IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. STATE ENGINEER, Plaintiff, v. R. LEE AAMODT, et al., Defendants. and UNITED STATES OF AMERICA PUEBLO DE NAMBE, PUEBLO DE POJOAQUE PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE, Plaintiffs-in-Intervention	CASE NO. 66cv6639 MV/WPL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE**

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I. INTRODUCTION

The United States and the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (collectively "Pueblos") submit this brief in support of the request of the United States, the Pueblos, the State of New Mexico, Santa Fe County, and the City of Santa Fe that this Court approve the *Settlement Agreement* (Apr. 19, 2012) (Doc. 7970-1) ("Settlement Agreement"), and, following the denial of the objections raised by the Objecting Parties, enter the *[Proposed] Partial Final Judgment and Decree of the Water Rights of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque* (Oct. 2, 2013) (Doc. 7970-3) and the *[Proposed] Interim Administrative Order* (Oct. 2, 2013) (Doc. 7970-2) (collectively "Proposed Partial Final Judgment and Decree") to finally adjudicate the water rights of the Pueblos. Congress has approved the settlement of the Pueblos' water rights as set forth in the Settlement Agreement in the Aamodt Litigation Settlement Act, Pub. L. No. 111-291, §§ 601-26, 124 Stat. 3064, 3134-56 (2010) ("Settlement Act"). In the Settlement Act, Congress identified, among others, the following conditions for final settlement of the Pueblos' water rights:

> (G) a partial final decree that sets forth the water rights and other rights to water to which the Pueblos are entitled under the Settlement Agreement and this subtitle and that substantially conforms to the Settlement Agreement has been approved by the United States District Court for the District of New Mexico;
>
> (H) a final decree that sets forth the water rights for all parties to the Aamodt Case and that substantially conforms to the Settlement Agreement has been approved by the United States District Court for the District of New Mexico.

Id. § 623(a)(2)(G), (H), 124 Stat. 3150-51.

Accordingly, the Court must determine whether to approve the Settlement Agreement and enter the Proposed Partial Final Judgment and Decree.[1] The question before the Court is

[1] The Settlement Act directs that both the Proposed Partial Final Judgment and Decree and the Final Decree must be entered by September 15, 2017. *Id.*

whether the Settlement Agreement and Proposed Partial Final Judgment and Decree are fair and reasonable with respect to the settlement of the Pueblo rights at issue in this litigation. The United States, the Pueblos, the State of New Mexico, Santa Fe County and the City of Santa Fe ("Settlement Parties") [2] have amended the Settlement Agreement pursuant to Congress' directive to conform the Settlement Agreement to the Settlement Act. Settlement Act § 623(A), 124 Stat. 3150. Amendment of the Settlement Agreement, therefore, is not before the Court.

The Court should approve the Settlement Agreement and enter the Proposed Partial Final Judgment and Decree. The Settlement Agreement is fair, reasonable and consistent with applicable law. The Settlement Agreement fairly and finally settles the federal water rights claims of the Pueblos and the settlement process was a multiple year, arms-length negotiation, approved both by this Court and ultimately by congressional action. This brief explains the history of this long litigation, the settlement process, how the Settlement Agreement works, and why the Court should overrule the objections and approve the Settlement Agreement, and enter the Proposed Partial Final Judgment and Decree. *See* Appendix (listing and describing objections).[3]

Finally, this brief also addresses the objections raised in opposition to the Settlement Agreement and entry of the Proposed Partial Final Judgment and Decree. Though several

[2] As of October 28, 2014, 401 parties have accepted the Settlement Agreement and not objected to the Proposed Partial Final Judgment and Decree.

[3] This brief defers to the brief to be filed by the State and the County to address the objections purporting to raise concerns arising under state law. The Appendix groups of objections which are not addressed in this brief are: Group C (property believed to be exempt from settlement); Group G (state funding concerns: connection fund, impairment fund, and/or Regional Water System not funded); Group I (OSE has a potential conflict of interest, or no authority to award future water rights, or to declare basin closed); Group N (threatens acequia system or culture or acequia rights); Group Q (personal financial situation and cost); Group S (concern Regional Water System will not be extended to property); Group T (New Mexico constitution violated); Group V (no objections or general objections).

hundred individuals filed objections to the Settlement Agreement in response to the Court's Order to Show Cause, these objections, to a greater and lesser degree, are repetitive. The United States and Pueblos have grouped the objections together based on the objection presented. As explained below, examination of the objections reveals that no objection, no matter how many times asserted, forms the basis for this Court to reject the Settlement Agreement and refuse to enter the Proposed Partial Final Judgment and Decree.

II. THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE

As initially negotiated among the parties, a proposed settlement agreement (Jan. 19, 2006) ("2006 Agreement") included a determination of the Pueblo water rights and established a process to administer and protect both the Pueblo water rights as well as the rights of the non-Pueblo water users in the Nambe-Pojoaque-Tesuque River Basin ("Basin"). Congress subsequently enacted the Settlement Act, which contained provisions requiring the amendment of the 2006 Agreement. The Settlement Agreement conformed the 2006 Agreement to the Settlement Act, but the substance and nature of the 2006 Agreement and its essential components were not affected by the Settlement Act.[4]

There are five general components of the Settlement Agreement. First, the Settlement Agreement defines the Pueblo water rights. Second, the Settlement Agreement provides non-Pueblo water users subject to the Settlement Agreement, whose rights are being adjudicated separate and apart from the Settlement Agreement, with certain protections. Those protections for non-Pueblo junior water rights would not otherwise be available absent the protections

[4] The primary changes under the Settlement Act were to provisions governing the event of the settlement failure, the timing of Pueblo non-construction funding, the nature of the water supply for the Regional Water System, and the specific language (but not the substance) of the Pueblo waivers.

provided by the Settlement Agreement. Third, the Settlement Agreement establishes a framework for the administration of Pueblo and non-Pueblo water rights. Fourth, as contemplated by the Settlement Agreement, the Settlement Act provides for the construction of a Regional Water System and includes certain other provisions for the benefit of the Basin. Those provisions are not relevant to the determination of the Pueblos' rights. *See Memorandum Opinion and Order Overruling Objection to Magistrate Judge's Order Denying Motion for a Partial Stay* at 4-5 (Sept. 12, 2014) (Doc. No. 9674) ("September 12 Order"). Fifth, the Settlement Agreement, consistent with the Settlement Act, specifies conditions which must be met if the Settlement Agreement is to become effective and others, which if not met, call for the voiding of the Settlement Agreement and resulting decrees.

A. PUEBLO RIGHTS UNDER THE SETTLEMENT AGREEMENT.

The Pueblos have each agreed to final quantification of their water rights, pursuant to the terms of the Settlement Agreement, in exchange for settlement of their water rights claims in this litigation. Under the Settlement Agreement, the Pueblos made substantial concessions on the claims that have been asserted in this litigation and ruled upon by this Court. Accordingly, the Settlement Agreement, if approved by the Court, provides the Pueblos with defined water rights that are less than they could have obtained through litigation. The Pueblos also provide certain protections from Pueblo priority calls to non-Pueblo water users subject to the Settlement Agreement as part of the administration of the Pueblo rights, which absent the settlement would not be available to these junior users.

Under the Settlement Agreement, each of the Pueblos will receive the right to consumptively use specifically defined "First Priority Rights." Settlement Agreement § 2.1.2. Nambé will receive 1,459 acre-feet per year ("afy") of First Priority Rights, of which 522 afy are deemed "Existing Basin Use Rights." Pojoaque will receive 236 afy of First Priority Rights, all

of which are Existing Basin Use Rights. San Ildefonso will receive 1,246 afy of First Priority Rights, of which 288 afy are Existing Basin Use Rights. Tesuque will receive 719 afy of First Priority Rights, of which 345 afy are Existing Basin Use Rights. *Id.* §§ 2.1.2, 2.3.1.

The Pueblos may use their Existing Basin Use Rights on Pueblo lands without restriction. *See id.* § 2.3.2. The Pueblos may also use their Existing Basin Use Rights off Pueblo lands, but if they do, the Pueblos must offset adverse effects on other Basin water users subject to the Settlement Agreement. *Id.* § 2.3.4. The Existing Basin Use Rights may come from surface supplies or groundwater. *Id.* § 2.1.2. The Pueblos' Existing Basin Use Rights have priority over non-Pueblo rights in the Basin. *Id.* § 2.1.1.

The Pueblos' remaining First Priority Rights are "Future Basin Use Rights." *Id.* § 2.4.1. Nambé's Future Basin Use Rights amount to 937 afy, San Ildefonso's Future Basin Use Rights amount to 958 afy, and Tesuque's Future Basin Use Rights amount to 374 afy. *Id.* The Pueblos may use their Future Basin Use Rights from groundwater without restriction for domestic and community purposes. *Id.* § 2.4.3.[5] However, if the Pueblos use such rights for agricultural or commercial purposes, or for domestic and community purposes from surface water, they will be responsible for offsetting the adverse effects on non-Pueblo surface water right holders subject to the Settlement Agreement and the Pueblos may not make a priority call on such users. *Id.* §§ 2.4.4.3.1, 2.4.4.3.2. Non-Pueblo water right holders lose those protections if they do not use their rights for five years. *Id.* § 4.2.2.1. The Pueblos may also use their Future Basin Use Rights off of Pueblo lands, but the Pueblos must offset any adverse impacts on other Basin water users subject to the Settlement Agreement. *Id.* § 2.4.4.3.2.

[5] A non-Pueblo groundwater right owner who suffers impairment from such uses is entitled to compensation from the state-funded Impairment Fund. *See* Settlement Agreement §§ 2.4.3, 5.5.

Nambé also has a quantified right of 302 afy with a 1902 priority which resolves its claim for federally reserved water rights for its Reservation lands. Settlement Agreement § 2.6.2. Under the Settlement Act and Settlement Agreement, Nambé must sell that water right to the United States for part of the water supply for the Regional Water System. Settlement Act § 613(a)(1)(A), 124 Stat. 3142; Settlement Agreement § 2.6.2.1. Finally, San Ildefonso will receive 4.82 afy of federal reserved water rights with a 1939 priority for grazing purposes on the San Ildefonso Eastern Reservation. Settlement Agreement § 2.6.1.

The Settlement Act and Settlement Agreement require the Pueblos to execute waivers to relinquish any other water rights claim in the Basin. Settlement Act § 624, 124 Stat. 3153; Settlement Agreement § 6.

B. PROTECTION OF NON-PUEBLO RIGHTS UNDER THE SETTLEMENT AGREEMENT.

The Settlement Agreement also contains provisions to protect the rights of non-Pueblo surface and ground water users in the Basin. Settlement Agreement § 3. The Settlement Agreement provides groundwater users with three options that permit them to avoid a priority call by the Pueblos. Such users may agree (1) to connect to the Regional Water System, *id.* § 3.1.7.2.1; (2) to continue to use their wells if they agree to a specified maximum usage,[6] *id.* § 3.1.7.2.2; or (3) that upon transfer of their property, they will connect to the Regional Water System. *Id.* § 3.1.7.2.3. Under the Settlement Agreement, conditions govern each alternative depending on the nature of the right being exercised. *See id.* § 3.1.7.

After the Settlement Agreement takes effect, parties who wish to establish a new right to groundwater must transfer existing rights to cover the water supply from the well. *Id.* §§

[6] As explained below in Part VI.A.1, the level of usage set forth in the Settlement Agreement is more than double the average well usage in the Basin.

3.1.4.1.2, 3.1.4.2.2. Once the Regional Water System is completed, all new domestic uses must be served from the Regional Water System if they are within the service area. *Id.* § 3.1.4.1.3. Following Regional Water System completion, commercial well users are also required to connect to the Regional Water System or reduce their usage unless they reach a separate agreement with the Pueblos. *Id.* § 3.1.7.2.4.

Non-Pueblo surface rights are affirmed under the Settlement Agreement. *Id.* §§ 3.2, 4.1. Existing Pueblo Rights have priority over such rights, *id.* §§ 3.2.1, 4.1, but, non-Pueblo surface rights subject to the Settlement Agreement are not subject to priority call by Future Basin Use Rights. *See id.* § 2.4.4.2. That protection is lost if the non-Pueblo surface rights are not used for five years. *Id.* § 4.2.2.1. In the event non-Pueblo surface rights are used to supply domestic uses prior to the completion of the Regional Water System, the Pueblos are precluded from asserting a priority call against such a "transitional" use until the Regional Water System is available. *Id.* §§ 3.1.4.1, 4.4.2. The Settlement Agreement contains other provisions which protect existing non-Pueblo agricultural uses but limit the adverse effect on the groundwater and surface supplies from junior domestic and other uses. *See, e.g.*, *id.* § 5.1.3.

The Settlement Agreement does not directly address issues related to the treatment of Objecting Parties in the event their objections are overruled, although it does contain a provision to address issues related to well owners who fail to act in accordance with the provisions providing for protection from priority calls for such users. Settlement Agreement § 3.1.9. The question of whether those parties may obtain the benefits of the Settlement Agreement and be compelled to operate in accordance with its terms is not now before the Court and that issue

should not delay the entry of the Proposed Partial Final Judgment and Decree and commencement of interim administration.[7]

C. WATER RIGHTS ADMINISTRATION.

"Pursuant to his statutory authorities, the [New Mexico] Office of State Engineer ("OSE") shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in the [Settlement Agreement] and the Final Decree." *Id.* § 5.2. The OSE "also agrees to perform the functions of Water Master" with respect to the Pueblo rights in accordance with the Settlement Agreement, the Final Decree, and further orders of the Decree Court. *Id.* § 5.2. Thus, under such circumstances, the OSE has authority to administer, and if necessary curtail, both non-Pueblo and Pueblo uses, and ensure compliance with the Settlement Agreement and Proposed Final Judgment and Decree. *Id.* § 5.2.1.1.

The Settlement Agreement calls for the promulgation of rules "to govern [the OSE's] responsibilities in his various capacities set forth in Section 5.2 of" the Settlement Agreement. *Id.* § 5.3. In addition to his general supervisory power and authority to administer which already exists under state law, the Settlement Agreement enumerates specific issues which the rules must address, such as identification of irrigated acreage; metering, monitoring and reporting of wells; measurement of diversions; maintenance of administrative and judicial records of changes to decreed rights; maintenance of lists of all Basin water rights owners; maintenance of well election records; notice of the rules to the OSE and other water users; establishment of

[7] The administration contemplated by the Settlement Agreement with its extensive protections against priority calls for non-Pueblo surface users and similar protections for well owners who comply with the terms of the Settlement Agreement is fair and reasonable. The United States and Pueblos would not deny the opportunity to Objecting Parties to accept the terms of the Settlement Agreement in the event their objections are overruled and the Proposed Partial Final Judgment and Decree entered, although those issues are not presently before the Court.

procedures to address surface water offsets; groundwater impairment and resulting administrative actions; administration of supplemental wells; procedures for replacement wells; establishment of penalties for rule violations; determination of historical beneficial use; and establishment of informal dispute resolution procedures. *Id.* § 5.3.1. As already recognized by the Court, state law requires that the process for developing the rules be a public one in which the public can participate and provide comment. September 12 Order at 4 ("NMSA 1978 § 72-2-8 provides that to be effective, a regulation shall first be issued as a proposed regulation, made available for public inspection and published in not less than five newspapers of general circulation in the state, after which there will be a hearing 'and any person who is or may be affected by the proposed regulation or code may appear and testify.'").

