UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, on its own behalf and on behalf of the PUEBLOS OF JEMEZ, SANTA ANA, and ZIA, and the STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,
Plaintiffs,

PUEBLOS OF JEMEZ, ZIA and SANTA ANA,
Intervenors,

v.

No. CIV 83-1041 MV/WPL
Jemez River Adjudication

TOM ABOUSLEMAN, et al.,
Defendants.

OBJECTIONS OF INTERVENORS PUEBLO OF SANTA ANA AND PUEBLO OF JEMEZ TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING ISSUES 1 AND 2 (DOC. 4383)

Intervenors Pueblo of Santa Ana and Pueblo of Jemez ("Pueblos") object to the Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (Doc. 4383) (hereinafter, "Recommended Disposition") filed herein by United States Magistrate Judge William P. Lynch on October 4, 2016, for the reasons set forth herein. Magistrate Judge Lynch recommended that the Court find that although the Pueblos of Jemez, Zia and Santa Ana did possess "aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish," Recommended Disposition at 11, the existence of Spanish authority over the Pueblos, alone, amounted to "a plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water without restriction," *id*. at 13, and that "Spain's exercise of complete dominion over the use of public waters extinguished the Pueblos'

aboriginal water rights." *Id*. at 14. He further recommended that the Court find that there were thus "no aboriginal water rights [of the three Pueblos] for the United States to recognize." *Id*. The Pueblos submit that this recommended finding of extinguishment of the Pueblos' aboriginal water rights, and the recommended determination that the United States could not, therefore, recognize the aboriginal water rights of the Pueblos, are inconsistent with all applicable case law, unsupported by the record and contrary to controlling acts of Congress, and should be rejected by this Court.

I. INTRODUCTION

This case, originally filed in 1983, is a general adjudication of all water rights in the basin of the Rio Jemez, in Sandoval County, New Mexico, including the rights of the three Pueblos whose lands are located in that basin, the Pueblos of Jemez, Zia and Santa Ana. During the period 2005-12, the parties attempted to reach a settlement of the Pueblos' claims, but those efforts collapsed in early 2012, *see* Letter dated March 15, 2012, Doc. 4234, and the parties returned to litigation. The parties proposed, and the Court ultimately agreed, that a necessary first step was for the Court to rule on a set of five critical legal issues (including some "sub-issues") regarding the nature and measure of water rights appurtenant to the Pueblos' Spanish grant lands. *See* Order Regarding Status Conference, filed April 26, 2012, Doc. 4242, at 2. The Court then set a briefing schedule on Issues 3, 4 and 5, and agreed to allow the parties to present expert testimony before briefing Issues 1 and 2. Order, filed July 5, 2012, Doc. 4253.

Briefing on Issues 3, 4 and 5 was completed by December, 2012,[1] and the parties then identified experts on Issues 1 and 2. Issues 1 and 2 are as follows:

> Issue No. 1: Have the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, have those aboriginal water rights been modified or extinguished in any way by any actions of Spain, Mexico or the United States?
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> > Sub-issue: Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights, and if so, what effect?
> >
> > Sub-issue: Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights, and if so, what effect?
> >
> > Sub-issue: Did the Indian Claims Commission Act have any effect on the Pueblos' water rights, and if so, what effect?
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> Issue No. 2: Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?

The Court had agreed to allow the parties to submit expert reports and testimony on Issue 1, especially on the Spanish and Mexican law questions. The United States retained Dr. Charles Cutter, of Purdue University, as its expert, and the State retained Prof. G. Emlen Hall, a professor emeritus at the University of New Mexico School of Law and former attorney with the Office of the State Engineer. Each expert produced an expert report on the Spanish and Mexican law issues in early 2013, and both experts' depositions were taken later in the year. The Court held an evidentiary hearing, presided over by Magistrate Judge Lynch, on March 31-April 2, 2014, at which the two experts testified and were cross-examined. *See* Transcript of Proceedings, March 31-April 2, 2014, *United States v. Abousleman* ("Trans."). Briefing on Issues 1 and 2 was then completed by the end of 2014.

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[1]Issue 5, regarding whether the Pueblos had riparian rights, was actually addressed by the Court in a Memorandum Opinion and Order filed on December 20, 2012, Doc. 4293, in which the Court ruled that inasmuch as none of the Pueblos, or the United States on their behalf, was claiming any riparian rights, the Court would make no ruling on the issue.

II. STANDARD OF REVIEW

This Court reviews recommended findings and dispositions by a United States Magistrate Judge *de novo*. See F.R.Civ.P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C); *Los Reyes Firewood v. Martinez*, 121 F.Supp.3d 1186, 1193 (D.N.M.2015).

III. THE RECOMMENDED CONCLUSION THAT IMPOSITION OF SPANISH SOVEREIGNTY OVER NEW MEXICO EXTINGUISHED PUEBLO ABORIGINAL WATER RIGHTS IS CONTRARY TO LAW.

