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 PUEBLOS DE TESUQUE,	)
Plaintiffs-in-Intervention.	)

RESPONSE IN OPPOSITION TO MOTION TO APPROVE SETTLEMENT AGREEMENT AND ENTRY OF PROPOSED PARTIAL FINAL JUDGMENT AND DECREE

COMES NOW Defendant-Objectors[1] by and through their counsel, A. Blair Dunn, Esq, and file this Response Brief in Opposition to Motion to Approve Settlement Agreement and Entry of Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso.

[1] Defendant-Objectors have been previously represent by this counsel have been previously identified to the Court as Group 1. Objecting Parties Rogaliner Trust, ECF No 8365, and Wolff Trust ECF No 8855 have recently joined this Group and wish to join in this Response. Defendant-Objector Paul White has also joined in this Response but has also presented unique claims to response to the Court in a separate pleading.

INTRODUCTION

The crux of this case centers on priority water rights administration, and specifically the authority of the settling parties to create law that excepts some non-Pueblo water rights from priority water calls for priority administration in exchange for reduction of their rights; while providing that other similarly situated junior water right holders will be subject to curtailment of their rights to satisfy future water needs of the Pueblos. This underlying violation of state water law flows like water from a broken dam through legal issues that prevent entry of judgment and issuance of decree sought by Plaintiff's Motion, *i.e.* equal protection, adverse impacts, lack of settling authority of the state signatories to the settlement agreement, public policy and the fundamental unfairness of harming non-pueblo water rights holders because they will not agree to the proffered settlement.

Defendant-Objectors do not contest that water rights of the Pueblos are and should be adjudicated in accordance with previous decisions of this Court and the 10th Circuit Court of Appeals, nor that the United States has an interest in such adjudication pursuant to its trust responsibilities. Rather, the major issue of this group of Objectors is that the settlement was designed such that, absent complete agreement of all of the parties, certain non-Pueblo junior rights will become elevated and exempt from a priority calls irrespective of their priority relation to other non-Pueblo rights.

For instance, if a priority call is initiated in the future by the Pueblos it would likely affect non-Pueblo rights in the following fashion:

> "Water Right A has a priority date of 1940, Water Right B has a priority of 1970. Water Right A does not agree to this settlement and chooses instead to retain its full historical use and priority, but Water Right B accepts this settlement agreeing to a reduced right in exchange for being exempted from the priority call of the Pueblos. The State Engineer as a settling party has agreed to the exception to priority administration and therefore 1940 Water Right A is curtailed, thus receiving no water even though the junior right of the 1970 Water Right B receives its full, reduced amount."

Effectively, the Attorney General is attempting to draft new water law through the proffered Settlement agreement that allows for a party to escape priority administration between non-Pueblo water rights holders in times of shortage. The Settlement agreement itself cannot bind non-settling parties. To swim around this limitation, Plaintiffs seek for the proffered Settlement to be anointed by this Court to create new law negatively impacting and binding non-settling parties, *i.e.* the objectors filing herein. The Settlement as drafted by the United States leaves parties with little choice - to accept a reduced amount now or face having their rights subordinated to other junior rights in the

future. A more transparent attempt to coerce parties to agree to an unwanted settlement is hard to imagine.

ARGUMENT

I. THE FAIR AND REASONABLE STANDARD IS ONLY REVIEWABLE AND RELEVANT IF THE AGREEMENT IS NOT ILLEGAL OR AGAINST PUBLIC POLICY.

A. Illegality and Public Policy Considerations Must be Addressed before the Substance of the Settlement Itself.

In *United States of America v. Colorado*, 937 F.2d 505 (10th Cir. 1991), the Court stated that:

> The district court, however, is not obliged to approve every proposed consent decree placed before it. Because the issuance of a consent decree places the power of the court behind the compromise struck by the parties, the district court must ensure that *the agreement is not illegal, a product of collusion, or against the public interest*. The court also has the duty to decide whether the decree is fair, adequate, and reasonable before it is approved.

