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 OPENING BRIEF

A. Blair Dunn, Esq.
Dori E. Richards, Esq.
WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP
400 Gold Ave. SW. Suite 1000
Albuquerque, NM 87102
(505) 750-3060

Dated: October 30, 2017

Oral Argument Requested

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STATEMENT OF PRIOR RELATED APPEALS

This Case was initially appealed to the United States Court of Appeals for the 10th Circuit, Case No. 16-2253, after entry of Partial Final Judgment.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico found subject matter jurisdiction had to hear the underlying case pursuant to NMSA 1978 72-4-19 and because the matter involves proprietary water claims of the United States, U.S.C. 28 U.S.C § 1331.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. The District Court for the District of New Mexico entered a final judgment in this matter on July 14, 2017, disposing of all claims. Appellants filed a timely Notice of Appeal on September 6, 2017.

STATEMENT OF THE ISSUES

1. JURISDICTION IS PROPER BECAUSE THE JULY 14, 2017, ORDER IN CONJUNCTION WITH THE COURT'S SEPTEMBER 9, 2017, ORDER ON APPELLANT'S MOTION TO ALTER OR AMEND IS A FINAL ORDER.

2. THE DISTRICT COURT ERRED IN FINDING THAT APPROVAL OF THE SETTLEMENT AGREEMENT BY THE EXECUTIVE OFFICERS OF THE ATTORNEY GENERAL'S OFFICE AND THE GOVERNOR FOR THE STATE OF NEW MEXICO RESULTING IN A FINAL JUDGMENT AND DECREE WAS A VALID EXERCISE OF POWERS UNDER THE NEW MEXICO CONSTITUTION.

3. THE DISTRICT COURT ERRED IN FINDING THAT THE NEW MEXICO ATTORNEY GENERAL DID NOT VIOLATE THE SEPARATION

OF POWERS REQUIRED BY THE NEW MEXICO CONSTITUTION AND DID NOT VIOLATE STATE STATUTE REQUIRING APPROVAL OF INDIAN WATER RIGHT SETTLEMENT AGREEMENTS BY THE NEW MEXICO LEGISLATURE?

4. WHETHER THE SETTLEMENT AGREEMENT AS ENTERED BY THE LOWER COURT WAS ENTERED IN IN ERROR AS CONTRARY TO LAW.

STATEMENT OF THE CASE

The crux of this case centers on priority water rights administration, and specifically the authority of the settling parties to create or modify law that excepts some non-Pueblo water rights owners from priority water calls for priority administration in exchange for a reduction of their rights; and 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. The difference between these two groups is solely whether or not they agreed to enter into the government's settlement agreement. For 50 years the flood of legal issues, violation of individual water rights, and changes to priority calls - based on settlement cooperation – is evident from the Settlement Agreement itself. The underlying violation of state water law, public policy and the fundamental unfairness of harming non-pueblo water rights holders because they will not agree to the settlement has been dammed. Now, the impermissible settlement by executive branch offices and erringly accepted by the District Court has breached that dam, bringing the matter to its head.

Appellants 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 Indian trust responsibilities. Rather, the major issue of this group of Appellants is that the settlement was designed such that, absent complete agreement of all of the parties, certain non-Pueblo junior rights will be elevated and exempt from a priority calls irrespective of their priority relation to other non-Pueblo rights. This is intersected with State law.

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's Office and the State Engineer; by execution of the Settlement Agreement, has crafted new water law governing New Mexico water rights that allows for a party to escape priority administration between non-Pueblo water rights holders in times of shortage. While the Settlement Agreement itself cannot bind non-settling parties, it purports to do so by its implementation

and in punishment for not agreeing to the settlement. To meander around this limitation, Plaintiffs sought anointment by the lower court to create new law negatively impacting and binding non-settling parties, *i.e.* the Appellants filing here. The Settlement Agreement as drafted largely by the United States demands that water rights holders not make waves in its implementation by accepting a reduced amount of water rights immediately and they will not have their rights subordinated to other *junior* rights in the future. A more transparent attempt to coerce parties to agree to an unwanted settlement is difficult to fathom. The District Court erred in accepting the Settlement Agreement making it part of the final order of the Court and the law.

