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.

UNITED STATES' REPLY IN SUPPORT OF OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING ISSUES 1 AND 2

On November 1, 2016, the United States filed Objections (Doc. 4385) to the Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 issued by Magistrate William P. Lynch on October 4, 2016 (Doc. 4383) ("Proposed Findings"). On December 16, 2016, the State of New Mexico ("State") filed a Response (Doc. 4389) to the United States' Objections and the Jemez River Basin Water Users Coalition ("Coalition") filed a separate Response (Doc. 4388) ("Coalition Resp."). The United States submits the following Consolidated Reply to the Responses filed by the State of New Mexico and the Coalition. The primary thrust of the State's and Coalition's Responses is this: the Rio Jemez was under Spanish law a "shared" resource, to be used by both Indians and non-Indians, and the Spanish crown had the power to allocate uses of water from such "shared" source. These facts alone, according to the State and Coalition,

extinguished the Pueblos' aboriginal water rights and no further action, edict or order was necessary by any Spanish official to eliminate the Pueblos' aboriginal rights. The State and Coalition are wrong. The Spanish crown undoubtedly had the authority, as sovereign, to allocate water rights among those who "shared" a common source. To extinguish the Pueblos' aboriginal rights, the crown, through a "plain and unambiguous" action, *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941), must have actually acted on its power, by issuing an order or edict allocating rights to a water source requiring the Pueblos, as a result of such allocation, to reduce their water uses from what the Pueblos otherwise would use. The crown did not do so. To the contrary, during the entire Spanish colonial period in New Mexico, the Pueblos used all the water they saw fit to use, with no interference by the Spanish crown.

I. This Court Expressly Recognized that Indian Aboriginal Rights Apply to Uses of Water on Aboriginal Lands, and the Coalition's Contention that Aboriginal Rights Doctrine does Not Apply to the Pueblos is Specious

In its October 4, 2004 Memorandum Decision and Order (Doc. 4051), this Court held that the doctrine of Indian aboriginal title applied to the Pueblos and that such doctrine specifically encompassed the Pueblos' aboriginal right to use water on their lands. *Id.* at 19-21. This Court stated that "in addition to the right to occupancy, aboriginal title includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title," *id.* at 20 and that the "policy of respecting aboriginal rights applies to the lands ceded to the United States by Mexico in the Treaty of Guadalupe Hidalgo." *Id.* *See also* Proposed Findings at 3. Notwithstanding this Court's holdings, the Coalition contends that imposition of the doctrine of Indian aboriginal title would be "improper" here. Coalition Resp. at 4. The Coalition's position is specious and should be summarily rejected.

II. Any Sovereign Would Have Had the Right to Allocate Uses of a Common Water Source; the Fact that Spain held Ultimate "Control" over Uses of Water Does Not, in Itself, Justify a Finding of Extinguishment of the Pueblos' Aboriginal Rights.

The Coalition asserts that "Spanish conquest and occupation itself" extinguished the Pueblos' aboriginal water rights because, once the Spanish crown exerted its sovereign control, the Pueblos no longer had "total command" of the use of the waters. Coalition Resp. at 13. It similarly asserts that "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." Coalition Resp. at 12. The State makes similar assertions. State's Resp. at 10. *See also* State's Resp. at 6 ("once the waters of the river were shared, they became public waters, under the authority of the Spanish crown"). Focus on the power of the dominant sovereign to make decisions on how water sources are to be used, however, is misplaced.

The fact that the crown, rather than the Pueblos, had the ultimate power to "control" uses of water is not particularly remarkable or significant. Any dominant sovereign has the authority to control resources in its territory. Thus, the mere power to allocate water rights and extinguish aboriginal rights, in itself, is insufficient to accomplish the extinguishment. If power to control were enough, the Supreme Courts' lengthy discussion in *Santa Fe Pacific* regarding the ongoing existence of aboriginal rights would have been irrelevant. The Supreme Court in *Santa Fe Pacific* went to great lengths to analyze whether the sovereign took specific actions to extinguish Indian aboriginal rights, making it clear that a sovereign had to exercise that authority in order to accomplish an extinguishment. 314 U.S. at 351-353. The court made it clear that it was not enough that the sovereign had the power to extinguish aboriginal rights; such power had to be deliberately exercised.