United States of America v. Colorado, 937 F.2d at 509 (emphasis added), citing *City of Miami*, 664 F.2d at 440-41. Similarly, the Court in *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990), cautioned that:

> Because of the unique aspects of settlements, a district court should enter a proposed consent judgment if the court decides that it is *fair, reasonable and equitable and does not violate the law or public policy*. *See Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C.Cir.1983), cert. denied, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984); *cf. Davis v. City and County of San Francisco*, 890 F.2d 1438, 1444-45 (9th Cir.1989) (district court reviews proposed consent decree in a class action suit brought under Fed.R.Civ.P. 23(c) to determine whether the settlement is "fundamentally fair, adequate and

> reasonable") (quoting *Officers for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.1982), cert. denied, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983)).

Id. at 1355. While the settling party governments strenuously argues that the proffered Settlement Agreement is fair and reasonable and thus should be entered, they strikingly fail to address the illegality of the Agreement or to even assert that the Agreement is fair as to non-settling parties. They fail to make these arguments because it is unable to do so. Instead, the governments argues that non-settling parties had the opportunity to participate in the process and therefore their rights were not violated. The governments miss one undeniable point. You can lead a horse to water, but you cannot make it drink, *i.e.* you cannot force a party to settle when it has determined its interests are better served and established by a fact-finding trial on the merits. Moreover, nowhere do the governments present legal authority that establishes that non-settling parties can be bound by a settlement they declined to enter into. Indeed, the cases cited by the United States in favor of an entry of judgment and decree are not on point, as such cases involve entry of settlement based on an agreement reached by all parties; or pursuant to Rule 23 of the Federal Rules of Civil Procedure related to class actions, not Rule 54 as invoked in this proceeding. Even in its argument, the government concedes that the fair and reasonable standard relating to Indian water settlements is not yet established law, but "recognized by scholars" as a viable standard of review for assessing a

proposed settlement. (*See* US Memorandum, FN 15) In its argument, however, the government is forced to note that such scholars add additional criteria for the courts in reviewing a proffered settlement, to include that an agreement was "reached in good-faith, all parties received due process, the terms are fair to the settling parties and *do not prejudice other claimants*." *Id.* (emphasis added).

The United States suggests that *Ratzlaff v. Seven Bar Flying Serv., Inc.*, 646 P.2d 586 (N.M. Ct. App. 1982) supports an entry of settlement based on New Mexico law. *Ratzlaff*, however, is equally unavailing as to the United States' desire for entry of judgment. In *Ratzlaff,* the Court noted that, "[T]he policy of our law is to favor amicable settlement of claims without litigation when the agreements are fairly secured, are without fraud, misrepresentation, or overreaching, and when they are supported by consideration." *Ratzlaff* at 590. In *Ratzlaff*, all parties to the underlying litigation had entered into a settlement and release. Plaintiff, a settling party, sought to set aside that settlement. The trial court had made specific findings, however, that no misrepresentations were made during settlement negotiation, that there was no mutual mistake, fraud or improper conduct in connection with their obtaining the release, and that the release was supported by adequate consideration. The Court then found that Plaintiff had not complied with the New Mexico Release Act to seek settlement set aside. Thus, while New Mexico common and statutory law provides a

mechanism to set aside settlements, they were inapplicable in Plaintiff's proceeding.

Ratzlaff notes that "amicable settlements" are favored when those settlements are fairly secured, are not overreaching, and when supported by consideration. These elements are not met by the proffered Settlement Agreement. Rights agreed to in the Settlement Agreement will impact non-settling parties with water rights. This is evidenced by a cursory reading of the language of the Agreement.

Quite simply, in its desperation to have this Court bless the proffered agreement and create legally binding law that negatively impacts third parties, the United States glosses over the preliminary review requirements of illegality and public policy. However you slice the settlement the United States has reached with the Pueblos as to their water rights, it negatively harms and impacts non-settling parties. Moreover, the Agreement is patently against public interest as it includes penalties against non-settling parties, in its effort to extort a Settlement agreement. (See Settlement Agreement at 2.4.4.2.2 in conjunction with Section 4).

Based on the above, and as a preliminary matter, a court must first determine whether a proposed settlement agreement is illegal or against the public interest, before assessing whether such agreement is "fair, adequate and reasonable." In this instance as demonstrated *supra.* and *infra.*, the proffered Settlement Agreement is illegal and against public interest. It

must not be entered by this Court.