As the United States has acknowledged in its lower court briefing, the federal government has a strong public interest in respecting state management of state-created rights to use natural resources. (APP 688) 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 discussions section, (APP 688-690), it fails to mention how it reconciles this policy with a Settlement that contravenes state water law as to priority use, nor can the government relieve this conflict.

"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." (APP 645-722) Such has not occurred here. 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." [1] *Id*. The Federal government continually overreaches in its sole argument that public policy supports the use of Settlement. 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. Yet arguments in support of settlement miss the boat to being favored by public policy in this instance. The policy to be assessed and reviewed in determining whether to approve a settlement by entry of judgment goes beyond the concept of merely settling, but goes to the overall impacts of those settling and those not. Such policy assessment must look to the underlying law, the rights of impacted parties and

[1] 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.

whether the rights of non-settling parties are prejudiced by such settlement as is the case here.

Settlement does not meet the public interest in this case. Entry of judgment and decree in contravention of non-settling impacted parties is not supported by fact finding or law by the lower court.

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 settlement. This violates New Mexico water law and is akin to extortion. Only the State legislature could have permissibly changes this aspect of State water law.

STATEMENT OF THE FACTS

On December 6, 2013, the Court entered an order to show cause, ordering that all persons claiming water rights in the Nambe-Pojoaque-Tesuque stream system show cause why the Court should not approve the Settlement Agreement and enter the proposed Partial Final Judgment and Decree adjudicating the Pueblos' water rights. An objection form was approved by the Court requiring parties filing objections to state the specific legal and factual basis for their objection, and how their water rights would be injured or harmed in a legally

cognizable way by the Settlement Agreement and entry of the proposed Partial Final Judgment and Decree and Interim Administrative Order. By the April 7, 2014 deadline, 650 persons had responded by filing with the Court 792 objections to the Settlement Agreement and the proposed Partial Final Judgment and Decree. On March 3, 2016 the District Court entered an order overruling the numerous objections and approving the Settlement Agreement. (APP 1051-1120) This Order forms the initial basis for this Appeal.

SUMMARY OF THE ARGUMENT

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 court accepted 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.

ARGUMENT

I. JURISDICTION IS PROPER BECAUSE THE JULY 14, 2017 ORDER IN CONJUNCTION WITH THE COURT'S SEPTEMBER 9, 2017 ORDER ON APPELLANT'S MOTION TO ALTER OR AMEND IS A FINAL ORDER.

A. The Final Judgment Satisfies Rule 54.

Per Rule 54(b), a "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." Fed.R.Civ.P. 54(b). Because "Rule 54(b) entries are not to be made routinely," we have held that:

> [C]ertification under Rule 54(b) is only appropriate when a district court adheres strictly to the rule's requirement that a court make two express determinations. First, the district court must determine that the order it is certifying is a final order. Second, the district court must determine that there is no just reason to delay review of the final order until it has conclusively ruled on all claims presented by the parties to the case.

Schrock v. Wyeth, Inc., 727 F.3d 1273, 1278 (10th Cir. 2013); *Oklahoma Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir.2001. This Court in *Oklahoma Turnpike*, made note that Rule 54(b)'s requirement that determinations be explicitly stated to be final judgment is to some extent a formality. 254 F.3d at 1224. However, in the Tenth Circuit, this formal requirement is adhered to. *See Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1264–65 (10th Cir.2005) (dismissing appeal for lack of jurisdiction without considering the merits of a Rule 54(b) certification or the motion seeking certification because district

court did not make the necessary findings). *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1279 (10th Cir. 2013).

Thus, courts in this Circuit must, in entering a Rule 54(b) certification "clearly articulate their reasons and make careful statements based on the record supporting their determination of 'finality' and 'no just reason for delay.'" *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005), *citing Old Republic Ins. Co. v. Durango Air Serv., Inc.*, 283 F.3d 1222, 1225 n. 5 (10th Cir.2002) As such, when a district court determines that its judgment is final (*See Curtiss–Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980)) and that no just reason for delay of entry of its judgment exists (*Id.* at 8), appeals may go forward. Here, both standards are met.

