

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO *ex rel.*
State Engineer,

Plaintiff,

v.

No. 66-cv-06639 WJ/WPL

R. LEE AAMODT, *et al.*,

Defendants.

**OPPOSED MOTION TO ALTER OR AMEND JUDGMENT
PURSUANT TO RULE 59(e)¹**

Defendant-Objectors, through their legal counsel, A. Blair Dunn, Esq.², respectfully request that this Court alter or amend its judgment and decision to approve the settlement agreement, as set forth in its March 21, 2016 Memorandum Opinion and Order (Doc. 10543). Defendant-Objectors preserve and continue to maintain the objections that they set forth in their Response in Opposition to Motion to Approve Settlement Agreement and Entry of Proposed Partial Final Judgment and Decree. (Doc. 9972) Defendant-Objectors submit this motion to alter or amend the judgment to call the Court's attention to additional statutory authority which demonstrates unequivocally that the New Mexico Legislature reserves the power to approve Indian water rights settlements. Accordingly, Defendant Objectors state as follows:

**I. THE NEW MEXICO LEGISLATURE HAS RESERVED THE AUTHORITY
TO APPROVE INDIAN WATER RIGHTS SETTLEMENTS.**

Although the State of New Mexico purports to be one of the main parties to the proposed settlement, it comes to this Court urging approval of an agreement that does not have legislative

¹ Pursuant to the Local Rule the position of parties was sought and the motion is opposed by all parties.

² The Court, in its Memorandum Opinion and Order approving the Settlement Agreement (Doc. 10,543), referred to the Defendant-Objectors represented by A. Blair Dunn as "the Dunn Group."

approval. Such approval, however, is required. In addition to the authorities already cited, the New Mexico statutes provide:

The “Indian water rights settlement fund” is created in the state treasury to facilitate the implementation of the state's portion of Indian water rights settlements. The fund consists of appropriations, gifts, grants, donations, income from investment of the fund and money otherwise accruing to the fund. Money in the fund shall not revert to any other fund at the end of a fiscal year. Money in the Indian water rights settlement fund shall be used to pay the state’s portion of the costs necessary to implement ***Indian water rights settlements approved by the legislature and the United States congress***. The interstate stream commission shall administer the fund and money in the fund is appropriated to the commission to carry out the purposes of the fund. Money in the fund shall be disbursed on warrants of the secretary of finance and administration pursuant to vouchers signed by an authorized representative of the interstate stream commission.

NMSA 1978, § 72-1-12. The import of this statute is unmistakable: the Legislature of New Mexico contemplates that Indian water rights settlements will involve its approval. This Court has accepted the position that the Attorney General’s generic grant of authority to settle lawsuits is sufficient to permit the Attorney General to enter into this settlement. *See* MOO at 6-7 (citing NMSA 1978, § 36-1-22). Such a ruling contravenes § 72-1-12, which recognizes that the Legislature retains jurisdictional power to approve Indian water rights settlements.

The United States has argued unwaveringly that New Mexico State law does not determine Indian water rights in this adjudication. To the extent such a statement is true, it is beside the point. State law provisions such as NMSA 1978, § 72-1-12 speak to New Mexico’s process for entering into compromises with the United States regarding Indian water rights. That process includes the requirement of Legislative approval. The Attorney General may be able to settle lawsuits, but he cannot remake New Mexico water law through such a settlement agreement.

The requirement of Legislative approval in the context of Indian water rights is not surprising or remarkable. A settlement agreement between the State of New Mexico and the United States in this matter would effectively re-write New Mexico water law because, as

Defendant-Objectors have pointed out, it will change the way non-Indian junior water rights owners are treated, even though those parties do not approve of the settlement. For similar reasons, over twenty years ago Governor Johnson was held to be in violation of principles of separation of powers when he entered into gaming compacts without the approval of the Legislature. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) (“The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. ***We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law.***”). Entering into a settlement agreement that so drastically alters parties’ water rights is something that requires lawmaking authority that the Attorney General (or any other New Mexico Executive Branch officer) does not have.

Defendant-Objectors will not rehash the arguments, which they have already presented and which this Court has already rejected, but will note that the understandable sense of urgency to consummate this settlement has led the parties to overlook the significant flaws with the settlement and to violate fundamental issues of separation of powers under the New Mexico Constitution. Expediency and convenience are not sufficiently compelling grounds to override constitutional requirements. “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *INS v. Chadha*, 462 U.S. 919, 944 (1983). The Court should not approve of this settlement agreement if it violates the law, and Defendant-Objectors have shown that it does just that.

II. CONCLUSION.

The New Mexico Legislature has clearly asserted approval authority over Indian water rights settlements. Here, with no such approval forthcoming, the settlement agreement the

Court has approved is invalid because, among other reasons, the Attorney General of New Mexico does not have the authority to enter into it. The Court should therefore reject it as it violates the laws of New Mexico.

WHEREFORE, Defendant-Objectors respectfully requests that this Court reconsider its order approving the settlement agreement, and that it reject the agreement. Furthermore, Defendant-Objectors respectfully request whatever other relief this Court deems just.

Respectfully Submitted,

/s/ A. Blair Dunn
A Blair Dunn, Esq.
Counsel for Defendant-Objectors
1005 Marquette Ave NW
Albuquerque, NM 87102
abdunn@ablairdunn-esq.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2016, I filed the foregoing **MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)** electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means. I further certify that, on April 19, 2016, copies of the foregoing were mailed to the non-CM/ECF Participants.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.