B. The Proffered Settlement Agreement is Not Legal.

1. Executive Branch Officials are not Authorized to Engage in the Proffered Settlement.

New Mexico state law controls the enforceability of settlements. *United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000). In interpreting settlement agreements, state law applies absent a significant conflict between using state law and some federal policy or interest. *Atherton v. FDIC*, 519 U.S, 213 (1997). "Construction of a settlement agreement generally is governed by state law." *Brockman v. Sweetwater County School Dist. No. 1*, 25 F.3d 1055, (10th Cir.), *cert. denied*, 513 U.S. 951 (1994)). In reviewing the elements of a contract, the federal courts turn to a state's basic contract rules. *Hueser, et al. v. Kephart, et al.*, 215 F.3d 1186, 1211-1212 (10th Cir. 2000).

It is without question that settlement agreements are contracts. *See Cortez v. Cortez*, 145 N.M. 642, 203 P.3d 857 (Feb. 20, 2009). Pursuant to New Mexico law, "[a] contract is a legally enforceable promise." UJI 13-801 NMRA. *Nance v. L.J. Dolloff Associates, Inc.*, 126 P.3d 1215, 1220 (Dec. 6, 2005). To be legally enforceable there must be an offer, acceptance, consideration, and mutual assent. *Id., citing DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 9, 134 N.M. 630, 81 P.3d 573. Additionally, a contract is only established when signed by individuals

having the authority to do so. *See Landers v. Board of Educ.*, 116 P.2d 690 (N.M. S.CT. Sept. 15, 1941), and internal citations.

In the instant matter, the Objectors challenge the authority of New Mexico Executive branch officials to sign the proffered Settlement Agreement and bind the State to its terms. *See* Argument, *infra.* As such, before granting the Motion for Entry of Partial Final Judgment and Decree, this Court must first determine whether the State signatories are authorized to bind the state to the terms of the proffered Settlement. Because Executive branch officials purporting to sign the underlying Settlement agreement presented to this Court for approval do not have the requisite authority to do so, the United States' Motion should be denied.

2. The Settlement Negotiation and Agreement Attempts to Extort Approval by Non-settling Parties by Subverting Junior Rights.

A district court can enter a consent decree that goes beyond the type of relief provided by the statute under which the suit had been brought. *See Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C.* v . *City of Cleveland*, 478 U.S. 501 (1986). The Court stated that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Id.* at 478 U.S. at 525. This is true, though, only if the agreement is "within the general scope of the case made by the pleadings," furthers "the objectives upon which the law is based," and does not "violate the statute

upon which the complaint was based." *Id.* at 525-26, (*quoting Pacific R. Co. v. Ketchum*, 101 U.S. 289, (1880) (citations omitted)).

The proffered Settlement agreement violates current State water law, by changing the priority rights of water right holders that are junior to the Pueblos. This disparate treatment between the non-Pueblo rights is what gave rise to the numerous objections filed by the parties represented in this group. A settlement agreement deciding the amount and priority of the Pueblos' rights should not have included an attempt to force all parties to agree to the settlement. If the water rights of the Pueblos stood on the merits, and some of the parties could agree that was the proper settlement of their rights, that would be acceptable and in keeping with the law. Even still, an agreement that offered consideration of funds for hooking up to the regional water system in exchange for voluntary reductions of rights would have been equitable and in keeping with the law, but creating a new system that effectively punishes objecting water rights owners for failing to agree to settlement by forcing them to bear the curtailment of future priority calls by the Pueblos while rights that are junior are excepted is unjust. Such an exception to priority administration does not exist in the law and such a new law cannot be created by the Executive Branches without violating the Separation of Powers of the New Mexico Constitution absent a delegation from the legislature. Neither the Attorney General nor the State Engineer possess the authority to create a whole new system that elevates certain

junior water rights over other senior water rights during a priority call. This is new law that impermissibly places water rights owners at odds and is contrary to existing New Mexico water law of first in time, first in right. *See* New Mexico Constitution Article XVI Sec. 2.