The Settlement Agreement also requires the State to establish an impairment fund to "mitigate impairment to Non-Pueblo groundwater rights as a result of new Pueblo water use." Settlement Agreement § 5.5. The fund may be used to provide an alternative water supply, and the OSE must promulgate rules for the administration of the fund. *Id.* [8]

D. THE REGIONAL WATER SYSTEM.

Although the completion of the Regional Water System is essential to the settlement of the Pueblos' rights, its design, construction and operation are subject to the federal legislation and established federal procedures that are not part of this Court's jurisdiction regarding adjudication of the Pueblos' water rights. *See generally* September 12 Order. Nevertheless,

[8] The Settlement Act and Settlement Agreement provide additional protections for the Pueblos, the United States, and the non-Pueblo water users in the event that the Court has not entered a final decree by September 15, 2017, and the governmental parties have not agreed to extend the deadline. Settlement Agreement § 10.1; Settlement Act § 623(a)(2). If these conditions are not satisfied by September 15, 2017, the settlement "shall no longer be effective." Settlement Act § 623(b)(1).

understanding how the Regional Water System works is necessary to the Court's consideration of the Settlement Agreement

The Regional Water System will serve the Pueblos and those existing users in the Basin who connect to the Regional Water System, as well as all new users in the service area.[9] The fundamental purposes and benefits of the Regional Water System are to (1) import water to a water-short Basin to assist in settlement of the Pueblo claims without effect on non-Pueblo users; (2) preserve and protect the Basin groundwater for all water users by reducing reliance on groundwater as a source of supply; and (3) protect Basin surface water supplies from the adverse effects of expanding groundwater uses by importing water for use by the non-Pueblo residents of the Basin. Five governments – the four Pueblos and the County of Santa Fe – will operate and manage the Regional Water System. Issues relating to the specific operation and management of the System will be determined by those five governments as directed by the Settlement Act. Public processes relating to the planning, design and environmental permitting for the Regional Water System are substantially underway.

Under the Settlement Act, the Pueblo water supply will be delivered through the Regional Water System from three sources. Settlement Act § 613(a). First, the United States will purchase the Nambé Reservation federal reserved right. *Id.* § 613(a)(1)(A); Settlement Agreement § 2.8.1.1. Second, the United States has purchased from Santa Fe County available water rights. Settlement Act § 613(a)(1)(B); Settlement Agreement § 2.8.1.2. Third, water from

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[9] Each of the Pueblos is entitled to receive 375 afy from the Regional Water System that must be constructed for the settlement to take effect. Settlement Agreement § 2.5.1. Each of the Pueblos will also receive an additional 131.25 afy from the Regional Water System. *Id.* § 2.7.1. This water is known as Economic Development Water and is subject to an agreement among the Pueblos concerning its final allocation.

the San Juan-Chama Project is being made available by the United States for use in the Regional Water System. Settlement Act § 613(a)(2); Settlement Agreement § 2.8.1.3.

III. THE FEDERAL NATURE OF PUEBLO WATER RIGHTS AND THE *AAMODT* LITIGATION

An Indian water rights settlement, such as that at issue here can only be understood within the context of federal Indian law, and a firm understanding of the principles of federal Indian law generally, and federal Indian water law specifically is essential for purposes of the Court's approval of the Settlement Agreement. Throughout the course of this litigation, the District Court and the Tenth Circuit have applied the principles of federal Indian law and Indian water law to determine the Pueblo water rights at issue here. The controlling principles of federal Indian water law and extensive litigation history of this case, provide the foundation for the Settlement Agreement.

A. THE PUEBLOS ARE FEDERALLY RECOGNIZED INDIAN TRIBES WITH FEDERALLY PROTECTED WATER RIGHTS.

It is beyond dispute that the Pueblos are federally recognized Indian Tribes. *See United States v. Sandoval*, 231 U.S. 28, 48-49 (1913). The United States recognizes the Pueblos as having all of the rights, responsibilities, protections and limits afforded to Indian tribal governments under federal law. The Pueblos are "distinct political societ[ies], separated from others, capable of managing [their] own affairs and governing [themselves] . . . ." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). The United States has primary responsibility to protect the Pueblos' rights of self-governance from the reach of state governments as part of the federal trust responsibility to Indian tribes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). As a result, state law has "no force" on Indian Tribes and their property. *Id*.

1. Plenary Federal Power and Responsibility.

The United States Constitution places with the federal government, as opposed to the individual state governments, the power to deal with Indian Tribes. The Constitution gives Congress the power to regulate commerce with Indian Tribes, U.S. CONST. art. I, § 8, cl. 3, and gives the federal executive the power to make treaties with them. *Id.* art. II, § 2, cl. 2. The United States acted quickly after ratification of the Constitution to adopt the Trade and Intercourse Act of 1790, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177). As initially enacted, the act, among other things, prohibited any acquisition of tribal trust property without congressional approval, and prohibited non-Indians from using the lands. In 1851, Congress applied the Trade and Intercourse Act to Indian Tribes in the territory acquired from Mexico under the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). *See New Mexico ex rel. Reynolds v. Aamodt* ("*Aamodt II*"), 618 F. Supp. 993, 1001 (D.N.M. 1985). From the beginning, then, federal responsibility for tribal property, including water rights, has been extensive and often referred to generally as the federal trust responsibility.

The federal trust responsibility is a plenary power, which Congress carries out by enactment of federal legislation. *Sandoval*, 231 U.S. at 49. As noted above, the early cases found no room for any state action even when Congress did not speak directly to an issue. Today federal preemption is based on applicable federal statutes and treaties, and the history of tribal-federal interaction. *McClanahan v. Arizona Tax Com'n*, 411 U.S. 164, 173-77 (1973). The Tenth Circuit applied this analysis to the Pueblos and their water rights in *State of New Mexico v. Aamodt*, concluding that "[t]he United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law." 537 F.2d 1102, 1111 (10th Cir. 1976 ("*Aamodt I*").

The Pueblos' water rights are not determined by or subject to state law, and they are protected by or held in trust for each Pueblo by the United States. *Aamodt I*, 537 F.2d at 1111-12; *Aamodt II*, 618 F. Supp. at 1006 (Pueblo water rights are "'the exclusive province of the federal law'" (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)). Thus, these rights are not subject to loss through application of principles of estoppel, such as non-use, forfeiture or abandonment. *See Aamodt II*, 618 F. Supp. at. 1006; *United States v. Ahtanum Irrigation Dist*, 236 F.2d 321, 334 (1956). For the Pueblos of New Mexico, Congress, pursuant to its plenary power, expressly stated this general rule: "[Pueblo prior rights to] water shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians." Pueblo Compensation Act of May 31, 1933, § 9, Pub. L. No.73-28, 48 Stat. 108, 111 ("1933 Act").

2. The Equal Protection Clause in Indian Law.

Congress' plenary power exists because Indian Tribes are governmental entities, and it is not a denial of equal protection to treat Indian Tribes and their members differently from other people when the distinctions are rationally related to Congress' trust responsibility toward the Indians generally. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974) (federal employment preferences for Indian people are not unlawful racial discrimination because being a member of a federally recognized Indian tribe is not a racial characteristic). The crux of this analysis is that Congress is not making distinctions among people based on the individual person, but on the relationship between the federal government and an Indian Tribe, and the nature of the trust responsibility that Congress is obligated to protect. Thus, it is not a denial of equal protection that the Pueblos' water rights are defined by federal law and protected from forfeiture or abandonment (and generally senior in nature to state-defined rights to water) while the rights of

the other parties to this adjudication are defined by state law, which provides for loss of water rights by non-use through forfeiture or abandonment.

B. HISTORY OF THIS ADJUDICATION.

1. Filing and Initial Rulings.

In 1966 the State of New Mexico filed suit in the District Court to determine rights to the use of water in the Basin. This drainage area includes lands of the Nambé, Pojoaque, San Ildefonso and Tesuque Pueblos. The United States, on its own behalf and on behalf of the Pueblos, intervened thus removing any bar of sovereign immunity. *See Aamodt I*, 537 F.2d at 1105.

In 1974, the Pueblos moved to intervene and have independent legal representation. The Pueblos appealed denial of that motion, as well as the Court's ruling that Pueblo water rights were based on state law. *Aamodt I*, 537 F.2d at 1104. The Tenth Circuit agreed with the Pueblos that they were entitled to intervene as a matter right with independent legal counsel, and that the Pueblos' water uses were not controlled by state water law based or the doctrine of prior appropriation. *Id*. In addition, the Tenth Circuit found:

> [t]he Pueblos did not obtain any rights by either treaty with the United States or Executive Order. The Spanish and Mexican governments recognized the Pueblos' land titles. In the Treaty of Guadalupe Hidalgo, the United States agreed to protect rights recognized by prior sovereigns. In 1858, Congress specifically confirmed the land titles of the Pueblos with which we are concerned.

Id. at 1108-09.

While the adjudication of Pueblo rights was on appeal before the Tenth Circuit, the OSE commenced quantification of the non-Pueblo water rights users in the Basin. By 1978, except as to the priority date of each right, all of the non-Pueblo surface water rights had been quantified. N.M. State Eng'r Office, *Draft Report of Non-Pueblo Water Rights Subject to Revision* (Dec. 8, 1978) (filed with *New Mexico's Brief on the Priority of Pueblo Rights Under the Reserved*

Rights Doctrine (Dec. 8, 1978) (Doc 105)). On January 13, 1983, the Court ordered that no permits to appropriate underground waters be issued within the Basin stream system unless limited to use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing the consumptive use of water. *Order* (Jan. 13, 1983) (Doc. 641) ("Post 82 Well Order").[10] The Court subsequently stayed "the Pueblos' challenges to the non-Indian defendants' acreages" pending a determination of priorities. *Order* (Oct. 27, 1983) (Doc. 1459).

2. Setting the Standards for Quantifying the Pueblos' Water Rights.

On November 23, 1982, after approximately sixteen days of evidentiary hearings, the Special Master appointed by the Court entered three reports, with findings of fact on the Pueblos' historically irrigated acreage, water rights measured by irrigable lands, and rights under Spanish and Mexican law. *See Special Master's Findings of Fact on the Pueblos' Historically Irrigated Acreage* (Nov. 23, 1982) (Doc. 626); *Special Master's Findings of Fact on the Pueblos['] Water Rights Measured by Irrigable Lands* (Nov. 23, 1982) (Doc. 627); *Special Master's Findings of Fact on the Rights of the Pueblos Under Spanish and Mexican Law* (Nov. 23, 1982) (Doc. 628). The Court allowed *inter se* challenges by "all parties" including defendants to the recommendations made by the Special Master. After ten more days of trial in October 1983, where defendants introduced evidence as part of the *inter se* portion of the Pueblos' case, the Special Master issued amended findings of fact and conclusions of law on the Pueblos' rights

[10] The District Court addressed these wells again in 1993. *See Order* (May 21, 1993) (Doc. 4184). Wells permitted and drilled after the entry of the Post 82 Well Order were to be adjudicated and determined in this case, and claimants to these wells were joined as defendants in these proceedings.

under Spanish and Mexican law. *See Special Master Conclusions of Law on the Rights of the Pueblos Under Spanish and Mexican Law* (Aug. 20, 1984) (Doc. 2003); *Special Master Amended Findings of Fact on the Rights of the Pueblos Under Spanish and Mexican Law* (Aug. 20, 1984) (Doc. 2004).

The Court adopted and modified the Special Master's amended findings of fact and amended conclusions of law. *Memorandum Opinion and Order* (Sept. 18, 1985) (Doc. 2712); *Aamodt II*, 618 F. Supp. at 996. After reviewing the Pueblos' rights under Spanish and Mexican law, United States law, the doctrine of equitable apportionment, and aboriginal rights, the Court concluded, as to the Pueblos' grant lands:

> [T]he 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. The acreage to which this priority applies is all acreage irrigated by the Pueblos between 1846 and 1924 . . . . The Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need. Acreage brought under irrigation between 1846 and 1924 was thus also protected by federal law.

Aamodt II, 618 F. Supp. at 1010 (internal citations omitted). The Court ruled that "the Pueblo water rights appurtenant to their lands are the surface waters of the stream systems and the groundwater physically interrelated to the surface water as an integral part of the hydrologic cycle. The Pueblos have the prior right to the use of this water." *Id.* (internal citations omitted). The 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), *as amended* (Sept. 9, 1987) (Doc. 3074), and found that the United States reserved lands for San Ildefonso and Nambé. The District Court ruled that federal reserved rights exist on these lands were to be quantified under the doctrine enunciated in *Winters v. United States*, 207 U.S. 564 (1908). *Aamodt II*, 618 F. Supp. at 1010.

Pursuant to Section 19 of the Pueblo Lands Act of 1924, Pub. L. No. 253, 43 Stat. 636, 642, funds paid to the Pueblos for lost lands were to be used to reacquire lands. The Court addressed the priority and quantity of water rights on the reacquired lands of the Pueblos, ruling that Pueblos are entitled to "replacement rights" with aboriginal priority, based on section 19 of the Pueblo Lands Act of 1924. *Memorandum Opinion and Order* at 4 (Feb. 26, 1987) (Doc. 2977). The Court subsequently clarified the meaning of the phrase "Indian Pueblos replacement lands and water rights," finding that appropriations made pursuant to the Pueblo Land Act of 1924 to compensate Pueblos for lands taken by the United States pursuant to the Pueblo Lands Act, were for the limited purpose of "acquisition of replacement land and water and necessary irrigation works for their development." *Memorandum Opinion and Order* at 5 (May 3, 1989) (Doc. 3283). The Court stated "the United States and the Interior must establish this source of revenue for any purchase of water rights so as to determine if such rights are replacement or restored water as contemplated by Congress." *Id.* The water rights on these lands so acquired have an aboriginal priority. *Id.*

After nine days of evidentiary hearings on Pueblos' replacement rights, the Special Master issued a lengthy report. *Special Master's Report Pertaining to Replacement Water Rights of the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque* (July 20, 1993) (Doc. 4197). The requirement regarding source of revenue was subsequently removed by the *Memorandum Opinion and Order* at 8 (Apr. 14, 2000) (Doc. 5596).[11] Thereafter, the Court

[11] The order notes that "the Pueblos have reacquired land and water rights located within the exterior boundaries of their grant lands." *Id.* at 7. "Regardless of the program or statute under which the land and water rights were reacquired, the aboriginal title reactivated, and the elements of the federal Pueblo water right came back into play. Questions regarding deeds and funding sources for reacquisition are not relevant in this instance." *Id.* at 8.

issued other opinions and orders further clarifying key components of the Pueblos' water rights, but the basic structure was in place.