Magistrate Judge Lynch's conclusion of law that the existence of Spanish "dominion" over the territory, that is, its establishment of governmental authority, alone, constituted a "plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water," Recommended Disposition at 12-13, is unsupported by case law and other authorities addressing the subject of Indian aboriginal title and its extinguishment. It is clear from the case law that in the very few instances in which "exercise of complete dominion" was viewed as having accomplished the extinguishment of Indian title, that "dominion" had to be manifested by one or more affirmative *actions* that were unmistakably "adverse to the [Indian] right of occupancy." The Recommended Disposition points to no such action in this instance to support its conclusion, nor is any apparent in the record.

This key phrase on which the Recommended Disposition relies is drawn from a passage in the opinion in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347 (1941). That case is unquestionably the leading authority in Supreme Court jurisprudence on the subject of Indian aboriginal title, and it is the case that specifically held that Congress expressly intended to extend to the Indian tribes in the lands acquired from Mexico by the Treaty of Guadalupe Hidalgo the

American policy of recognition of Indian aboriginal title. *Id*. at 347-48.[2] On p. 347 of that opinion, the Court addressed the issue of extinguishment of Indian title, and in noting that as to that matter, "[t]he power of Congress . . . is supreme," it elaborated, saying,

> whether it be done by treaty, by the sword, by purchase, *by the exercise of complete dominion adverse to the right of occupancy*, or otherwise, its justness is not open to inquiry in the courts.

314 U.S. at 347 (emphasis added). The point the Court was making here is that the exercise of congressional power to extinguish Indian title is nonjusticiable, however it is accomplished. As it happens, that is no longer a good statement of the law. That proposition, that such matters are not subject to review in the courts, was "'expressly laid to rest in *Del. Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977).'" COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton, editor, 2012 ed.) ("COHEN") at 1052 n. 22 (quoting *United States v. Sioux Nation*, 448 U.S. 371, 413 (1980)).[3]

The actual meaning of the phrase "exercise of complete dominion adverse to the right of occupancy," is not discussed in *Santa Fe Pacific*, but the facts described in that case are highly suggestive of what that phrase must entail. The case had to do with the question whether certain grants of public lands to the railroad (or its predecessor) were still subject to the aboriginal title of the Hualapai Indians of Arizona (referred to as the "Walapais" in the opinion). The railroad argued that various actions of the government had effectuated the extinguishment of Hualapai aboriginal title, one of which actions was Congress's unilateral creation of a reservation to which

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[2]That the tribes covered by that policy included the Pueblo Indians of New Mexico was established in *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926).

[3]Thus, the doctrine of *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877), cited by Magistrate Judge Lynch, Recommended Disposition at 4, is also no longer good law.

the Hualapais were "*forcibly removed.*" That certainly sounds like an exercise of "complete dominion, adverse to the right of occupancy," but the Court held that that action had *not* extinguished the Hualapai right of occupancy in the lands they had aboriginally occupied. 314 U.S. at 354-56 (emphasis added). Only when the Hualapais *voluntarily* requested the creation of a reservation within their aboriginal area, and took up occupancy there when their request was granted, the Court held, could the Hualapais' aboriginal rights to lands outside that reservation be deemed to have been lost. *Id*. at 357-58.

There is no question, as the Court stated, that Congress has the power to extinguish Indian aboriginal title, but nowhere, in that case or elsewhere, does the Court hold that the mere *existence* of that power, without more, is sufficient to effectuate such an extinguishment. Moreover, the Court in *Santa Fe Pacific* cautioned that extinguishment of aboriginal title "cannot lightly be implied in view of the avowed solicitude of the Federal Government for its Indian wards." *Id*. at 354. And the view of the leading treatise in the field of Indian law is that Indian aboriginal title "can be extinguished only by an express and unambiguous *act* of Congress." COHEN, at 1053 (emphasis added).

Magistrate Judge Lynch cites to and relies on an obscure case arising from Indian Claims Commission proceedings, *Quapaw Tribe v. United States*, 120 F.Supp. 283, 286 (Ct.Cl. 1954), *overruled in part on other grounds*, *United States v. Kiowa, Commanche and Apache Tribes*, 166 F.Supp. 939, 943 (Ct.Cl. 1958), and a more recent Court of Federal Claims decision, *Uintah Ute Indians v. United States*, 28 Fed.Cl. 768 (1993), as support for his recommendation that the existence of Spanish dominion, alone, would suffice to extinguish aboriginal title, but neither of those cases stands for that proposition. The issue in *Quapaw* was whether the tribe had proven

that it had aboriginal title to the area it claimed at the time it ceded lands to the United States by treaty. The Indian Claims Commission found that, while the tribe may at some time in the past have occupied the lands claimed, at the time of the treaty it occupied a far smaller area, and any claim it may have had to the larger area had been lost. The Court of Claims affirmed. There was no issue of extinguishment by the United States at all. In *Uintah Ute*, the court found that the tribe had not actually proven possession of the land it claimed had been taken from it, and that even if it had possessed that land at some point, the construction of a military fort by the United States effectively ended that possession. The court viewed construction of the fort as "dominion adverse to Indian title," 28 Fed.Cl. at 787, but importantly, that was an assertion of control manifested by an affirmative act, the construction of the fort. It was not merely the imposition of overriding authority, unaccompanied by any action adverse to tribal rights.[4]

