) non-settling parties seeking priority administration shall have the same rights and benefits as would be available to them without the settlement. Hence

the Dunn Parties argument is not only premature and speculative, the rules and regulations which were promulgated protect non-settling parties from the very evil they rely upon for their argument that the Settlement Agreement changes New Mexico water law and hence must be approved by the legislature.

D. **The Attorney General had the authority to enter into the Settlement Agreement and Legislative Approval is not required**.

The Dunn Parties assert under (III(A)(1) that; "Executive Branch officials are not authorized to approve settlements adjudicating water rights." *Dunn Brief* at 25. Despite this heading, they cite no authority for that sweeping generalization. Such a proposition is contrary to § 72-4-15, NMSA 1978 (requiring Attorney General to "enter suit on behalf of the state" in stream adjudications) along with his authority under § 36-1-22, NMSA 1978, *infra*.

Although not clear to the Association, it would appear that if the Settlement Agreement did not "modify existing law or create new law," the Dunn Parties contention that it required approval by the legislative branch, would be irrelevant and the executive branch did not violate the separation of powers.

The Dunn Parties complain of the district court:

> Instead of addressing the legality of whether the state signatories had authority to enter into an agreement that modifies water adjudication in New Mexico, or whether such authority was permissible despite the Indian water settlement legislation of the state, the district court allowed the settling parties plunges us down a waterfall to a pool of an irrelevant treatise on federal Indian water law.

Id. at 18; emphasis by the Association. The Association submits that rather it is the Dunn Parties who are attempting to "plunge us down a waterfall to a pool of an irrelevant treatise on [the doctrine of separation of powers]" Dunn *Brief* at 19 – 24, culminating in Dunn Parties' almost total reliance on Clark v. Johnson, 904 P.2d 11, 120 N.M. 562 (1995). Clark v. Johnson is distinguishable from the case at bar and does not apply here. In Clark, prior to addressing the merits, the New Mexico Supreme Court noted:

> Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law.

904 P.2d at 570. The Court noted that the compact entered into by the governor allowed class III gaming on Indian land. Such gaming was allowed under IGRA only if such activities were conducted pursuant to a tribal-state compact and were "located in a State that permits *such gaming* for any purpose by any person, organization or entity." Id. at 571. The Court discussed the various forms of gaming allowed under New Mexico law and concluded:

> We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances. We need not decide which forms New Mexico permits. The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy. That fact is relevant in evaluating his authority to enter into the compacts and revenue-sharing agreements. Further, even if our laws allowed under some

> circumstances what the compact terms "casino-style" gaming, we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer. To reach this conclusion, we first consider the separation of powers doctrine and then consider the general nature of the Pojoaque compact as representative of all of the compacts the Governor of New Mexico signed.

Id. at 572, emphasis by the Association. In discussing the "separation of powers" doctrine, the Court noted (citations omitted):

> Despite the strict language of Article III, Section 1, this Court has previously said that "[t]he constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function." This common sense approach recognizes that the absolute separation of governmental functions is neither desirable nor realistic. As one state court has said, separation of powers doctrine "does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government."

Noting that the gaming compacts significantly undermined the express will of the New Mexico legislature that made the types of gambling allowed under the compact a felony and "thereby expressed a general repugnance to [such] activity," the Court found:

> The compact signed by the Governor, on the other hand, authorizes Pojoaque Pueblo to conduct "all forms of casino-style games"; that is, virtually any form of commercial gambling. By entering into such a permissive compact with Pojoaque Pueblo and other Indian leaders, we think that the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority as this State's chief executive officer.

Id. at 574-575. And, further at 578:

> Based on our interpretation of state gambling laws as making casino-style gaming illegal, state constitutional law as limiting the authority of the executive branch, and the IGRA as not purporting to expand state gubernatorial power, we conclude that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.

Unlike in Clark where the governor had no authority to enter into gaming compacts which allowed gaming that was repugnant to the express will of the legislature making such forms of gaming a felony, as the district court properly found (Dunn App at 940-941) the legislature delegated to the Attorney General the authority set forth in § 36-1-22, NMSA 1978. The pertinent parts of which are as follows:

> The attorney general … of this state … when any civil proceedings may be pending … in which the state …may be a party, whether the same be an ordinary suit . . . or otherwise, shall have power to compromise or settle said suit … or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings shall be entirely under the management and control of the said attorney general … and all compromises, releases and satisfactions heretofore made or entered into by said [attorney general]are hereby confirmed and ratified.

Hence, unlike the situation in Clark, § 36-1-22 provides the Attorney General unequivocal authority to execute the Settlement Agreement on behalf of the State. The Association joins other Appellee's arguments that nothing in § 72-1-12, NMSA 1978, limits the Attorney General's power to settle the Pueblos' claims, as argued by the Dunn Parties.

E. CONCLUSION

The Attorney General had unequivocal authority to enter into the Settlement Agreement. The district court did not commit reversible error in determining that the Dunn Parties failed to show that the "Settlement Agreement is not fair, adequate or reasonable, is not in the public interest, or is not consistent with applicable law." The district court's approval of the Settlement Agreement, Partial Final Judgment and Decree of the [Pueblos'] Water Rights and its Final Judgment and Decree of the Water Rights of the Nambe, Pojoaque and Tesuque Stream System should be affirmed and the Dunn Parties' appeal be dismissed.

ORAL ARGUMENT STATEMENT

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

CERTIFICATE OF COMPLIANCE

As required by Federal Rules of Appellate Procedure 28(a)(10) and 32(g)(1) and 10th Circuit Rule 32(a), undersigned counsel for the Rio de Tesuque Association, Inc. certifies that this brief is spaced in 14-point font and contains 7031 words, as calculated with Microsoft Office Word 2016.

Respectfully submitted on this 2nd day of February, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2018, a true and complete copy of this foregoing **RESPONSE BRIEF OF APPELLEE THE 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 below.

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