II. THE FAIR AND REASONABLE STANDARDS ARE ONLY REVIEWABLE AND RELEVENT IF ALL IMPACTED PARTIES AGREE TO SETTLE.

The United States seeks an entry of "Partial" Final Judgment and Decree, and states its intent that the proffered Settlement Agreement be treated as a consent decree as final judgment pursuant to Fed. R. Civ. P. Rule 54(b) "as to each of the Pueblos surface and groundwater rights in the Basin." Rule 54(b) in pertinent part provides:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Because a judgment by consent has the same force and effect as judgment rendered on the merits following trial, (*Cf. VTA, Inc. v. Airco, Inc.*, 587 F.2d 220, 224 (10th Cir. 1979)) such judgment cannot be issued in contravention of the rights of impacted, non-settling parties. Hence, the Rule prohibits judgment by consent in the absence of an "express" determination by the

court that there is *no just reason* for delay. Without an express finding that there is no just reason to delay entry of the settlement, the Rule further provides that entry of the settlement "does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment."

Since the pending action must proceed as to the non-settling parties without such express determinations by a Court, entry of a judgment – or even less strong as proposed in this instance, a partial judgment -- is essentially without any legal effect. This is so because it is not possible to issue a judgment determining the water rights of the Pueblos without also determining the right of other impacted users.

III. PUBLIC POLICY MANDATES AGAINST APPROVAL OF THE PROFFERED SETTLEMENT WITHOUT FIRST RULING ON CONSTITUTIONAL AND STATE LAW SHORTCOMINGS.

As the United States has acknowledged in its brief, the federal government has a strong public interest in respecting state management of state-created rights to use natural resources. (U.S. Memorandum at 50) It cites to the Desert Land Act of March 3, 1877, 43 U.S.C. §§ 321-339, *Cappaert v. United States*, 426 U.S. 128, 143 n. 8 (1976) ("[W]ater rights vested under state law or custom are protected.") and *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) in support of the establishment of this policy. Yet, in its public policy discussion section, at

pages 36-39, it fails to mention how it reconciles this policy with a proposed Settlement that contravenes state water law as to priority use.

Instead, the government argues repeatedly that "amicable settlements" are favored whenever possible and that the "preference for negotiated resolutions is embodied in Fed. R. Civ. P. 16(a)(5) . . . and Fed. R. Evid 408." (U.S. Memorandum at 37) Then the government attempts to tip the proverbial boat by arguing that the general policy favoring settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement."[2] Id.

The federal government continually overreaches in its sole argument that public policy supports the use of settlement agreements to resolve litigation. No party has argued that settlements are *per se* disfavored or inappropriate when entered into all impacted parties who meaningfully engaged in developing the terms of the settlement and understand the rights given and taken by a settlement's terms. It misses the boat in its arguments, however, as the public policy to be assessed and reviewed in determining whether to approve a settlement by entry of judgment goes beyond the concept of merely settling. Such policy assessment must look to the

[2] The United States has argued throughout its Memorandum that its sole interest is in determining Pueblo water rights in furtherance of its trust responsibility. Suggesting that it serves the general public's interest because it is a government actor having "pulled the laboring oar" to reach settlement, is consequently disingenuous.

underlying law, the rights of impacted parties and whether the rights of non-settling parties are prejudiced by such settlement as is the case here.

None of the cases cited by the federal government supporting its "settlement is in the public interests" argument are on point with the type of settlement and entry of judgment at issue in this proceeding. The United States fails to identify cases where an entry of judgment and decree is sought in contravention of non-settling impacted parties. It fails to disclose to this Court the differences in class action settlements per Fed. R. Civ. P. Rule 23, such as at issue in *Ehrhear*; or that cited language in support of this settlement is dicta, as in *Pfizer, Inc. v. Lord* which reached a decision on a motion to recuse a District Court judge for alleged bias, not on the propriety of an actual settlement agreement; or even that the issue in *United States v. Armour & Co.* was interpreting an existing settlement to identify rights and responsibilities of settling parties. None of these scenarios are relevant in this case.

What is relevant is effecting the articulated federal policy of leaving the management of state resources to states. The proffered settlement violates this policy, as it changes the standards for determining the priority of water rights for junior rights holders – based on whether they succumbed to the federal and State Executive branch officials' pressure to enter into the proffered settlement. This violates New Mexico water law and is akin to

extortion. Only the State legislature can change this aspect of State water law.

