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.

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

The State of New Mexico ("State") and the Jemez River Basin Water Users Coalition ("Coalition") have filed Responses (Docs. 4389 and 4388, respectively) to the Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez and the United States (Docs. 4384 and 4385, respectively)[1] 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. As will be shown in this Reply by the Pueblos of Santa Ana, Jemez and Zia ("Pueblos"), neither the State nor the Coalition has presented a legally correct, coherent or plausible basis for upholding the Recommended

[1]The Pueblo of Zia concurred in both sets of Objections. Doc. 4386. Zia has joined in this Reply.

Decision, and indeed, neither of those responses actually supports the Recommended Decision on its own terms; rather, they invent different bases for claiming that the Pueblos' aboriginal rights to water appurtenant to their lands were extinguished by the Spanish or Mexican regimes in New Mexico. Their new theories are just as flawed as is that of the Recommended Decision itself, and the State and the Coalition fail entirely to respond to centrally important arguments presented by the Pueblos and the United States in their Objections. As argued in the Pueblos' and the United States' Objections, and in this Reply, the Recommended Decision should be rejected by this Court.

Preliminarily, it would be useful to review the shifting theories that have been presented in this proceeding with respect to the Pueblos' water rights under Spanish and Mexican law. The Recommended Decision found that the Pueblos did possess aboriginal water rights prior to the establishment of Spanish sovereignty over the territory. Recommended Decision at 11.[2] The question presented here is whether those rights were extinguished prior to the American

[2]Interestingly, the Coalition does not accept this aspect of the Recommended Decision, and attacks with vigor (albeit badly misplaced vigor) the very notion that the Pueblos ever had aboriginal title or rights to water (or, presumably, to land either). Coalition Response at 3-6. Indeed, the Coalition's arguments are remarkably untethered from established historical fact and law. For example, the Coalition dates Spanish sovereignty in New Mexico from 1540, *id*. at 12, the year that Francisco Vasquez de Coronado set out on a three-year expedition in which he passed through New Mexico, but did not stay, and certainly did not claim to establish sovereignty over the area. Most experts agree that Spanish authority in New Mexico dates from 1598 at the earliest, the year that Juan de Oñate established a permanent settlement near modern-day Española and met with various Pueblos and induced them to swear allegiance to his King. *See* Cutter Report, U.S. Ex. 1, at 27-28. Even more remarkable is the Coalition's expression of doubt that the Act of February 27, 1851 (the Coalition refers to the "Act of February 21, 1851," but the correct date is February 27), by which Congress extended the provisions of the Indian Nonintercourse Act to the Indian tribes in the New Mexico and Utah territories, ever applied to the Pueblos at all. Coalition Response at 7. That proposition was expressly settled ninety years ago, in *United States v. Candelaria*, 271 U.S. 432, 441 (1926) ("While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them.").

accession to sovereignty in New Mexico in 1848. The theory advanced by the State's expert, Prof. G. Emlen Hall, in his report, "The Water Rights of the New Mexico Pueblos and Their Neighbors as of the End of Mexican Sovereignty in 1848," State Ex. 2 ("Hall Report"), and in his testimony, was that the *possibility* that a *repartimiento* could have been instituted on the Rio Jemez, resulting in some allocation of the waters of the river among the Pueblos and non-Indian settlers, meant that Pueblo aboriginal rights to the use of those waters were extinguished, even though no such repartimiento ever occurred. *See, e.g.*, Hall Report at 2; Tr. 269-70, 335-38. Both the State and the Coalition relied on this position in the briefs they filed on Issues 1 and 2 following the 2014 evidentiary hearing. *See, e.g.*, State of New Mexico's Opening Brief on Issues 1 and 2, Doc. 4363, at 5-7; Coalition's Opening Brief on Issues 1 and 2, Doc. 4361, at 14-15.

The Recommended Decision discusses Prof. Hall's theory, but ultimately adopts a somewhat different rationale, concluding that the imposition by Spain of "a legal system to administer the use of public waters" amounted to a "plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water without restriction." Recommended Decision, Doc. 4383, at 13. That is, the mere imposition of Spanish authority, including ultimate authority over water usage, effectuated the extinguishment, according to Magistrate Judge Lynch.