The lower court issued its decision on July 14, 2017, specifically stating that judgment of approving the Settlement Agreement is final, largely relying on its 2016 findings of fact. (APP 1046-1050). The Court also found no just reason to delay entry of judgment, given the decades that this case has been pending. "There is no just reason for delay, and the Court hereby expressly directs entry of this Final Judgment and Decree pursuant to Fed. R. Civ. P. 54(b)." (APP 1050). Moving forward to appeal the adoption of the Settlement Agreement meet the

standards[2] applicable in *Stockman's Water Co., LLC v. Vaca Partners.* Finally, a district court's decision to grant certification under Rule 54(b) merits substantial deference and should not be disturbed unless the district court's determination was clearly erroneous. *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1265 (internal citation omitted).

The Panel proposes to hold that the district court's purported certification under Federal Rule of Civil Procedure 54(b) is insufficient to invoke the Court's jurisdiction. *See Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 955 n. 1 (10th Cir.2003) (tying the entry of a Rule 54(b) certification to the existence of appellate jurisdiction); *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645–46 (10th Cir.1988) (*en banc*) (observing that failure to secure a proper Rule 54(b) certification may leave the case vulnerable to summary dismissal for lack of appellate jurisdiction). More specifically, although an order terminating fewer than all pending claims in a lawsuit is generally not considered "final" within the meaning of § 1291, *see Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431–32, 76 S.Ct. 895, 100 L.Ed. 1297 (1956), Rule 54(b) is a historically recognized

[2] Factors the district court should consider are "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss–Wright Corp.*, 446 U.S. at 8, 100 S.Ct. 1460.

exception to the final-judgment rule. This rule provides, in pertinent part, that:

> [w]hen an action presents more than one claim for relief ... 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.

Fed.R.Civ.P. 54(b).

The purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available. *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir.2001) (emphasis added) (internal quotation marks omitted). With this justification in mind, where finality of the adjudicated claim is undisputed, "the exercise of appellate jurisdiction is proper if the court of appeals is satisfied that the district court did not abuse its discretion in certifying the appeal. *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1239 n. 1 (10th Cir.2001).

A Rule 54(b) certification is deemed to provide the proper foundation for an appeal when it contains three key features. *See* 10 Charles Alan Wright et al., *Federal Practice and Procedure* § 2656, at 48 (3d ed. 1998) ("The rule itself sets forth three basic conditions on its applicability."). First, the order must stem from a lawsuit that involves multiple claims. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S.

737, 743, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) (noting that the rule "is limited expressly to multiple claims actions."

Second, the order must represent a final decision on at least one of the claims. *See Jordan v. Pugh*, 425 F.3d 820, 826 (10th Cir. 2005) (noting that, to be final for purposes of Rule 54(b), an order must be "'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'").

Third, the order must include the district court's express determination "that there is no just reason for delay." Fed.R.Civ.P. 54(b); *see Elm Ridge Exploration Co. v. Engle*, 721 F.3d 1199, 1209 n. 5 (10th Cir. 2013). This Court has relevantly required that Rule 54(b) certification "is only appropriate when a district court adheres strictly to the rule's requirement" of making this express determination. *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1278 (10th Cir.2013). This Court has noted that "once parties have expended the effort of briefing and argument on appeal, it may appear wasteful and inefficient for the appellate court to decline to rule," but has previously nonetheless maintained that "in the long run it will be less wasteful and more efficient for district and appellate courts to adhere to the rule that only separate and distinct claims can be isolated for appeal under Rule 54(b)." *Jordan*, 425 F.3d at 829.

