UNITED STATES DISTRICT COURT
FOR THE 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 STATE OF NEW MEXICO ex rel. STATE ENGINEER, and PUEBLOS OF JEMEZ, SANTA ANA and ZIA as Interveners

Plaintiffs,

v.

TOM ABOUSLEMAN, et al.,

83cv01041 MV-WPL
Jemez River Adjudication

Defendants

COALITION'S RESPONSE TO *US/PUEBLOS' OBJECTIONS* (Docs. 4384, 4385) TO MAGISTRATE JUDGE LYNCH'S *PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING ISSUES 1 AND 2* (Doc. 4383)

The Coalition files this response to both the *Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* (Doc. 4384; "*Santa Ana Objections*") and the *United States' Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* (Doc. 4385; "*US Objections*")[1]. The *Santa Ana Objections* and *US Objections* will be jointly referred to as *US/Pueblos' Objections*.

[1] The Pueblo of Zia joined both the *Santa Ana Objections* and *US Objections* (Doc. 4386).

At the outset it should be noted that in its October 4, 2004 *Memorandum Opinion and Order* (*2004 Opinion*) the Court denied the portions of motions for summary judgement[2], which sought summary judgment on the US/Pueblos' claim to an "expanding water right" with first priority, under an "aboriginal" or Winans theory. The State and Coalition contended that only the Pueblos' actual uses of water as of the eve of American sovereignty were recognized and protected by the Treaty of Guadalupe Hidalgo (Treaty). (*2004 Opinion* at 21). The Court denied those portions of the summary judgement motions because it did not have a sufficient understanding of Spanish and Mexican law to rule that only the Pueblos' actual uses of water were protected by the Treaty. *Id*. It was in this context that Magistrate Judge Lynch heard the testimony of both the US/Pueblos' expert (Cutter) and the State's expert (Hall) on Spanish and Mexican Law March 31-April 2, 2014 ("2014 trial"). Subsequently, the US/Pueblos, State and Coalition filed simultaneous opening, response, and reply briefs on August 19, October 20, and November 19, 2014, respectively, addressing Issues 1 (including the 3 sub-issues) and 2 in light of the 2014 trial testimony on Spanish and Mexican law.

In the context of the *2004 Opinion* and Legal Issues 1 and 2, Judge Lynch found, concluded, and recommended that the Court determine that the Spanish Crown extinguished the "Pueblos' right to increase their use of public water without restriction" and that "the Winans doctrine does not apply to any of the Pueblos' grant or trust lands." *Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* (filed October 4, 2016, Doc. 4383; *Proposed Findings and Disposition*) at 13 and 14. If the Pueblos' aboriginal - expanding rights

[2] One filed by the State of New Mexico (State), the other by the Coalition's predecessors.

were extinguished prior to the Treaty, *ipso facto*, only their existing uses could have been recognized and protected by the Treaty.

Prior to specifically addressing Judge Lynch's *Proposed Findings and Disposition* and the *US/Pueblos' Objections* thereto, the Coalition deems it appropriate to set forth an analysis of the claims the US/Pueblos are making under the guise of "aboriginal water rights" that they contend survived the Treaty. As will be demonstrated below, the US/Pueblos' claim of an "aboriginal water right" is dubious at best and contrary to law, Judge Lynch correctly concluded that any such "aboriginal water right" the Pueblos had prior to Spanish conquest was extinguished, and this Court should conclude that only the Pueblos' actual uses of water at the time of the Treaty, which has already been determined, was protected thereby.[3]

POINT I
THE US/PUEBLOS' CLAIM OF AN UNEXTINGUISHED, EXPANDING ABORIGINAL WATER RIGHT HAS NO BASIS IN LAW

Because the Pueblos have no basis for an expanding water right with first priority under the "reserved rights" or Winters doctrine (*2004 Opinion*), they resort to *dicta* from Winters v. United States, 207 U.S. 564 (1908) (Winters) for the proposition that prior to Spanish conquest, as the only inhabitants of the area, they had "total command of the lands and waters – command of all their beneficial use," in the Jemez Basin. The US/Pueblos themselves define this pre-conquest "total command" as it relates to water, their "aboriginal water right." The US/Pueblos then rely upon statements in United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941), (Santa Fe Pacific) for the proposition that extinguishment of such "total command" of the water within the Jemez Basin can only be found where there is proof of "plain and unambiguous

[3] Evidentiary hearings on the Pueblos Historic and existing uses, including actual uses at the time of the Treaty, has been concluded. *See, October 1, 1991 Report of the Special Master*, at 28.2 and 52.

action" to extinguish such title. *See, e.g., US Objections* at 3. They then contend that because there were no *repartimientos,* there was no extinguishment of that "total command." The US/Pueblos finally contend that quantification of that "aboriginal right" should be based upon their "practically irrigable acreage" ("PIA") plus additional amounts for "non-agricultural needs, such as domestic, municipal and commercial uses," all with a first priority.[4]

As noted by this Court and not contested by the Pueblos "neither the Mexican nor Spanish governments at any time recognized that the Indians had 'aboriginal title' in the legal sense in which that term is used in our courts today."[5] The US/Pueblos contend that the Pueblos nevertheless had "aboriginal water rights" that amounted to "total command" over water in the Jemez Basin. As such, water could be could be taken at the Pueblos' will from Spanish settlers who settled and farmed in the Jemez Basin without regard to the injury caused to those settlers. Such is dubious at best, relies upon "smoke and mirrors" and *dicta* from 19th and 20th century "aboriginal title" cases. Those cases, without any evidence, some 200- 300 years after Spanish conquest, impose upon the Spanish sovereign the American concept of "aboriginal title." In the case at bar, the Coalition submits that the imposition of such a doctrine on a sovereign when it is clear that such sovereign did not recognize such a doctrine, would be improper. In any event

