UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-2147

AAMODT, *et al*.,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*
Appellees,

and,

UNITED STATES OF AMERICA, PUEBLO DE NAMBE,
PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO,
TESUQUE PUEBLO and SANTA FE COUNTY,
Appellees in intervention.

On Appeal from the United States District Court
For the District of New Mexico (Hon. William P. Johnson)
District Case No. 6:66-cv-06639

APPELLANT'S CONSOLIDATED REPLY BRIEF TO APPELLEES' AND APPELLEES IN INTERVENTION'S BRIEFS

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Oral Argument Requested

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I. THE NEW MEXICO ATTORNEY GENERAL DOES NOT HAVE ABSOLUTE UNFETTERED AUTHORITY TO SETTLE ALL CASES.

The Attorney General has broad settlement powers. Appellants have never argued to the contrary. However, those powers are not without limitation. Indeed, even Appellees, the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque acknowledge that the Attorney General's office does not have unlimited powers, and that it is *within the power of the Legislature* of New Mexico to limit the state attorney's powers, including the ability to settle cases. (*Joint Answer Brief of Appellees Pueblo De Nambe, Pueblo De Pojoaque, Pueblo De San Ildefonso, and Pueblo De Tesuque,* at 32 "that the possession of the[se] powers . . . is unwise; but that is a matter for the Legislature, and not for the courts, to determine." *State v. State Inv. Co.*, 1925-NMSC-017, ¶ 18, 30 N.M. 491, 239 P. 741, 746. Consequently, the Legislature sets forth the "statutory responsibilities" of the Attorney General (one of which is identified settlement authority at issue in this instance) and his acts can only be affirmed by the courts if – and only if – the actions comport with that legislatively approved statutory responsibilities. Thus, Appellees Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque arguments that the Attorney General has unfettered authority to settle cases does not reflect the law in New Mexico or its interpreting cases. Cases such as *Lyle v. Luna*, 65 N.M. 429, 338 P.2d 1060 (1959), *State v. State Inv. Co., et al.*, 30 N.M. 491, 239 P. 741 (1925)

and *State ex rel. Prop. Appraisal Dep't v. Sierra Life Ins. Co.*, 1977-NMSC-023, ¶ 11, 90 N.M. 268, 271, 562 P.2d 829, 832, are unavailing to the extent they are cited for the unbending proposition that the Attorney General enjoys unfettered, unlimited right to settle any matter, and his actions to settle the underlying matter should be rubber-stamped consistent with those cases. Rather, the Court must return to the question of whether there is legislative expression that limits the Attorney General's settlement authority in this particular instance, instead of relying on Appellees' referenced cases for a general proposition. *See Lyle v. Luna*, 338 P. 2d 1060, 1065 (N.M. 1959)[1]. This is the very same type of inquiry in which the State of New Mexico, First Judicial District engaged in determining whether the Attorney General's general settlement authority overruled the Legislature's limitation on such authority in the context of environmental statutes and cases. In *State of New Mexico and the New Mexico Environment Department v. Exxon Mobil Oil Corporation*, D-101-CV 2010 00917 (1st Jud. Dist. Dec. 29, 2015), the Court did not simply defer to the Attorney General's profession of his authority, but rather, reviewed that very general, delegated statutory authority in the context of more

[1] And, contrary to the matter at bar, the type of settlement at issue in *Lyle* was one flowing from a case initiated by the Attorney General, himself (*Lyle v. Luna*, 1959-NMSC-042, ¶ 23, 65 N.M. 429, 437, 338 P.2d 1060, 1065 ("the attorney general possesses entire ***dominion over every suit instituted by him*** in his official capacity….)(emphasis added)) and with different statutory settlement authorities.

specific statutory authority related to environmental cases. *Exxon Mobil Oil Corporation*, D-101-CV 2010 00917 at 15-17 (1st Jud. Dist. Dec. 29, 2015).