There is no reason at this juncture for the Court either to dismiss the appeal altogether nor for the Court to disallow the appeal to progress if, as appears, the Court has jurisdictional concerns. Rather, in the interests of judicial efficiency and to save public and private resources, the Court should order a limited remand of No. 16-2253 to the district court for its consideration as to whether the March 23, 2016 decision of the district court should be certified as an appealable final judgment under Rule 54(b). *See, e.g., National Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1168 (9th Cir. 2003), *opinion after limited remand*, 340 F.3d 835, 840 (Tashima, J.). An order or amended order from the district court containing a Rule 54(b) certification would be sufficient to validate a prematurely filed notice of appeal if neither party is prejudiced. *See Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir.1986).

B. Alternatively, The District Court's Final Judgment And Decree (APP 0959-1016) Satisfies Collateral Order Doctrine

To the extent this Court does not consider the District Court's "Final Judgment and Decree" to be a final order subject to appeal, the Court still has jurisdiction pursuant to the collateral order doctrine. The core issue in dispute from the perspective of appellant is the settlement authority of the Attorney General of New Mexico without the approval of the New Mexico Legislature. The District Court determined that the Attorney General's actions in entering into the Settlement Agreement did not violate separate of powers principles under New

Mexico law. This finding by the District Court effectively cut off any chance for Appellee to obtain relief on the merits because the court-approved settlement indirectly determines water rights with respect to Appellees.

The Court's jurisdictional statute (Section 1291), "encompasses not only judgments that 'terminate an action,' but also a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.' *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 545-46 (1949). Orders reviewable under the collateral order doctrine are those "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. at 106 (internal quotation marks and citation omitted). "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp*., 379 U.S. 148, 152, 85 S.Ct. 308, 310, 13 L.Ed.2d 199 (1964).

Here, Appellant takes issue with the District Court's approval of a Settlement Agreement that indirectly and adversely affects the water rights of multiple parties that is incorporated into a final decree and judgement. The primary basis asserted to support Appellee's challenge is state law separation of powers, as embodied in certain state statutory provisions. Without delving into the merits of

the appeal, Appellee's contend that the District Court's order is conclusive and resolves an important issue, given that the Settlement Agreement the Court approved settles in final fashion certain water rights. Specifically, the District Court found that the Settlement Agreement at issue is does not violate state law separation of powers principles. The question of separation of powers is not tied to the merits of who is entitled to what water rights. In other words, New Mexico Attorney General's authority to enter into water rights settlements with Indian Tribes is not "an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. at 546–47.

The Court is not being asked to decide on the merits of any party's water rights in this appeal. Rather, the question is whether certain state actors had the authority to enter into a Settlement Agreement with federal and tribal entities over water. The primary legal issue is a question of state-law separation of powers.

This Court "construes [the] designation requirement liberally." *Nolan v. U.S. Dep't of Justice*, 973 F.2d 843, 846 (10th Cir. 1992). In a decision issued September of this 2016 this Court evaluated this very issue, albeit in a somewhat reverse course of a notice of appeal from a final judgment that explicitly excluded a decision denying Rule 59 consideration, and concluded that the Court "can't 'fairly ... infer[ ]' from any of the relevant documents an intent to appeal from the undesignated order. *Williams v. Akers*, 837 F.3d 1075, 1080 (10th Cir. 2016); *See*

also Sines v. Wilner, 609 F.3d 1070, 1074 (10th Cir. 2010) (*quoting Sanabria v. United States*, 437 U.S. 54, 67 n.21, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978)) ("[a] mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.") Appellants have clearly indicated an intent to appeal the Partial Final Judgment and Decree including the district court's analysis in the Memorandum Order and Opinion (APP 935-958) and the Memorandum Order and Opinion Denying Reconsideration (APP 1042-1045). As the Docketing Statement of Appellant correctly points out, Appellant is ultimately appealing from the Partial Final Judgment and Decree (APP 0959-1016) entered by the district court on March 23, 2016 but that judgment is intertwined and supported by both of memorandum orders mentioned above. As such, Appellant has now clearly indicated to this Court in the Docketing Statement, the Response to the Motion to Dismiss in this case and now in this memorandum brief that Appellant's intention and desire has been, even up to the point of filing their Rule 59 Motion to Alter or Amend in the district court, to have this court review the entirety of the district courts analysis with regard to the issue of the settling authority of the executive branch in New Mexico across both orders and the Partial Final Judgment and Decree. Based this Court's recent conclusion on this matter in *Akers*, Appellants intention to appeal this issue is crystal clear and to allow the

appeal to proceed would certainly not cause Appellees any discernable surprise or prejudice.