The Court next addressed the reserved water rights of Nambé and San Ildefonso in its order concerning threshold legal issues relating to the Pueblos' *Winters* water rights. These issues arose with consideration of the Special Master's August 1992 report. *Memorandum Opinion and Order* (Dec. 29, 1993) (Doc. 4267). The Court reviewed all types of irrigation water rights that the Pueblos could have on the Pueblo grant and reservation lands. *Id.* at 2. The Court had clarified that "Congressional actions [from 1858 through] the remainder of the 19th Century did not extinguish aboriginal ownership of lands outside of the grant boundaries." *Memorandum Opinion and Order* at 8 (Feb. 26, 1987) (Doc. 2977). The Court concluded, therefore, that Nambé is entitled to a water right for practicably irrigable acreage on its 1902 Reservation based upon the condition of the reservation lands in 1902. *Id.* at 7.

The reserved water rights for the San Ildefonso Eastern Reservation have been addressed by the Court's partial summary judgment ruling, *Memorandum Opinion and Order* (Jan. 17, 1997) (Doc. 5209), and a stipulation between the United States, New Mexico, and San Ildefonso Pueblo. On April 30, 1998, the Court adopted the stipulation in a partial judgment, concluding that the right as defined "shall be incorporated into the partial final decree of federal rights to be entered in this case upon completion of the quantification of all federal and federally recognized tribal rights, and the final decree of all rights to be entered in this matter." *Partial Judgment* at 3 (Apr. 30, 1998) (Doc. 5390).

The Court has issued two orders concerning the Nambé Reservation. The *Memorandum Opinion and Order* (Nov. 14, 1997) (Doc. 5330), is a partial summary judgment on the 1902 Nambé Reservation. In its *Memorandum Opinion and Order* (July 10, 2001) (Doc. 5916), the

Court rejected the Special Master's report recommending Nambé be found to have no *Winters* rights for its 1902 Reservation.

The final remaining component of the Pueblos' water rights were the rights based on domestic and livestock uses. *Memorandum Opinion and Order* (Jan. 31, 2001) (Doc. 5642). One of the issues was whether these rights, which were part of the Pueblos' rights under Spanish and Mexican law, were subject to Spanish law-based principles of *repartimiento*, or equitable sharing. The Court ruled that *repartimiento* did not survive the United States' acquisition of the New Mexico territory. *Id.* at 6. The Court restated a previous ruling that recognition of these Pueblo rights did not violate any Fifth Amendment right of the non-Pueblos, concluding that the non-Pueblos' water rights were always subject to all of the Pueblos' prior rights, including future uses. "If there is not enough water in the stream system to serve both, the junior users must forgo the use of water." *Id*. at 9.

3. Making the Federal and State Law Systems into a Whole.

The Court undertook the task of setting out how the Pueblos' and non-Pueblos' water rights could be melded into a workable whole. In its *Memorandum Opinion and Order* (Feb. 26, 1987) (Doc. 2978), the Court addressed legal issues relating to the rights of non-Pueblo water users. The Court determined that "after this phase is completed, there will be an opportunity for *inter se* challenges and for challenges by Pueblos with equal or junior rights." *Id.* at 3 (citations omitted). The Court addressed the rights of non-Pueblo users under the Treaty of Guadalupe Hidalgo, and ruled that pre-treaty non-Pueblo uses could establish a water right with a priority date prior to United States sovereignty, but that the method of allocation under Spanish and Mexican law did not survive the New Mexico Territory's adoption of the prior appropriation doctrine. *Id.* at 14, 17-18; *see also Memorandum Opinion and Order* at 6 (Jan. 31, 2001) (Doc. No. 5642) ("Some non-Pueblo water rights arose from *repartimiento* practices. . . . The system,

however, is not a right and therefore did not survive the change in sovereigns. Its characteristics of uncertainty and balancing uses among people are not appropriate in this context . . . [.]") (internal citations omitted).[12] The Court also confirmed that the non-Pueblo rights are to be governed by state law, and are distinct from the Pueblos' rights, ruling that New Mexico state law requires priority be determined on a tract-by-tract basis. *Order* at 23 (Doc. 2978). The Court advised "New Mexico and non-Pueblo defendants to re-appraise the ditch-by-ditch approach in view of possible Tenth Circuit disapproval in the future." *Id.* at 27.

The non-Pueblo defendants filed a motion to dismiss the adjudication arguing that the case should join all groundwater users in the Tesuque aquifer, which aquifer went beyond the boundaries of the river system being adjudicated. The Court denied the motion, stating that the litigation will provide complete relief as to the priority of rights within the Basin, inclusive of all the surface and groundwater rights in the Basin. *Order* at 3 (Apr. 9, 1992) (Doc. 3973).

In addressing the Pueblos' standing in the *inter se* proceedings for defendants, the Court found "that the Pueblos will have standing in the inter se proceeding any time their water right is affected, which is to say, any time they risk a diminution in their water right or a change in priority." *Order* at 3 (Aug. 17, 1992) (Doc. 4013). The Court adopted the findings of fact pertaining to hydrology, as recommended by the Special Master in a report filed April 16, 1993, and denied without prejudice the Pueblos' motion for evidentiary hearing on Basin hydrology. *Order of the Court Adopting Findings of Fact Pertaining to the Hydrology Report & Denying, Without Prejudice, the Pueblos' Motion for an Evidentiary Hearing* at 2 (May 6, 1993) (Doc. 4178).

[12] Thus, the Court has already addressed the issue of the consistency of the Pueblo rights with the Treaty of Guadalupe Hildago, a point which Objecting Parties miss.

Administration of water rights in the Basin has been addressed by numerous court orders. *See Order* (Oct. 10, 1996) (Doc. 5118); *Order* (Mar. 26, 1997) (Doc. 5255). In its order with respect to metering and reporting of groundwater diversions, the Court directed New Mexico and the United States to develop a plan for

> adoption of criteria and procedures for the metering and monitoring of every diversion and use of underground and surface water in the Basin, estimated costs, the appointment of a water master, collection and analysis of test data from existing wells and if necessary for new wells, and anything else deemed necessary. It may include alternatives to metering for meeting the goals of compliance with court orders, monitoring, enforcement, data collection and conservation.

Order at 3 (Apr. 21, 1998) (Doc 5386*)*; *accord Administrative Order* (May 5, 1998) (Doc. 5393) (replacing *Order* (Mar. 20, 1990) (Doc. 3375), *Order* (Feb. 26, 1993) (Doc. 4126), and *Order* (Apr. 29, 1996) (Doc. 5033)).[13]

IV. THE SETTLEMENT AGREEMENT WAS DEVELOPED UNDER THE COURT'S SUPERVISION.

A. BACKGROUND OF THE NEGOTIATIONS.

In 1999, the Settlement Parties, along with counsel for various individual water users initiated discussions, which served as the basis of the negotiations which resulted in the present Settlement Agreement. Between 1999 and 2012, the Court closely monitored and supervised the activities of the negotiating parties, primarily to ensure the fairness of the process, but also to facilitate the success of those efforts. A review of the history of the settlement discussions is helpful to gain an understanding of the framework of the Settlement Agreement, and

[13] The Court's understanding of the need for administration to protect and finally settle the Pueblo water rights is carried through in the Settlement Agreement, which provides for the administration of Pueblo and non-Pueblo rights by the OSE (a significant compromise by the Pueblos), and also provides for significant administrative protections for non-Pueblo water users from the Pueblos' use of their water rights.

demonstrates the lack of any basis for an objection that the procedures and negotiations by which the Settlement Agreement was developed were flawed.

B. SETTLEMENT NEGOTIATIONS.

As discussed, the nature and extent of the Pueblos' water rights and the relationship of those rights to the state law water rights of the other non-Pueblo parties have been the subject of difficult litigation in this case since 1966. During nearly 40 years of active litigation, this Court addressed certain matters related to those questions, but other equally difficult issues remained unresolved and appeared to require decades of additional litigation before the Court. And, of course, were litigation to ever conclude with a complete final judgment in this Court, appeals to the Tenth Circuit and the Supreme Court would ensue. Under these circumstances, the parties explored the potential for resolving the litigation in a mutually agreeable fashion. As described below, the settlement efforts began with the discrete issue of domestic wells with permits issued after the Court's injunction prohibiting outdoor use of groundwater from domestic wells permitted by the OSE under, N.M. STAT. ANN. § 72-12-1. *See* Post 82 Well Order. Those discussions ultimately evolved into the comprehensive settlement discussions that resulted in the Settlement Agreement now before the Court.

In May 1998, the Court referred the issues concerning the Post 82 Well Order to Magistrate Judge Smith for the "expeditious mediation of the parties' settlement negotiations." *Order* (May 28, 1998) (Doc. 5409). After a series of settlement conferences with Judge Smith, *see, e.g., Order Setting Settlement Conference* (June 1, 1998) (Doc. 5411), the parties entered into a stipulation to resolve the controversies surrounding the Post 82 Well Order. *See Order re Adopting Post-1982 Well Settlement Agreement* (Oct. 4, 1999) (Doc. 5549). The Court ultimately approved that stipulation. *Id.*

Following the successful resolution of the issues related to the Post 82 Well Order, the parties turned their attention to the Pueblos' domestic and livestock rights. *See, e.g., Order Directing Settlement Process* (Sept. 29, 1999) (Doc. 5542); *Order* (June 7, 1999) (Doc. 5517) (adopting the "Plan of Settlement" for domestic and livestock claims). Again, under the direction of Judge Smith, the discussions expanded to include the "goal of a global negotiated solution." *Order Directing Pre-Settlement Process* (Aug. 6, 1999) (Doc. 5531). Judge Smith subsequently held a series of settlement conferences to advance the settlement effort. *See, e.g., Notice of Status Conference* (Mar. 2, 2000) (Doc. 5577). Ultimately, the parties stipulated to stay the proceedings before the Special Master and agreed that the settlement discussions "should be all encompassing . . . ." *Stipulated Order Staying Further Proceedings Before the Special Master* (Aug. 31, 2000) (Doc. 5623) ("Stipulated Order"). The Stipulated Order stated that the parties had selected a mediator, Judge Michael Nelson, to begin the mediation process. *Id.* Judge Smith subsequently entered an order protecting the confidentiality of the settlement discussions. *Order* (Sept. 15, 2000) (Doc. 5629). Thereafter, the parties regularly reported to the Court on the progress of the settlement discussions and sought extensions of the stay of proceedings to allow the negotiations to continue. *See, e.g., Joint Status Report and Motion to Continue Stay of Further Proceedings before the Special Master* (Sept. 17, 2001) (Doc. 5923); *Order Granting Joint Motion to Continue Stay of Further Proceedings before the Special Master* (Mar. 25, 2002) (Doc. 5982); *United States' Response to Motion to Continue Stay of Further Proceedings before the Special Master* (Feb. 18, 2003) (Doc. 6048).

In January 2004, the Settlement Parties reported to Judge Vasquez that they had completed a draft of a settlement agreement which required review by their principals. *Status Report* (Jan. 15, 2004) (Doc. 6081) ("January 15 Report"). The January 15 Report noted that the

review process within the federal government would require consideration by various federal agencies and that ultimately the proposed settlement agreement would have to be approved by Congress. *Id.* at 2. Following a January 29, 2004 status conference, the Court directed Judge Nelson to send a one-page letter to Judge Smith and the Court's Water Rights Clerk every month reporting on the progress of the discussions. *Order Setting Status Conference and Schedule for Status Reports, and Denying Old Motions without Prejudice* (Feb. 5, 2004) (Doc. 6083). As the proposed agreement neared completion, the Court continued to hold status conferences and to require reports from the parties and the mediator. *See, e.g., Order Setting Status Conference* (June 2, 2004) (Doc. 6095).

The agreement under consideration at that time was widely circulated but met with widespread community concerns that required a significant restructuring of the draft agreement's terms. *See generally Memorandum in Support of Proposed Order* (Aug. 19, 2004) (Doc. 6100) ("August Memo"). To facilitate addressing those concerns, Paul White and Orlando Romero were chosen as community representatives at the May 27, 2004 status conference. Mr. White subsequently attended various settlement discussions with Judge Nelson. *Id.* at 4. In addition, attorney Fred Waltz entered his appearance on behalf of various water right holders, primarily domestic well users, and participated in the continued settlement discussions to address the concerns of the non-Pueblo water users. *See Entry of Appearance* (Dec. 14, 2004) (Doc. 6110); *Entry of Appearance* (Feb. 11, 2005) (Doc. 6121); *Entry of Appearance* (Apr. 1, 2005) (Doc. 6123); *Entry of Appearance* (July 26, 2005) (Doc. 6133). Settlement discussions continued for another two years to address the concerns of the non-Pueblo water users.

In September 2005, following a status conference, the Court ordered Judge Nelson to certify to the Court by the end of that month whether the parties had completed the settlement

agreement. *Order* (Sept. 9, 2005) (Doc. 6140). The Court directed that the governmental entities other than the United States were to determine by December 15, 2005 whether to approve the proposed agreement. *Id.* at 1. Ultimately, counsel for the parties, including Mr. Walz, reached agreement on a significantly modified settlement agreement in January 2006. *See Order* (Jan. 20, 2006) (Doc. 6153) ("January 2006 Order"); *see* 2006 Agreement. In accordance with the January 2006 Order, the Settlement Parties submitted a schedule of proposed deadlines to the Court for the public dissemination of the proposed agreement as revised and the adoption of the agreement by the governmental parties. *Schedule of Proposed Deadlines* (Feb. 1, 2006) (Doc. 6157). Those proposed deadlines were adopted by the Court. *Order* (Mar. 1, 2006) (Doc. 6160). Thereafter, the Settlement Parties, along with certain counsel for individual water users and organizations, began the long process of obtaining Congressional approval of the settlement. *See generally Motion of Settlement Parties to Establish Procedures for (1) Approval of Settlement Agreement, (2) Entry of Partial Final Decree, (3) Entry of Interim Administrative Order, and (4) Entry of a Final Decree* (Nov. 1, 2006) (Doc. 6185).