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[4] With respect to Santa Ana Pueblo's historic use, the parties stipulated that, at some time, Santa Ana Pueblo had irrigated 16.5 acres within the Jemez basin. Historical Use Stipulation Pueblo of Santa Ana; filed June 29, 1988. As to the Pueblos' claims herein in relation to historic use, see Coalition's Opening Brief on Issue 1 and 2 (Doc. 4361, filed 8/19/2014) at 5. The Court should also note that Santa Ana has established its "homeland" in the Rio Grande Basin outside of the Jemez Basin (*Tx. 2014* at 120, lines 12-24).

[5] Court's *2004 Opinion* at 19 citing Pueblo de Zia v. United States, 11 Ind. Cl. Comm. 131, 133 (1962). Likewise, the State's expert witness on Spanish and Mexican law (G. Emlen Hall) found no references to "aboriginal title," much less an "aboriginal water right" under either Spanish or Mexican law. *Hall, Tx. 2014* at 284, line22 to 285, line 1. This was not challenged by the US/Pueblos nor their expert witness Charles Cutter.

however, as shown herein, any "expanding - aboriginal right" the Pueblos may have had was extinguished under prior sovereigns and only the Pueblos' actual uses of water were recognized and protected by the Treaty.

A. Neither The "Aboriginal Title Cases" Nor the Acts of Congress Cited by the US/Pueblos Support Their Claim of an Expanding Water Right.

The US/Pueblos object to Judge Lynch's *Proposed Findings and Recommended Disposition,* contending, e.g., they "are inconsistent with all applicable case law, unsupported by the record and contrary to controlling acts of Congress, ..." *Santa Ana Objections* at 2. To the contrary neither the "aboriginal title" cases nor acts of Congress relied upon by the US/Pueblos support their claim of an "expanding" aboriginal water right. Although the *US/Pueblos' Objections* are replete with references to "aboriginal rights" cases for various propositions regarding what is necessary to extinguish "aboriginal title," very few of them even mention aboriginal rights in connection with water. They involve almost exclusively nomadic tribes that entered into treaties with the United States pursuant to which they moved onto reservations and reserved certain rights to themselves in the treaty. The Court cites certain of these cases in the *2004 Opinion* at 30-13. See, e.g., United States v. Winans, 198 U.S. 371 (1905); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (Adair) and Joint Board of Control of the Flathead, Mission & Jocko Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 100 L. Ed. 2d 196 (1988) (Joint Board of Control). These cases were addressed in the *Coalition's Opening, Response and Reply Briefs on Issue 3* filed November 13, December 5 and December 21, 2012, as well as in the *Coalition's Opening, Response and Reply Briefs on Issue 1 and 2.* As demonstrated therein, in Winans, the Yakimas, by treaty, expressly reserved the right of taking fish at all usual and accustomed places, in common with the citizens of the territory. In Adair Article I of the 1864 treaty recognized the Tribe's exclusive right to hunt and fish on the

reservation, a non-consumptive use predating the treaty by some 1,000 years. For this use the Ninth Circuit affirmed a "time immemorial" priority. Article II of the treaty provided funds to help the Tribe adapt to an agrarian lifestyle. Id. at 1397-1398. The Ninth Circuit affirmed the date of reservation priority for these uses. In Joint Board of Control, the Tribe's fishing rights were secured by an 1859 treaty. The Ninth Circuit held that to the extent that the Tribe did exercise aboriginal fishing rights at the time of the treaty, the treaty did preserve those rights and they had priority over later irrigators. Hence in these cases only uses predating the creation of the reservation were given a time immemorial priority. New agricultural uses were limited to a date of reservation priority.

The only case that addresses aboriginal consumptive use rights and implies that such a right is "expanding," is New Mexico ex. rel. Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985) (Aamodt II). The US/Pueblos rely on Judge Mechem's conclusion that the Aamodt Pueblos had an "expanding" right under Spanish and Mexican law. The US/Pueblos denounce Judge Mechem's conclusion that such "expanding right" was terminated by the 1924 Act and that the Pueblos' water rights were based, not on"PIA," but rather on their "historically irrigated Acreage" (HIA). With respect to the Pueblos' "aboriginal rights" Judge Mechem's December 29, 1993 Opinion clarified many of the court's previous memoranda opinions and orders, stating (citations omitted): "Aboriginal irrigation water rights may exist on any lands occupied and irrigated by the Pueblos from time immemorial;" and further "The first priority of the Pueblos to water is limited to lands actually irrigated. To interpret this passage as supporting first priority for PIA is incorrect as a matter of law." Id. at 3- 4, emphasis by the Coalition. Hence under the authority set forth above and in the *Coalition's briefs on Issue 3*, any "aboriginal" rights to water these Pueblos may have are limited to their actual uses as of 1848.

