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,	)	**NO. 66cv6639 WJ/WPL**
Plaintiffs-in-Intervention.	)	

STATE OF NEW MEXICO, SANTA FE COUNTY AND CITY OF SANTA FES JOINT RESPONSE TO OPPOSED MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(E)

The State of New Mexico ("State") submits this Response to the April 18, 2016 *Opposed Motion to Alter or Amend Judgment Pursuant to Rule 59(e)* (Doc. No. 10567) ("Motion to Alter") filed by A. Blair Dunn, Esq. on behalf of Defendant-Objectors (the "Dunn Group"). The motion does not present any grounds for the Court to alter or amend its judgment, and should be denied.

I. THE MOTION FAILS TO MEET THE REQUIREMENTS OF RULE 59(e).

"In general, 'reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.'" *United States v. Philip Morris Inc.*, 130 F. Supp. 2d 96, 99 (D.D.C. 2001) (*quoting* 11 Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and

Procedure § 2810.1, at 124 (2d ed.1995)). *See also Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006) ("Unless the court has misapprehended some material fact or point of law, such a motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected."); *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) ("This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."). "The 'limited grounds [that] support a Rule 59(e) motion' include: (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Memorandum Opinion and Order at 2, *Zapata v. Torrez*, No. CIV 06-1200 WJ/CEG (D. N.M. Jan. 24, 2008) (alteration in original) (*quoting Schlussler-Womack v. Chickasaw Tech. Products Inc.*, 116 Fed. Appx. 950, 954 (10th Cir. 2004)). *See Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1186 n. 5 (10th Cir.2000) (holding that Rule 59(e) motions "should be granted only to correct manifest errors of law or to present newly discovered evidence"); *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir.1995) (noting that the requirements for motions for reconsideration are "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice"). This means that a "court should not grant a Rule 59(e) motion in order for the movant to present new arguments or supporting facts that could have been offered initially." Memorandum Opinion and Order at 3, *Carillo v. Qwest*, No. CIV 03-233 WJ/RLP (D. N.M. Aug. 12, 2003) (*citing Van Skiver v. United States*, 952 F2d 1241, 1243 (10th Cir. 1991)).

The Dunn Group raised and briefed the argument that the Governor and the Attorney General acted outside their powers in entering into the Settlement Agreement in their *Response*

in Opposition to Motion to Approve Settlement Agreement and Entry of Proposed Partial Final Decree (Doc. No. 9972) filed on January 5, 2015, pp. 20-27. This Motion to Alter does not raise any new law that was not available or controlling at the time they filed their Response. The "additional statutory authority" which they seek to bring to the Court's attention was enacted in 2005, was available to the Dunn Group, and could have been argued in their Response. Because they simply failed to present this "additional statutory authority" in their Response, and there is no clear error by the Court or manifest injustice, the Motion to Alter should be denied.

II. THE NEW MEXICO LEGISLATURE HAS PUBLICLY APPROVED THE AAMODT WATER RIGHTS SETTLEMENT.

As stated in the *State of New Mexico, Santa Fe County and City of Santa Fe's Joint Memorandum in Support of Settlement* (No. 9913) filed on November 22, 2014 ("Joint Memorandum"), the Legislature has been extensively briefed on the Aamodt Settlement Agreement since the Indian Water Rights Settlement Fund Act was passed in 2005. In addition to the annual Indian Water Rights Settlement Report, presented annually by the State Engineer and the Interstate Stream Commission Director to the Indian Affairs Committee, the State Engineer and staff as well as the Interstate Stream Commission Director also have briefed members of the New Mexico Legislature extensively in both regular and interim Legislative Committee hearings.

Moreover, to the extent that the language in NMSA 1978, § 72-1-12 (2005) demonstrates that the Legislature "contemplates" that its approval is involved, the Legislature, has, in fact, provided its approval. As stated in the Joint Memorandum, not only has the Legislature been informed of the Aamodt and other federally authorized Indian water rights settlements, they have taken the affirmative act of authorizing multiple appropriations to the Indian Water Rights Settlement Fund to implement these Indian water rights settlements, including the Aamodt

settlement. In 2007, the Legislature authorized the issuance of severance tax bonds (STB) in the amount of $10 million for deposit in the Indian Water Rights Settlement Fund, which was reauthorized in House Bill 9 in 2009. *See* S.B. 827, Severance Tax Bond Projects, Reg. Sess. (N.M. 2007), section 88, p. 384; and H.B. 9, Capital Outlay Cuts and Reauthorization, Reg. Sess. (N.M. 2009), section 2, paragraph 45B(11), pp. 30-1. At the special session in 2011, the Legislature appropriated an additional $15 million in STB authorization to the Fund. S.B. 10, Severance Tax Fund Projects, 1st Spec. Sess. (N.M. 2011) section 16, pp. 19-20. During its 2013 regular session, the Legislature appropriated an additional $10 million in STB authorization to the Fund. *See* S.B. 60, Severance Tax Bond Projects, Reg. Sess. (N.M. 2013), section 22, p. 61. Most recently, the Legislature appropriated $8.2 million in STB authorization to the Fund in the 2015 special session. S.B. 1, Severance Tax Bond Projects, 1st Spec. Sess. (N.M. 2015), section 19, p. 88.