The United States has never disputed that Spanish crown had the power to intervene and allocate uses of water in the Rio Jemez among Pueblo and non-Pueblo users. But, the crown never exercised its power. The Coalition contends that it was up to the "conquering sovereign" to make "choices" on how water from a common source was to be used. Coalition Resp. at 12. The State similarly contends that "the Pueblos did not decide who received the water – the Spanish, and later, the Mexican officials did." State's Resp. at 12. Neither the State nor the Coalition, however, cite to any evidence to show that the crown made *any* allocation decisions. Thus, any potential sovereign authority the crown had to allocate water rights was unexercised and purely theoretical.

III. The Mere Fact that the Rio Jemez was Used by Both the Pueblos and Non Pueblo Users Does Not Mean that the Pueblos' Aboriginal Water Rights Were Extinguished

The State and Coalition repeatedly assert in their Responses that under Spanish law common sources of water were "shared" or "common" resources to be used by both Indians and non-Indians. State Resp. at 7 ("[I]t was the Spanish crown's act of imposing sharing of the water that exercised their legal dominion and control over the river as a public resource to be shared in common with others that extinguished the Pueblos' exclusive use and occupancy of the waters of the river"); Coalition Resp. at 11-12 ("[W]ith the Spanish conquest the laws of the new sovereign controlled access to common, shared water sources").[1] The State and Coalition further assert that, because both Indians and non-Indians had the right under Spanish law to use water from a "common" source, the Pueblos lost their "exclusive" right to use water and therefore, *ipso facto,*

[1] The State and Coalition refer to the "shared" or "common" water resource numerous times in their Responses. See State's Resp. at 4, 7, 8, 9, 10, 11, and 13; Coalition's Resp. at 7, 12, 13, 14, 15, 17, 18, and 24.

the Pueblos' aboriginal rights were extinguished. States' Resp. at 7; Coalition's Resp. at 11-12. The State and Coalition are mistaken because the fact that both Pueblos and non-Pueblos may have used water from the same source does not mean the Pueblos' aboriginal rights were extinguished.

As the United States explained in its Objections at 23-24, the Tenth Circuit, in *Pueblo of Jemez v. United States,* 790 F.3d 1143 (10th Cir. 2015) expressly rejected the argument made by the State and Coalition. Indian aboriginal rights are not necessarily extinguished when non-Indians used or held possessory rights to the same resource as the Indians. *Id.* at 1167. The court stated that, although settlement of lands in Indian aboriginal territory by non-Indians, with federal government authorization, was "an important indicator of when aboriginal title was lost." *Id*. at 1167, citing to *Gila River Pima Maricopa Indian Community v. United States*, 494 F.2d 1386, 1321 (1974) such authorized settlement was "only one of various factors to be considered" when determining if aboriginal title was lost. *Id*. The Tenth Circuit held that the critical inquiry necessary to determine whether aboriginal title was lost is "whether anyone has *actually interfered with* the Jemez Pueblo's traditional occupancy and uses of land in question." *Id*. at 1168 (emphasis added). The analysis is fact specific and, pursuant to *Jemez*, one cannot presume that aboriginal rights are lost merely because non-Indians used or "shared" the same resource.

Remarkably, the State and Coalition ignore the *Tenth Circuit's holding in Jemez (*in fact, the State fails to even cite the *Jemez* decision)[2] contending that, because the Pueblos' rights to use were no longer "exclusive" (i.e. the Rio Jemez was a "shared" resource) the Pueblos'

[2] The Coalition cites to *Jemez,* Coalition's Resp. at 9, but does not discuss the express holding in *Jemez* that the use of resources by non-Indians, even with governmental authorization does not, in itself, necessarily constitute extinguishment of Indian aboriginal title.

aboriginal rights were *ipso facto* extinguished. State's Resp. at 7. Coalition Resp. at 11-12. Taking the State's and Coalition's argument to its logical extension, every Pueblo's aboriginal water rights would be extinguished the moment any water source was shared with any non-Indian. This is not the law. The fact that both Pueblos and non-Indians may have "shared" the same water source is by itself not significant. The critical inquiry pursuant to *Jemez* is: did the fact that non-Pueblos used the same source of water as the Pueblos result in any *actual interference* with the Pueblos' rights to use water?