The Coalition assumes that Santa Ana's contention that Judge Lynch's recommended finding and conclusion of extinguishment of the Pueblos' aboriginal water rights is "contrary to controlling acts of Congress," *Santa Ana Objections* at 2, refers to the Act of February 21, 1851, 9 Stat.574 (1851 Act) extending the provisions of the Indian Trade and Intercourse Act of 1834 to the "Indians" in New Mexico. While the Coalition takes issue with the 1851 Act's application to the Pueblos in New Mexico, even if it did apply, as observed by the Court the 1851 Act did not create any rights in the Pueblos. *2004 Opinion* at 25 ("Nor did the extensions of the Indian Trade and Intercourse Act over the Indians of New Mexico impliedly reserve any water rights above what the United States agreed to recognize in the Treaty of Guadalupe Hidalgo"). *In accord*, *Santa Ana Objections* at 20.

B. The Pueblos Concede that a Grant by Spain to a Third Party Extinguished The Pueblo Aboriginal Claim to What was Granted.

Under American law governing aboriginal title, the Spanish Crown's grant of water to Spanish settlers within the San Ysidro and Cañon de San Diego Grants extinguished the Pueblos' aboriginal claims to those waters. When the Spanish Crown authorized and established the San Ysidro Grant in 1786, Cutter, V1, p. 136, lines 16-19 and Hall, V2, pp. 266, lines 23-24, and the Cañon de San Diego in 1798, Hall, V2, pp. 267, lines 6-7, the Rio Jemez became, if it was not already, public water to be shared by all users, as described under Point II below. San Ysidro and Cañon de San Diego are both New Mexico community land grants, with implied rights to use water from the public source. Hall, V2, p. 228, lines 21-23, p. 267, lines 4-5; Cutter, V1, p. 134, lines 9-17. As this Court recognized by final decree of non-Pueblo water rights, Spanish ditches or acequias within the grants were irrigating over a 1,000 acres during Spanish rule. *See Partial Final Judgment and Decree on Non-Pueblo, Non-Federal Proprietary Water Rights* (Doc. 3948, filed Dec. 1, 2000), Addendum Book 1, pp 1-55. Spanish settler irrigation accounted

for approximately one-third of all irrigation at that time, *see October 1, 1991 Report of the Special Master*, at 28.2., and was located generally upstream of the Pueblos. Hall, V2, pp. 266, lines 23-24, p. 267, lines 6-7.

On a water short stream like the Rio Jemez, the Spanish Crown's granting of substantial water rights to Spanish settlers upstream of the Pueblos can only be seen as a plain and unambiguous encroachment on the Pueblos' prior exclusive use of those waters. The grant of a substantial portion of the river's waters to Spanish settlers had the same legal effect as that of a grant to others of land previously claimed or used by a Pueblo, i.e., the Pueblo's aboriginal right to what was granted was extinguished. See Pueblo of Zia v. United States, 165 Ct.Cl. 501, 503 (1964) ("Appellants (Pueblos of Jemez, Zia and Santa Ana) concede the correctness of the Commission's determination that they have no aboriginal claim to Spanish grants which encroach on the claimed area, since these grants were all held valid and patented by the United States, and hence were private property as of the time of the Treaty."); 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). The Pueblos now again concede this form of extinguishment: "… 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." *Santa Ana Objections at 9*.

The San Ysidro and Cañon de San Diego grants, with implied grants of water, were made by Spain in 1786 and 1798, respectively. See Pueblo of Zia v. United States, 168 U.S. 198, 202 (1897) ("San Isidro Grant" 1786 and "Cañon de San Diego Grant" 1798). Congress confirmed

the San Ysidro Grant by Act of June 21, 1860 and 11,476 acres were patented in 1936. See *Act to Confirm Certain Private Land Claims in the Territory of New Mexico*, Chap. 167, 12 Stat. 71 (1860); H. R. Exec. Doc. No. 14, 36th Cong., 1st Sess. 79-81 (1860); GAO-01-951 Report, *Treaty of Guadalupe Hidalgo, Definition and List of Community Land Grants in New Mexico* (Sept. 2001), Appendix I. Congress confirmed the Cañon de San Diego Grant in 1860 and its 116,286 acres were patented in 1881. *Id*. And finally this Court, in this case, entered a final judgment and decree, binding on all parties including the Pueblos and the United States, that the water rights associated with those grants are valid. See *Partial Final Judgment and Decree on Non-Pueblo, Non-Federal Proprietary Water Rights* (Doc. 3948, filed Dec. 1, 2000).

The legal effect of Spanish land grants made to Spanish settlers is analogous to the legal effect of grants by the United States to homesteaders and other third parties adverse to a claim of aboriginal title. In United States v. Pueblo de Zia, 474 F.2d 639, 641 (1973), Jemez Pueblo conceded that the federal transfer of property to private parties extinguished aboriginal title and the ICC "found that a scattering of 114 homesteads deprived the pueblos of aboriginal lands." Id. at 641 n.4 ("The parties agreed . . . that 16,811.74 acres were taken during 1920 by various homestead or preemption entries."). See also United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391 (finding title extinguished on dates when "third persons entered lands conveyed to them under the public land laws"); Pueblo of Jemez v. United States, 790 F.3d 1143, 1151 (10th Cir. 2015 (quoting Gila River Pima–Maricopa Indian Community v. United States, 494 F.2d 1386, 1391 (1974) ("Unquestionably, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorized settlement is only one of various factors to be considered in determining when specific lands were 'taken.") (in original).