In November 2006, the Settlement Parties moved the Court to adopt procedures to govern the approval process. *Id.* Following briefing by various parties, the Court addressed the issues raised by certain parties and instructed the Settlement Parties to provide a procedural order with various court-directed changes to their original proposal. *Memorandum Opinion and Order* (May 24, 2007) (Doc. 6236) ("May 24 Order"). In addition to setting the standard for approval of the Settlement Agreement, the Court, among other things, addressed concerns regarding the process by which the 2006 Agreement was developed. The Court stated that it had "closely supervised the status of the settlement negotiations over [the] past seven years" and concluded "that the negotiations were conducted at 'arms length' meaning that the negotiations were

conducted by unrelated parties, each acting in their own self interest." *Id.* at 9-10. The Court also noted that the confidentiality of the initial settlement discussions was pursuant to order of the Court and was necessary to the successful completion of the settlement. *Id.* at 10-11. Ultimately, the Court issued its order adopting the procedures and standards by which it would consider whether to approve the Settlement Agreement and enter the Partial Final Decree and the Final Decree. *Order Granting Motion of Settlement Parties' to Establish Procedures for (1) Approval of Settlement Agreement, (2) Entry of Partial Final Decree, (3) Entry of Interim Administrative Order, and (4) Entry of a Final Decree* (Dec.18, 2007) (Doc. 6282) ("Procedural Order").[14]

Subsequently, in 2010, the Settlement Act directed the United States to execute the Settlement Agreement as modified by the legislation and to carry out the federal obligations necessary to resolve the Pueblos' water rights. *See* Settlement Act § 621(b), 124 Stat. 3149. The process for amending the 2006 Agreement to conform to the Settlement Act was open to the public. *See Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso* at 1 (Mar. 11, 2014) (Doc. 8236) ("Order to Show Cause"). Once revisions were complete and signatures were secured to the final agreement, the Settlement Agreement was submitted to the Court and pursuant to the Order to Show Cause, these proceedings were initiated.

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[14] That order has been amended. *Amended Order Establishing Procedures for (1) Approval of Settlement Agreement, (2) Entry of Partial Final Decree, (3) Entry of Interim Administrative Order, and (4) Entry of a Final Decree* (Feb. 9, 2011) (Doc. 7310); *Second Amended Procedural Order Regarding Approval of Settlement Agreement* (Nov. 4, 2013) (Doc. 7988) ("Second Amended Procedural Order").

V. STANDARD OF REVIEW

The standard of review under which the Court must consider the Settlement Agreement and Proposed Partial Final Judgment and Decree is long-established in this case and well-supported by the law. In its Procedural Order, the Court decided that it must determine whether the Settlement Agreement and the resulting Proposed Partial Final Judgment and Decree were fair, adequate, and reasonable and consistent with public policy and applicable law. *Id.* at 4. This standard of review is subsequently referred to as the "Fair and Reasonable Standard."

A. THE FAIR AND REASONABLE STANDARD.

The Proposed Partial Final Judgment and Decree contemplated under the Settlement Agreement is a consent decree intended to be a final judgment pursuant to Fed. R. Civ. P. 54(b) as to each of the Pueblos' surface and groundwater rights in the Basin. *Cf. VTA, Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979) (for purposes of finality, underlying judgment by consent has same force and effect as judgment rendered on the merits following trial). Generally, in reviewing a proposed consent decree, the Court must ascertain that the settlement is fair, adequate, and reasonable and does not contravene the public interest:

> Because the issuance of a consent decree places the power of the court behind the compromise struck by the parties, the district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest. The court also has the duty to decide whether the decree is fair, adequate, and reasonable before it is approved.

United States v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991); *see also Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) ("Because of the unique aspects of settlements, a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy."); *cf. Ratzlaff v. Seven Bar Flying Serv., Inc.*, 646 P.2d 586, 590 (N.M. Ct. App. 1982) ("[T]he policy of our law is to favor amicable settlement of claims without litigation when the agreements are fairly

secured, are without fraud, misrepresentation, or overreaching, and when they are supported by consideration.").[15]

B. ELEMENTS OF THE FAIR AND REASONABLE STANDARD.

The Tenth Circuit has specified the elements of the Fair and Reasonable Standard:

> In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:
>
> (1) whether the proposed settlement was fairly and honestly negotiated;
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
> (4) the judgment of the parties that the settlement is fair and reasonable.

Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984). In addition, when a settlement affects third parties, the court may consider whether the effect on them is unfair or proscribed. *See In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992); *United States v. Oregon*, 699 F. Supp. 1456, 1461 (D. Or. 1988) ("When considering a consent decree that also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed."); *United States v. City of Miami, Fla.*,

[15] The Fair and Reasonable Standard has also been recognized by water law scholars as applying to water rights settlements generally and to Indian water rights settlements specifically. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 7:24 (2014). ("An adjudication can be greatly facilitated by settlements among the parties. . . . Basically, the court must determine if the settlement was reached in good faith, all parties received due process, the terms are fair to the settling parties and do not prejudice other claimants."); PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 186 (1989) ("Once [an Indian water rights] settlement has been negotiated, what standard should the court apply in reviewing substantive objections by parties not involved in the negotiations? . . . It is likely that courts will apply a 'fair and reasonable' test to proposed consent decrees settling stream adjudications, to ensure that rights of third parties are protected.").

664 F.2d 435, 441 (5th Cir. 1981) This is particularly true in the water rights context, where a court must ensure that settlement of the claims of one water rights holder does not unfairly prejudice the interests of other water rights holders.[16] *See State ex rel. Office of State Eng'r v. Lewis*, 150 P.3d 375, 392 (N.M. Ct. App. 2006) ("The court presumably could have rejected the settlement agreement if it unfairly and adversely affected the water rights of third parties who were allowed to object to it.") (citing *In re Masters Mates*, 957 F.2d at 1026 *Manual for Complex Litigation* (Fourth) § 13.14 (2004)); *see also* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 7:24 (2014).

Consideration of the circumstances surrounding the Settlement Agreement reveals that each element of the Fair and Reasonable Standard is established. Ultimately, the decision to approve a settlement lies in a court's discretion, based on the particular facts and circumstances of each case. *Platte v. First Colony Life Ins. Co.*, 194 P.3d 108, 109-10 (N.M. 2008) (citing *Jones*, 741 F.2d at 324). However, the Court is not free to simply substitute its judgment for that of the parties to the Settlement Agreement. "The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

1. <u>The Settlement Agreement was Fairly and Honestly Negotiated</u>.

The Court must first consider the good faith of the parties to fairly and honestly resolve the water rights of the Pueblos and to develop the Settlement Agreement. That each Settlement Party negotiated the Settlement Agreement in a good faith and transparent manner and at arms-

[16] The Settlement Agreement's impacts on the interests of other water rights holders are addressed below, with respect to the objections of the Objecting Parties. *See infra* Part VI. As explained, although numerous objections were articulated, no objection suggests that the Settlement Agreement will unfairly prejudice the Objecting Parties' interests.

length is the only reasonable conclusion that can be drawn from the history of the negotiations. *See* Part IV, *supra*. Certainly no basis exists to suggest that any improper collusion or unfair dealing occurred as the 2006 Agreement, as amended by the Settlement Agreement, was developed or in the process that led to its approval by Congress.

The events briefly described above spanned more than a decade and involved hundreds of individuals from across New Mexico and the United States. These events are all thoroughly supported by the Court's record or, with respect to the Settlement Act, its legislative history. In fact, the Court has already observed that under its supervision, negotiations through 2007 were conducted at "arms-length." May 24 Order at 9-10. Pursuit of federal legislation and conforming the agreement to the Settlement Act after 20007 involved identical open and arms-length conduct.

The events and circumstances underlying the negotiations of the Settlement Agreement establish that the negotiation process was open, transparent, inclusive, and thorough. The Court should conclude that the Settlement Agreement was fairly and honestly negotiated.

2. Serious Questions of Law and Fact Exist Concerning the Quantification of the Pueblos' Water Rights that Place the Ultimate Outcome of the Litigation in Doubt.

The second consideration that the Court must give to the Settlement Agreement is whether serious questions of law and fact exist concerning the Pueblos' water rights that place the ultimate outcome of the litigation in doubt. In this litigation, the Pueblos and the United States have asserted a first priority or time immemorial priority water right for all water that the Pueblos have historically used and for all water that the Pueblos will need in the future to ensure that the lands of each Pueblo serve as their permanent homes. The Court need look no further than its record to conclude that while the Pueblos' priority has been recognized by the Tenth Circuit, the underlying litigation of the extent and nature of those senior water rights involves

serious questions of law and fact that place in doubt the ultimate outcome of the litigation. *See* Parts III.B.2, IV.B, *supra*.

Though many aspects of the Pueblos' water rights have been litigated over the course of more than four decades, few aspects of the Pueblos' water rights have been finally resolved or otherwise removed from contention. In fact, the only issues associated with Pueblos' water rights that are firmly established are those addressed by the Tenth Circuit in *Aamodt I*:

1) the Pueblos had a right to independent representation by private counsel and had right to intervene;
2) any federal law water rights Pueblo Indians may have had were not lost by the Pueblo Lands Act of 1924 and 1933;
3) the United States has not relinquished jurisdiction and control over the Pueblos nor placed their water rights under New Mexico law; and
4) the water rights of the Pueblos are prior to all non-Indians whose land ownership was recognized pursuant to the Pueblo Lands Act of 1924 and 1933.

See generally Aamodt I, 537 F.2d. at 1106-13.

Despite the apparent strength of the Pueblos' and United States' assertion of first priority water rights found in the Tenth Circuit's opinion, for nearly a quarter of a century thereafter complicated and contentious litigation over the quantification of the Pueblos' water rights continued. The substantial issues related to the quantification of the Pueblos' water rights remain subject to challenge on appeal.

As described above, the Pueblos' water rights settled under the Settlement Agreement arise from a unique and complicated body of federal common law. Based upon examination of its extensive record since 1966, this Court should conclude the second component of this Court's consideration of the Settlement Agreement has been met and that serious questions of law and fact exist concerning the Pueblos' water rights that place the ultimate outcome of the litigation in doubt.

3. The Value of Immediate Resolution of the Pueblos' Water Rights Outweighs the Mere Possibility of Resolution Through Protracted Litigation.

The third consideration that the Court must give when evaluating the Settlement Agreement is whether the value of immediate resolution of the Pueblos' water rights outweighs the mere possibility of alternative relief after protracted and expensive litigation. Were the Court to reject the Settlement Agreement and refuse to enter the Partial Final Judgment and Decree, the only alternative for the Court and the parties would be to resume the litigation over the Pueblos' water rights. This litigation has been stayed since 1999. *Stipulated Order Staying Further Proceedings Before the Special Master* (Aug. 31, 2000) (Doc. 5623). Resumption of such litigation would raise again serious questions of law and fact unlikely to be resolved anytime in the foreseeable future. *See* Parts III.B.2, IV.B, *supra*. On the other hand, if the Court accepts the Settlement Agreement and enters the proposed Partial Final Judgment and Decree, the Court would bring an unprecedented level of certainty to water rights throughout the Basin. The immediate benefits of approving the proposed Settlement Agreement greatly outweigh any alternative relief after protracted and expensive litigation.

The Settlement Agreement provides substantial benefits to the non-Pueblo water right holders in the Basin subject to its terms. First, the Pueblos have generally accepted the quantification of their rights as determined by the Court over the years, rather than continue to advocate for the far larger amounts which they have claimed in the litigation.[17] The Pueblos

[17] In the years after *Aamodt I*, the Special Master held a series of hearings concerning water rights associated with one component of the Pueblos' water right – the Pueblos' practicably irrigable acreage. At the conclusion of these hearings, the Special Master concluded that the Pueblos had the following substantial water right for practicable irrigable acreage: Nambé Pueblo – 8,055 afy; Pojoaque – 8,130 afy; San Ildefonso – 5,376 afy; and Tesuque – 8,574 afy. *Special Master Finding of Fact on the Pueblos' Water Rights Measured by Irrigable Lands* (Nov. 23, 1982) (Doc. 626). Although the District Court subsequently rejected these findings, *see Order* (Oct. 30, 1992) (Doc. 4052), important here is the fact that these water

have substantially compromised those rights by agreeing to the provisions of Section 4 of the Settlement Agreement. In that section, the Pueblos agree not to enforce their first priority for their Future Basin Use Rights against existing surface water right holders subject to the Settlement Agreement so long as those rights continue in use. Second, the Pueblos agree to dismiss their *inter se* claims against all other Settlement Parties. *See* Settlement Agreement § 6.1. Among other things, this provision permits non-Pueblo water right holders to establish priority dates on a ditch-by-ditch basis rather than tract-by-tract – a significant benefit to non-Pueblo water users, and compromise by the Pueblos, allowing all water users on a ditch to assert the earliest ditch water right priority. Third, the Pueblos accept a variety of provisions that require them to offset the adverse effects on non-Pueblo water rights of certain Pueblo water development. *See, e.g., id.* § 2.4.4.2.3. Fourth, the Pueblos agree to provisions that would protect well users against a priority call by the Pueblos if the well users abide by the relevant terms of the Settlement Agreement. *See id.* § 3.1.7.2. Fifth, the State has agreed to establish an impairment fund "to mitigate impairment to Non-Pueblo groundwater rights as a result of new Pueblo water use." *Id.* at § 5.5. In sum, the Settlement Agreement, while recognizing the Pueblo water rights, contains significant benefits for the non-Pueblo water users that would not be available in the course of litigation.

Although not directly before the Court, it is also important to recognize the benefit to all water users from the construction of the Regional Water System which would not have been possible without the settlement. As part of the settlement of the Pueblo water rights, the United

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quantities are far in excess of the Pueblos' agreement to accept the water rights set forth in the Proposed Partial Final Judgment and Decree, and illustrate the magnitude and disruptive force of the Pueblos' water rights that would remain absent the Settlement Agreement and Settlement Act.

States, the State and Santa Fe County are providing the capital costs associated with the construction of that water project which will deliver water to the Pueblos and non-Pueblo water users throughout the Basin. That water supply will effectively benefit every present and future water user in the Basin. As contemplated in the Settlement Agreement and Settlement Act, Rio Grande water from outside the Basin will be conveyed to pumping and treatment facilities located at the confluence with the Pojoaque River. From the mouth of the Pojoaque River, the water will be pumped throughout the Basin. In the arid Southwest, it is difficult to imagine a settlement more valuable than one that imports additional water into a chronically water-short Basin. Even if some water users do not benefit directly from the water delivered through the Regional Water System, the presence and use of additional water in the Basin fundamentally makes the water naturally arising in the Basin more secure for both Pueblo and non-Pueblo surface and groundwater users by reducing effects on surface flows from groundwater pumping and protecting the aquifer from additional withdrawals. But for the settlement, the additional water would not be brought to the Basin. Certainly, such relief could not be obtained as the result of resumed litigation of the Pueblos' water rights.