Indeed, the Pueblos' counsel cannot locate any case in the abundant case law discussing Indian aboriginal title in which such title was deemed extinguished simply by the establishment of a governmental regime, but no affirmative act adverse to the Indian right of occupancy, as the Recommended Disposition proposes happened with respect to the Pueblos' water rights. Such a proposition would, in fact, lead to absurd results. If the mere imposition of a controlling legal

[4]Another case that is occasionally cited for the "complete dominion" theory of extinguishment is *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), an appeal by three members of the Pit River Indian Tribe who were convicted of unlawfully taking Christmas trees from national forest land. They claimed the land was still subject to Pit River aboriginal title, but the court of appeals rejected that claim, finding that a series of federal actions beginning in 1851 decisively extinguished that title, and that the payment of the judgment in the Pit River claim under the Indian Claims Commission Act, for the taking of Pit River aboriginal lands, clearly resolved "any ambiguity about extinguishment" that may have remained. 535 F.2d at 1148-49. Importantly, the court noted that "[t]he relevant question is whether the government *action* was intended to be a revocation of Indian occupancy rights . . ." *Id*. at 1148 (emphasis added).

regime, with no affirmative act adverse to Indian aboriginal rights, were nonetheless deemed to extinguish those rights, no aboriginal rights to land or water would have existed in the area of the Mexican cession at all. They would all have been extinguished upon the establishment of Spanish control of the area. The Recommended Disposition attempts to address this point, saying that Spanish laws regarding Indian land rights were "separate" from laws regarding rights to water, and the "Spanish government appears to have recognized aboriginal title to land, but did not recognize aboriginal title to the use of water." Recommended Disposition at 13. In other words, the Recommended Disposition is saying, the Spanish regime did not impose any limitation on the aboriginal land rights of the Pueblos, but it did limit their rights to use water. Such a system, Magistrate Judge Lynch concludes,

> is a plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water without restriction and as such is an exercise of complete dominion adverse to the Pueblos' aboriginal right to use water.

Id. Calling the mere *existence* of a system that, as the Recommended Disposition admits, was never implemented with respect to these Pueblos, *see id*. at 8, an "*exercise* of complete dominion" (emphasis added) seems dubious; but regardless, case law shows that the premise on which that conclusion rests is wrong. The Spanish authorities held the same power over Pueblo land rights as they did over the use of water, only their ability to exercise the power to extinguish land rights did not depend, as the system for adjudication of water uses did, on someone complaining.[5] For example, a case on which the Recommended Disposition relies, *Pueblo de Zia*

[5]Spanish law regarding mineral rights was most definitely distinct from the law regarding land rights, in that the crown claimed outright ownership of all minerals, yet in *United States v. Northern Paiute Nation*, 393 F.2d 786, 793-97 (Ct.Cl. 1968), the Court of Claims held that minerals, even though never exploited by the Indians themselves, were part of the intact aboriginal rights the tribes brought with them into the period of American rule. This ruling

v. United States, 165 Ct.Cl. 501 (1964), demonstrates that the Spanish government could and did issue land grants to Spanish settlers that encroached on Pueblo aboriginal lands, and when those grants were found to be valid by American authorities and titles were issued to the grantees, Pueblo aboriginal rights to such lands were deemed to have been extinguished by the Spanish. 165 Ct.Cl. at 503; *see also Pueblo de Cochiti v. United States,* 7 Ind.Cl.Comm. 422, 423 (1959); *Pueblo of Taos v. United States,* 15 Ind.Cl.Comm. 666, 667 (1965); *Jicarilla Apache Tribe v. United States*, 17 Ind.Cl.Comm. 338, 347 (1966). Contrary to the Recommended Disposition, no meaningful distinction can be drawn between Spanish authority over Pueblo lands and Spanish authority to allocate uses of water, at least for purposes of this analysis,[6] so the rationale of the Recommended Disposition as to why Pueblo aboriginal water rights were extinguished by the imposition of Spanish rule, but land rights were not, simply fails.[7] And if there can be no

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seems directly to contradict the assertion of the Recommended Disposition that tribal rights to water–an essential aspect of the tribes' ability to survive on their land–were extinguished or at all limited merely by the imposition of Spanish sovereignty.