POINT II
THE RECORD SUPPORTS JUDGE LYNCH'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION AND THEY SHOULD BE ADOPTED

Judge Lynch found and concluded, based upon the 2014 trial testimony and subsequent briefing, that:

> I find 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 water without restriction and as such is an exercise of complete dominion adverse to the Pueblos' aboriginal right to use water.

Proposed Findings and Disposition at 13. With respect to his recommendations:

> Further, I recommend that the Court find that Spain imposed a legal system to administer the use of public waters which extinguished the Pueblos' right to increase their use of public water without restriction, and that Spain's exercise of complete dominion over the use of public waters extinguished the Pueblos' aboriginal water rights. Finally, I recommend that the Court conclude that the *Winans* doctrine does not apply to any of the Pueblos' grant or trust lands.

Id. at 14. With respect to the sub-issues under Issue 1, Judge Lynch concluded:

> Because I recommend that the Court conclude that the Spanish crown extinguished the Pueblos' aboriginal right to use water, the issues of whether the Acts of 1866, 1870, and 1877; the Pueblo Lands Acts of 1924 and 1933; and the Indian Claims Commission Act had any effect on those rights are moot.

Id. at 13. Hence, because of his finding and conclusion that Spain's imposition of its *regalia* over water ended the Pueblos' right to increase their use of public water without restriction and extinguished any "expanding - aboriginal water right" the Pueblos may have had prior to the conquest as the only inhabitants in the Jemez Basin, it was unnecessary for him to address, whether such an inchoate, expanding right was recognized and protected by the Treaty or any of

the other sub-issues enumerated under Issue 1.[6]

In their contentions that the Court should reject Judge Lynch's proposed findings and recommendations concerning Spanish and Mexican Law, the US/Pueblos are very selective in their references to the *2014 trial transcript.* As Judge Lynch properly found, based largely upon the testimony of Cutter, the US/Pueblos' witness, and Cutter's report introduced by the US/Pueblos in the 2014 trial:[7]

> The crown's regalía included the power to determine rights to public shared waters. (Id. at 105 ("regalia included the power to determine rights to public shared water"); see also id. at 50 ("to oversee the use of water"), 51 ("That is the prerogative of the crown, to ensure effective use of water"), and 126 ("The crown reserved the right to allocate access to public shared waters.").) The right to use public waters was an interest separate from land ownership. (Id. at 112-16 ("the surface interests of land was a separate interest under Spanish and Mexican law from the mineral interests and from the interest in common public water sources"); see also id. at 119-22;....
>
> Public water in rivers was a common resource for use by everybody. (Id. at 113-14; ... The general principle was one could not use public waters to the detriment of other users. (Cutter Tr. at 114-15; Hall Tr. at 269.) A user could increase his use of water so long as that increased use was not to the detriment of other users. (Cutter Tr. at 130; Hall. Tr. at 215.) If one user's increased use caused a detriment to another user, the crown could intervene in the conflict and make an allocation. (Cutter Tr. at 124, 130.)

Findings and Recommended Disposition at 7-8. The Coalition submits that substantial evidence supports Judge Lynch's *Findings and Recommended Disposition* and they should be adopted by the Court.[8] As testified to by both Cutter and Hall, with the Spanish conquest the laws of the

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[6] This issue of inchoate rights and the "sub-issues" under Issue 1 have been fully briefed by the parties in their briefs on Issues 1 and 2. Further, quantification of any Winans or aboriginal rights the Pueblos may have was briefed in connection with Issue 3 and, as demonstrated by the State and Coalition, is limited to historic use predating the Treaty.

[7] Judge Lynch's references are to Cutter testimony or report unless otherwise indicated.

[8] The following is taken from the Coalition's Opening Brief on Issues 1 and 2, filed 8/19/14 (Doc. 4361), for the Court's convenience.

new sovereign controlled access to common, shared water sources. As stated by Hall, the Pueblo water rights were subject to the authority of the succeeding sovereigns - the law of Spain and then Mexico extinguished the Pueblos' unilateral command over common, shared water sources and subjected Pueblo water claims to the general control of the broader government. *Hall Report*, State's Ex. 2, at 1-2, 4; *Hall testimony, Transcript of Proceedings March 31 - April 2, 2014*, (hereafter "*Tx. 2014*,") at 203 - 204, 402. In all cases the right to water from a common source was based on a choice made by the conquering sovereign, not the conquered subjects. *Id*. *Hall Report*, State's Ex. 2 at 11. In this sense the conquest by Spain and the imposition of Spanish rule over the Pueblos and their resources extinguished the unfettered command that the Pueblos may have had prior to 1540. *Id*. From 1540 on, Pueblo sovereignty extended only as far as the law of the succeeding sovereigns allowed it to. *Id*. It was first the Spanish and then the Mexican law that determined Pueblo ownership of resources, not the previous Pueblo command of those resources. *Id*. at 11, 13. In accord, *Cutter*, Tx. 2014 at 167, line 12 to 168, line 24. Although there may have been protections of the Pueblos' lands and use of water at the time of the Spanish conquest, Spain as the conquering sovereign certainly did not recognize a right in the Pueblos to greatly expand the use of water to the detriment of its other citizens as claimed by the US/Pueblos here. If granted, such an expansive claim would squeeze out the rights of others, including acequia members of the Coalition whose water rights were equally valid under Spanish and Mexican law and were protected by the Treaty.

