

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

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

Plaintiff,

v.

66-cv-06639 WJ/WPL

R. LEE AAMODT, *et al.*,

Defendants.

**REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT
PURSUANT TO RULE 59(e)**

Defendant-Objectors, through their legal counsel, A. Blair Dunn, Esq.¹, hereby submit their Reply in Support of the Motion to Alter or Amend Judgment Pursuant to Rule 59(e). The State and the United States continue to ignore the basic fact that the settlement agreement into which they entered does not have the necessary approval of the New Mexico Legislature. The Legislature may approve certain appropriations from time to time to be added to the general Indian Water Rights Settlement Fund, and it may even desire for a settlement to be reached. Nevertheless, there is no official act by the Legislature demonstrating that it is apprised of the specific terms of the settlement that this Court has approved or that it agrees to both implement and fund those terms. New Mexico law, including the statutory provision cited to this Court in the Motion to Alter or Amend makes clear that this settlement agreement requires the approval of the New Mexico Legislature. That approval is not present here. It is a therefore a violation of state law, including separation of powers, to allow the settlement to move forward as is.

¹ 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.”

Accordingly, the Defendant-Objectors have asked for this Court to alter or amend its judgment approving the settlement.

I. IT IS CLEAR ERROR TO IGNORE THE STATUTORY PROVISION RECOGNIZING LEGISLATIVE JURISDICTION TO APPROVE THIS SETTLEMENT AGREEMENT.

Although it has been quoted in all parties' briefs, it bears repeating that, under New Mexico law:

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 parties opposing this Motion attempt to manufacture Legislative approval by pointing to appropriations, memorials, and other acts of the Legislature. Of all of the acts that they cite, however, actual approval of this settlement agreement is conspicuously absent.

The capital outlay legislation cited by the United States and the State does not amount to an approval of any settlements.² Rather, it allows for certain expenditures in the event that there is a settlement. Nothing in the capital outlay language either approves of any specific settlements or waives the requirement of Legislative approval. There is no indication that the

² See also Doc. 9913 at p. 41. The document only makes brief mention that "the New Mexico Legislature has been kept informed regarding the substance and status of the Aamodt Settlement for years." Such informing, however, has only been by submission of an "Indian Water Rights Settlement Report" to lawmakers and briefing on such report. Neither the State nor the United States ever suggest that this particular Settlement with its full terms and obligations have been submitted for action to the Legislature, that the Legislature has held hearings it deems appropriate on such Settlement, heard the voice of its citizens and voted to approve or deny the Settlement.

Legislature as a body, knows what this particular settlement contains, either in terms of capital expenditures or in terms of how the settlement regulates water priority moving forward.

Section 72-1-12 recognizes that the Legislature must approve of particular settlements, not the abstract concept of settlement. There is good reason for this. As discussed in the Motion, this settlement agreement rewrites New Mexico water law and purports to permanently abrogate the rights of many owners by subordinating their water-rights in contravention of existing New Mexico law. It violates New Mexico's constitution for such action, which amounts to lawmaking, to take place without legislative approval. Defendant Objectors-Understand that, thus far, the Court has rejected their arguments regarding loss of water rights as speculative. Defendant-Objectors point it out only because it underscores why the Executive Branch is not authorized to settle this matter in a way that alters New Mexico water law without legislative approval. Such approval does not exist here.

The United States' argument regarding the appropriation language is essentially the same as that of the State – that the approval of the expenditures set forth in those appropriations constitutes Legislative approval of the settlement. There is good reason, however, to reject such a proposition. First, the plain language of the statute is that the Legislature must approve Indian water rights settlements. Second, Legislative approval of Indian water rights settlements is not merely about approving appropriations needed to implement those settlements. Rather, Legislative approval is required because the most important outcomes of Indian water rights settlements are not monetary, but rather involve substantial changes to the manner in which priority of water rights is handled going forward once the settlement agreements are in place.

Similarly, the Legislative memorials that the United States references have no bearing on whether this settlement has or requires Legislative approval. Those memorials from 2006 and 2009 (which do not have any weight of law and do not go through the same vetting process as

legally binding law-making) certainly indicate a desire on the part of some members of the Legislature for a settlement to be reached and for there to be money available for such a settlement. Those memorials, however, do not approve of any specific legislation. Moreover, it is easy to believe that such memorials would not have been issued if they actually contained substantive provisions altering the way New Mexico water right priority is determined. Such concepts would have required extensive debate rather than the hortatory memorials approved by some of the state legislators and relied on by the United States.

For the above reasons, the Defendant-Objectors have opposed this settlement and have now drawn the Court's attention to NMSA 1978, § 72-1-12. It is not a violation of separation of powers for the Legislature to assert the right to approve of settlement agreements that fundamentally alter the water rights of New Mexico's citizens. The contrary position articulated by the United States, however, would violate principles of separation of powers. In its Response brief, the United States attempts to argue out from under *New Mexico ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995) in the following terms: "Johnson involved gaming compacts entered into between the governor on behalf of the state and a number of Pueblos, and the New Mexico Supreme Court concluded that the governor violated separation of powers principles by unilaterally changing the law." Response at 5. Defendant-Objectors state that the exact same logic that the United States so succinctly expresses in its Response brief is equally applicable to this settlement. By entering into the settlement without Legislative approval, the Executive seeks to unilaterally re-write New Mexico water law, in violation of New Mexico's law on separation of powers.

The Defendant-Objectors accordingly urge this court to alter or amend its decision to approve the settlement on the grounds that the settlement violates separation of powers as recognized under New Mexico law, including NMSA 1978, § 72-1-12.

II. CONCLUSION.

The New Mexico Legislature has clearly asserted approval authority over Indian water rights settlements. None of the Legislative acts or appropriations that the State and the United States cite constitute approval of the settlement.

WHEREFORE, Defendant-Objectors respectfully requests that this Court alter or amend 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
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I filed the foregoing electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means. I further certify that, on May 24, 2016, copies of the foregoing were mailed to the non-CM/ECF participants.

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