

**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: Settlement Agreements Concerning County-Maintained Roads (CMRs) within the Exterior Boundaries of the Pueblo of Nambe and the Pueblo de San Ildefonso.

The purpose of this memorandum is to address some of the major questions and concerns raised by the public in both written comments and during several public meetings concerning the CMR Settlement Agreements among the County, the Secretary of the United States Department of the Interior (Secretary), and (in separate Agreements) the Pueblo of Nambe (Nambe) and the Pueblo de San Ildefonso (San Ildefonso). The Nambe and San Ildefonso Agreements are addressed in a single memorandum because they are similar in structure. The Settlement Agreements concerning the Pueblo of Pojoaque and the Tesuque Pueblo are addressed in a separate memorandum.

The purpose of this memorandum is not to repeat the FAQs that the County has already published or cover every provision of the Settlement Agreements. Instead, this memorandum addresses specific issues raised by the public and presents staff's perspective on these issues. The issues are addressed in outline form under the numbered topics below. This memorandum has been shared with representatives of the Pueblos and the United States.

Nambe and San Ildefonso Agreements.

- I. County-Maintained Roads (CMRs) and Prescriptive Easements on Private Land within the Pueblos; Assignments to the BIA.**
- A.** Under long-established state law, the traveling public can establish a public road right-of-way (ROW), which is a type of easement, simply by using private property as a public road over a period of 10 years or more. Easements established by use rather than grant are called "prescriptive easements."
 - B.** Dozens of CMRs within the County have been established by prescription, including CMRs that traverse private land within the Pueblos. These prescriptive easements belong to the County and are legally distinct from the private property they traverse. As a general rule, an easement cannot be owned by the owner of the private property that it crosses.
 - C.** Under the Nambe and San Ildefonso Agreements, the County will assign its prescriptive easements to the BIA wherever the CMRs traverse private land within the Pueblos. All of the County's rights under the prescriptive easements will be assigned to the BIA, including the right to maintain and improve the CMRs. However, the County will continue to maintain the roads under a road maintenance agreement between it, the BIA and the Pueblo.

D. No Taking of Private Property without Just Compensation. The County's assignment of its prescriptive easements to the BIA will not constitute a "taking" of private property. As already mentioned, the easements belong to the County. The assignments to BIA will not (nor could they) increase the burden or width of the easements on private land or otherwise grant BIA more rights than the County possesses under the easements. The County will survey the prescriptive easements prior to assigning them to BIA and attempt to work with landowners to amicably resolve any disputes. The County has committed to defending its title to the easements should they be challenged. In the unlikely event that a Court determines the County lacks title to a segment of CMR, the County has further committed to purchase or condemn the necessary property interests, in which case it would pay the affected landowners just compensation pursuant to the New Mexico Constitution.

E. No Violation of the Anti-Donation Clause. The County's assignment of its prescriptive easements will not violate the Anti-Donation Clause of the NM Constitution. First, the purpose of the Clause is to prevent donations or aid to private enterprise. The BIA is a governmental entity. Second, the Agreements provide adequate consideration to the County in return for the assignments, including a permanent release of claims, as defined in the Agreements, by the Pueblos and the United States.

II. Pueblo Land Rights-of-Way. Wherever a CMR traverses Pueblo Land, and along the new roads at San Ildefonso, the Secretary will grant public road rights-of-way to the BIA.

III. BIA Roads.

A. The Secretary's grants of rights-of-way across Pueblo Land together with the County's assignment of its prescriptive easements (and any deeded easements) will provide the BIA with continuous rights-of-way along the CMRs covered by the Agreements. These CMRs (and the new roads at San Ildefonso) will then become BIA Roads.

B. The BIA Roads will remain open public roads for 198 years.

C. The County will maintain the BIA Roads under a road maintenance agreement between the County, the Pueblo, and the BIA.

IV. Private Property.

A. The Agreements do not grant, compromise, or encroach on any private property or alter private property rights in any way; nor could they.

B. The Agreements do not give, nor could they give, the Pueblos or the BIA the right to grant utility or other easements across private land. (However, public road rights-of-way that traverse private land, including those established by prescription, generally include the right to authorize the installation of utilities within the road rights-of-way.)

- C. The Nambe Agreement does not alter, and could not alter, any private property rights adjudicated under the Herrera Decree, including rights of ingress and egress.

V. Jurisdiction.

A. Utilities.

1. The Agreements will not change the jurisdiction over utilities on Pueblo Land. As is currently the case, the Pueblos and BIA will continue to have jurisdiction and authority to determine the terms and conditions under which utility easements may be granted on Pueblo Land.
2. The County will no longer issue road cut permits along the CMRs for utilities after the Agreements are executed. However, since at least 2004, the County has required utilities companies to obtain Pueblo consent before it would grant a road cut permit within the boundaries of the Pueblos.
3. The Agreements will not affect any existing utilities.

B. Criminal Jurisdiction. The Agreements will not change the allocation of criminal jurisdiction as between the State, Federal, and Pueblo authorities.

C. Civil Jurisdiction. Although the Agreement is silent on the issue, Pueblo courts might assert jurisdiction over civil disputes that arise from accidents or other incidents on BIA roads.

VI. Emergency Services.

- A.** The Agreements will not prevent or change in any way the ability or right of State and local emergency responders to respond to accidents on BIA roads.
- B.** The Agreements will not prevent or change in any way the ability or right of emergency responders or non-Pueblo law enforcement from responding to incidents on private land located within the Pueblos.

VII. Gaps.

A. San Ildefonso.

1. Although the Agreement will not resolve every access issue, it should resolve the vast majority of them; both in the interim and after the new roads are constructed and opened.
2. In the long term, the vast majority of lots on private land will have a surveyed access point for ingress and egress to a BIA Road. In some cases a single access point may serve several lots. The gaps of Pueblo Land that currently prevent legal access to

these points will be surveyed by the County and included in the rights-of-way to be granted to BIA by the Secretary.

3. In the short term, CMR 84C, CMR 84D, and Sandy Way will remain open for at least 5 years while the County constructs Yellowbird Loop. The Pueblo will legislatively grant access to private land via access points to CMR 84, CMR 84A, CMR 84B, and CMR 101D for 5 years or until the ROWs are granted to BIA. In addition, individuals may request the Pueblo to grant permits to allow specific access. The cost for these permits will be no more than \$100 for the first 5 years. If permanent access is still not available after 5 years, the term of the individual permits may be extended in 1-year increments at a cost of no more than \$100 per extension until permanent access becomes available.
4. The Pueblo and the County will work cooperatively to resolve the unique gap issues regarding access to CMR 101D.
5. As to access issues not resolved by the Agreement, the County is committed to working with private landowners and acting as a liaison between them and the Pueblo if requested.

B. Nambe.

1. Nambe has agreed to extend the width of the ROW up to 25 feet on either side of the centerline of a CMR, or to private land, whichever occurs first. This width will eliminate most of the gaps.
2. As to any gaps that extend beyond the width of the ROW, the Pueblo will provide a process through which private landowners may obtain an access easement under 25 CFR Part 169. There will only be a nominal fee for the easement and its terms will be up to 35 years.