Based on the foregoing, the Court should conclude that the value of immediate resolution of the Pueblos' water rights outweighs the mere possibility of resolution through protracted and expensive litigation.

4. <u>The Judgment of the Settlement Parties is that the Proposed Settlement is Fair and Reasonable</u>.

The fourth consideration that the Court must give when evaluating the Settlement Agreement is whether, in the judgment of the Settlement Parties, the Settlement Agreement is fair and reasonable. Inherent in this factor is recognition that a party to litigation has the right to compromise his or her litigation claims for reasons that are unique to that party. This factor

necessarily considers whether the parties to a settlement believe that settlement is in their best interest. *Cf. Cannons Eng'g Corp.*, 899 F.2d at 85 (in a settlement context, a court cannot substitute its judgment for that of the parties). The circumstances surrounding the Settlement Agreement establish that this consideration is satisfied.

As stated, between 2000 and 2013 the Settlement Parties, along with counsel for other water users, laboriously and thoroughly negotiated the Settlement Agreement. By March 27, 2013, eight separate and independent governments voluntarily entered into the Settlement Agreement. Although signed by individual government representatives, the decision of each government was reached pursuant to the governing law of each government.

As the Settlement Parties approved the Settlement Agreement, the Court was informed when and how that occurred. Each Pueblo approved the proposed Settlement Agreement through resolution of its respective tribal council. Similarly, Santa Fe County and the City of Santa Fe approved the Settlement Agreement by council resolution. The Secretary of the Interior signed the Settlement Agreement as directed by the Settlement Act. Settlement Act § 621(b), 124 Stat. 3149. The State, acting through its executive branch and the Attorney General, entered into the Settlement Agreement through signatures of the Governor, the Attorney General, the Attorney General's Chief Counsel, and the State Engineer.

The parties have each chosen to compromise their respective positions to accept the benefits that the Settlement Agreement offers. The extensive process by which the Settlement Agreement was negotiated and approved establishes the good faith belief of the Settlement Parties that the agreement is fair and reasonable. Furthermore, the very large number of other parties who have either accepted or otherwise not objected to the Settlement Agreement

demonstrated its fairness and reasonableness. The Court should conclude that the Settlement Parties have determined that the Settlement Agreement is fair and reasonable.

C. THE SETTLEMENT AGREEMENT IS CONSISTENT WITH THE SETTLEMENT ACT AND IS SUPPORTED BY THE STRONG PUBLIC POLICY TO SETTLE LITIGATION CLAIMS.

The final consideration that the Court should give to the Settlement Agreement is whether it is consistent with public policy and applicable law. Procedural Order at 4; *see also United States v. Colorado*, 937 F.2d at 509; *Cannons Eng'g*, 899 F.2d at 90. Here, the Court must consider two principle matters. First, the Settlement Act is a controlling federal statute that authorizes the United States to enter into the Settlement Agreement and authorizes the construction of the Regional Water System. The Court can be confident that the Settlement Agreement is not in conflict with the Settlement Act and no Objecting Party has claimed otherwise. Second, whether in this context or with respect to other contentious litigation, the established and prevailing public policy in New Mexico and federal court is that settlements are strongly favored over ongoing litigation.

With respect to the consistency between the Settlement Act and the Settlement Agreement, authorization for the United States to be bound by the Settlement Agreement was conditioned on the Agreement's conformity with the Settlement Act. Settlement Act § 623(a)(2)(A), 124 Stat. 3150. After the Settlement Act passed into law, the starting point for the negotiating parties was the 2006 Agreement. Governmental and non-governmental representatives regularly met over the course of approximately two years to ensure that provisions of the Settlement Agreement conformed to the Settlement Act. *See* Part IV.B, *supra*. Through the course of the post-2010 negotiations, all issues raised were addressed until, to the satisfaction of all signatories to the agreement, the 2006 Agreement was fully consistent with the Settlement Act.

With respect to the public policy considerations associated with settlement, the public policy and the law in New Mexico very strongly favors amicable settlements of claims "whenever feasible." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 690 P.2d 1022, 1024 (N.M. 1984). Likewise, federal common law has long expressed a presumption favoring negotiated conclusions to litigation. *See, e.g., Tulsa City Lines v. Mains* 107 F.2d 377, 380 (10th Cir. 1939) ("The inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims."). The preference for negotiated resolutions is embodied in Fed. R. Civ. P. 16(a)(5), as one of the five purposes of a pretrial conference, and in Fed. R. Evid. 408, for which the Advisory Committee Notes state that "public policy favor[s] the compromise and settlement of disputes." In *Cannons Engineering*, the First Circuit observed that the general policy favoring settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." 899 F.2d at 84. In the present case, six sovereign governments, the State, the United States, and each of the four Pueblos, as well as the County and City of Santa Fe have worked together for many years to craft a settlement to eliminate the need for litigation which would continue to consume resources of this Court and be extremely costly for all of the parties to this case.

Furthermore, the interest in conserving the resources of the courts is a key consideration behind this policy favoring settlement, and has particular weight in complex cases involving hundreds or thousands of parties. In *Ehrheart v. Verizon Wireless*, the Third Circuit noted that the presumption in favor of settlement agreements "is especially strong in . . . complex cases where substantial judicial resources can be conserved by avoiding formal litigation. . . . Settlement agreements are to be encouraged because they promote the amicable resolution of

disputes and lighten the increasing load of litigation faced by the federal courts." 609 F.3d 590, 595 (3rd Cir. 2010) (internal quotation marks and citations omitted.); s*ee also In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources."). However, the law also recognizes that parties have a right to conserve their own costs, and manage their litigation risk, by means of settlements. In *United States v. Armour & Co.*, the United States Supreme Court stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case *and thus save themselves the time, expense, and inevitable risk of litigation.* Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

402 U.S. 673, 681 (1971) (emphasis added). In *Carson v. American Brands, Inc.*, the Court reiterated that "[s]ettlement agreements may thus be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation," and ruled that a district court decision denying a joint motion to enter a consent decree "might thus have the 'serious, perhaps irreparable, consequence' of denying the parties their right to compromise their dispute on mutually agreeable terms." 450 U.S. 79, 87-88 (1981) (internal quotation marks and citations omitted); *see also Ehrheart*, 609 F.3d at 595 ("In addition to the conservation of judicial resources, the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial."); *Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972) ("The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto.").

The Court and the parties to this litigation have actively litigated the water rights of the four Pueblos since 1966. During that time, the Court has addressed numerous complex and controversial factual and legal issues associated with the Pueblos' water rights. However, regardless whether the Court ruled favorably or unfavorably regarding the Pueblos' water rights, the Court's decisions are far from final and remain subject to appeal. Absent the Settlement Agreement, litigation associated with the numerous factual and legal issues remaining unresolved along with litigation that results after unavoidable appeals will ensure that the resumption of litigation over the Pueblos' water rights will last for decades more. Certainly, given the duration of litigation endured and given the equally daunting potential for ongoing litigation, the important public policy consideration supporting settlement of litigation claims are exceptionally compelling in conjunction with the Pueblos' water rights.

VI. NONE OF THE OBJECTIONS SUPPORTS A FINDING THAT THE SETTLEMENT AGREEMENT IS NOT FAIR AND REASONABLE.

A. THE SETTLEMENT AGREEMENT IS CONSISTENT WITH STATE LAW AND THE LAW OF THE CASE WITH REGARD TO THE RIGHTS OF DOMESTIC WELL OWNERS.

The first group of objections submitted by the Objecting Parties can be described as "Domestic Well Objections." These objections can be roughly divided into four categories: (1) the Settlement Agreement will result in a taking or cause injury to the property value of a domestic well and any rights associated with such well; (2) the Settlement Agreement violates the New Mexico domestic well statute; (3) the Settlement Agreement somehow curtails water use resulting in insufficient water to meet the needs of the well owners; and (4) the Settlement Agreement does not address shared wells. *See* Appendix, Groups A, E, O, U. Each Domestic Well Objection is without merit and fundamentally misunderstands both (1) what a domestic water user is entitled to under state law; and (2) the effect of the Settlement Agreement vis-à-vis

domestic wells. Before addressing the specific objections raised here, it is important to keep in mind what the Settlement Agreement provides concerning domestic wells.

Section 3.1 of the Settlement Agreement addresses the administration of non-Pueblo groundwater rights including rights in and to domestic wells.[18] Pre-basin and permitted wells, other than N.M. STAT. ANN. § 72-12-1 wells, have a priority date and quantity as adjudicated in the sub-file for each such well. Settlement Agreement § 3.1.1. Wells permitted under N.M. STAT. ANN. § 72-12-1 have the priority date adjudicated in the sub-file for each well, or the date of the filing of the application to drill if priority was not adjudicated, and a quantity defined as follows:

> The quantity of the right for each Section 72-12-1 well, including all wells subject to the Post-1982 Well Agreement, shall be limited to the historic beneficial use from such well, *provided*, however, that in no event shall the total diversion from any such well exceed 3 AFY, and *provided further* that the State agrees, and the Settlement Parties will not oppose, to move the Court to presume that historic beneficial use from a well is .5 AFY per household, unless a greater historic beneficial use is shown or unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

Settlement Agreement § 3.1.2. The presumption is necessary because domestic wells have not been historically metered. One-half of an acre-foot per year provides a domestic well owner more than twice the average annual usage for domestic use in the state, including the Basin. *See 2010 Report of Post-Moratorium Wells Watermaster* at 2 (May 29, 2012) (Doc. 7693-1) (stating that average use in 2010 for each of the 334 households that have a meter under the Post-1982 Well Order was 0.235 afy); *see also 2009 Report of Post-Moratorium Wells Watermaster* at 1 (Aug. 5, 2010) (Doc. 7035-1) (stating the average diversion of 298 households is 0.271 afy).

[18] Each well, including domestic well rights has been or will be adjudicated pursuant to proceedings before the Special Master pursuant to an individual subfile order.

The priority date and quantification for domestic wells "shall not be subject to any *inter se* challenges by the Pueblos or the United States . . . ." Settlement Agreement § 3.1.3. When a well owner makes an election regarding future well use under the Settlement Agreement, the well owner is protected "from the enforcement and administration of priorities within the Pojoaque Basin . . . ." *Id.* § 3.1.7.2. Well owners who elect to connect to the Regional Water System may use up to 0.5 afy. *Id.* § 3.1.7.4.1. Well owners who elect to keep their wells and reduce use, or elect to connect upon transfer of property, may use up to 0.5 afy, except for wells with permits issued after the Court's Post 82 Well Order, which may use up to 0.3 afy, and wells exempted from that order because of the Post-1982 Well Agreement, which may use up to the maximum of their historic beneficial use or 0.7 afy, whichever is less. *Id.* §§ 3.1.7.4.2; 3.1.7.4.3.

1. Domestic Well Rights Are Limited Under State Law.

Addressing the Domestic Well Objections requires an understanding of the rights domestic well owners have under New Mexico law. Underground water "is declared to belong to the public and is subject to appropriation for beneficial use." N.M. STAT. ANN. § 72-12-1 ("Domestic Well Statute"). Applications for domestic wells used "in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use . . . ." are governed by the Domestic Well Statute, N.M. STAT. ANN. § 72-12-1.1. The Domestic Well Statute, requires users of underground water for household or domestic use to apply to the OSE for a permit, which the OSE "shall issue."

The New Mexico Supreme Court recently confirmed the constitutionality of the Domestic Well Statute in *Bounds v. State ex rel. D'Antonio*, 306 P.3d 457 (N.M. 2013), and also explained the limited nature of a domestic well right under New Mexico law. In *Bounds*, the Supreme Court analyzed the distinction between the issuance of a domestic well permit – which the OSE must issue upon application – and administration of the water right under the permit.

> Theoretically, the State Engineer could issue a domestic well permit and immediately administer priority to curtail diversion under that permit. . . . In such an instance, a permit – even if temporarily inoperative – would give the applicant a priority date. Should conditions in the particular basin change, curtailment by priority administration could be lifted, and the permit holder could then divert water under that permit with a priority date set at the original date when the permit issued.

Id. at 465-66; *see also id.* at 466. ("In this regard, the permit would serve as a placeholder should more water become available in the future."). The Domestic Well Statute is consistent with New Mexico's prior appropriation system because a domestic well permit, like any other water right, "do[es] not create an absolute right to take water." *Id.* at 466. A water right is "conditioned on the *availability* of water to satisfy that right," and limitations on the availability of water may be "for a number of reasons, including drought or the lack of priority due to unsatisfied demand of senior water rights." *Id.* *Bounds* also noted that domestic wells may also be limited by court order, municipal or county ordinances, or OSE regulations. *Id.* at 467 (citing § 19.27.5.13(B)(6) NMAC). "Therefore, not only are domestic well permits subject to curtailment by the State Engineer, they are explicitly subject to limitations by our courts and by local ordinance, should such a need arise after a proper evidentiary showing." *Id.*

Indeed, the OSE has limited the rights of domestic wells by regulation. § 19.27.5.9.D.1 NMAC (domestic wells for a single household limited to 1.0 afy, and multiple households to 1.0 afy per household, with a maximum of 3.0 afy, regardless of the number of households). The regulation also states that water uses "are subject to such additional or more restrictive limitations imposed by a court, or by lawful municipal or county ordinance." *Id.* The regulations further authorize the OSE to declare "all or part of a stream connected aquifer as a domestic well management area to prevent impairment to valid, existing surface water rights." § 19.27.5.14 NMAC. If a management area is declared, the maximum diversion of water is 0.25

afy per domestic well. § 19.27.5.14.C NMAC. Before 2006, previous regulations limited domestic wells to beneficial use, but "not to exceed three (3) acre-feet per annum, subject to limitation imposed by the courts." § 19.27.1.22 NMAC.

Nowhere in the statutory scheme authorizing domestic wells and use thereunder is there any vested or guaranteed right in a 3.0 afy water right. New Mexico statutes and regulations governing domestic wells demonstrate two key points: (1) the doctrine of beneficial use applies to domestic wells; and (2) the rights of domestic well users are limited in nature and can be affected and administered by regulation and court order including the maximum amount of water a domestic well user can put to beneficial use.