IV. THE PROFFERED SETTLEMENT AGREEMENT VIOLATES FEDERAL LAW.

A. Equal Protection.

In a self-serving, cursory discussion (US Memorandum at 55-56), the United States concludes that "[t]he fact that priority protection may not extend to all of a junior right does not constitute a taking of that right." Without any discussion of the Equal Protection Clause and the nature of rights protected thereby, the government reaches its conclusion solely based on a referenced statement in *Aamodt I*, 537 F.2d at 1113 ("A recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violated the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to a prior right to the use of the water."). Based on this statement, the United States over-archingly concludes that all Indian water rights in the impacted area are senior to all other water rights; and thus, all non-Indian users' junior rights to water use can be denied. (US Memorandum at 56, "the Pueblos have senior priority rights.") In the immediately preceding sentence, however, the U.S. states that "[n]othing in the Settlement Agreement alters any non-Pueblos' quantified right." [3]

[3] The ways to reconcile this statement are limited. Either the U.S. is arguing that no rights were confirmed prior to 1933; or they were confirmed and already created a senior right in the Pueblos. If the latter were the case, there would be no need for the pending litigation.

The United States makes no mention of the disparate impact the proffered Settlement Agreement has as to junior water right holders. As discussed *infra.* at water rights established by beneficial use in New Mexico prior to March 19, 1907, were recognized and confirmed by the state constitution at the time of its adoption. N.M.S.A. 19.26.2.8. Consequently, the proposed settlement – to the extent it suddenly creates a "tier" for junior water users – violates the Equal Protections Clause.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States argues that the Settlement agreement does not violate the Equal Protection Clause because it is rationally related to the government's federal trust responsibility to the Pueblos. The Objectors, as to the concept of adjudicating Pueblo water rights, do not contest such interest. However, the Pueblos' senior rights to water have already been determined. *See State of New Mexico ex. rel. S.E. Reynolds v. Aamodt*, 618 F.Supp. 993, 1010 (D.N.M. 1985), adopting the Special Master report and finding that the Pueblos have an aboriginal right to use water to support all acreage irrigated by the Pueblos between 1846 and 1924. The issue of the objectors is not the water acreage sought to be established by the United States on behalf of the Pueblos. Rather, it is the derogation of the priority system established by

State law equally applied to junior water rights holders. The proffered Settlement Agreement subverts the rights of junior water rights users, based on whether they went along with the United States' settlement demands, and not based on applicable water law and priority rights. Thus, a junior water rights holder who acquired such right in 1950 and signed on to the government's drafted agreement, will be given priority over a senior user having acquired water rights in 1940, if the latter did not sign onto the Settlement agreement. This violates state law and the equal protections clause. The federal government has no rational basis in changing the prior beneficial state water law as to junior rights, as part of its trust responsibilities. It is simply not necessary to affect junior rights in an attempt to avoid a priority call for water as part of the government's trust responsibilities. To do so violates the rights of non-Pueblo users.[4] The United States asserts that it is its policy "to respect state management of state-created rights to use natural resources." U.S. Memorandum at 50. Yet, the Settlement agreement as drafted and negotiated by the United States violates the State priority system. Modifying the rights of junior water right holders is not necessary, nor appropriate, for the government to fulfill its trust responsibilities. No party to the Settlement agreements is authorized

[4] The United States argues in its brief that, "Pueblo water rights are not defined by or subject to the laws of Ne Mexico, but solely by federal law." U.S. Memorandum at 49. This statement is difficult to reconcile with the Court's holding that, "non-Pueblo's priorities begin as of the date they appliced water to the land they used or occupied and which have not been lost by non-use pursuant to the law of Spain, Mexico or the Teritory or State of New Mexico." *State of New Mexico ex. rel. S.E. Reynolds v. Aamodt*, 618 F.Supp. at 1010.

to create new priority water rights for junior users, without legislative approval. The United States' argument on the Equal Protection issue misses the boat and argues issues immaterial to the objectors' position.