According to the US/Pueblos' previous expert on Spanish and Mexican law, Santiago Oñate who testified on their behalf on July 14, 1988, the Crown of Castile declared itself owner of all lands and waters in New Spain. *Oñate Deposition*, *Tx. 2014*, *Coalition's Exhibit 1*, at 108, line 4 to109, line 19; 164, lines 16-25; *Oñate* testimony in this case in 1988 (*Onate, Tx. 1988*,

Vol. IV (hereafter "*Tx. 1988*") at 610, lines 10 - 24. The US/Pueblos' current expert, Charles Cutter, takes a different view and believes that instead of assuming ownership of all the land and water in new Spain, the Crown only asserted its sovereignty and jurisdiction over the area. However, as Professor Hall points out, it makes no difference whether the Crown acquired ownership, on the one hand, or sovereignty and jurisdiction on the other, under either the Crown had power over property, defined it, and the Pueblos' claims to water resources were still determined under the laws of the sovereign, i.e., first Spain, then Mexico. *Hall Report, State's Ex* 2, at 13; *Hall, Tx. 2014* at 269, line 3 to 270, line 17.

As Cutter testified "*regalia*" was "the prerogative of the sovereign to license, allocate, or have control over certain issues... And in this particular case, to oversee the use of water." *Tx. 2014* at 49, line 17 to 50, line 6. This concept of "*regalia*" applied to the regulation of the use of water by the sovereign. *Id*. at 51, lines 1- 18, 104, line 10 to 105, line7; 108, lines 6 - 17. Cutter agreed with the US/Pueblos prior expert, Santiago Oñate, as well as with the State's expert, Professor Hall, that a principle of Spanish civil law, based largely on Roman law, was that waters were to be held in common, shared, and for the use by everyone. *Tx. 2014* at 113, line 6 to 9; 114, line 1to 116, line 18.

The Coalition submits that in accordance with the foregoing, Spanish conquest and occupation itself extinguished the Pueblos "total command" and any "aboriginal water rights" they may have had to make uses of water that would result in injury to the Spanish settlers who also settled and farmed in the Jemez Basin. In their contention that they had "total command" of the waters in the Jemez basin which was never extinguished, the US/Pueblos not only ignore the impact of the Spanish conquest itself, they also overlook the "cedulas" (laws) which were incorporated into the Recopilacion as 4.17.5 and 4.17.7. Recopilacion 4.17.5 and 4.17.7 provided

that water from a common source was "common" to both the Indians and the Spanish settlers. *Hall Report* at 19; *Oñate deposition, Coalition's Exhibit 1*, at 120, line 10 to 122, line 20; *Oñate Testimony, Tx.* 1988 at 614, line 24 to 615, line 7; *Cutter, Tx. 2014* at 116, line 19 to 118, line 2; 168, line 18 to 169, line 5. As Cutter testified beginning at Tx. 2014 168, line 18:

> Q. Okay. The provisions of Recopilacion, I'm going to say 4.17.5 and 4.17.7, those are the provisions that actually provided that the woods, pastures, and waters were to be common to both the Spaniards and the Indians. Is that correct?
>
> A. That's correct. And that's similar to what was the case in Spain at the time, that there was common pasture, rivers were to be used by everyone. So what we're seeing is not something distinct to the Indians, but an approach that water is common.

(Emphasis added). The Coalition submits that these provisions of the Recopilacion "plainly and unambiguously" provided that waters, and as relevant here, rivers, were common and were to be used by everyone (Spaniards and Indians). Hence even if an aboriginal water right as claimed and defined by the US/Pueblos was not extinguished by the Spanish conquest itself, it was clearly and unambiguously extinguished by Recopilacion 4.17.5 and 4.17.7. The US/Pueblos' argument that because there were no *repartimientos*, their "total command" remained in tact, ignores the law of first Spain, then Mexico. Just because there were no *repartimientos* because there were no documented disputes over water in the Jemez Basin certainly does not change the law that water was in common to both Spaniards and Indians. As the 2014 testimony and exhibits demonstrated, while everyone had the right to use the common waters, no one had the right to do so to the injury of others. Should conflict arise, the Crown would step in and exercise its "*regalia*." *Cutter, Tx. 2014* at 114, lines 17 - 24. As a general principle, one could not use public waters to the detriment of other users. *Id.* at 114, line 25 to 115, line 3. The Crown (sovereign) could exercise its "*regalia*" over water by a "*repartimiento*;" or it may issue orders

to resolve the water conflict, or encourage the parties to resolve the conflict themselves. *Id*. at 126, line 13 to 127, line 16.

As the court observed in Aamodt II, at 618 F. Supp 993, 998-999 (D.C.N.M. 1985):

> 8. In the event of a dispute over the use of water, allocations and quantification of irrigation rights were made in a *repartimiento*.
>
> 9. A *repartimiento* was a quasi-judicial proceeding in which government officials applied controlling principles of equitable distribution to apportion available water supplies.
>
> ***
>
> 16. Under Mexican law, *repartimientos* did not give any preference, or prior and paramount interest, to Indian irrigation needs; instead, the competing needs of all water users were taken into account and allocations made on the basis of relative needs. By definition, the *repartimiento* involved a balancing of needs to achieve an equitable distribution of available water.