In addition to the appropriation bills, the Legislature has also expressly approved the Aamodt settlement, as well as the Navajo Nation and the Taos Pueblo (Abeyta) settlements, in multiple Memorials passed by the House and the Senate both before and after federal legislation authorizing the settlements was enacted in 2009 and 2010. In 2006, in House Memorial 3, the House expressly noted the benefits of the implementation of the settlement in the Aamodt case and requested the Governor to include in the Governor's capital outlay appropriations for fiscal year 2007 "significant funding for the Indian water rights settlement fund as a matter of statewide importance". H.M. 3, Native American Water Rights Settlement Funds, Reg. Sess. (N.M. 2006). In 2009, both the House and the Senate passed Memorials requesting continued funding of the Indian water rights settlements. In House Memorial 66, the House observed that settlement of disputes regarding Indian water rights is "for the benefit of all the state's residents,

Indian and non-Indian alike" in approving a resolution "that the governor and legislature be requested to continue to support funding for the Indian water rights settlements through contributions to the Indian water rights settlement fund." H.M. 66, Native American Water Rights Settlement Funds, Reg. Sess. (N.M. 2009). In Senate Memorial 64, the Senate specifically noted the execution of the Aamodt Settlement Agreement by the State in its request that the Governor and the Legislature continue to support funding for the Indian Water Rights Settlement Fund. S.M. 64, Native American Water Rights Settlement Funds, Reg. Sess. (N.M. 2009). And in 2013, after the federal authorization of the Aamodt and Taos Pueblo Settlements in 2010, the Legislature passed House Joint Memorial 22, declaring that "the New Mexico legislature created the Indian water rights settlement fund to aid the implementation of the state's portion of Indian water rights settlements based on the cost-sharing proportions of the Aamodt, Taos and Navajo Nation waters settlements" in support of its request that Congress provide full funding for its cost share of the settlements. H.J.M. 22, Indian Water Rights Disputes Funding, Reg. Sess. (N.M. 2013).

The Legislature has, in fact, publicly approved the Aamodt settlement multiple times, and satisfied any requirement that can be read into the language of § 72-12-1. The Motion to Alter does not present any grounds for the Court to amend its judgment that the objections should be overruled and that the Settlement Agreement should be approved.

III. THE LANGUAGE IN NMSA 1978, § 72-1-12 DOES NOT LIMIT THE ATTORNEY GENERAL'S AUTHORITY TO SETTLE WATER RIGHTS CLAIMS UNDER NMSA 1978, § 36-1-22.

The Dunn Group claim that NMSA 1978, § 72-1-12 has "unmistakable" import. Respondents agree that the statute is important, but disagree with the Dunn Group's interpretation of the statute. The Dunn Group argue that recognizing the Attorney General's

authority to enter into settlements "contravenes § 72-1-12, which recognizes that the Legislature retains jurisdictional power to approve Indian water rights settlements." The Dunn Objectors misread the purpose of the statute and invent a jurisdictional requirement which does not exist in the statute. The purpose of the statute is to create and preserve an Indian water rights settlement fund: "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…. Money in the Fund shall not revert to any other fund at the end of a fiscal year." § 72-1-12.

Although the statute does state that, "[m]oney in the Indian water rights 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…", *id*., the verb in this clause, "shall," commands that the money in the fund be spent on the state's portion of the costs necessary to implement the settlement. The verb "shall" does not dictate the agent of approval nor does it reserve "jurisdiction" to approve settlements to the New Mexico Legislature. Thus, the Dunn Group have hinged their response on interpreting a description of "settlements" as creating a condition for a settlement, while ignoring that the obligation relates to paying the State's portion of costs. The obligation to pay the State's portion of the costs of a settlement is consistent with and not antagonistic to settlements approved by the Attorney General pursuant to NMSA 1978, § 36-1-22 (1953).

Moreover, in enacting NMSA 1978, § 36-1-22 the Legislature delegated settlement authority to the Attorney General. *State ex rel. Prop. Appraisal Dep't v. Sierra Life Ins. Co.*, 1977-NMSC-023, ¶ 10-11, 90 N.M. 268, 271, 562 P.2d 829, 832. Thus, assuming *arguendo* that the Dunn Group's reading were correct, which the Respondents do not admit, the Legislature's designee has approved the settlement.

In sum, the statute is not a jurisdictional statute dictating which branch of government approves an Indian water rights settlement, but is a statute creating and preserving a fund to implement Indian water rights settlements.

The Dunn Group's fails to present any grounds for this Court to alter or amend its judgment under Rule 59(e). Not only does the Motion present arguments that could have been offered initially, the Dunn Group have not shown that the Settlement violates any "additional statutory authority" which they attempt to present.

WHEREFORE the State of New Mexico, Santa Fe County and the City of Santa Fe request that the Court deny the motion.

Respectfully submitted this 5th day of May, 2016.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 5, 2016 I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.