B. Due Process.

The United States again misunderstands the Objector's argument related to a violation of due process for non-Pueblo water rights holders. Essentially, the government asserts that no third parties were required to be included in negotiations of the Pueblo water rights. U.S. Memorandum at 57. The government goes on to note that "to the extent that the Settlement Agreement will affect the interests of any third-party, this Court should consider whether any impact on third-parties is unfair or proscribed." *Id.* at FN 24. By this statement, the government acknowledges the possibility that third-parties are harmed by the proffered Settlement. In pleading the Court to enter judgment anyway, however, it asserts that any harm to third parties should be assessed as to whether the harm is "unfair or proscribed." *Id.* This is simply an erroneous legal standard. A determination as to the legality of the Settlement agreement must be made before fairness is assessed. *See* Discussion *infra*.

The federal government argues that due process is met because it provided notice to non-Pueblo water users. Due process is not met in the pending matter by merely showing that notices were mailed to potentially impacted non-Pueblo water rights holders, even if such notice met procedural

due process. Substantive due process serves to protect individuals from government action that exceeds the limits of authority, regardless of the fairness of process/notice. *See generally Mugler v. Kansas*, 123 U.S. 623 (1887). In the instant matter, the State Executive branch officials have exceeded its authority as to impacting non-Pueblo junior water rights, depriving individuals of their Constitutional rights.

V. THE PROFFERED SETTLEMENT AGREEMENT VIOLATES STATE LAW.

The United States continually puts the cart before the horse when arguing that the proffered settlement is "fair and reasonable." Before reaching a factual determination of the fairness and reasonableness of the settlement, the questions of whether the agreement itself violates applicable law must be answered. Instead of addressing these issues head on, the federal government plunges us down the rabbit hole into an unnecessary treatise of federal Indian water law. No party has questioned that the federal government has an interest in addressing Indian water rights. Quite the contrary. It is this very interest that creates the biases evident in the Settlement Agreement, leaving state citizens and individuals without a meaningful voice in the process. It is this very interest that has resulted in a proposed Settlement Agreement – against the interests and wishes of impacted state citizens and junior water right holders – that the United States seeks this Court to bless.

A. THE POWERS VESTED IN NEW MEXICO'S THREE BRANCHES OF GOVERNMENT ARE DISTINCT.

The New Mexico Constitution, Art. III, sec. 1, provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type an organization of the body, the mode of appointment or election of its member and such other matters as the legislature may deem necessary or proper. (Adopted by the people November 4,1986.)

This provision vests state legislative power in "a senate and house of representatives which shall be designated the legislature of the state of New Mexico, and shall hold its sessions at the seat of government." *Id.* With the powers of the State government being vested in three distinct departments – legislative, executive and judicial – "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others." *State of New Mexico v. The Hon. Gary Johnson*, 904 P.2d 11, 22 (July 13, 1995). This doctrine, the separation of powers, flows from the recognition that the accumulation of too much power in one governmental entity presents a threat to liberty. *See generally*, *Gregory v. Ashcroft*, 501 U.S. 452, 459

(1991). While an absolute separation of powers may not be completely realistic, Art. III, sec. 1 must be accorded its intended effect, which is to ensure that another branch of government does not unduly "interfere with or encroach on the authority or within the province" of the other governmental branches. *See Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963).

Article III, sec. 1 mandates that the Legislature creates law, "while the Governor's proper role is the execution of the laws." *State v. Fifth Judicial Dist.Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932); *See State v. Armstrong*, 31 N.M. 220, 255, 243 P. 333, 347 (1924). "Deeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each." *State of New Mexico v. The Hon. Gary Johnson*, 904 P.2d at 19.

In this regard, the New Mexico Constitution, Article II, Section 14 does not expressly limit the Legislature's power to legislate to [ ] enumerated items." *Jones v. Murdoch, et al.*, 200 P.3d 523, 532 (NM 2009), *citing Varney v. Albuquerque,* 40 N.M. 90, 94, 55 P.2d 40, 43 (1936) (recognizing that "when an act of the Legislature is assailed, the court looks to the state Constitution only to ascertain whether any limitations have been imposed upon such power") (internal quotation marks and citation omitted); *cf. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly,* 39 N.M. 312, 321, 46 P.2d 1097, 1102 (1935) (ruling that "the enumeration of subjects of taxation contained in

article 8, § 2, as originally adopted, was merely confirmatory of the Legislature's inherent power to tax, and not a limitation thereon").