This Court previously limited domestic well rights when it enjoined the OSE from issuing any further domestic permits which allowed outdoor use after 1982.[19] In its Post 82 Well Order, the Court ordered:

> no permits to appropriate underground waters shall be issued within the Rio Pojoaque stream system under Section 72-12-1, NMSA 1978. Permits may issue *limited to the use of water for household, drinking and sanitary purposes* within a closed system that returns effluent below the surface of the ground minimizing and consumptive use of water.

(emphasis added).

The linchpin of New Mexico water law remains: a water right is limited by the beneficial use to which it is applied. *See* N.M. CONST. art. XVI, § 2; *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957) ("The amount of water which has been applied to a beneficial use is, of course, a measure of the quantity of the appropriation."). Simply diverting water onto land is not a beneficial use. *State ex rel. Martinez v. McDermett*, 901 P.2d 745, 749 (N.M. Ct. App.

[19] Previously, the Court had recognized that beneficial use, not a right to 3.0 afy controlled the quantity of a domestic well water right. *See Order* at 2 (Aug. 17, 1992) (Doc. 4014) ("water rights for domestic . . . uses . . . are limited by historical beneficial use . . . .").

1995) ("A diversion alone is not a beneficial use."). In order for a use to be considered "beneficial," there must be an "actual use for some purpose that is socially accepted as beneficial." *Id.* at 748. Moreover, beneficial use is differentiated from waste. *See McLean*, 308 P.2d at 987; *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981) (reciting that a beneficial use of water requires a clear application of the water to some useful purpose that does not constitute waste). Thus, like any other New Mexico water user, no domestic well user is entitled to a water right in excess of that amount of water actually (not theoretically) placed to beneficial use. Only once water has been put to beneficial use is it a perfected or vested water right. *See Hydro Res. Corp. v. Gray*, 173 P.3d 749, 756 (N.M. 2007); *Hanson v. Turney*, 194 P.3d 1, 4 (N.M. Ct. Ap. 2004); *see also Memorandum Opinion and Order, United States v. Zuni Indian Tribe*, No. 01-cv-0072-BB-ACE (N.M. June 15, 2006) (Doc. 733) (answering in the affirmative the question, "are water rights for domestic wells in New Mexico limited to the quantity of water beneficially used?").

2. Given the Nature of the Rights Held by Domestic Well Owners, the Domestic Well Objections Have No Merit.

The first issue raised by the Domestic Well Objections is that the Settlement Agreement will result in a taking or cause injury to the property value of wells or claimed water rights relating to such wells. This objection is inconsistent with the doctrine of prior appropriation. Water is the property of the State, and the right to use water is subject to limitation or curtailment under the doctrine of prior appropriation. As explained in *Bounds*, the system in which the OSE grants a well permit, and then immediately curtails diversion under the permit, is constitutional under the doctrine of prior appropriation. 306 P.3d at 465-66.

The Fifth Amendment "prohibits the government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). A taking

may occur "when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Id.* This Court has already rejected the argument that Pueblo water rights, and limitation of the junior non-Pueblo rights, is a taking. In its *Memorandum Opinion and Order* (Jan. 31, 2001) (Doc. 5642), the Court rejected the argument that the Fifth Amendment is violated by the recognition "of any rights of the Pueblos to 'additional consumptive uses of water' initiated subsequent to 1846, alternatively 1858 or 1866, where the priority date predates such actual use." *Id.* at 8-9. The Court ruled that its previous rulings made it unnecessary to address the non-Pueblo's Fifth Amendment claim, stating, "[t]he non-Pueblos' water rights have always been subject to *all* of the Pueblos' prior water rights, including future uses. If there is not enough water in the stream system to serve both, the junior users must forgo the use of water." *Id.* at 9 (citing 1933 Act § 9; *Aamodt I*, 537 F.2d at 1110, 1113; *Aamodt II*, 618 F. Supp. at 1005, 1009-10). In *Aamodt I*, the Tenth Circuit held, "[a] recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violates the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to a prior right to the use of water." 537 F.2d at 1113; *see also State ex rel. Reynolds v. Lewis*, 508 P.2d 577, 584-85 (N.M. 1973) (limiting a water right does not constitute a taking). Limitation of junior water rights is consistent with the New Mexico Constitution and does not constitute a taking or an impairment of property value.[20]

[20] The Settlement Agreement actually provides a reprieve from this potentially significant limitation. If a domestic well user makes an election vis-à-vis the Regional Water System, the water user will receive protection from administrative enforcement already extant in the fundamental premise of prior appropriation. The consideration for such protection is either connection to the Regional Water System to protect the aquifer and streams for all users, or to reduce water usage if and only if it exceeds .5 afy.

Moreover, to the extent the Domestic Well Objections appear to complain that they are entitled to a 3.0 afy water right, they are misguided. The Settlement Agreement is fully consistent with recognizing the right of a domestic well user to utilize that amount of water which has been placed to beneficial use. The Settlement Agreement additionally provides that if a junior domestic well user desires priority protection from the use of Pueblo rights **and** does not want to connect to the Regional Water System once it is available, then in exchange, that water user can choose to reduce use from historic beneficial use. The 3.0 afy which is erroneously pointed to as a "water right" associated with a domestic well by many Objecting Parties, is not set forth in any statute, and is simply not a vested or property right. Rather, the 3.0 afy reference seen in some earlier permits relates to the amount which could be put to beneficial use – but it is the maximum, it is not the water right. Three afy is a potential limit to lawfully use up to that amount of water to the extent there is a permitted beneficial use for the water. The fact that a domestic well user could, potentially, use up to 3.0 afy does not establish a water right or protected property interest in that aspiration.

The second Domestic Well Objection is that the Settlement Agreement violates the Domestic Well Statute. This objection is without merit, because the Domestic Well Statute does not "create an absolute right to take water," *Bounds*, 306 P.3d at 466, and the amount of water permitted under the Domestic Well Statute is "subject to such limitations as may be imposed by the courts or by lawful municipal and county ordinances which are more restrictive than the conditions of this permit . . . ." § 19.27.5.13(B)(6) NMAC. Moreover, as explained above, the Domestic Well Statute does not provide any particular amount of water to a domestic well user; that amount is controlled by the amount of water placed to beneficial use and, even then, those

rights are subject to priority enforcement under the doctrine of prior appropriation. The Settlement Agreement, therefore, does not violate the Domestic Well Statute.

The third Domestic Well Objection is that the water quantity provided to domestic well users under the Settlement Agreement is insufficient to meet the needs of the well owners. The Settlement Agreement does not limit or dictate any particular amount of water associated with a domestic well. Rather, beneficial use governs the amount of water to which a domestic well user may establish a water right both before and after the entry of the Proposed Partial Final Judgment and Decree. What the Settlement Agreement does is provide an option to domestic well users to avail themselves of a secure and reliable supply of water through the Regional Water System; if a user chooses not to connect but desires priority protection, then and only then, must a user agree to reduce water use, and then only if it is in excess of 0.5 afy.

If a domestic water user does choose to reduce use, the reductions provided by the Settlement Agreement are more than adequate to satisfy permissible beneficial uses from a domestic well. The average beneficial use by domestic well owners in the Basin (and statewide) is **less** than the limitations imposed by the Settlement Agreement. *See* Part VI.A.1, *supra*. Regardless, a speculative concern of inadequate water, now or in the future, is insufficient to demonstrate that the Settlement Agreement does not satisfy the requirements that it be fair, adequate, and reasonable. *Cf. Bounds*, 306 P.3d at 470 ("Without a proven threat to water rights, there has been no deprivation of property. Without a deprivation of property, there can be no due process violation."); s*ee also McLean*, 308 P.2d at 987 ("[N]o matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use, within the meaning of the Constitution.").

The fourth Domestic Well Objection is that the Settlement Agreement does not address shared wells: this is incorrect. Section 3.1.7.4.4 of the Settlement Agreement clarifies that, with respect to the elections available to Settlement Parties under Section 3.1.7.2, "[w]here there is more than one household connected to a well, the quantities [described in the elections] are 'per household,' not per well." Furthermore, the Special Master is addressing shared wells in the adjudication of non-Pueblo rights. *See, e.g., Recommendation of Special Master on Multiple-User Domestic Wells* (Aug. 22, 2014) (Doc. 9540).

The Domestic Well Objections are without merit and fail to demonstrate that the Settlement Agreement is not fair, adequate, and reasonable. As a result, all such objections should be overruled.

B. THE SETTLEMENT AGREEMENT AND PROPOSED PARTIAL FINAL DECREE DO NOT VIOLATE FEDERAL OR STATE LAW.

1. <u>There Is No Denial of Equal Protection of the Law</u>.

Numerous Objecting Parties claim that the Settlement Agreement is a violation of equal protection. Appendix, Group X. The basis for the objections is a general belief that approval of the Settlement Agreement and Proposed Partial Final Judgment and Decree would violate the Objecting Parties' rights to equal protection of the law. The Court should reject these assertions as having no basis in law or fact.

Part III.A.2, *supra*, addresses the fact that Congress, when it enacts laws that define the rights of Indian Tribes differently from other people in a similar situation, does not violate the Equal Protection Clause that is part of the guarantee of due process found in the Fifth Amendment to the United States Constitution. This litigation, the Settlement Agreement and the Proposed Partial Final Judgment and Decree all deal with a federal definition of the rights of Indian tribal governments, not the rights of individuals claiming under state law, and, therefore,

any objection raised by such individuals based upon the Equal Protection Clause must fail. The Equal Protection Clause does limit federal action in this sphere but not in the way that Objecting Parties assert. The sole question is whether the Settlement Agreement is rationally related to the federal government's federal trust responsibility to the Pueblos. *Morton*, 417 U.S. at 555. The Settlement Act, the Settlement Agreement approved in the Settlement Act, and the entry of the Proposed Partial Final Judgment and Decree adjudicating the federally recognized and protected water rights of the Pueblos, are acts that are more than rationally related to the federal government's obligations to the Pueblos. *See* Part III.A, *supra*.

a. Differences Between the Pueblos' Federal Rights and Objecting Parties' State Law Rights Do Not Violate Equal Protection.

i. Forfeiture.

The basis for the objections shown in Appendix, Group H is that it is a violation of the Objecting Parties' rights to equal protection for Pueblo water rights to not be subject to forfeiture, while an objector's water right is subject to the laws of New Mexico that allow for forfeiture of those water rights. *See* Part VI.A.1, *supra*. It is the law of this case that Pueblo water rights are not defined by or subject to the laws of New Mexico, but solely by federal law. *Aamodt I*, 537 F.2d at 1112.[21] The 1933 Act, § 9, expressly provided that the Pueblos' water rights "shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians." The Settlement Act echoes this provision concerning water rights

[21] "In discussing the law of the case doctrine, the United States Supreme Court has stated that: 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' This rule promotes finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'. The doctrine applies to the decisions of an appellate court as well as to a trial court's own decisions." *Memorandum, Opinion and Order* at 15 (June 30, 2003) (Doc. 6065) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988); 1B J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at (Vasquez, J.).

acquired by the United States on behalf of the Pueblos to provide a "reliable, firm supply of water" to the Pueblos: "The nonuse of the water supply secured by the Secretary for the Pueblos . . . shall in no event result in forfeiture, abandonment, relinquishment or other loss thereof." Settlement Act § 613(b), 124 Stat. 3142.

The Objecting Parties' water rights are recognized, created under, and subject to the laws of the State of New Mexico pertaining to water rights. New Mexico views the water of the State as belonging to the State, with individuals acquiring the right to use water as established by beneficial use. N.M. CONST., art. XVI, § 2 (the unappropriated water of every natural stream belongs to the public and is subject to appropriation in accordance with the laws of the State). The laws of New Mexico have long provided for the forfeiture of water rights for non-use. *See, e.g., Yeo v. Tweedy*, 286 P. 970, 974 (N.M. 1929). It is the policy of the United States to respect state management of state-created rights to use natural resources. *See, e.g.*, Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-339); *Cappaert v. United States*, 426 U.S. 128, 143 n.8 (1976) ("[W]ater rights vested under state law or custom are protected"); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (with the passage of the Desert Land Act, Congress intended that the waters within each state be subject to the laws and plenary authority of those states). Of course, the Pueblos' water rights are creatures of federal law, and are not subject to state law, nor have they ever been. *See Aamodt I*, 537 F.2d at 1111-12; *Aamodt II*, 618 F. Supp. at 1006.

A violation of equal protection can only be established by showing that the non-forfeitability characteristic of the Pueblos' water rights, which is established and protected under federal law, is not rationally related to some federal duty. As noted above, this type of protection extends to all property held in trust or restricted fee for an Indian tribe, as a means of fulfilling

the federal trust responsibility to Indian tribes.[22] The Court should, therefore, deny all objections based upon the unsupportable claim of equal protection violation.

ii. Different Quantification and Use Standards.

The basis for the objections shown in Appendix, Group M is that the Pueblos' water rights should be limited to traditional uses such as agriculture. For example, Jose P. Archuleta objects to the settlement in part because of his belief that the Pueblos do not use water for agricultural purposes. *Objection* at 4 (Mar. 10, 2014) (Doc. 8181). Richard E. Rodriguez objects in part because he opposes use of the water for golf courses or a casino, *Objection* at 2 (Mar. 10, 2014) (Doc. 8192), as does Robert Medrano, *Objection* at 2 (Mar. 18, 2014) (Doc. 8251). Another relatively common objection is to the amount of water quantified based on Pueblo livestock use. *See, e.g.*, *Objection* at 3 (Mar. 25, 2014) (Doc. 8286); *Objection* at 2 (Mar. 31, 2014) (Doc. 8362). Generally, these objections are based on the belief that it is a denial of equal protection for federal law instead of state law to control how the Pueblos use their water. This belief is an erroneous statement of the law, and the Court should reject these objections.

In this adjudication, once it was established by the Tenth Circuit that the Pueblos' rights were not subject to or defined by state law, it became the duty of the Court to determine how federal law quantified those rights. *Aamodt I*, 537 F.2d at 1112. Litigation over several decades determined to quantify the Pueblos' rights and thereafter applied those analyses to the quantification. Part III.B.2, *supra*. Having been quantified, only Congress can limit or change how the Pueblos can use their water rights.

[22] While case law prior to 1933 was equivocal on this point as to the Pueblos, the Pueblo Compensation Act of 1933, § 9, quoted above, made this protection explicit.