[6]True, the *nature* of the Spanish policy toward water, as to which it typically recognized the rights of more than one user to share the resource, differed from its policy regarding land, which could be held in exclusive ownership. But the government's *power* to impose those policies was essentially the same in each case. And, as will be shown in the next section, Spanish policies toward the Indians in the allocation of water regularly respected and protected Indian aboriginal rights as against uses by non-Indians.

[7]Interestingly, the State's own expert, Prof. G. Emlen Hall, noted this logical inconsistency. He had testified that he agreed that there was nothing to prevent the United States, following the Treaty of Guadalupe Hidalgo, from instituting a new legal regime that recognized and protected the aboriginal rights of the Pueblos, Trans. at 357-58, but he said he had "a question about water rights." *Id*. at 358. He elaborated on that a few minutes later, saying,

> I have a question about whether the modification or different treatment of the water rights could possibly extinguish the water rights without establishing–without extinguishing the aboriginal right to land.

Id. at 359. Of course, as will be explained below, Prof. Hall was the author of the theory that the "different" Spanish treatment of water uses resulted in the extinguishment of Pueblo aboriginal

such distinction, and it is clear that aboriginal land rights were not extinguished by the mere imposition of Spanish sovereignty over New Mexico, then the major premise, that aboriginal water rights *were* extinguished, must likewise fail.

Moreover, the reasoning of Magistrate Judge Lynch's Recommended Disposition would similarly force the conclusion that the mere extension of American authority over lands occupied by Indian tribes resulted in the extinguishment of Indian aboriginal rights of all types–a result that is plainly not true. It is consequently not surprising that every previous case to have considered the question found that Indian aboriginal title survived the Spanish period, such that the extension by Congress of the terms of the Nonintercourse Act to the Indian tribes within the Mexican cession, by Section 7 of the Act of February 27, 1851, 9 Stat. 574, 587, was effective to preserve the aboriginal titles of those tribes, including the Pueblos. *Santa Fe Pacific*, 314 U.S. at 347-48; *Candelaria*, 271 U.S. at 441-42; *Pueblo de Zia*, 165 Ct.Cl. at 508-09; *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1388 (Ct.Cl. 1974); *Pueblo of Nambe v. United States*, 16 Ind.Cl.Comm. 393, 402 (1965) ("Spain and Mexico had not dispossessed the Pueblo of these lands, previously identified, which constitute its aboriginal claim, . . ."); *Pueblo of Taos*, 15 Ind.Cl.Comm. at 681 ("At the time the United States acquired sovereignty over New Mexico, the Pueblo of Taos was the owner, under Spanish and Mexican law, of all lands which it exclusively used and occupied aboriginally."); *Lipan Apache Tribe v.*

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water rights, so that passage actually casts further doubt on his theory.

Prof Hall further testified that he was aware of no concept in either Spanish or Mexican law of Indian aboriginal rights that were exempt from the reach of the Spanish or Mexican legal regimes. Trans. at 403-04. That view is of course consistent with the cases cited in the text, and further undermines the Recommended Disposition's rationale for distinguishing between the Spanish laws related to Indian land and those related to water.

United States, 180 Ct.Cl. 487, 493 (1967) ("the law of the prior sovereigns (Spain, Mexico . . .) accepted aboriginal ownership . . ."*)* *New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 1000, 1009 (D.N.M. 1985) ("Spain considered the Pueblos as wards . . . [with] the right to use the water available . . . recognizing that the Pueblos were prior in time in the use of the water." "The Pueblos came into the United States with these long established priorities and with their aboriginal rights to use the water for irrigation purposes.").

In short, there is no support in the case law for the proposition that the mere existence of a governmental power automatically extinguishes Indian aboriginal rights, absent any affirmative action clearly manifesting an intention to accomplish such an extinguishment. That proposition moreover would lead to results that are plainly at odds with established legal principles. The Recommended Disposition should be rejected for that reason alone.

IV. THE RECOMMENDED DISPOSITION WITH RESPECT TO EXTINGUISHMENT OF PUEBLO WATER RIGHTS IS NOT SUPPORTED BY THE RECORD IN THIS CASE

In addition to being contrary to applicable law, Magistrate Judge Lynch's Recommended Disposition that the Pueblos be found to have no aboriginal water rights that survived the Spanish territorial period is not supported by the record. In fact, the record shows that Spanish policy in New Spain, including New Mexico, was strongly in favor of protecting Indian rights in their lands and resources, and that even in disputes over water, Indians' rights were routinely given preference, even on occasion to the complete exclusion of non-Indian water uses.