The Pueblos' rights to use water were not affected merely because non-Indians used the same water source, as the State's expert concedes. Under Spanish law, it was only when a conflict arose that allocation of the waters of a common water source became necessary and it was only then, *after* a decision on allocation was actually made by the appropriate Spanish or Mexican official, that actual restrictions on the amount of water that the Pueblos could use would have materialized. Tr. at 175-176. Dr. Cutter explained that although common sources of water were to be shared, that did not require the Pueblos to reduce their uses of water unless there was "some kind of complaint that some harm was being done, which kicked in the machinery of the government" and that Pueblos' water uses could continue absent direct "action by the government." *Id.* Absent government intervention, the Pueblos were "free to use the water." *Id.*

The State's own expert, Professor Hall, conceded that, because no *repartimiento* took place in the Rio Jemez, the Pueblos had the right to use, and continued to use water, "without interference" throughout the Spanish and Mexican period. Tr. at 334-335. The State's and Coalition's repeated references to the Rio Jemez being a "shared" water source under Spanish law is, therefore misleading. Both Pueblos and non-Indians may used water from the same source, and in that sense the Rio Jemez was a "shared" resource. But it was not the case that the

Pueblos were required by Spanish law to reduce the amount of water they were using in order to "share" water with non-Indians. To the contrary, Pueblo uses continued, unabated. The Pueblos had the right to use such water under Spanish law unless and until Spanish officials stepped in and directed otherwise. As conceded by the State's expert, that never happened.

The State contends that "a *repartimiento* was merely a means of enforcing the legal system, not establishing it," and that "the Spanish crown's power over the waters did not depend on "someone complaining." State's Resp. at 7. It is true that the crown's *power* to allocate water rights was not contingent on "someone complaining." But, as explained above, the crown chose to intervene and allocate waters only if someone raised a complaint, and it was only then that the crown stepped in. The crown, as the dominant sovereign, could have dealt with water rights in a different manner. For example, the crown could have mandated that if the Pueblos were to use water in a way that could possibly harm others, the Pueblos needed to obtain advance approval or permission by the crown before increasing their water users. Or, the crown could have quantified, in advance, the amount of water the Pueblos could use and mandate that the Pueblo seek specific permission to increase such uses. These methods of water management likely would have reflected an intent to extinguish at least a portion of the Pueblos' right to use water. Yet, the historical record is clear that the crown did not regulate water resources in such manner.

Contrary to the State's and Coalition's argument, the issue is not a matter of the Spanish crown's power to manage or regulate uses of water; were that the case then all aboriginal rights of Pueblos in New Mexico would have instantly ended the moment the territory came under Spanish rule. Instead, the issue is: how did the crown exercise its powers to regulate uses of water? The record shows that the essence of the "system" that existed under Spanish law is that the Pueblos had the right to continue using water, unless and until a Spanish authority directed

the Pueblo otherwise. The crown never intervened, and thus there was no unambiguous action indicating an intent to extinguish the Pueblos' aboriginal rights.

IV. The State's and Coalition's Focus on the Specific Water Rights of Non-Indians is Misdirected.

The State and Coalition devote numerous pages of their Responses discussing the alleged water rights of non-Indians and contend that the granting of water rights to non-Indians was, in itself, an act of the sovereign to extinguish the Pueblos' aboriginal rights.[3] The State, citing to land grants issued by the Spanish crown to several non-Indian communities, State's Resp. at 9-10, contends that "by granting lands for irrigation to settlers both upstream and downstream on the river, Spain unambiguously and plainly asserted dominion over the waters by limiting and allocating the amount of water supply formerly controlled exclusively by the Pueblos." *Id*. at 10. The Coalition makes similar arguments. *See* Coalition Resp. at 8 (the Spanish crown's granting of water rights to Spanish settlers "can only be seen as a plain and unambiguous encroachment on the Pueblos' uses of those waters").