II. THE DISTRICT COURT ERRED IN FINDING THAT APPROVAL OF THE SETTLEMENT AGREEMENT BY THE EXECUTIVE OFFICERS OF THE ATTORNEY GENERAL'S OFFICE AND THE GOVERNOR FOR THE STATE OF NEW MEXICO RESULTING IN A FINAL JUDGMENT AND DECREE WAS A VALID EXERCISE OF POWERS UNDER THE NEW MEXICO CONSTITUTION.

The United States has consistently argued that the settlement agreement is "fair and reasonable" for it, and the parties it represents, while ignoring those who do not want to engage in the settlement. Before reaching a factual determination of the fairness and reasonableness of the settlement, the question of whether the agreement itself violated applicable law must be considered and determined.

Instead of addressing the legality of whether the state signatories had authority to enter into an agreement that modifies water adjudication in New Mexico, or whether such authority was permissible despite the Indian water settlement legislation of the state, the district court allowed the settling parties plunges us down a waterfall to a pool of an irrelevant treatise on federal Indian water law. In fact, no party has questioned that the federal government has an *interest* in addressing Indian water rights. But it is this very interest that creates and highlights the biases contained in the Settlement Agreement, leaving citizens of New Mexico and individuals who are not Indian water rights holders without any

meaningful voice in the process. It is this very interest and goal that has resulted in a accepted Settlement Agreement that ignores state citizens' interests and seeks to take the property rights of impacted state citizens and junior water right holders, and which the government sought the Court to bless. The Court in approving the settlement did not fully consider the separation of powers issues so raised, instead merely referencing NMSA 36-1-22 as generally authority to settle "ordinary suits." (APP 941-942).

A. The Powers Vested In New Mexico's Three Branches Of Government Are Distinct.

In considering a constitutional division of power, a court must necessarily return to the constitution and its implementation. 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 Settlement Agreement (APP 1051-1120) accepted by the District Court determines water rights outside of existing law, enters into compacts with sovereign entities, and provides 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. While the lower court references NMSA 36-1-22[3] as the attorney general's office authority to enter into agreements to settle "ordinary suits," there is no discussion as to whether the subject settlement is the type anticipated by the statute, nor discussion as to whether given the agreements and powers at issue such settlement impermissibly treads on the powers of the legislative branch. Nor is there any discussion by the Court regarding the conflux between NMSA 36-1-22 and NMSA 72-1-12, the latter of which provides a clear demonstration that the legislature did not authorize settlement of Indian water rights without its involvement, as is discussed *infra*.

III. THE DISTRICT COURT ERRED IN NOT CONSIDERING OR FINDING THAT THE NEW MEXICO ATTORNEY GENERAL DID NOT VIOLATE THE SEPARATION OF POWERS REQUIRED BY THE NEW MEXICO CONSTITUTION AND DID NOT VIOLATE STATE STATUTE REQUIRING APPROVAL OF INDIAN WATER RIGHT SETTLEMENT AGREEMENTS BY THE NEW MEXICO LEGISLATURE.

A. The Proffered Settlement Agreement Is Not Legally Approved.

[3] The attorney general and district attorneys of this state in their respective districts, when any civil proceedings may be pending in their respective districts, in the district court, in which the state or any county may be a party, whether the same be an ordinary suit, scire facias proceedings, proceedings growing out of any criminal prosecution, or otherwise, shall have power to compromise or settle said suit or proceedings, or grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings shall be entirely under the management and control of the said attorney general or district attorneys, and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified.

