

**MEMORANDUM
(NOT CONFIDENTIAL)**

Date: January 24, 2018
To: Santa Fe County (County) Board of County Commissioners
Via: Katherine Miller, County Manager
From: R. Bruce Frederick, County Attorney
Subject: Response to Comments on Settlement Agreements Concerning County-Maintained Roads (CMRs) within the Exterior Boundaries of the Pueblo de San Ildefonso

The purpose of this memorandum is to address most of the comments and questions provided on the attached partially executed Settlement Agreement between the County, the Pueblo de San Ildefonso (Pueblo), and the United States Department of the Interior.

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- 2 **Section 1(A): Does “Access Point” include utilities?** No. The term refers to a surveyed line of ingress and egress along a CMR¹ or New Road. Any “gaps”, i.e., areas of Pueblo Land between the Access Points and Private Land, will be included in the County’s survey and ROW application to BIA. The purpose of surveying the Access Points and the gaps under the Agreement was to devise a means of providing basic ingress and egress. Neither the Access Points nor the ROWs across the gaps will include rights to install utilities. Existing utilities, however, should not be affected by the Agreements. The Pueblo will regulate the installation of new utilities on Pueblo Land.
- 3 **Section 1(Q): Modify the definition of “Private Land” to indicate that it excludes land “owned by a governmental entity.”** As defined in the Agreement, “Private Land” means land within the exterior boundaries of the Pueblo that has been patented to private claimants or to which Indian Title has been otherwise extinguished. This would include lands that were patented in the past but are now owned by the Pueblo or another governmental entity. Therefore, the suggested change would render the Agreement incomplete.
- 4 **Section 1(W): Define “ROW” to be “the legal right, established by usage or grant, to pass along a specific route”** The legal meaning of “right-of-way” is well known in the law, and the Agreement does not change that meaning. The only purpose of defining “ROW” in the Agreement is to clarify that it stands for “right-of-way.”
- Section 2(A)(1)(b): Require the County to record the survey of the CMRs and New Roads.** The Agreement requires the County’s ROWs to be recorded at BIA’s Land and Records Office. The ROWs will include a legal description based

¹ For purposes of convenience, “CMR” in this Memorandum refers to “Subject Road” as defined in the Agreement.

on the County's survey. In addition, although not a contractual requirement, the County will record the survey and the ROWs in the records of the County clerk.

Section 2(A)(1)(c): Determine whether any CMRs are subject to “existing deeded ROWs.” The survey should identify any road easements² granted by private landowners on private land. Private landowners, however, may also present any such grants to the County. As of the date of this memorandum, no such deeds have been provided or discovered.

5. **Section 2(A)(3): Change “Convey the County’s existing ROWs” to “Convey right-of-ways deeded to the County”** This proposed change would misrepresent the nature of most of the County’s existing ROWs, which arose by prescription rather than by deed.

7. **Section 2(F) regarding Special Funding Source: Is the County expecting to expend more than \$4 million?** The question is based on a misunderstanding of the Agreement. No \$4 million sum is referenced in the Agreement.

Section 3 and 3(C): Why does the Agreement include a contingency regarding the County’s possible condemnation of private land underlying a CMR on private land (Section 3(C)) but not Pueblo Land underlying the New Roads? The County has an obligation under the Agreement to assign its Road ROWs on Private Land to the BIA. A private landowner could conceivably dispute the existence, width, or location of the ROW as depicted on the County’s survey. In the event such a dispute leads to litigation, the County will defend its title to the ROW, and, to the extent necessary, condemn private land to establish the ROW. The County will defend its title whether the ROW arises on private land by prescription or deed. To minimize the chances of litigation, the County will share its draft survey with landowners and seek to amicably resolve disputes. Because the CMRs at issue have existed and been maintained by the County for several decades, the County is confident that a Court would find in its favor if the prescriptive easements were challenged. If the County is sued without a good faith basis in law or fact to dispute the County’s ROW, the County will seek appropriate sanctions under Rule 11, including payment of its attorney’s fees.

Section 3(B): Why is “Standard Width” not defined? It is defined in this Section.

Section 3(C): What authority does the County have to transfer a “privately owned” easement to a Federal agency? The County has authority to assign “County-owned property”, including easements, to federal entities or other third parties. The County does not have, and is not claiming to have, authority to assign privately-owned property.

² “Easement” and “ROW” are used interchangeably in this memorandum.

- **If there is a deeded easement, does the County have an obligation to consult with the grantor?** No, unless the deed expressly imposes such an obligation.

8 **Section 4(D)(2): Who will pay for the cost of removing or remediating contamination within the alignment of the New Roads?** The applicable substantive law, not the Agreement, will determine who is obligated to pay such costs if contamination is discovered.

9 **Section 4(D)(5): Who will determine which utilities are installed below the New Roads and could infrastructure for the regional water system be installed below the New Roads?** The Pueblo and the BIA will determine which utilities are installed on the Pueblo Land underlying the New Roads. If called for in its design, infrastructure comprising the regional water system could be installed under or along the New Roads.

Section 4(F): How will the County procure contractors? The County will follow its Procurement Code.

10 **Section 4(H): Why will the County continue to maintain CR 84C and 84D across private land after Yellowbird Loop opens?** The County will not abandon its easements and will continue to maintain these roads where they traverse Private Land to provide internal access within subdivided areas of Private Land.

11 **Section 7: Will roads within El Rancho be subject to temporary closure for cultural activities?** Under the applicable federal regulations, Tribes may temporarily close Tribal roads for cultural purposes.

- **What about the BIA roads on the west side of the Rio Grande?**
These are not subject to the Agreement.

12 **Section 10(B): Will the BIA ROW across the gaps have a total term of 198 years?** Yes.

Section 10(C): How will additional Access Points be obtained in the future? There should be no need to obtain additional access points in the future. If access across Pueblo Land is required in addition to that provided in the BIA ROWs, a new ROW specifically granting that access will be required.

13 **Section 11(A): Is the County “encumbering future County Commissioners to pay for the maintenance of these roads without really specifying the costs and scope of work/contract?** The County has an ongoing obligation to maintain county roads, and its obligation to maintain the roads in question will not be materially different than that of other roads. However, the obligations will be

negotiated in a separately negotiated road maintenance agreement, which the Board will execute.

- 15 **Section 12(A): Does the Pueblo have jurisdiction over the grant of easements on existing and future Access Points?** The Pueblo now has, and will continue to have, jurisdiction to grant easements over Pueblo Land.

Section 12(B): Define fair market value and unrestricted fee land. These terms need not be defined in the Agreement. Standard Appraisal Method is already defined in the Agreement, and unrestricted fee land has a clear meaning under federal Indian law.

- Under the JPA, the Pueblos have agreed to provide easements necessary to connect landowners to the regional water system at no cost.

- 17 **Section 15(B): Is the County “willing to compromise the property rights of the County tax payers” by agreeing to exclude the Settlement Agreement from evidence in the event of litigation?** This question is based on a misunderstanding of the Agreement and/or Rule 48. In the event of litigation, Rule 408 generally prevents a settling party from using the Settlement Agreement to prove the liability or show an admission of another settling party.