The extent to which non-Indians held water rights in the Rio Jemez Valley is a red herring. It is correct that under Spanish law grants of land often included an implied right to use water on such lands. Tr. at 134. However, that has no bearing on the rights of the Pueblos' aboriginal right to use water. Neither the State nor the Coalition purport to show that there were

[3]Although the State and Coalition made minimal references to land grants issued to San Ysidro and other non-Indian communities in briefs filed before Judge Lynch, *See* State of New Mexico's Opening Brief on Issues 1 and 2 (Doc. 4363) at 10; State of New Mexico's Response Brief on Issues No 1 and 2 (Doc. 4366) at 11;and Coalition's Opening Brief on Issues 1 and 2 (Doc. 4361) at 17, it is only in the present Responses that the State and Coalition devote lengthy discussions to these non-Indians land grants and contend that these grants, by themselves, constitute an "act" of the crown to extinguish aboriginal water rights. To a large extent, the focus of the Responses on the implied water rights of non-Indians is a new argument not fully briefed to Judge Lynch.

any provisions in the land grants that somehow limited the right *of the Pueblos* to use water. The mere existence of the land grants (and accompanying implied water rights) has no legal consequence here,[4] *unless* Spanish or Mexican officials, precisely as a result of the consideration of the non-Indians' implied water rights, ordered the Pueblos to reduce the amount of water they were using. As explained above, that never happened.

The bottom line is, regardless of what water rights (implied or otherwise) non-Indians may have had to use water in the Rio Jemez,[5] the Pueblos continued to use whatever water they saw fit. At no time did the crown ever intervene to restrict the Pueblos' water uses. The State is, therefore flatly wrong when it asserts that the crown, by granting land and implied water rights to non-Indians, asserted control over the Pueblos by "limiting and allocating the amount of water" used by the Pueblos. State's Resp. at 10. To the contrary, the crown *never* allocated the amount of water the Pueblos could use, nor did the crown direct the Pueblos to reduce the amount of water they were using so that those in San Ysidro (or other non-Indian communities) could use the water instead. Had that occurred, an argument might be premised on that action. But, that is

[4]To support its contention that the Pueblos' water rights were extinguished, the Coalition cites to various Indian Claims Commission ("ICC") and Court of Claims cases which held that certain pueblos' aboriginal rights to land were extinguished because the Spanish crown issued land grants, covering the same parcels of land, to non-Indians. See Coalition Resp. at 8. The Tenth Circuit's decision in *Jemez*, which discusses various ICC and Court of Claims cases, sets forth the position that this Court must follow here, namely that the granting of possessory rights to non-Indians does not, by itself, mean that Indian aboriginal rights were extinguished.

[5] In addition to the land grants to various non-Indian communities, the State cites, as evidence that "Spain took affirmative acts" to extinguish the Pueblos' aboriginal rights, various non-Indian water rights recognized in the Partial Final Judgment and Decree on non-Pueblo, non-Federal Proprietary Rights entered by this Court on December 1, 2000, as well as several Ditch Agreements executed by the United States, ditch associations, and the State. *See* State's Resp. at 10-11. These documents focus only on non-Indians' rights and do not even purport to address the nature, scope, or priority of the Pueblos' aboriginal rights, nor do they contain any provisions imposing any obligations on the Pueblos to reduce their water uses or in any other manner to cease from exercising their aboriginal rights. These documents are not relevant.

sheer speculation, as there was no *repartimiento* or other proceeding during the Spanish period to allocate uses of water in the Rio Jemez. Tr. at 334-335.

V. There is no factual basis for the Court to speculate regarding the extent to which the Pueblos' water rights would have been reduced, it at all, if a *repartimiento* had taken place on the Rio Jemez

Aboriginal rights can be extinguished only by unambiguous actions of a sovereign. *Santa Fe Pacific*, 314 U.S. at 346. The United States has demonstrated that no acts were taken by the Spanish crown to extinguish the Pueblos' rights. Further, even if it were assumed a *repartimiento* had taken place, there is no factual basis for this Court to make determinations as to how, exactly, the Pueblos' rights would have been modified or reduced. The State and Coalition do not even purport to demonstrate what *specific* rulings or decisions the crown would have made if a *repartimiento* had taken place. This is not surprising, given that many factors were taken into account during a *repartimiento* and it cannot be known for certain how the waters of the Rio Jemez would have been allocated more than 150 years ago.