In response to the Pueblos' and the United States' Objections to the Recommended Decision, the State and the Coalition have now taken an entirely new tack. They both now focus on the fact that in the late 18th century the Spanish governors in New Mexico made two grants to Hispanic settlers on the Jemez River, and argue that those acts effectively terminated the

Pueblos' aboriginal rights to water. In effect, they have abandoned Prof. Hall's theory, that the possibility of a repartimiento amounted to extinguishment, and they barely give a nod to the approach of the Recommended Decision. As will be shown, nothing in either Response helps to sustain the approach of the Recommended Decision, and the new theory now argued by the State and the Coalition is refuted by the record in this case.[3]

I. THE PREMISE OF THE RECOMMENDED DECISION IS UNSUPPORTED BY THE RECORD, AND BOTH THE STATE AND THE COALITION APPEAR TO ACKNOWLEDGE, CONTRARY TO THE RECOMMENDED DECISION, THAT ONLY AN AFFIRMATIVE ACT OF THE SPANISH OR MEXICAN GOVERNMENT COULD EXTINGUISH THE PUEBLOS' ABORIGINAL RIGHTS.

The Recommended Decision plainly rests its conclusion that the Pueblos' aboriginal water rights were extinguished solely on the proposition that the mere extension of Spanish sovereignty over New Mexico, without more, effectuated the extinguishment of those aboriginal water rights, simply because Spanish "*regalía*" (or royal prerogative) included the power to allocate common waters among various users. *Id*. at 12-13. The Recommended Decision essentially concedes that neither Spain nor Mexico took any affirmative action to extinguish the Pueblos' rights. Magistrate Judge Lynch stated that he was not persuaded that those rights were not extinguished just because "there was *no repartimiento or other affirmative act* limiting [the Pueblos'] use of water." *Id*. at 12 (emphasis added). That was so, Judge Lynch explained, because as he interpreted a passage from *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339,

[3]The State and the Coalition did mention the making of those grants in their briefing following the evidentiary hearing, *see* Doc. 4363 at 10; Doc. 4361 at 17-18; State of New Mexico's Response Brief on Issues 1 and 2, Doc. 4361, at 11; Coalition's Reply Brief on Issues 1 and 2, Doc. 4371, at 5, but only barely, and these references are mainly in the context of showing that at least as of the dates of those grants, the Rio Jemez became a "public water source." The immateriality of that assertion will be addressed below.

347 (1941), extinguishment of Indian aboriginal rights could be accomplished by (among other things) "'the exercise of complete dominion adverse to the right of occupancy.'" Recommended Decision at 12 (*quoting Santa Fe Pacific*, 314 U.S. at 347). But neither the Recommended Decision nor the State's or Coalition's Responses demonstrate any "adversity" to the Indian right of occupancy in the establishment of Spanish authority in New Mexico, an essential premise of that principle, and in any event, as the Pueblos showed in their Objections, the cases demonstrate that an "exercise" of dominion means some affirmative act.

As was noted in the Pueblos' Objections, at 12-13, Spanish legal doctrine of the 16th and 17th centuries made protection of Indian rights an overriding policy of the colonial governments in New Spain. *See* Dr. Charles Cutter, "Land and Water Rights of the Pueblo Indians of New Mexico during the Spanish and Mexican Eras of Sovereignty," U.S. Ex. 1 ("Cutter Report"), at 14-28. The 1504 codicil to Queen Isabella's will expressly directed that the Indians not "receive any harm whatever, in their persons or goods," and that they "be treated well and justly." *Id*. at 15. As Dr. Cutter, the United States' expert, noted, Spanish laws dictated that the Indians be recognized as the "true and rightful owners of their property," and that their ownership was to be protected. *Id*. at 17-18. The *Recopilación de Indias*, the 1681 compilation of tens of thousands of royal decrees, ordinances, cedulas and other legal edicts, repeatedly directed that actions of Spanish colonial officials be taken so as to avoid prejudice to the rights of the Indians. *Id*. at 8-9, 19-20. Perhaps most importantly, the Acts of Obedience and Vassalage, derived from the Ordinances of Pacification, that Don Juan de Oñate declared to each of the Pueblos shortly after he arrived to establish Spanish rule in New Mexico in 1589, essentially promised to each Pueblo that if it pledged obedience to the Spanish crown it would be protected in its property and

internal authority. *Id*. at 27-29; *see also* Transcript of Proceedings ("Tr.") at 29-30. It is impossible to reconcile that undisputed and pervasive cornerstone principle of the Spanish regime in New Mexico with the Recommended Decision's assertion that the mere establishment of Spanish authority, by itself, was "*adverse* to the [Indian] right of occupancy," and thus extinguished such essential Pueblo rights as their prior rights to the use of water for their needs.