Contrary to the broad powers committed to the legislature, the Executive branch powers are limited. "A governor's proper role is the execution of the laws." New Mexico Const. Art. V, sec. 4. In the administration of authorized programs, Executive branch discretion is not boundless. *State ex. Rel. Taylor v. Johnson*, 961 P.2d 768, 775-6 (NM 1998). Generally, the Legislature, not the Executive branch, declares the policies and establishes primary standards to which the Executive branch and its agencies must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority,* 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The Executive branch's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. *See, e.g., Chalamidas v. Environmental Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit),* 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) (stating that an "agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue,* 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct.App.1972).

Thus, the powers inured to each branch are not only limited, but functionally identifiable. *Old Abe Co. v. New Mexico Mining Commission*, 908 P.2d 776, 787 (1995) (Article III provides for the division of government into three distinct branches, the legislative, executive, and judicial branches,

each responsible for performing a different function. The separation of powers provision of Article III, Section 1, generally bars one branch of government from performing a function reserved for another branch of government. *Citing State ex rel. Clark v. Johnson,* 904 P.2d 11, 22 (1995)).

The question at hand is, therefore, does the Executive branch's entering into the proposed Settlement Agreement make or change law, and/or is it a compact/contract requiring legislative approval. "The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches." *State ex rel. Clark,* 904 P.2d at 23. If a governor's actions infringe upon "the essence of legislative authority the making of laws then the [g]overnor has exceeded his authority." *State ex rel. Clark,* 1995-NMSC-051, 120 N.M. at 573, 904 P.2d at 22. A violation occurs when the Executive, rather than the Legislature, determines "how, when, and for what purpose the public funds shall be applied in carrying on the government," *State ex rel. Schwartz v. Johnson,* 1995-NMSC-083, ¶ 14, 120 N.M. 820, 907 P.2d 1001 (quoting *State ex rel. Holmes v. State Bd. of Fin.,* 69 N.M. 430, 441, 367 P.2d 925, 933 (1961)). In addition, infringement upon legislative power may also occur where the Executive does not "execute existing New Mexico statutory or case law [and rather attempts] to create new law." *State ex rel. Clark,* 1995-NMSC-051, 120 N.M. at 573, 904 P.2d at 22.

In the instant matter, the proposed Settlement Agreement seeks to determine water rights outside of existing law; to enter into compacts with

sovereign entities; and to provide for the appropriation and expenditure of state funds without legislative review and approval. Since the Executive branch's authority (the Governor and State Attorney General in this instance) is limited to implementing laws, not changing them, the Executive branch's approval of the subject settlement agreement is an act outside and in excess of its powers.

B. APPROVAL OF THE SETTLEMENT AGREEMENT PER THE JOINT MOTION FOR PROPOSED PARTIAL JUDGMENT AND DECREE WITHOUT LEGISLATIVE REVIEW IS IN DEROGATION OF ARTICLE III OF THE STATE CONSTITUTION.

1. Similar to Other Compacts, the Proposed Water Adjudication Settlement Agreement Creates and/or Changes Existing Law.

In this case, the Governor and State Attorney General have entered into a Settlement Agreement without legislative approval. These Executive Branch Officers seek to enter into a compact with other sovereign powers and create new law through this Court's order.

In *Clark v. Johnson*, 904 P.2d 11, 120 N.M. 562 (1995), the then-Governor of New Mexico, Gary Johnson, entered into an agreement with the Pojoaque Pueblo. Petitioners, including Clark, filed a Writ of Mandamus, alleging that Governor Johnson "attempted to exercise legislative authority, contrary to the doctrine of separation of powers expressed in the state Constitution. *See* N.M. Const. art. III, § 1…" *Id*. The New Mexico Supreme Court took up the issue of whether the Governor of New Mexico had "authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or

ratification." *Id.* "Such authority cannot derive from the compact and agreement; it must derive from state law." *Id.* The Court in *Clark* stated, "[t]he 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." *Id.* (internal citations omitted).

"[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [the action by one branch prevents another branch] from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-12 [94 S.Ct. at 3109-10]." *Id.* One of the ways the Court could determine undue disruption was if the Governor's actions:

> [W]ould be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact with Pojoaque Pueblo and those of which it is representative cannot be said to be consistent with these principles.