N.M. Stat. Ann. § 36-1-22 (West)

1. Executive Branch officials are not authorized to approve settlements adjudicating water rights.

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 approved 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 Appellants challenged the authority of New Mexico

Executive branch officials to sign the Settlement Agreement and bind the State to its terms. (APP 845) Based on the type and nature of this particular settlement, the executive branch officials purporting to sign the underlying Settlement Agreement presented to this Court for approval, did not have the requisite authority to do so. The executive branch, acting through the attorney general 's office and the state engineer, entered into an agreement with other sovereign powers, that actually serves to modify existing law and/or create new law by Court order instead of legislative action. On a basic level, the Settlement Agreement is a compact for the administration of water, for example, no different than Rio Grande Compact. In *Clark v. Johnson*, 904 P.2d 11, 120 N.M. 562 (1995),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 that "[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).

The Court laid out a test to determine whether the Governor's action "disrupts the proper balance between the executive and legislative branches." *Id*. (internal citation 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.
>
> Residual 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. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue…We conclude 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*. (internal citations omitted).

It is clear from the New Mexico Supreme Court's opinion in *Clark* that only the New Mexico legislature, and not any other New Mexico government body, be it executive, judicial, or administrative, has the authority to bind the State into compacts and agreements such as the Consent Decree hear which is recast as a settlement agreement to avoid the premises of NMSA 36-1-22.

In the present case, the executive branch of the State of New Mexico has impermissibly entered into a settlement agreement with other named Plaintiffs, which is not merely a settlement of an "ordinary suit" but instead changes or creates new law regarding water right adjudications. NMSA 36-1-22 does not

authorize such action. Moreover, despite the existence of a State Supreme Court decision outlining how a court is to assess whether an executive branch action "disrupts the proper balance between the coordinate branches," the lower court did not perform the proper inquiry as so outlined. The executive branch action (by the attorney general's office) is not consistent with the New Mexico Supreme Court's decision in *Clark*, where the Supreme Court stated in no uncertain terms that the power to enter into agreements of this sort – one's that impact existing law - lie with the legislative branch. he executive branch's actions in this matter violates the separation of powers preserved y the New Mexico Constitution.

2. Indian Water Rights Settlements are Reserved to the New Mexico Legislature.

Although the State of New Mexico purports to be one of the main parties to the settlement, it comes to this Court urging approval of an agreement that does not have legislative 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. (APP 940-941)(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-Appellants 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.

The 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 District Court should not have approved the Settlement Agreement if it

violated the law, and Appellants have shown that it does just that. The District Court erred by accepting the Appellees manufactured Legislative approval by pointing to appropriations, memorials, and other acts of the Legislature. Of all of the acts that Appellees cited, 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.[4] 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 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

[4] *See also* APP 792. The government 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 party of 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.

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 Appellants-Understand that, thus far, the Court has rejected their arguments regarding loss of water rights as speculative. Defendant-Appellants 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 nor 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, Appellants opposed the settlement and draw this 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 alters 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." (APP 1025) Defendant-Appellants 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.

IV. WHETHER THE SETTLEMENT AGREEMENT AS ENTERED BY THE LOWER COURT WAS ENTERED IN ERROR AS CONTRARY TO LAW.

A. Legality 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 [ ] 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. Yet, approval of the settlement agreement was deemed a foregone conclusion.

Instead of actually addressing the legality of the Settlement Agreement or the public policies impacting New Mexican citizens and non-settling parties; and change in the law it demonstrates, the governments' briefings simply asserted in that any non-settling party had the opportunity to "participate" in the process and therefore non-settlors were sufficiently considered. In finding the settlement "fair and reasonable" the lower court drank from the same cup, making nothing more than cursory statements about the fairness of the agreement to the settling parties, while discounting each and every objection. Indeed, if each and every objection was not discounted, the proffered settlement would never have been finalized given the time frame provided for – after the decades of litigation - by the Aamodt Litigation Settlement Act, Pub. L. No. 111-291 §§ 601 *et seq*. Such is the case

because of a drop-dead date of September 15, 2017, for entry of a final decree or evaporation of funds necessary to facilitate any settlement. Indeed, if the Court did not dismiss each objection raised, the time to finalize a decree would have run on the Statute. The Final Judgment was essentially the sanctification of a plan to provide benefits to Pueblo-water users to the detriment of other non-Pueblo water users in the very same locality, performed at the 12th-hour.