As Professor Hall points out, the existence of the *repartimiento* process itself shows that private Pueblo rights to common public water under Spanish and Mexican law were subject to the over-riding adjudicatory authority of the broader government and that the existence of the *repartimiento* process meant that the Pueblos did not have full command of the common public water which ran through their lands. *Hall Report* at 36. The sovereign's power to control the allocation of water under Spanish law did not change during Mexican sovereignty. *Cutter, Tx. 2014* at 131, lines 10 - 19.

As stated by Hall:

> The public's interest in water allocations under Spanish and Mexican law was not simply the exercise of a residual right of eminent domain. Instead, the public right of allocation and control was a right that the supervising sovereign had never parted with in allowing and overseeing rights to water in the first place. It was in this area, particularly, where the government's jurisdiction over Pueblo and non-Indian access to common public water sources operated, clearly extinguishing Pueblo unilateral control over access to it.

Hall Report, *State's Exhibit 2*, at 33. *Hall, Tx. 2014*, at 241, lines 1 - 19.

In accord, *Cutter, Tx. 2014*, at 167, lines 12 - 24:

> Q. I guess my point is, this judicial order, it was government intervention, and we want to look at it that way and say how you're going to do things.
>
> A. Yes. Exactly.
>
> Q. Which was exactly what was accomplished under repartimiento as well?
>
> A. Right. The intervention of the state.
>
> Q. So it showed the broader power of the government was in control of the distribution of that water?
>
> A. Right. And the crown, or the Mexican government, intervened when some kind of conflict emerged.

In addition to extinguishment of the Pueblos' pre-conquest "total command" both by the Spanish conquest itself and the imposition of Spanish sovereignty over the Pueblos as well as the laws in Recopilacion 4.17.5 and 4.17.7, additional clear acts of extinguishment occurred with the Spanish land grants to San Ysidro and Cañon de Diego de Jemez, the predecessors in interest to many of the current non-Pueblo water right owners in the communities of Jemez Springs, Cañon, Ponderosa and San Ysidro located along the Jemez River. Significantly, both Hall and Cutter recognized that these grants not only included the land but also included an "implied grant of water." As Cutter testified (*Tx. 2014* at 136):

> Q. Are you aware of any Spanish grants for communities in the Jemez River system?
>
> A. Yes. I think there are two grants. One San Ysidro, and the other one the Canon de Diego de Jemez.
>
> Q. And do you know the dates of those grants, approximately?
>
> A. Late 18th, early 19th century.
>
> Q. And I believe you have expressed the opinion that both of those grants imply the right to use of water. Is that right?

A. Yes. They were farming communities.

Q. So is it correct that after the date of the first of those grants the Jemez River was a public shared water source?

A. True.

And further at *Tx. 2014*, at 160 - 161:

Q. Okay. I think you've testified, too, this morning, that they [the Pueblos] could continue and make additional uses of water -- this is up to the eve of sovereignty -- as long as it didn't infringe with or harm anybody else's use. Is that correct?

A. When it did harm somebody, there would be some kind of complaint. And then some authority from the government would step in. I think it's important to point out that in this watershed we don't have any documentation of that.

Q. Okay.

A. I'm assuming that the three Indian pueblos used water the way they saw fit. We don't see any conflict being generated.

Q. Okay. And the community of the San Diego grant, that's basically the community of Jemez, which is actually above [upstream from] Jemez Pueblo. Is that correct?

A. Yes.

Q. Okay. And that had an implied right to use water. Is that correct?

A. That is correct.

Q. So it would be a good assumption that they were also using water during that period?

A. Yes.

Q. Okay. And they, likewise, would have had the right to increase their uses as long as nobody downstream objected or went to the authorities, correct?

A. That is my understanding of how water administration worked both in the colonial period and in the Mexican period.

Also, see, *Hall, Tx. 2014* at 266-269, describing the location of the San Ysidro and

Cañon de San Diego grants in relation to the Jemez and Zia Pueblos and the discussion of those grants under Point I(B), *supra*.

As of the eve of American sovereignty (1848) both the Pueblos and non-Pueblos could make new uses of water from the common source [Jemez River] but not to the detriment of other users from that source. *Id.* At 269. *Cutter, Tx*. 2014 at 150, lines 10 -15. *Hall, Tx. 2014* at 208, lines 17 - 22. The determination of detriment was made by the broader government in charge of the apportionment of waters from a common source (first Spain, then Mexico), not by the Pueblos. *Id.* at 208, line 24 to 209, line 8; *Cutter, Tx. 2014* at 147, line 23 to148, line 10. Under Mexican law the Pueblos had no preferences in a *repartimiento*. Absent a *repartimiento*, only actual uses as of 1848 of both Pueblo and non-Pueblos were recognized and protected, i.e., the Treaty protected existing and perfected rights to water, including Pueblo rights to water, the same as any other Mexican citizens' rights to water - i.e. water they actually used. The Pueblo Indians were considered citizens under the law, and the Treaty protected equally Indian and non-Indian perfected property rights. *Hall, Tx. 2014* at 279, line 18 to 280, line18; 298, line 19 to 299, line 9; 207, lines 14 - 22. In accord, *2004 Opinion* at 23-24 ("The Treaty...was an agreement between the United States and Mexico in which the United States agreed to protect property of Mexican citizens then in the ceded territory. Mexican citizens included not only Indians, but Europeans and Africans. As such, the Pueblos' grant lands had no different status under the Treaty than the grant lands owned by the non-Indian Mexicans."). As Judge Lynch correctly observes with respect to the Treaty based upon the evidence presented: At the time of the Treaty the property rights of pueblos were no different than property rights of Mexicans. . . . The treaty did not treat property rights of Pueblos specially, and it guaranteed the present protected rights of pueblos as Mexican citizens, as any other Mexican citizen; at the transfer of