While not precedential, *Exxon Mobile* has significant persuasive value as to the type of review the New Mexico courts would engage in determining whether the general settlement authority of NMSA § 36-1-22 must give way to the limitations[2] in settling Indian water rights cases created by the Legislature by NMSA § 72-1-12, the latter here reserving to the Legislature the right to approve such settlements, determining how and for what, special funds will be expended in the context of water right settlements. In fact, the Attorney General argued for just this type of review in the *Exxon Mobile* case, *i.e.* that his authority to settle a particular matter is curtailed only if there is an express limitation to that authority. *Id*. at 11-12 ("Based on this language the Attorney General argues that none of the environmental statutes cited above expressly provide for a limitation on the Attorney General's power to settle cases."). In finding that the Attorney General's general authority to settle cases as per NMSA § 36-1-22 must give way to the more specific grant of authority to a different entity, the Court gave heed to the well-settled maxims of statutory construction, that general statutes cannot be used to

[2] "Disposition by order, decision or memorandum opinion does not mean that the case is considered unimportant. It does mean that the disposition is not precedent. Non-precedential dispositions may be cited for persuasive value." *See Exxon Mobil* at p. 8.

overcome a specific grant (or reservation) of authority. *Id.* at p. 16 (The statutes relied on by the Attorney General [NMSA § 8-5-2, § 36-1-19 and § 36-1-22] are general statutes which cannot be used to overcome the specific grant of authority to NMED."*; citing to State ex rel., Schwartz v. Sanchez*, 1997-NMSC-021, ¶ 8, 12N.M. 165, 936 P.2d 334; *and see State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 13, 91, N.M. 279, 573 P.2d 213. By reserving for itself the responsibility to approve Indian water rights settlements for which special use funds will be required, the Legislature has passed a specific statute curtailing any general delegation to the Attorney General to settle such cases. It is not surprising that the Attorney General as part of the executive branch argues as he consistently does, against any limitation to his general authority delegated by the Legislature, despite the Legislature's actions to limit such authority. In each case in which the Attorney General raises the issue of his authority to act, the Attorney General consistently argues as he does in this instance, for his own unlimited authority to act despite Legislative action and intent to the contrary. (*See* State of New Mexico's *Appellee's Answer Brief* at 32-3). And, in a strange and unsettling argument, the Attorney General goes so far as to argue that this Court – or any Court – would exceed its authority to review and opine upon the statutory authorities delegated by the Legislature if such review restricted the broad authority that the Attorney General perceives was given to him. Such argument misapprehends the

obligations, authorities and responsibilities of the judicial branch of a three-branch government and its charge to ensure that the executive branch does not overstep its delegated authorities.

Here, the Legislature has not committed authority to the Attorney General to settle this Indian water rights matter. Rather, the Legislature has acted to reserve that authority to itself. A settlement of Indian Water rights which is tied to the use of state funds for it to be effective– such as is the case here – cannot stand without the Legislature's approval. Such is expressly stated by the language of NMSA § 72-1-12, manifesting the Legislature's intent that "[m]oney 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 Legislature must approve Indian water rights settlements; and without such approval (which inherently includes the right to consider and negotiate such settlement) no state funds can be used to effect that settlement. To the extent the settlement is approved by the Court, it cannot be implemented pursuant to state law without the Legislature's actions to settle such claim. Simply put, the Attorney General does not have sole and unfettered settlement authority over every matter, as the Legislature has not conferred such.[3]

[3] *See discussion in Exxon Mobil Oil Corporation*, D-101-CV 2010 00917 at 15-16, finding that the New Mexico Environment Department also has settlement authority, *citing State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051,

This interpretation is consistent with further limitations expressed in NMSA § 72-1-11 B, which requires subsequent joint action by the Legislature and interstate stream commission to "expend money" from the Indian Water Rights Settlement Fund solely to implement terms of a properly "approved" settlement, and subsection C which restricts the use of funds for agreements made between the "state" and a tribe. As such, since the Legislature has acted to reserve to itself the right to enter into agreements with tribes for water right settlements, and for it to approve settlement expenditures (jointly with the ISC) the Attorney General does not have such authority.

Without explanation or referenced authority, Appellees suggest that the New Mexico Legislature must reserve "exclusive authority to approve Indian water rights settlements" to overcome the Attorney General's general settlement authority the Legislature delegated to him. There is simply no support for such premise. Moreover, such argument directly contradicts both the separation of powers inherent in a tripartite government and the basic rights set forth in the State constitution, *i.e.* that the executive branch is one of delegated powers. To the extent

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¶ 44, 85 N.M. 165, 173, 510 P.2d 98, 106 (for the premise that the Attorney General does not have exclusive settlement authority, "Legislature has manifested its intent" that the Environmental Improvement Agency has power and duty to seek relief from the courts, and such power includes settlement authority when considering *Blanchar v. City of Casper*, 81 F.2d 452, 454 (10th Cir. 1936)).

the Legislature has given general authority to the Attorney General to settle cases, the Legislature can curtail that authority, especially when such settlement involves public policy issues and expenditure of restricted funds.