Although several factors are considered in a *repartimient*o, the State's expert, Professor Hall, recognized that priority of use was "always a critical factor." Tr. at 235. He also conceded that, although non-Indian communities would have had standing as a community in a *repartimiento*, their standing was "obviously" not as strong as the Pueblos. *Id.* at 239. Thus, it is reasonable to assume that, had a *repartimiento* taken place, at the very least the fact that the Pueblos occupied lands long before the Spanish arrived would receive substantial, if not dispositive, consideration.

The United States pointed out in its Objections that in the 1823 Taos *Repartimiento*, the only *repartimiento* that took place in New Mexico (which occurred during the Mexican period,

not the Spanish period), the Mexican *ayuntamiento* fully recognized the rights of Taos Pueblo as the first user in the system. See Objections at 16-17. The State contends that Taos Pueblo "was required to share water with three non-Indian communities, including the new community of Arroyo Seco." State Resp. at 13. *See also* Coalition's Resp. at 20 ("Arroyo Seco, the "new" community, was given one surco of water"). However, neither the State nor Coalition address the fact, expressly pointed out by the United States in its Objections, that (1) the *ayuntamiento* recognized Taos Pueblo as the "*dueno despotico*", the complete owner of the river, Tr. 310, and as first users Taos Pueblo enjoyed "antiquity and superiority," *id*, and (2) the allocation of water to Arroyo Seco was expressly tied to circumstances when water was "in abundance" and that, during times of water shortage, Arroyo Seco's allocation had to be reduced to ensure that "there would be no lack of water to the first users [Taos Pueblo]." Tr. at 444-455; See Objections at 17-18. The State and Coalition ignore these provisions in the 1823 decision and mischaracterize the nature of the ruling. Contrary to the assertions of the State and Coalition, Tao Pueblos' first priority rights, as the "first user" were, in fact, fully recognized and protected.

The Taos *repartimiento* applied only to the waters of the Rio Lucero, and not to waters of the Rio Jemez. Thus, it is not binding in the *stare decisis* sense.[6] Nevertheless, the Taos *repartimiento* demonstrates that, even when non-Indians use water from a common or "shared" source of water, a *repartimiento* nevertheless can (and did) recognize and fully protect the first priority rights of a pueblo.

[6]The State and Coalition point to decisions rendered by a Spanish official regarding Tesuque Pueblo. See State's Resp. at 12 and Coalition's Resp. at 20. The Tesuque decision did not allocate any specific water rights. Moreover, in any event, like the Taos *Repartimiento*, the decision regarding Tesuque Pueblo was not binding on any other Pueblos- it was a *sui generis* decision.

Of course, it is theoretically possible that, had a *repartimiento* taken place, the Pueblos' rights to use water could have been reduced in some fashion to take into account the rights or needs of non-Indian communities. But, there is no way of knowing the extent to which the Pueblos' rights to use water would have been reduced and it would be sheer speculation to guess. Thus, there is no factual basis to conclude that the Pueblos' rights were modified or extinguished, as there is no way, other than to engage in total speculation, to rule on the extent to which the exact manner in which the Pueblos' aboriginal would have been modified.

CONCLUSION

To justify a finding that the Pueblos' aboriginal rights were extinguished, the record must show that the sovereign, the Spanish crown, took actual, "plain and unambiguous" actions, *Santa Fe Pacific*, 314 U.S. at 346, to extinguish the Pueblos' rights. The evidence shows, however, that the Pueblos used all the water they needed to sustain their communities, with no interference by the Spanish crown, during the entire Spanish colonial period in New Mexico. Neither the State nor the Coalition demonstrated in their Responses that there is any evidence to contrary, nor have they presented any legal authorities to rebut the basic principle of federal law that it is not enough that a sovereign has the power to extinguish aboriginal rights; rather, the sovereign must actually exercise such power.

Respectfully submitted,

UNITED STATES DEPARTMENT OF JUSTICE

Date: Jan. 12, 2017 ___// S // _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will cause all CM/ECF participants to be served by electronic means. I hereby certify that, on this 12th day of January, 2017, I have mailed by United States Postal Service of the foregoing document to the following non CM/ECF participants:

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