It is critically important to remember that the phrase from *Santa Fe Pacific* on which Magistrate Judge Lynch relies for his recommendation that Pueblo aboriginal water rights be

found to have been extinguished by the imposition of Spanish rule is "the *exercise* of complete dominion *adverse to the [Indian] right of occupancy*." *Santa Fe Pacific*, 314 U.S. at 347 (emphasis added). As was shown in the previous section, in the very few instances in which that phrase has been relied on to support a finding of extinguishment, there was factual evidence of an "exercise" of dominion, by some affirmative action that was plainly "adverse to the right of occupancy." There is no such evidence in the record of this case. That is, there was never an "exercise" of dominion with respect to the water rights of these Pueblos, nor could the Spanish legal regime be, in any respect, characterized as "adverse" to the Pueblos' rights to use water. To the contrary, as will be shown, it was deferential to and protective of those rights.

It is also important to note that Magistrate Judge Lynch expressly states that on the relevant issues, he believes that "the US/Pueblos' expert, Dr. Cutter, is correct, and [Magistrate Judge Lynch has] resolved all factual questions in favor of Dr. Cutter's opinion." Recommended Disposition at 11[8]. Dr. Cutter's expert report, Ex. USP 1, delves at length into the extent to which Spanish legal doctrines applicable in New Spain in the 16th, 17th and 18th centuries mandated the fair and just treatment of the Indians and the protection of their rights and possessions. The earliest such expression is the 1504 will of Queen Isabella herself, who urged her husband, Ferdinand, and her daughter and son-in-law, to assure that the Indians would not

[8]Admittedly, this passage from the Recommended Disposition is difficult to square with Magistrate Judge Lynch's conclusion. He notes that Dr. Cutter and Prof. Hall, though they agree on many issues, disagree on a critical one, in that Prof. Hall "opined that Spanish civil law divested the Pueblos of their aboriginal water rights, whereas Dr. Cutter opined that Spain recognized the Pueblos' preconquest right to use water." He then states that he "assume[s] that the US/Pueblos' expert, Dr. Cutter, is correct, and ha[s] resolved all factual questions in favor of Dr. Cutter's opinion." Recommended Disposition at 10-11. But it is precisely Prof. Hall's view, that "Spanish civil law divested the Pueblos of their aboriginal water rights," that Magistrate Judge Lynch expressly adopts two pages later.

"receive any harm whatever, in their persons or goods; rather, you must command that [the Indians] be treated well and justly." Ex. USP 1 at 15. More generally, the policies of favorable treatment of the Indians that became embedded in the law of New Spain were largely the result of the urging of Spanish theologians Francisco de Victoria and Bartolomé de las Casas, whose lectures and writings have been regarded by many as the foundation of modern international law doctrines regarding the rights of native inhabitants of the New World, and of American Indian law in particular. *Id*. at 12-13.[9] Dr. Cutter reiterated in his testimony the many provisions found in Spanish law applicable in New Spain, including the *Recopilacion de Leyes de las Indies* (a compilation of several thousand Spanish laws, decrees and other legal documents published in 1681), that were protective of Indian property rights, and that required Spanish officials to take steps to assure that Indian communities were provided for "amply in terms of land and anything that they may need for their agriculture." Trans. at 26; *and see id*. at 21-27; *see also* Ex. USP 1 at 14-28.

With respect to Spanish law regarding the use of water, there is some disagreement between the two experts, but the Pueblos submit that the evidence overwhelmingly supports the view that even in that arena, Spanish law and policy clearly favored, and was in no way "adverse" to, the Pueblos' rights. The key contention of the State's expert, Prof. Hall[10], was that

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[9]*See* COHEN at 8-14; Felix Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 Geo.L.J. 1 (1942).

[10]Prof. Hall is a lawyer, not a professional historian, though he has studied the history of New Mexico extensively. Prior to going to teach at the University of New Mexico Law School, Prof. Hall spent seven years as an attorney in the Office of the New Mexico State Engineer, mainly litigating on behalf of the State against four Pueblos in the general stream adjudication of the Rio Tesuque-Rio Nambé-Rio Pojoaque basin, *New Mexico ex rel. State Engineer v. Aamodt*, Dkt. 66-CV-6639 (D.N.M.); *see* Trans. at 302-03. He has also served as an expert for the State

the *possibility* that a procedure known as a *repartimiento* could be instituted to allocate the uses of water from a "public" water source (that is, according to Prof. Hall, a source that was utilized by several different users), alone, extinguished any right of a Pueblo that was utilizing that water source to expand its uses without limitation. This is a theory of which Prof. Hall is the sole known proponent; he conceded that there is no other expert in the field who supports or agrees with this position, Trans. at 339, and Dr. Cutter testified that he knew of no document that supported Prof. Hall's claim. *Id*. at 53. The Recommended Disposition discusses Prof. Hall's theory at some length, at pp. 7-8, and appears to rest its ultimate conclusion on Prof. Hall's position, saying,

> I find that Spain imposed a legal system to administer the use of public waters and that regalía ended the Pueblos' exclusive use of the public waters and subjected the Pueblos' later use of public waters to potential repartimientos. Such a system is a plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public waters without restriction and as such is an exercise of complete dominion adverse to the Pueblos' aboriginal right to use water.

