

Defendant-Objectors Group 1, by their undersigned attorney, file their Response in Opposition to Plaintiffs' Joint Motions for Entry of Case Management and Service Order as follows:

The Plaintiff and the Plaintiffs-in-Intervention (referred to hereafter as the Plaintiffs) in two separate groups through two pleadings filed Joint Motions for Entry of Case Management and Service Order (referred to hereafter as the Joint Motions) with this Court on May 7, 2014. Defendants oppose each of the Joint Motions, for the following reasons.

ARGUMENT

Threshold Issues

There are three issues in this matter that should be resolved prior to any case management and service order being entered by the Court. These are:

- a. Lack of settling party State of New Mexico authority to enter in to settlement agreement;
- b. Lack of proper service; and
- c. Request for opportunity for disclosure of conflicts and opportunity to discuss with the Court any appearances of conflict between Judge Vasquez and Settling Party City of Santa Fe

Lack of Authority to Settle

In the instant matter, State of New Mexico has entered a settlement agreement without legislative approval. They seek to make this agreement with other sovereign powers a new law through this Court's order. On basic level, this is a compact for the administration of water, no different than Rio Grande Compact for instance. In *Clark v. Johnson*, 904 P.2d 11, 120 N.M. 562 (1995), then- Governor of New Mexico Gary Johnson signed 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.

As stated above, in the present case, the State of New Mexico has taken it upon itself to enter into a settlement agreement with the other named Plaintiffs in this matter. This 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 lie with the legislative branch. The State of New Mexico's actions in this matter clearly violate the separation of powers in the New Mexico Constitution.

The State of New Mexico lacks standing to enter into the agreement at issue in this matter. This represents a threshold issue that efficiency and judicious use of judicial resources lends to itself to being resolved before proceeding with case management schedules.

Lack of Proper Service

The second point of contention which must be resolved prior to this Court entering a Case Management and Service Order is the lack of proper service in this matter.

Plaintiffs acknowledge that "[o]ver 700 objections were filed by various individuals and entities," and that "[m]any of the objections raise the same or similar issues, and many include form objections that are attached or otherwise repeated by numerous parties." However, despite the fact that there have been over 700 objections, Plaintiffs also to acknowledge that over 30%

(thirty percent) of the packages sent to potential Defendants were returned to Plaintiffs meaning that there are many people currently deprived of due process and the opportunity to protect their constitutional rights.

Service is the responsibility of the Plaintiffs in this matter. They entered into a settlement agreement that they should have known was going to garner many objections and they should be prepared to delay progress until the proper due process has been afforded to all of those of the 30% that have yet been given notice. The fact that over 30% of the packages sent to potential Defendants were returned to Plaintiffs shows that service was not effective to begin with, and a court order for case management and scheduling should mandatorily require more time and opportunity for service to be accomplished and for parties not previously served to object or accept the proposed settlement. Plaintiffs should use more diligence in locating the remaining Defendants and serving them via first-class or certified mail with notice of their proposed settlement agreement.

The lack of proper service to all potential Defendants is alarming in this matter. Instead of asking this Court to move forward with entering an order for case management and service, Plaintiffs should make contact with the remaining potential Defendants. This Court should see to it that justice is served for all Defendants.

Request for opportunity for disclosure of conflicts and opportunity to object regarding appearance of conflict between Judge Vasquez and Settling Party City of Santa Fe and Bureau of Reclamation

The Code of Conduct for United States Judges, Canon 1 and 2(B) read:

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective...

(B) *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge...

Although Defendants recognize that this Court is not bound by the New Mexico Rules of Judicial Conduct, Defendants believe that the New Mexico Rules shed light on what exactly would constitute a disqualifying condition. NMRA 2-211(A)(2)(a and c) and (3) states:

21-211. Disqualification.

A. A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(2) The judge knows that the judge, the judge's spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, or a member of the judge's staff is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding...

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.

Defendants respectfully request that this Court disclose any conflicts it may have with regards to this matter, as well as afford an opportunity to all of the parties to vet and object any potential conflicts that may or may not exist between Judge Vasquez and the Settling Party City of Santa Fe.

Defendants have become aware of what can be deemed, at the very least, to be an appearance of a conflict. Specifically, Defendants request this Court disclose any conflicts between itself (Judge Vasquez) and the settling parties City of Santa Fe. Defendants recognize that this is a delicate matter and seek only to raise the issue so that it may be addressed by all of

the parties so that it is not later called into question.

CONCLUSION

There are threshold issues pending that need to be resolved prior to this Court entering an Order for case management and service, specifically that the State of New Mexico does not have standing to enter into the settlement agreement; the lack of service; and the request for opportunity for disclosure of conflicts and opportunity to examine any conflicts of interest that may exist for justice requires due consideration.

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Joint Motions or hold them in abeyance until the threshold issues are resolved if they can be.

Respectfully submitted,

/s/ A. Blair Dunn, Esq.

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CERTIFICATE OF SERVICE

I CERTIFY that I filed the foregoing documents on May 20, 2014 using the ECF System, which will send notification to all parties of record.

Electronically Signed by – A. Blair Dunn
A. Blair Dunn, Esq.

I FURTHER CERTIFY that, on upon the direction the Court as to how to proceed with service of pleadings, I will immediately cause copies of the foregoing to be delivered to the non-CM/ECF.

Electronically Signed by – A. Blair Dunn
A. Blair Dunn, Esq.