On at least one occasion, the State of New Mexico sought to prohibit Pueblo water uses based on the type of water use. A non-Indian operated a trailer park on land leased from Tesuque Pueblo and the non-Indian held a state law water right appurtenant to the trailer park. When the lease expired, the Pueblo of Tesuque continued to operate the trailer park and over time, Tesuque was using more water at the trailer park than the appurtenant state water right. In 1986, the State of New Mexico filed a motion for an order to show cause why the Tesuque Pueblo should not be held in contempt of court for use greater than the appurtenant state right. The State also disputed that the Pueblo's federal water rights extended to commercial purposes. The State's motion was denied, rejecting the reasoning of the objections:

> Federal water law accords Tesuque a certain quantity of water with an aboriginal priority. The Pueblo must decide for itself how to use the water. The Pueblo's power derives from the Supremacy Clause and Indian sovereignty.
>
> Unlike reservation Indians, the Pueblos retained all rights to use the water of the stream system except those terminated by the 1924 Pueblo Lands Act. In confirming the Pueblo's priority to a quantity of water "for domestic, stockwater, and irrigation purposes for lands remaining in Indian ownership" Pueblo Compensation Act § 9, 48 Stat. 108, 111 (1933), Congress did not abrogate the Pueblo's right to transfer water to unenumerated uses. Section 9 does not expressly bar such transfers and the legislative history does not evidence that Congress intended such a bar.

Memorandum Opinion and Order at 3-4 (Dec. 1, 1986) (Doc. No. 2879).

Throughout the course of this litigation, non-Pueblo water rights owners were fully represented as the Court considered this and other issues. The Objecting Parties had every opportunity to participate in the litigation throughout the entirety of this case, and should not be allowed to relitigate decided issues at this juncture through objection to the approval of the Settlement Agreement and entry of the Proposed Partial Final Judgment and Decree. Certainly, the Objecting Parties here raise no new issues or arguments that have not been raised and argued before.

iii. Settlement Act Leasing Limits.

The basis for the objections shown in Appendix, Group L is that the Settlement Act and the Settlement Agreement do not provide a similar right to lease water to the Objecting Parties. As a fundamental matter, no identifiable aspect of the Settlement Agreement interferes with an Objecting Party's ability to lease a water right and to the extent New Mexico law permits such leasing, that remains unchanged. The Settlement Act authorizes each Pueblo to "enter into leases or contracts to exchange water rights or to forbear undertaking new or expanded water uses for water rights recognized in section 2.1 of the Settlement Agreement for use within the Basin, in accordance with other limitations of section 2.1.5 . . . " Settlement Act § 621(c)(1), 124 Stat. 3149. The Settlement Act also sets out specific limitations as to whom the Pueblos can lease their water: "The water . . . may only be leased or marketed by any of the Pueblos pursuant to the intergovernmental agreements" among the Pueblos or with the County Water Utility as set out in section 614(c)(2). Settlement Act § 621(c)(1)-(5), 124 Stat. 3149. Thus, while it is arguable that a Pueblo's right to lease water pre-existed the Settlement Act, it is undisputable that the Settlement Act explicitly authorizes and significantly limits a Pueblo's right to lease its water rights.

As demonstrated above, there is no violation of the Objecting Parties' equal protection rights here. Parts III.A.2, VI.B.1.a, *supra*. The Objecting Parties' rights are defined by New Mexico law, having been created under state law, not by federal law.[23] The only question is whether placing limits on the right of Pueblos to lease their federally protected water rights is rationally related to a valid federal purpose. *See Morton*, 417 U.S. at 555. The federal

[23] New Mexico law allows for the leasing of water rights, without most of the limits that the Settlement Act places on the Pueblos' right to lease their water rights. *See* New Mexico Water-Use Leasing Act, §§ 72-61-1 to 72-6-7 N.M.S.A. 1978, amended (2014).

government has a strong interest in ensuring a sufficient water supply to benefit the Pueblos and serve their needs. By agreeing to allow the Pueblos to lease, contract for or exchange water rights with each other and the Santa Fe County Water Utility, the Settlement Act and related terms of the Settlement Agreement provide the flexibility necessary to meet the Pueblos' needs and the needs of all users in the Basin, including the Objecting Parties.

Accordingly, the Court should reject the objections to the leasing provisions of the Settlement Agreement.

2. There is No Denial of Non-Pueblo Rights Protected by the Treaty of Guadalupe Hidalgo.

The priority of water rights of non-Pueblos initiated prior to United States sovereignty are protected by the Treaty of Guadalupe Hidalgo. There is nothing in the Settlement Agreement which affects the priority right of any objector. The Court's order of reference to the Special Master makes it clear that non-Pueblo water rights are to be adjudicated outside the Settlement Agreement and the procedures mandated by the Settlement Agreement. *Order of Reference* (June 30, 2008) (Doc. 6336). Therefore, objections based on the Treaty of Guadalupe Hidalgo should be denied. *See* Appendix, Group R; *see also* Part III.B.3, *supra*.

3. There is No Violation of the McCarran Amendment.

The basis for the objections shown in Appendix, Group J is that 43 U.S.C. § 666, the McCarran Amendment, requires Pueblo water rights to be defined under state law. The objection is based on an erroneous interpretation of the McCarran Amendment. The explicit wording of the McCarran Amendment, a procedural and jurisdictional statute belies any such contention.

Under the McCarran Amendment, consent is "given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or

other source," and "the United States is a necessary party to such suit." 43 U.S.C. § 666(a)(1), (2). In *Colorado River Water Conservation Dist. V. United States*, 424 U.S. 800, 812-13 (1976) the Supreme Court held that although a federally protected water right could be adjudicated in a state court, the McCarran Amendment has no effect on the nature and extent of the federal rights of Indian Tribes which are solely governed by federal law. 424 U.S. 800, 812-13 (1976); *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

Here, where the Pueblos' rights have never been subject to state law, the McCarran Amendment merely gives federal consent to having those water rights adjudicated. In 1966, the State of Mexico chose to adjudicate the Pueblo rights in federal court, and the United States took the initiative to waive its sovereign immunity and intervene in this action. Thus, the McCarran Amendment is of no effect here. The Court should reject the objections set out in Appendix, Group J.

4. <u>There Is No Unconstitutional Taking of Property</u>.

The basis for the objections shown in Appendix, Group A is that approval of the Settlement Agreement and entry of the Proposed Partial Final Judgment and Decree will constitute a taking of water rights in violation of the Fifth Amendment. The majority of these objections relate to the Domestic Well Statute and are addressed in Part VI.A.2, *supra*. Other parties urge the Court to find that adjudicating the Pueblo rights necessarily means that their rights will be taken to meet Pueblo rights. For example, Marc J. Levine objects that "the [P]ueblo entities and their commercial enterprises will damage, limit, restrict, waste or otherwise harm access to my own rightful water supply." *Objection* at 5 (Mar. 3, 2014) (Doc. 8158). These objections are not based on the legal concepts applied in this water adjudication, the Settlement Agreement or its operation. The Objecting Parties ignore the role of priority in water rights administration.

Nothing in the Settlement Agreement alters any non-Pueblo's quantified right. As previously decided in this litigation, the Pueblos have senior priority rights. *Aamodt I*, 537 F.2d at 1113 ("A recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violated the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to a prior right to the use of the water."). Whether the Pueblo water rights are resolved through litigation or settlement, the Objecting Parties have water rights junior to the Pueblos. Therefore, absent any settlement agreement, the Objecting Parties, as junior users, can lawfully be denied water to meet their water rights if water is needed to meet the Pueblos' senior rights. The Settlement Agreement is a compromise of the Pueblos' claims. In return for bringing an end to this litigation, the Pueblos agree to significant limits on their senior priority water rights both in terms of quantity as well as when and how to exercise the amounts which are quantified vis-à-vis junior water users. The Settlement Agreement provides many alternatives for non-Pueblo junior users to protect themselves from priority calls by the Pueblos. The extent of that protection exceeds actual metered water use per household in the Basin. The fact that priority protection may not extend to all of a junior right does not constitute a taking of that right. Therefore, objections to the Settlement Agreement or to the Act itself on these grounds should be denied.

C. NO DUE PROCESS INFIRMITY EXISTS IN THE SETTLEMENT NEGOTIATION PROCESS OR THIS *INTER SE* PROCESS TO PREVENT THIS COURT FROM APPROVING THE PROPOSED SETTLEMENT AGREEMENT AND ENTERING THE PARTIAL FINAL DECREE.

Numerous Objecting Parties raise the following procedural challenges to the Settlement Agreement and this expedited *inter se* proceeding. First, with respect to the propriety of how the Settlement Agreement was negotiated, the Objecting Parties assert that the Settlement Agreement was negotiated without sufficient due process or otherwise without a sufficient

opportunity to participate in settlement negotiations. *See* Appendix, Group P. Second, with respect to the propriety of this expedited *inter se* proceeding, the Objecting Parties assert that the procedures previously considered and approved by the Court are deficient and fatal to the Settlement Agreement because: (1) certified mail was not used to notify water rights holders in the Basin; (2) notice was not received by all potential water rights holders; and (3) insufficient information was provided concerning the proposed Settlement Agreement and insufficient time was allotted for the Objecting Parties to specify their objections to the Settlement Agreement. As described below, these objections raise no due process infirmity that prevents this Court from approving the Settlement Agreement. *See also* Appendix, Groups F, W.

1. All Willing Third-Parties, Including Objecting Parties, Had Every Opportunity to Engage in the Negotiation Process that Resulted in the Settlement Agreement.

The Objecting Parties first assert that the Settlement Agreement was negotiated without a sufficient opportunity for third parties, including the Objecting Parties, to participate in settlement negotiations. Appendix, Group P.

As an initial matter, the Objecting Parties misconstrue a third-party's role in the negotiation of a settlement concerning the Pueblos' water rights. The Objecting Parties argue that due process requires that all defendants who might be affected by the Pueblos' water rights in a basin must be made negotiating parties to the settlement negotiations. No authority exists to support the notion that due process requires such third-party involvement in settlement negotiations of the Pueblos' water rights. In fact, were such extensive third-party participation

required, no water right (Indian or non-Indian) could be resolved by settlement in a general stream adjudication.[24]

Nevertheless, as described above where the United States and Pueblos detail the good faith associated with settlement negotiations, the Objecting Parties' complaint that they could not be involved in the underlying settlement negotiations is without basis. As detailed throughout this Court's record, settlement negotiations between 2001 and 2006 involved a host of representatives from federal, state, and local governments, along with counsel for various private parties and regular updates to the Court. *See* Part IV.B, *supra*. Throughout this time, all private parties and their representatives had the same opportunity to participate in settlement negotiations. *Id.* In fact, throughout the negotiation process, many private parties remained active in the negotiations to ensure that their concerns and interests, to the extent they might be affected, were addressed. *Id.* After 2006 and until the Settlement Act was passed by Congress, every party – Pueblo, State, local government, and private parties – had an equal opportunity in the political process to sway federal representatives for their positions concerning the draft agreement as it might be affected by federal legislation – including advocating for the agreement's adoption, modification, or rejection. Finally, after the Settlement Act was passed, the agreement had to be conformed to be consistent with the Settlement Act. Between 2010 and 2012, all parties again came together to negotiate and accomplish this task. Throughout this final negotiation process, private parties and their representatives were active participants and together the parties were able to achieve the Settlement Agreement now before the Court.

[24] As previously described, to the extent that the Settlement Agreement will affect the interests of any third-party, this Court should consider whether any impact on third-parties is unfair or proscribed. *See City of Miami*, 664 F.2d at 441; *In re Masters Mates*, 957 F.2d at 1026; *United States v. Oregon*, 699 F. Supp. at 1461. As described herein, no objection suggests that the interests of non-settling parties will be unfairly prejudiced by the Settlement Agreement.

Ultimately, the complaint that the Objecting Parties could not negotiate with respect to the Settlement Agreement rings hollow. No aspect of due process requires that all third-parties must be included in settlement negotiations concerning the Pueblos' water rights. Furthermore, since 2001, all third-parties, including the Objecting Parties, have had the same opportunity to participate in every aspect of settlement negotiations. That the Objecting Parties did not participate in such negotiations does not undermine the reasonableness or fairness of the Settlement Agreement.

2. The Steps Taken to Notify All Water Rights Owners of this *Inter Se* Proceeding on the Settlement Agreement Far Exceeds Due Process Requirements.

The Objecting Parties assert that three notice infirmities exist in the *inter se* procedures associated with this Court's consideration of the Settlement Agreement and that these infirmities are fatal to the agreement. Appendix, Groups F, P, W. Before addressing each asserted infirmity, it is necessary to identify the notice requirements called for by due process.

The United States Supreme Court has long provided lower courts specific direction concerning the notice that due process requires.

> An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). More specifically, *Mullane* instructed that the "practicalities and peculiarities" of providing notice under the specific circumstances of a case must be considered when determining the method of notice required. *Id.*at 314-15. Due process requires no less and no more than that the method of notice chosen be reasonably calculated to inform those who are entitled to such notice.

Id. at 315. When considering the sufficiency of mailed notice, the Tenth Circuit has observed, "when the name and address of an interested party is known, due process requires notice by mail or other means as certain to ensure actual notice. But due process does not require that the interested party actually receive the notice." *In re Blinder, Robinson & Co., Inc.*, 124 F.3d 1238, 1243 (10th Cir. 1997) (internal citations and quotation marks omitted).

Here, the Court determined that in this *inter se* proceeding, notice should be provided to other water claimants in the Basin. Procedural Order at 3. Attempting to notify all water claimants in the Basin, involves substantial challenges unique to this general stream adjudication. Consistent with the Supreme Court's *Mullane* instruction to provide notice reasonably calculated, under all the circumstances, to apprise water claimants of the pendency of this action, this Court instructed the Settlement Parties to engage in an extensive, thorough, multifaceted process to provide notice. The Court ordered that the Settlement Parties provide notice as follows: (1) mailing notice of the order to show cause by first-class mail (using the State of New Mexico's most updated service list of all known water claimants); (2) publishing notice of the order to show cause in newspapers of general circulation in the Basin and in the City and County of Santa Fe; (3) posting notice of the order to show cause at both the Court's website and the OSE's website; and (4) posting notice of the order to show cause at prominent locations both inside and beyond the Basin. *Id.* The Objecting Parties do not contend that these steps directed by the Court were not accomplished, and in fact they were accomplished by the Settlement Parties between the time the Court issued its *Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambé, and San Ildefonso* (Dec. 6, 2013)

(Doc. 8035) ("Dec. 6 Order") in December 2013 and the time that objections were due to be filed with the Court in April 2014.