In this instance, the Final Decree serves to bind and impact the rights and interests of non-settling parties despite their refusal to agree to settlement. Law does not support that premise, however. In considering the "fair and reasonable standard, the Court should have looked at the impacts to non-settling parties, considered if they were being bound, obligated or otherwise negatively impacted. Such was glossed over by the governmental briefings in support of the settlement, as well as the Court – to reach the decision all parties knew would be reached, *i.e.* implementation of the settlement agreement spear-headed by the United States.

B. The District Court Erred In Only Considering "Fair And Reasonable Standards" Because Not All Impacted Parties Agreed To Settlement.

The Appellees sought and obtained an entry of "Partial" Final Judgment and Decree, and states its intent that the 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 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.

C. Public Policy Mandates Against Approval Of The Settlement

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.

The United States presented legal discussion to the lower court of cases off-point in favor of an entry of judgment and decree, 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 the underlying proceeding. While the governments conceded in their briefing that argued for "fair and reasonable standard" relating to Indian water settlements is not yet established law, but only "recognized by scholars" as a viable standard of review for assessing a proposed settlement (APP 680). Even the governmental briefing was forced to note that such scholars clarify that additional criteria are *necessary for courts to consider* and review in considering proffered settlements to ensure that the settlement is truly appropriate before anointment by a court. Those additional considerations, beyond just the reasonableness for the settling parties 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*). This additional consideration is compelling when considering water in western states, where after all "[w]ater is the driving force in nature"[5] including human nature. The lower court did not consider any other or additional standards before reaching its decision, however. (APP 938-939). The negative impacts to Appellants were thus not a consideration by the lower court, and such is a failure as a matter of law.

Cases such as *Ratzlaff v. Seven Bar Flying Serv., Inc.*, 646 P.2d 586 (N.M. Ct. App. 1982) do not support an entry of settlement based on New Mexico law. In *Ratzlaff*, the Court noted that, "the 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*, contrary to this proceeding all parties to the underlying litigation had entered into a settlement and release of claims, after which 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

[5] Leonard da Vinci, See generally, Pfister, L., Savenije, H., Fenicia, F. "*Leonardo Da Vinci's Water Theory: on the origin and fate of water,"* International Association of Hydrological Sciences (IAHS) (2009).

complied with the New Mexico Release Act to seek settlement set aside. Thus, to the extent that New Mexico common and statutory law provides a mechanism to set aside settlements, they were inapplicable in *Ratzlaff*. Here, not all parties agreed to, or enter into a settlement in which they give up rights and by which they receive no/unacceptable compensation or benefit; a settlement that can result in disparate access to water and/or costs for water access (flowing from operations and maintenance of systems) in which they have no voice per the settlement terms. (APP 1051-1120). Appellants did not enter into settlement nor agree to a release of claims. Rather, their governments – ostensibly acting on their behalves – did so, against the will and desire of Appellants.

The language of the Settlement Agreement provides no protections to these individuals. While it may require development of an "operation agreement" consistent with the Settlement Agreement, and even perhaps dispute resolution, there is absolutely no finding or basis to support that such agreement will protect individuals such as Appellants, will provide a voice to individuals such as Appellants or that any dispute resolution process will take their interests into account. Appellants have no voice in such matters per the Settlement Agreement, as either acknowledged or side-stepped below. (APP 944). Without such protections, how can Appellants impact and interests have actually been considered? And, without explanation, those interests were not found to impact or

be considered as part of the public interest inquiry that the lower court was to vet and consider.

As *Ratzlaff* notes that "amicable settlements" are favored when those settlements are fairly secured, are not overreaching, and when supported by consideration. These elements were not met by this Settlement Agreement, nor does the final judgment provide as such. Rights agreed to in the Settlement Agreement will impact non-settling parties with water rights. This is evidenced by even a cursory reading of the language of the Settlement Agreement and the lower court's approval of that Agreement. The lower court did not take into account the actual impacts to non-settling parties in its judgment, while still binding all to the terms of the Settlement Agreement. (APP 1048). The only real consideration given at all to non-settling parties and the taking of their rights, was merely to state that they were given adequate legal notice. (APP 1048).