Id. The Court went on to say that "[w]hile the legislature might authorize the Governor to enter into a…compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority." *Id.* The Court concluded with the following:

> Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states. These agreements

> encompass such widely diverse governmental purposes as interstate water usage and cooperation on higher education. In every case, New Mexico entered into the compact with the enactment of a statute by the legislature. Apart from non-discretionary ministerial duties, the Governor's role in the compact approval process has heretofore been limited to approving or vetoing the legislation that approves the compact. This is the Governor's role with respect to all legislation passed by the legislature. *See* N.M. Const. art. IV, § 22.

The state legislature directly represents state citizens and has broad plenary powers. "If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue …" *Clark*, at 24. In *Clark*, the Court concluded "that the Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question." *Id*. at 25 (internal citations omitted).

It is clear from the opinion in *Clark* that only the New Mexico legislature has the authority to bind the State into compacts and agreements. Executive branch Officers signing and authorizing compacts that confer water rights, the guarantee and the use of state appropriations is simply not consistent with the New Mexico Supreme Court's decision in *Clark*, in which the State Supreme Court clearly stated that the power to enter into such agreements rests with the Legislative branch.

The New Mexico Executive branch Officers who signed the proposed Settlement Agreement in the pending matter lacked the authority to authorize it. This represents a threshold issue that must properly be decided prior to

addressing the substantive merits of the Settlement Agreement as it currently exists.

C. The State Engineer is required to Adjudicate Water Rights based on Specific Criteria and Existing Law.

> The Office of the State Engineer is charged with administering the state's water resources. The State Engineer has power over the supervision, measurement, appropriation, and distribution of all surface and groundwater in New Mexico, including streams and rivers that cross state boundaries.

http://www.ose.state.nm.us/index.html. The State Engineer is an Executive branch employee, serving by appointment of the Governor. In this capacity, his function is limited, as other Executive branch employees, to implementing law, not create it. N.M.S.A Section 72-2-1 gives the state engineer general supervision of waters of the state and of the measurement, appropriation and distribution thereof and such other duties as required. N.M.S.A 72-2-8 gives the state engineer authority to adopt regulations and codes *to implement and enforce any provision of any law administered by him* and also provides the state engineer with authority to issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. N.M.S.A Section 72-2-9 gives the state engineer authority over and supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts. N.M.S.A. Section 72-9-1 gives the state engineer authority to regulate reservoirs, canals, pipelines or other works and the rights of the owners thereof. These rules shall be construed so as to provide the state engineer with authority to take

lawful alternative or additional actions relating to the management of surface water resources. 19.26.2.3 NMAC (1/31/2005)(emphasis added).

All water rights established by beneficial use in New Mexico prior to March 19, 1907, were recognized and confirmed by the state constitution at the time of its adoption. N.M.S.A. 19.26.2.8. Thus, the law in New Mexico is that beneficial water rights existing and used prior to 1907 have been confirmed. The instant Settlement Agreement seeks to modify this legal standard and provide water rights to the Pueblos that were not established by beneficial use prior to 1907. This departure and factual inconsistency warrants further review and consideration by the State of New Mexico legislature, as well as the other State-based commitments contained in the proposed Settlement Agreement.

CONCLUSION

The Joint Motion to Approve and Enter Partial Final Judgment and Decree on the Water Rights of the Pueblos of Nambe, Pojoaque, San Idelfonso and Tesuque seeks for this Court to approve a Settlement Agreement or Compact creating and/or improperly extending New Mexico law, creating state financial appropriation obligations and agreeing to Mutual-Benefit projects, based solely on State Executive branch approval. These functions are properly vested in the New Mexico legislature per the State Constitution.

Thus, the Joint Motion should be denied at this time. This court should enter an Order of prohibitory mandamus to prevent the Executive branch Officers from authorizing the proposed Settlement Agreement and compel the Governor to submit the Settlement agreement to the State Legislature for action as appropriate.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 5, 2015, the **RESPONSE IN OPPOSITION TO THE MOTION TO APPROVED SETTLEMENT AGREEMENT AND ENTRY OF PROPOSED PARTIAL FINAL JUDGMENT AND DECREE** was filed electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I FURTHER CERTIFY that, on January 6, 2015, copies of the foregoing were mailed to the non-CM/ECF Participants.

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