II. *STATE EX. REL. CLARK V. JOHNSON* AND EXECUTIVE BRANCH LIMITED AUTHORITY.

While the Attorney General's brief argues that Appellants akin the present controversy to approval of gaming compacts, he errs in both supposition and attribution of arguments to Appellants. (State of New Mexico's *Appellee's Answer Brief* at 34). The Court in *State ex. rel. Clark v. Johnson*, 1995-NMSC-048, 904 P.2d 11, concerned itself with the disruption of the balance of powers which prevents a branch from "accomplishing its constitutionally assigned functions" and outlined a test for determining if the balance between the executive and legislative branch is so disrupted. The existence of a gaming compact/contract being at issue as the underlying agreement reviewed in the *Johnson* decision has no bearing on the test employed by the New Mexico Supreme Court to assess disruption to constitutionally mandated separation of powers. The fact that *Johnson* involved a gaming contract does not serve as the pivotal, singular point of distinguishment that Appellees would collectively have one believe (State of New Mexico's *Appellee's Answer Brief* at 34-35; *Response Brief of Appellee the Rio De Tesuque Association, Inc.* at 24) as the New Mexico Supreme Court noted. (*State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 39, 120 N.M. 562, 575, 904 P.2d 11, 24

("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.")

The Executive branch, in which the Attorney General's office rests, is one of limited authority. *See* New Mexico Const. Art V, sec. 4. Article III, sec. 1 of the New Mexico Constitution mandates that the Legislature creates laws and the executive branch is limited to the execution of those laws. *See State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P2d 691, 692 (1932). The executive branch's authority is not boundless as the Attorney General would have one believe. *See State ex. Rel. Taylor v. Johnson*, 961 P.2d 768, 775-6 (NM 1998). It is from these premises that the Court in *Johnson* undertook review of the balance of power between the Legislature and the Executive branch, noting that inherently "[r]esidual governmental authority should rest with the legislative branch rather than the executive branch. The state legislature, directly representative of the people, has broad plenary powers." *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 40, 120 N.M. 562, 575–76, 904 P.2d 11, 24. The lower Court erred in not actually reviewing the balance of powers as outlined in Johnson to determine whether the Attorney General's settlement disrupted that balance given the limitations enounced by the Legislature in NMSA § 72-1-12.

In particular, the lower Court should have considered the New Mexico Supreme Court's finding that the Executive branch "lack(s) authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question" in light of the fact that the settlement agreement is indeed a cost sharing agreement – an issue that the lower Court was required to consider as part of its substantive review of the settlement agreement itself. Instead of reviewing NMSA § 72-1-12 (and § 72-1-11) and the reservation of authority to the Legislature it evinces, the lower Court merely relied on the general settlement authority the Legislature has given to the Executive branch to approve the settlement agreement.

The Legislature need not reserve exclusive power to itself but may maintain concurrent jurisdiction. Such is consistent with legislative enactments and the executive branch's veto power. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 39, 120 N.M. 562, 575, 904 P.2d 11, 24 ("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.") Only the Legislature can appropriate state funds, determine the amounts and programs receiving funds, and pass laws for doing so. Here, the Executive branch seeks to undermine the Legislature's authority to appropriate funds as well as undermining Indian water rights settlement authority generally. The Executive branch goes

beyond its conferred authority in this instance, to determine exactly what funds will be appropriated for and the amounts of funds to be appropriated – taking away the Legislatures negotiating authority for such activity. Such is why Legislative approval of the settlement agreement is reserved and required.

CONCLUSION

The New Mexico Constitution establishes that the power of the state Legislature is plenary, while the powers of the Executive branch which includes the Attorney General's office is limited to those delegated to it. The District Court erred by not undertaking a review of NMSA § 72-1-12 in the context of this balancing of powers and the limitations the Legislature placed on settlement of Indian water rights litigation, reserving such settlement authority to itself along with the determination of appropriating special program funds for use in such settlements. The approval of the water rights settlement in the underlying case should be reversed in consideration of the limitations on the Attorney Generals settlement authority in this instance.

Respectfully submitted this 2nd day of April 2018.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that Appellants' Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,445 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk.

I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Microsoft Windows Defender

Antivirus version: 1.263.1946.0 updated March 15, 2008 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

CERTIFICATE OF SERVICE

I certify that on April 2, 2018, I filed Appellant's Reply Brief through the United States Court of Appeals for the Tenth Circuit's ECF System, causing each counsel of record to be served; and served seven (7) hardcopies of Appellant's Reply Brief with the Clerk of the Court.

April 2, 2018.

/s/ Dori E. Richards
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