Quite simply, in its eagerness and desperation to have the lower Court bless the Settlement Agreement which creates legally binding and modification of law that negatively impacts third parties, the governments glossed over the preliminary review requirements of legality and public policy, that even scholars require. However you slice the settlement the United States has reached here with the Pueblos, it negatively harms and impacts non-settling parties by flowing water to the former while damming the property rights and interests of the latter.

Moreover, the Agreement is patently against the public interest – if all of the public's interests are considered as it includes penalties against non-settling parties, in its torrential effort to extort a settlement *before* the flow of money ebbed by congressional action. (APP 1063-1065). There is no finding that Appellants are not harmed by the settlement agreement, nor finding that such harm is both permissible and consistent with public policy in this particular instance. (APP 1046-1050, APP 935-958).

D. 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.

F. The Proffered Settlement Agreement Violates Federal Law.

1. Equal Protection

In a self-serving, cursory discussion (APP 707-708), 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. (APP 708, "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."[6]

The United States made no mention of the disparate impact the proffered Settlement Agreement has as to junior water right holders and the District Court

[6] 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.

did not adequately consider the impact. As discussed *infra*. 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 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 has argued 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 Appellants, 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 Appellants was 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 accepted 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.[7] The United States asserts that it is its policy "to respect state management of state- created rights to use natural resources." (APP 702). 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

[7] The United States argues in its brief that, "Pueblo water rights are not defined by or subject to the laws of New Mexico, but solely by federal law." (APP 701) This statement is difficult to reconcile with the Court's holding that, "non-Pueblo's priorities begin as of the date they applied 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.

responsibilities. No party to the Settlement Agreements is authorized 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 Appellants' position.

2. Due Process.

The district court misunderstood and failed to adequately address the Appellants' 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. (APP 709). The government went 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." (APP 710). By this statement, the government acknowledged the possibility that third-parties are harmed by the Settlement. In pleading the Court to enter judgment anyway, however, it asserted that any harm to third parties should be assessed as to whether the harm is "unfair or proscribed." (APP 710). This was simply an erroneous legal standard and should not have been accepted by the district Court. A determination as to the legality of the Settlement Agreement must be made before fairness is assessed.

The federal government has argued that due process was met because it provided notice to non-Pueblo water users. Due process was 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 including Due Process and Equal Protection.

CONCLUSION

The District Court erred in entering the Partial Final Judgment and Decree on the Water Rights of the Pueblos of Nambe, Pojoaque, San Idelfonso and Tesuque (incorporated into the Final Decree and Judgement) on the basis of approving the Settlement Agreement (compact) thereby 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. The District Court erred in failing to recognize that settlement of this type is properly vested in the New Mexico Legislature per the State Constitution and should not have entered final judgement absent a valid legal and binding settlement agreement. This court should remand the matter back to the District Court with instructions to require the New Mexico executive branch officers to obtain the

required state legislative approval of the Settlement Agreement and require any settlement agreement fully comply with all provisions of relevant law including both the US and NM Constitutions before final decree and judgment may be entered.

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(4), Appellant requests oral argument in this matter. Such argument is necessary because the issues involve important questions of procedural law. Appellant respectfully suggests that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 30th day of October 2017.

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

/s/ Dori E. Richards
Dori E. Richards, Esq.

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES
Attorneys for Appellant
400 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
Warba.llp@gmail.com

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that Appellants' brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,359 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 Windows Defender Security Center, Antivirus version: 1.255.250.0 updated October 30, 2017 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

CERTIFICATE OF SERVICE

I certify that on October 30, 2017, I filed Appellant's Opening 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 Opening Brief with the Clerk of the Court.

October 30, 2017

/s/ Dori E. Richards
Dori E. Richards, Esq.

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