sovereignty Mexican law protected primarily water that was then used by both the pueblos and the non-Indians from that common source; ... Indians were treated as Mexican citizens and.... "[t]he treaty protected as presently perfected water rights, pueblo rights to water, that they actually used.". *Proposed Findings and Recommendation* at 9-10. As this Court further concluded the Treaty only protected existing rights and neither it, nor the acts confirming title to the Pueblos, granted or reserved additional property rights in the Pueblos but maintained the *status quo*. *2004 Opinion* at 24. The Treaty did not, however, protect inchoate or imperfect rights. *Hall, Tx. 2014* at 278, line 19 to 279, line 4; see also *Coalition's Opening, Response and Reply Briefs on Issues 1 and 2*.

Despite the US/Pueblos' total reliance on the fact that there were no *repartimientos* in the Jemez Basin, and therefore their "total command" has never been extinguished, they discuss various *repartimientos* in great detail, presumably for the proposition that the Pueblos would be given some preference in a *repartimiento*. *Santa Ana Objections* at 15-19; *US/Pueblos Objections* at 16-18. In their objections, Santa Ana relies heavily on the 1823 Taos *Repartimiento*. In that *repartimiento*, Taos Pueblo and the non-Pueblo community of Don Fernando de Taos complained that the new community of Arroyo Seco, located upstream from Taos Pueblo and Don Fernando, was taking water preventing them from getting the water to satisfy their needs (clearly based on actual uses). Although there was much back and forth between the Cutter Testimony and the Hall testimony concerning various phrases in the ayuntamiento's decision, the bottom line was:

> Q. Okay. But I think my question was: For the Taos Pueblo to be complaining that Arroyo Seco was taking some of the water that they should be getting, it necessarily follows that whatever land they were claiming that for -- or Arroyo Seco's point of diversion was above that point, correct?
>
> A. Yes.

> Q. Okay. And despite this complaint that they weren't getting sufficient water, the end result of that repartimiento is that Arroyo Seco was given one surco of water, correct?
>
> A. Exactly.

Tx. 2014 at 455, line 23 to 456, line 9. The fact that Arroyo Seco, the "new" community was given one surco of water shows that water was common to both the Spanish settlers and the Pueblos, negating the concept that the Pueblos had "total command" over public waters.

Although Cutter does not recognize a dispute between Tesuque Pueblo and downstream non-Pueblo users as a "formal" *repartimiento*, it did involve governmental intervention (*Tx. 2014*, 166, line 20 - 167, line 24). As Cutter testified at 168, lines 6 - 17:

> Q. So the conflict that you remember was the conflict that was in the 1800s over the pueblo [Tesuque Pueblo] actually constructing a ditch that took spring water away from the common source. Is that what you were talking about?
>
> A. Yeah. That's what I was thinking of.
>
> Q. And the order basically resulted in an order that, basically, the pueblo could not interfere with the water from the common source getting to downstream non-Indians. Is that correct?
>
> A. That's correct.

Also see *Hall Report, 2014, States Exhibit 2* at 28. Actually government intervention started some 50 years earlier in 1752 on the Rio Tesuque with a grant by the Spanish government to non-Pueblos upstream from Tesuque Pueblo. *Id.* The grant explicitly authorized the non-Pueblo use of the Rio Tesuque surface water but directed the new settlers not to reduce the flow of the Rio Tesuque in a way that harmed existing downstream uses by the Pueblo. Such is absolutely contrary to the US/Pueblos claims of "total command" over water from a common source.

Interestingly, the US/Pueblos cite Recopilacion 4-12-18, 4-12-14, and 6-3-8 for the proposition that Indians or Indian communities had a special status under Spanish/Mexican

which protected their rights to land and their use of water, including the concept of additional water for expansion. Recopilacion 3-2-63 and 6-3-8 pertained to "congregaciones", applied to setting up new villages and did not apply to these Pueblos as they were already established. (tx. 2014 at 161, l. 12 – 163, l. 1). With respect to Recopilacion 4-12-18, as Oñate explains the seeming conflict between Recopilacion 3-1-1 where the Crown declared itself the owner of all lands and waters in New Spain, with Recopilacion 4-12-18: "The general principle is Crown ownership [Recopilacion 3-1-1], but later on they decided as a matter of law and as a matter of policy, as I have written in the memorandum, that it was wiser, more sensible, more convenient, and in the best interests of the conquest to leave the Indians in their possessions," and hence the exception in Recopilacion 4-12-18 was introduced in 1642. (*Oñate Deposition, Coalition Exhibit 1*, at 113, line 10 to 114, line 3.) Recopilacion 4-12-18 was a directive to those distributing land that in distributing lands they are to leave the Indians with the lands and waters that they had been using. *Oñate, TX. 1988* at 615, lines 14 - 24. Although Oñate testified that it was Recopilacion 4-12-18 that he relied upon for special treatment of the Pueblos, in a *repartimiento*, the needs of both the Pueblos and the Spaniards would be taken into account. *Id.* at 617, lines 6-16. With respect to water under Recopilacion 4-12-18, the Crown recognized what the Pueblos were using but to get more water they would have to ask the authorities and, in granting more, the authority would take into account all other nearby uses that may be affected. *Id*. at 623, line 19 to 624, line 9.