Recommended Disposition at 13. There are several points to be made about that conclusion. First, it is something of a stretch to call the Spanish regime regarding allocations of water a "system." Prof. Hall acknowledged that there is no written law or decree that he knows of, including no provision of the *Recopilacion*, that actually refers to repartimientos or describes how they are to be conducted or decided. Trans. at 312. Although Prof. Hall described certain "factors" that he contended bore on the ultimate outcome of a repartimiento, Trans. 213, he acknowledged that those factors were not derived from any Spanish source, but from a study of

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in at least three other stream adjudications involving Pueblo Indian water rights. *Id*. at 303-04.

repartimientos by Prof. Michael Meyer, an American historian. *Id*. at 312.[11] He conceded that those factors have no applicability to the activities of a water user unless a repartimiento is instituted, something that would only happen if another water user made a complaint to the government, and that other than the possibility of a repartimiento, there was no system of administration of water uses in New Mexico in the 17th or 18th centuries. *Id*. at 333-34. And during the near-quarter of a millenium that Spain ruled New Mexico, there is no record of a single formal repartimiento being conducted here, Trans. at 52, 131, such that the notion that "Spain imposed a legal system to administer the use of public waters," a critical premise of Magistrate Judge Lynch's main recommendation, is rather hypothetical.

The only true repartimiento[12] of which there is any record in the archives of the Spanish and Mexican periods in New Mexico occurred in Taos in 1823, during the Mexican period. The matter arose when the Pueblo of Taos and the community of Don Fernando de Taos complained that a ditch constructed by the squatter community of Arroyo Seco that diverted water from the Rio Lucero, apparently above the diversions that served the fields of Taos and Don Fernando,

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[11]Dr. Cutter agreed that those factors were the ones that seemed to be applied in repartimientos, *see* Trans. at 132-33, but he explained that he regarded the Taos proceeding, discussed in the text beginning on the next page, as unusual, in that the ayuntamiento specifically explained why it was giving Taos Pueblo such an extraordinary preference, due to its immemorial priority. *Id*. at 133-34. The work of Dr. William Taylor, discussed in the text below, *and see* Trans. at 310-19, appears to confirm that cases involving established Indian communities were handled differently than ordinary repartimientos among non-Indian users.

[12]Prof. Hall admitted that he uses a "rather broad definition of repartimiento," and would include in that term any dispute over water in which Spanish authorities became involved, of which there are a few instances in the Spanish archives. Trans. at 305-06. Dr. Cutter testified that the only such dispute that could clearly be called a repartimiento is the Taos proceeding, described in the text. *Id*. at 52, 131. *See also New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 999 (D.N.M. 1985) ("*Aamodt II*") (noting that "[t]he only recorded *repartimiento* . . . that anyone has knowledge of involved the Rio de Lucero and the Pueblo of Taos . . .")

was infringing on the rights of the Pueblo and the community of Don Fernando.[13] The proceeding was conducted by the *ayuntamiento*, or local governing body, of the non-Indian village of Don Fernando de Taos, and the decision of the ayuntamiento is set forth in a document that is identified as SANM I: 1292.[14] In its decision, the ayuntamiento referred to the Pueblo as the "*dueño despotico*," or complete owner, of the Rio Lucero, Trans. at 310, and it noted that the settlers of Arroyo Seco had no real right to take water from the river. But the ayuntamiento "tak[es] pity" on that community, and agreed that in times of abundance it could take a *surco*[15] of water from the river, but that in times of scarcity, its share would be proportionately reduced according to the judgment of the ayuntamiento.

Prof. Hall and Dr. Cutter disagreed on a key point, however. Prof. Hall insisted that the decision meant that in times of scarcity *all* parties, including the Pueblo and the community of Don Fernando, would have their shares of water reduced. Trans. at 244. Dr. Cutter, however, pointed to the final passage in the decision (which, he noted, Prof. Hall "didn't read"), following the statement that Arroyo Seco would have its share reduced in times of scarcity, where the ayuntamiento explained that this was so "there would be *no lack to the first users*, who enjoy the antiquity and superiority, or primacia, who are the sons of the above-mentioned pueblo." Trans.

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[13]This case is discussed by Prof. Hall and Dr. Cutter fairly extensively in their testimony. Trans. at 133-34, 143-44, 155-57, 242-48, 307-10, 444-46, 450-52, 461-64.

[14]This designation refers to volume I of the comprehensive index of the Spanish Archives of New Mexico ("SANM") compiled by Ralph Emerson Twitchell and that was published in 1914. This document is number 1292 in that volume. *See* Trans. at 243. The document was introduced as Ex. USP 72.