In addition, the Settlement Parties took additional, concrete steps to provide notice beyond those ordered by the Court. In February, March, and April of 2014, Santa Fe County and the State, with assistance from the other Settlement Parties, publicized and conducted numerous public meetings throughout the Basin. The County hired the Joe M. Stell Water Ombudsman Program at the Utton Transboundary Resources Center of the University of New Mexico School of Law ("Water Ombudsman Program") to facilitate this process. These meetings were attended by many hundreds of members of the public from throughout the Basin. At these meetings, Settlement Party representatives and public officials undertook a substantial effort to notify interested members of the public about this proceeding and to explain the Settlement Agreement and court process.[25]

With the requirements of due process and the conduct of the Settlement Parties to notify water rights holders of this *inter se* proceeding identified, each of the Objecting Parties' due process (notice) contentions can be quickly addressed. As an initial matter, the Objecting Parties' complaint concerning notice of this *inter se* proceeding fundamentally attempts to raise

[25] The Water Ombudsman Program conducted twenty public meetings which were attended by representatives of the County, the State, the United States, the Pueblos, and others interested in the settlement of the Pueblos' water rights. Meetings took place on February 18, 20, 25 and 27, 2014; on March 4, 6, 11, 13, 18, 20, 25 and 27, 2014; and on April 1 and 3, 2014. The State and the County also attended public meetings regarding the Settlement Agreement held by State Representative Carl Trujillo on March 4, 5, 6, 26 and 27, 2014; and on April 3, 2014. In addition, the parties participating in the settlement discussions held more than fifty other public meetings over the preceding years in an effort to explain the proposed settlement and its terms. In 2010, Santa Fe County conducted numerous public meetings in the Pojoaque Valley to inform water users and the general public regarding the settlement and the implementation process. Moreover, the County approved the final Settlement Agreement in a public process through the County Commission, over through the course of several public meetings.

the speculative objection of an unknown class of persons who did not receive notice of this proceeding. Obviously, the Objecting Parties were provided sufficient notice of this proceeding as they have filed objections to the Settlement Agreement – precisely as contemplated by the Court and the Settlement Parties. As such, the Objecting Parties lack standing to make an objection that asserts that other parties did not get notice to which they were entitled. *See, e.g., The Wilderness Soc. v. Kane Cnty.*, Utah, 632 F.3d 1162, 11678 (10th Cir. 2011) (stating prudential standing limitations include a "general prohibition on a litigant's raising another person's legal rights") (internal quotation marks and citations omitted).

Nevertheless, even if the Court were to address the Objecting Parties' specific complaints, the due process notice objections are without merit. First, the complaint that certified mail should have been used to provide notice is without substance because it wrongly implies that certified mail would improve or increase the number of persons notified of this proceeding. Instead, certified mail would only unnecessarily increase the cost of service. Certified mail is a service performed by the United States Postal Service in the course of delivering mail. For a higher fee, the Postal Service will provide the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made.[26] Certified mail does not increase the incidence or accuracy of mail reaching the intended recipient. Because the same address is used whether the mail is delivered first class or certified, nothing would be gained for this proceeding by using certified mail except to

[26] https://www.usps.com/ship/insurance-and-extra-services.htm ("Certified Mail – Prove you sent it. See when it was delivered or delivery was attempted and get the signature of the person who accepts the package when combined with Return Receipt.") (last visited on Nov. 5, 2014).

unnecessarily increase service cost. Second, the complaint that not all water rights holders received a mailed notice of this *inter se* proceeding likewise does not undermine the Settlement Agreement. Providing notice to potentially thousands of known and unknown water rights holders in a river basin is a significant and difficult task. Because no one service method would ensure that every known and unknown water rights holder received notice of this *inter se* proceeding is precisely why the Settlement Parties pursued and the Court authorized numerous notice methods (as described above: targeted mailing, publication, prominent postings, and public meetings) over an extended period of time (January through March 2014). Such a comprehensive effort to provide known and unknown water rights holders notice of this *inter se* proceeding ensured that the broadest notice reasonably possible was achieved. Again, due process requires that notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *See Mullane,* 339 U.S. at 314. Due process does not require that the interested party actually receive the notice." *See In re Blinder*, 124 F.3d at 1243. The Objecting Parties' assertions that the Settlement Agreement is compromised because some unknown number of water right holders did not receive notice is unsupported by the law and the circumstances under which service was accomplished for this proceeding.

Third, the objection that insufficient information was provided concerning the Settlement Agreement and insufficient time was allotted for the Objecting Parties to specify their objections to the Settlement Agreement disregards the notice procedures followed and the information distributed with notice. Whether notice was provided through targeted mailing, publication, prominent postings, and public meetings, those notified were provided more than sufficient information to inform themselves of the pendency of this *inter se* proceeding and their

opportunity to object. *See Mullane*, 339 U.S. at 314. The most obvious example of the depth of information distributed to all known and unknown water rights holders is the information provided by the Court in its Dec. 6 Order where the Court provided the following: (1) a summary of the proceedings; (2) a summary of the proposed Decree; (3) a summary of the proposed Settlement Agreement; (4) a summary of the Interim Administrative Order; and (5) a summary of the rights and options of every water right owner. Further, the Dec. 6 Order described multiple locations (physical and Internet locations) where all relevant documents concerning this *inter se* proceeding could be found including copies of the Settlement Agreement, the Proposed Partial Final Judgment and Decree, the proposed Interim Administrative Order, and the Settlement Acceptance/Objection forms.

The information distributed to all known and unknown water right owners concerning this *inter se* proceeding between December 2013 and April 2014 was substantial. Certainly, the information provided well-exceeded the threshold due process requirement to inform water right owners of the pendency of this *inter se* proceeding and their opportunity to object.

Finally, with respect to the amount of time that water right owners had to present their objections, the Court's record establishes that more than sufficient time was made available so that all potential Objecting Parties would be able to prepare and file objections to the Settlement Agreement. The Dec. 6 Order specified that persons had until April 7, 2014 to file their objections. Examination of the Court's record reveals that after notice was mailed, the first *Acceptance of Settlement Agreement and Notice of Domestic Well Election* (Jan. 14, 2014) (Doc.

8085) was completed and filed on January 14, 2014.[27] Focusing on just the period during which the Court's record establishes that information was first available to water right owners (January 14 and April 7), potential Objecting Parties had at least eighty-three days to consider the materials provided by the Court and the Settlement Parties, and to file a completed Court-approve objection form. Though each potential objector was required to specifically articulate the nature of her/his objection, the form did not require briefing or extensive explanation for the basis of objection. With more than eighty days to act, no reason exists why any person wishing to participate in this proceeding and to object to the Settlement Agreement could not do so in the period provided. Ultimately though, the Objecting Parties' argument here is thoroughly undermined by the large number of persons able to file objections with the Court by the Court's April 7, 2014 deadline.

D. THE REMAINING OBJECTIONS ARE NOT RELEVANT TO THE COURT'S PRESENT DETERMINATION.

Various Objecting Parties raise questions about certain aspects of the Settlement Agreement that relate to the design, construction and operation of the Regional Water System, including environmental compliance matters. *See* Appendix, Group C. Some Objecting Parties question whether the State and the United States will provide the funding required to implement certain provisions in the Settlement Agreement and Settlement Act. Certain of the Objecting Parties complain about the cost of participation in the settlement process or obtaining water from the Regional Water System. Other Objecting Parties misunderstand the portions of the

[27] The forms titled *Acceptance of Settlement Agreement and Notice of Domestic Well Election* and *Objection to Settlement Agreement and Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambé and San Ildefonso, and Interim Administrative Order* were approved by the Court for use on November 4, 2013. *Second Amended Procedural Order Regarding Approval of Settlement Agreement* at 2. (Nov. 4, 2013) (Doc. 7988).

Settlement Agreement which provide an opportunity for domestic well owners to obtain water from the Regional Water System at a lower cost if they transfer the water supply associated with their domestic wells to the Regional Water Authority. Finally, certain Objecting Parties complain that the rules required by § 5.3 of the Settlement Agreement ("Water Master Rules") to define the responsibilities of the OSE under § 5.2 of the Settlement Agreement have not yet been issued.

These objections reflect a fundamental misunderstanding of the critical distinction in the Settlement Agreement and Settlement Act between the determination and administration of the Pueblos' water rights and the role of the Regional Water System in delivering otherwise unavailable water from the Rio Grande to both the Pueblo and non-Pueblo communities in the Basin. As noted above, the Regional Water System is an important component of the Settlement as defined in the Settlement Agreement and the Settlement Act. But the sole issue now before the Court is whether to approve the Settlement Agreement and issue the Proposed Partial Final Judgment and Decree determining the nature and extent of the Pueblos' water rights. As the Court has previously noted, the Objecting Parties' complaints about issues related to the Regional Water System and the implementation of the Settlement Agreement fail to recognize that the scope of the Court's review of the Settlement Agreement is limited to the determination of the Pueblos' water rights and the provisions for the administration of those rights. Likewise, the complaint that the Water Master Rules have not yet been issued by the OSE fails to recognize that those rules will implement the Proposed Partial Final Judgment and Decree, and that under

the terms of the Settlement Agreement, are not required until prior to the entry of the Final Decree adjudicating both the Pueblo and Non-Pueblo rights. *Id.* § 5.3.[28]

1. <u>This Court Has Recognized that its Determination Whether to Enter the Partial Final Decree Does Not Require it to Examine (1) the Construction and Future Operation of the Regional Water System or (2) the Ultimate Implementation of its Decree</u>.

Certain parties previously raised many of these same issues in requesting a stay of these proceedings, which the Court denied. *See Memorandum Opinion and Order Overruling Objection to Magistrate Judge's Order Denying Motion for a Partial Stay* (Sept. 12, 2014) (Doc. 9674) ("Stay Order"). The present contentions are in large part duplicative of the arguments presented in support of a stay; they are certainly no more persuasive. In seeking a stay, the moving parties argued that the following documents were required before the Court and parties could properly address the issues now before the Court: (1) the Joint Powers Agreement governing the establishment of the Regional Water Authority; (2) the Water Master Rules; (3) the Operating Agreement for the Regional Water System required by § 612 of the Settlement Act; (4) the Environmental Impact Statement and Record of Decision required to initiate construction of the Regional Water System; and (5) the easements for the Regional Water System. *Id.* at 2. The Court rejected the notion that the completion of these documents was relevant to its consideration of the Settlement Agreement and its determination to enter the Partial Final Decree. *Id.*

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[28] Moreover, with or without the Settlement Agreement the OSE has full authority to administer the Basin as to non-Pueblo water rights and could do so at any time in accordance with priority administration and beneficial use of water. The Settlement Agreement provisions relating to administration which will be implemented under the rules, if anything ameliorate the existing provisions of state law with regard to priority and beneficial use.

As the Court noted, the procedures to develop the documents in question are all public and well-prescribed by State and federal law to ensure consideration of all legitimate concerns. *Id.* at 4. Nothing in the objections supports a different conclusion. While the Regional Water System was authorized by Congress for a specific and unique purpose, and is subject to various legislative requirements, *see* Settlement Act §§ 611-14, it is being built by the Bureau of Reclamation to serve the Pueblos and County residents. As a result, its precise configuration and operation remain subject to various ongoing governmental procedures that are readily transparent and subject to public scrutiny and influence along the way. *See, e.g., id.* § 616 (project subject to all federal environmental laws). Similar to any public infrastructure project, the precise configuration of the project may be adjusted over time as additional information is developed. Moreover, the Settlement Act plainly contemplates that the Settlement Agreement will be approved and a decree entered adjudicating all rights in the Basin before the Regional Water System is completed. *See id.* § 623. As with any such project, the final product will reflect a series of events and decisions that must occur in the appropriate sequence. For example, the design of the project is important to developing the terms of the legislatively-required operating agreement among the Pueblos and the County, and that design must be completed before the operating agreement can be put in final form. *See id.* § 612(a) (operating agreement required within 180 days of the completion of environmental compliance or final project design). Put another way, although the completion of the Regional Water System is critical to concluding the settlement of the Pueblos' rights and benefits the entire Basin, its design, construction and operation are subject to the federal legislation and established federal procedures that are not subject to this Court's jurisdiction in this case and do not bear on the Court's adjudication of the Pueblos' rights pursuant to the Settlement Agreement and the entry of the Proposed Partial Final

Judgment and Decree and Interim Administrative Order. *See* Stay Order at 4-5. And to the extent that any party contends that the Regional Water System is being developed outside the purview of the applicable federal laws whether related to issues arising under the National Environmental Policy Act, 42 U.S.C. §§ 4321-70(h), or water quality matters, established procedures exist to mount such challenges in response to the federal decision-making.

The same holds true for the Water Master Rules. In fact, the Settlement Agreement specifically notes that the rules must be promulgated "pursuant to NMSA 1978 § 72-2-8, prior to the entry of the Final Decree." Settlement Agreement § 5.3; s*ee* Stay Order at 4. As the Court previously noted, there is no basis to argue that these rules will not comply with the law or that the procedures will not allow for a full and fair review of the proposed rules at the appropriate time.

2. The Objections Related to the Transfer of Domestic Water Supplies Lack Merit .

Finally, some Objecting Parties have contended that they will be required to transfer the water supplies associated with their domestic wells to the Regional Water Authority prior to the time when the Regional Water System will be capable of delivering water supplies to them and, therefore, the Settlement Agreement lacks consideration. Appendix, Group K. That argument ignores the plain language of the Settlement Agreement that the provisions related to the transfer of water rights associated with domestic wells, permitted pursuant to N.M. STAT. ANN. § 72-12-1, *see* Part VI.A, *supra*, apply only "upon connection to the [County Water Utility] and discontinuation of the domestic use from a Section 72-12-1 well." Settlement Agreement § 3.1.8.1. Consideration for the Settlement Agreement exists with regard to this specific issue because transfer of the water right occurs contemporaneously with connection to the Regional Water System and provision of water service by the County Water Utility. That provision does

not transfer any water right prior to completion of the system. Nor is there anything in the language of § 3.1.8.1 of the Settlement Agreement that suggests that owners of pre-Basin or permitted wells must transfer their water right or halt the use of their well in advance of receiving water from the Regional Water System.

VII. CONCLUSION.

For the reasons set forth above, the United States and the Pueblos respectfully request the Court (1) to overrule the pending objections; (2) approve the Settlement Agreement; and (3) enter the Proposed Partial Final Judgment and Decree. Following the entry of the Proposed Partial Final Judgment and Decree, including the Interim Administrative Order, the Court may consider any issues that may arise related to the status of the Objecting Parties and Non-responding Parties. *See* Settlement Agreement § 3.1.9. As the Court is aware, the Settlement Act establishes a September 15, 2017 deadline for the entry of the Partial Final Judgment and Decree. *Id.* § 623(a)(2)(G). Questions concerning the extent to which the Objecting Parties and the non-responding Parties may obtain the benefit of the Settlement Agreement and be compelled to operate in accordance with its terms should not interfere with the Court's efforts to meet that deadline.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 6, 2014, the **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE** was filed electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I FURTHER CERTIFY that, on November 6, 2014, copies of the foregoing were mailed to the non-CM/ECF Participants listed below.

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