As Judge Lynch found, pursuant to the Plan of Iguala in 1821, under Mexican sovereignty which lasted until 1848 when the United States acquired sovereignty over the area pursuant to the Treaty of Guadalupe Hidalgo, all preferences given the Pueblo Indians based upon racial origin were abolished and the individual Pueblo Indians were considered as equal to

any other race, Spaniards or otherwise. *Proposed Findings and Disposition* at 8-9*; Oñate, TX. 1988* at 636, lines 10 - 25; *Cutter, Tx. 2014* at 157, lines 13 - 21. As Professor Hall explains:

> Pueblo status as indigenous Indians did not add much to the claim of a Pueblo for a particular apportionment of water in the *repartimiento* process during the period of Spanish rule. Under the Mexican law applicable as of the change of sovereignty in 1821, the Indian element of a Pueblo claim added nothing at all and, indeed, could not be considered by authorities in the allocation of water from a common source.

Hall Report, States Exhibit 2 at 40, and at *Tx. 2014*, 234 lines 9 - 13:

> Well, that after 1821 in the *repartimiento* process, the racial classification of Indians didn't add anything and couldn't be considered in the balance of coordinate factors that went into making up the *repartimiento* decree.

Although Cutter acknowledges that after 1821 it was not permissible to refer to the Pueblo Indians as "Indians" because all racial references were abolished, he insinuates that these three Pueblos may have been given certain preferences in a *repartimiento* because they were "communities" of long standing. As Cutter acknowledged at the eve of American sovereignty both the Pueblo communities and the non-Pueblo communities in the San Ysidro and Cañon Don Diego grants could have increased their use of water as long as no one objected and it was not to the detriment of other users. *Tx. 2014*, at 160 - 161.

Hence, under Mexican law (1821 - 1848) the Pueblos had no preferences in a *repartimiento*; and, absent a *repartimiento*, only actual uses as of 1848 of both Pueblo and non-Pueblos were recognized and protected, i.e., the Treaty protected existing and perfected rights to water, including Pueblo rights to water, the same as any other Mexican citizens' rights to water - i.e. water they actually used.

POINT III
ANY EXPANDING RIGHT THE PUEBLOS MAY HAVE HAD WAS EXTINGUISHED BY PRIOR SOVEREIGNS AND THE TREATY ONLY PROTECTED THEIR EXISTING USES.

The US/Pueblos contend that Judge Lynch's *Proposed Findings and Disposition* is contrary to American law of aboriginal title because there was no affirmative act by the Spanish sovereign adverse to the Indian right of occupancy. *US Objections* at 20; *Santa Ana Objections* at 4. The *Santa Ana Objections* at 7-10 further argue that Judge Lynch's conclusion that the imposition of Spanish sovereignty itself extinguished the Pueblos' "total command" over water, is in error because if it applied to land, the Pueblos would have had no aboriginal title to land. Santa Ana states:

> If the mere imposition of a controlling legal 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. ... The Recommended Disposition attempts to address this point, saying that Spanish laws regarding Indian land rights were "separate" from laws regarding rights to 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.

Id. As previously stated, there was no doctrine of "aboriginal title" under either the Spanish or Mexican sovereigns. The Coalition does not dispute that lands the Pueblos' were occupying and using at the time of Spanish conquest were protected. The Coalition also does not dispute that the Pueblo's actual uses of water at the time of conquest were protected. What was extinguished, if it ever existed, however, was the Pueblos "total command over all lands and waters" within the area over which Spanish sovereignty existed. Contrary to the assertion of Santa Ana, Judge Lynch properly found, based upon the agreement of both experts, that land and water were treated differently and that what was extinguished was the "Pueblos right to increase their use of public water without restriction...."

What the US/Pueblos overlook is the direct and unambiguous acts of the Spanish Crown to grant land and water to Spanish settlers in the same watershed. Those actions made the waters of the Rio Jemez a shared public source and affirmatively ended any question that the Pueblos retained an exclusive right over use of water. Although Judge Lynch did not specifically recommend that the court conclude that only the Pueblos' existing uses were protected by the Treaty, his discussion of the Treaty at 9-10 certainly indicates such and because any "expanding" rights the Pueblos may have had were extinguished prior to the Treaty, *ipso facto*, only their existing uses could be recognized.

CONCLUSION

Pursuant the Court's *2004 Opinion*, Judge Lynch conducted the 2014 trial segment on Spanish and Mexican law. In the context of the *2004 Opinion* it was to determine whether the water rights of the Pueblos which were protected by the Treaty were limited to their existing uses or whether the Pueblos had "expanding rights" based upon the doctrine of "aboriginal title" that were protected. For the reasons set forth above and in the *Coalition's Opening, Response and Reply Briefs on Issues 1 and 2*, Judge Lynch properly concluded that the Pueblos' right to increase their use of public water without restriction.... or "total command" was extinguished by prior sovereigns and hence it could not be protected by the Treaty. *Ipso facto*, only the Pueblos' actual uses as of 1848 were protected by the Treaty and have been found by Special Master Zinn to have a first priority. Such does not limit the Pueblos from acquiring additional water rights under the laws of the new sovereign as found by Special Master Zinn.

Respectfully Submitted this 16th day of December 2016.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

AND I FURTHER CERTIFY that on the 17th day of December 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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