[15]The word means "furrow." There is no clear statement in the record of what quantity of water this amounts to, but according to the decision in *Aamodt* the parties in that case agreed that a *surco* was about 51 gallons per minute. *Aamodt II*, 618 F.Supp. at 1000.

at 445 (emphasis added); *and see* Trans. at 309 (Prof. Hall acknowledges that language, noting that the Pueblo is described as having "antiquidad, primacia and prioridad"(antiquity, primacy and priority))[16]. Dr. Cutter, in other words, interpreted the decision to mean that in all cases, the rights of the Pueblo would be fully protected. It might be noted that in the decision in *Aamodt II*, 618 F.Supp. at 999-1000, Judge Mechem sets forth a translation of the document by the late historian Dr. Myra Ellen Jenkins, that agrees with Dr. Cutter's interpretation. And Twitchell, in his commentary on SANM I:1292, states, "The general tone of the report is favorable to the priority of the right of the Indians."

The Pueblos submit that the one documented repartimiento in New Mexico demonstrates that Pueblo rights were accorded a clear preference in these proceedings. That view is further supported by the outcome of a lengthy and well-documented dispute concerning the Pueblo of Santa Clara and its use of the waters of Santa Clara Creek. The matter is discussed in some detail in the two expert reports, *see* Ex. USP 1 at 46-48 and Prof. Hall's report, State Ex. 2, at 28-30, and in testimony at the hearing. Trans. at 46-49, 250-53, 320-28. It need not be described in detail here, except to say that when a Spanish settler, Cristobal Tafoya, applied in 1724 for a grant in the upper parts of Santa Clara Canyon, the Pueblo objected, saying it needed the water of Santa Clara Creek for its crops. The governor therefore made the grant, but for grazing livestock only: irrigation of crops from the creek was prohibited. Over the years, the Pueblo complained that the Spaniards were indeed cultivating crops with water from the creek, and the grantees repeatedly asked that the prohibition on irrigation be lifted. Finally, in 1763, after a full

[16]Prof. Hall, to his credit, acknowledged in the course of this exchange that he was "not as good as Dr. Cutter is at [reading 19th century Spanish on the fly]." Trans. at 307.

investigation of the situation, Governor Tomas Velez Cachupin voided the grant to the Tafoyas, and made a new grant to the Pueblo of the entire canyon, thereby giving the Pueblo the exclusive right to all of the water in the creek.

That outcome is significant, in light of Prof. Hall's assertions, in his report, State Ex. 2 at 40, and in his testimony, Trans. at 313, that in disputes over common water sources (which Prof. Hall agreed Santa Clara Creek was; *see* State Ex. 2 at 29; Trans. at 326-27), the Indians *never* were given complete control over the water. In fact, the only scholarly study of repartimientos in other parts of New Spain in the 18th and 19th centuries that is referred to in the record shows Prof. Hall's assertions on that point to be incorrect. Dr. William B. Taylor, an historian for whom Prof. Hall conceded he has "great respect," Trans. at 311, wrote an article entitled "Land and Water Rights in the Viceroyalty of New Spain," that was published in 1975 in the New Mexico Historical Review, in which he described the results of his examination of the records of 22 repartimientos that occurred in Mexico during the period of Spanish rule and that involved disputes between Indian communities and non-Indian communities. In several instances, as Prof Hall conceded he was aware, the Indians were allocated *all* of the available water. Trans. at 313-14. Dr. Taylor also reported that non-Indian grants had on occasion been cancelled outright when it was found that they were encroaching on the Indians' rights. *Id*. at 314-15. Finally, although Prof. Hall had testified that a repartimiento would award Indians sufficient water only for existing uses, not for future uses, Dr. Taylor reported that none of the cases he reviewed indicated that. Rather, he said, they

> consistently mention that the Indians should have enough water to irrigate their lands or for the irrigation and benefit of their lands, somewhat open-ended phrases that allowed for a sliding scale of irrigation of lands that could be irrigated, i.e., irrigable acres, . . .

This standard provision provided some leeway for increased use in the future, . . . Trans. at 316-18. Prof. Hall quibbled over just what this passage might mean, but the Pueblos submit that its meaning is clear enough on its face, and that it does not support Prof. Hall's claims as to the effect of the repartimiento process on Indian water rights. Significantly, Prof. Hall admitted that he has not studied any of those repartimientos, and that he does not dispute Dr. Taylor's findings. Trans. at 319.

With the sole exception of the unsupported and frankly novel opinion of Prof. Hall, thus, the record of this case does not support the essential element of the doctrine on which the Recommended Disposition relies, that the "complete dominion" imposed by the Spanish over New Mexico was "*adverse to the Pueblos' aboriginal right to use water*." Rather, the record shows that even when Spanish or Mexican authority to allocate rights to the use of water was exercised (which, to be sure, it *never was* with respect to the three Pueblos involved in this case), any such exercise consistently accorded the Indians priority of right and protection for their needs. The Recommended Disposition fails to show anything to the contrary, and indeed, fails to address this critical element at all. It must be reversed.

V. THE RECOMMENDED DISPOSITION ERRS IN FAILING TO ACKNOWLEDGE THAT AFTER THE TRANSFER OF SOVEREIGNTY OVER NEW MEXICO TO THE UNITED STATES, THE PUEBLOS WERE ENTITLED TO THE BENEFIT OF AMERICAN RECOGNITION OF THEIR ABORIGINAL WATER RIGHTS

Having concluded that Spanish sovereignty extinguished the aboriginal water rights of the Pueblos, without actually having imposed any real limitations on those rights, Magistrate Judge Lynch appeared to believe that his job was done, and that there was no basis for consideration of

claims of aboriginal water rights of the Pueblos in the American period in New Mexico. *See* Recommended Decision at 13 (viewing sub-issues of Issue 1 as "moot"). The Pueblos submit that that view is erroneous, however, and that the testimony of Prof. Hall supports their position.[17]

First, Prof. Hall stated his view that whatever the Spanish doctrine respecting Pueblo land rights might have been (and to be clear, Prof. Hall made clear his opinion that Spanish law had no concept of "aboriginal" rights such as exists under American law; Trans. at 284-85, 403-04), nothing prevented the United States, after the Treaty of Guadalupe Hidalgo, from instituting a new legal regime that fully recognized and respected the aboriginal rights of the Indians. Trans. at 357-58. He further testified that just before the Treaty, the three Pueblos involved in this case had the right to continue expanding their uses of water, so long as no other user complained, and that after the Treaty, they could likewise continue to expand their uses, but under American law. *Id*. at 386-87, 407-08. But American law, as it applied to Indian tribes after the Treaty, and especially after the enactment of the Act of February 27, 1851, 9 Stat. 574, 587, Section 7 of which extended the terms of the Nonintercourse Act over the tribes of the Mexican cession, intended "to recognize [the Indian] right of occupancy." *Santa Fe Pacific*, 314 U.S. at 348. That right of occupancy included the right to the use of water appurtenant to their lands, in accordance with their needs. *Aamodt II*, 618 F.Supp. at 1009-10.

It is correct, of course, that the Court in *Santa Fe Pacific* observed that the 1851 Act "did not create any Indian right of occupancy which did not previously exist." 314 U.S. at 348. But these Pueblos did previously have aboriginal rights, as found in the Recommended Disposition,

[17]Dr. Cutter did not go into issues regarding the post-Mexican period.

at 11; and even if one were to accept Prof. Hall's novel and unique contention that the mere existence of Spanish legal doctrines that could possibly result in some limit being imposed on the Pueblos' use of water actually had that effect, albeit rather theoretically here, the fact is that nothing about the use and occupancy of their lands by these Pueblos had actually changed. They still exclusively occupied lands that they had held aboriginally, as Prof. Hall agreed, Trans. at 352, there had been no action of the Spanish or Mexican governments to impose any limit whatever on their uses of water, *id*. at 334-35, and they were still able to increase their uses at that time. *Id*. at 335; *see also id*. at 54-58. In short, all of the elements necessary to establish Indian aboriginal title, including aboriginal rights to water, were in place with respect to these Pueblos in 1851; no "new" rights were created by the Act of 1851.

Consequently, the Recommended Disposition should have found that notwithstanding any theoretical limits that might have pertained to their rights under Spanish law, American law recognized the full measure of aboriginal rights, including their rights to water, enjoyed by these Pueblos, and Magistrate Judge Lynch could have gone on to address the sub-issues.

CONCLUSION

Magistrate Judge Lynch's Proposed Findings and Recommended Disposition is inconsistent with applicable law, in that it posits a finding of extinguishment of Pueblo water rights in the complete absence of any affirmative act of the Spanish sovereign whatever that could have or was intended to effectuate such an extinguishment, and in that it fails entirely to demonstrate that Spanish law or policy in this area was in any respect "adverse" to Pueblo water rights. On the contrary, the evidence in the record shows extraordinary deference to and

protectiveness of Indian water and land rights on the part of the Spanish in the 16th, 17th and 18th century, and that policy was effectively unchanged during the brief Mexican period. The Court should therefore reject Magistrate Judge Lynch's Recommended Disposition, and find that the Pueblos came under American sovereignty with their aboriginal rights intact. Alternatively, the Court should find that regardless of Spanish policy toward the Pueblos, the absence of any affirmative act to impose limits on Pueblo water rights meant that those rights remained intact, and that the extension of the Nonintercourse Act to the Indian tribes within the Mexican cession resulted in American law recognition and protection of those rights.

Respectfully submitted, this 1st day of November, 2016,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of November, 2016, the foregoing brief was filed electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as is more fully reflected on the Notice of Electronic filing.

I further certify that on the 1st day of November, 2016, I served the foregoing on the following non-CM/ECF participants by first class mail, postage prepaid, addressed as follows:

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