The Pueblos demonstrated in their Objections (Doc. 4384), at 4-11, that in the only cases in which the phrase "exercise of complete dominion adverse to the [Indian] right of occupancy" has been cited in support of a ruling that claimed aboriginal rights had been extinguished, including the cases cited and relied upon in the Recommended Decision, there was clearly one or more affirmative actions by the government that manifested the "*exercise*" of dominion that was "plain[ly] and unambiguous[ly]" adverse to the Indian right of occupancy. No case has ever held, as Magistrate Judge Lynch proposes here, that the mere extension of authority over Indian lands or resources, without more, effectuates an extinguishment of Indian rights of whatever character.[4]

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[4]The Recommended Decision also cites a quote from *Mattz v. Arnett*, 412 U.S. 481, 505 (1973), in which the Court stated that congressional intent to extinguish Indian title "must be expressed on the face of the Act *or be clear from the surrounding circumstances and legislative history*." Recommended Decision at 12 (emphasis supplied by Judge Lynch). The inference that Magistrate Judge Lynch appears to draw from that quote is that "surrounding circumstances" may supply sufficient indication of intent to extinguish title. *See also* State Response, Doc. 4389, at 5. But *Mattz* was a so-called "diminishment" case, in which the question was whether an Act of Congress had effectively diminished the size of an established Indian reservation. The Court was not referring to "surrounding circumstances" in general, but rather to the "circumstances" surrounding a particular and express Act of Congress, including, importantly, its legislative history. *Mattz* had nothing to do with aboriginal title, and is of questionable relevance to this case, but regardless, it provides no support whatever for the Recommended Decision's premise, that "circumstances" such as the extension of governmental power, alone, in the absence of any affirmative act, could ever suffice to extinguish Indian aboriginal rights.

The Responses of the State and the Coalition (Docs. 4389 and 4388, respectively) barely pay lip service to the proposition embraced by the Recommended Decision. They do hammer incessantly on statements by Dr. Cutter that the regalía of the Spanish crown included the power to allocate water from a public water source among its users. *See, e.g.*, State Response (Doc. 4389) at 3-5; Coalition Response (Doc. 4388) at 10-14. But the *existence* of that power has never been in dispute. Indeed, the United States possesses such power, and always has. The question here has never been about whether the power *existed*, but rather whether it was ever *exercised* in any affirmative manner "adverse to the [Indian] right of occupancy;" or whether, to take the proposition proposed by the Recommended Decision, absent any such affirmative act, whether its mere existence *alone* extinguished that right. Nothing in either Response provides any plausible support for the position of the Recommended Decision, that the existence of Spanish authority was adverse to the Indian right of occupancy, and that no affirmative act is required to effectuate an extinguishment of the Pueblos' rights. As was noted above and in the Pueblos' and the United States' Objections, all of the relevant case law and the record in this case (apart from the novel and unsupported opinion of Prof. G. Emlen Hall, the State's expert) is to the contrary.[5] In short, the Recommended Decision cannot be sustained.

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[5]The State and the Coalition rely on extraordinary distortions of the testimony in their efforts to make an argument to the contrary. For example, the State claims that Dr. Cutter "agree[d] that the Spanish crown *regulated* the use of the water by *requiring* supply to be shared" and that it "*mandated*" that water was held in common and that no user could use water to the detriment of other users. State Resp. at 9 (emphasis added); *and see* Coalition Resp. at 13. Those terms clearly imply active management of water use by the crown. But there is absolutely no evidence of any such management. In the passages from Dr. Cutter's testimony that are cited in support of those claims, he merely acknowledges that the notions that public waters were available for use by all, and that no user could use water to the detriment of others, were "principles" of Spanish law. The State's claim that the Spanish authorities' "power to allocate and control the use of water . . . did not exist only when enforced," State Resp. at 7, is simply

II. THE MAKING OF LAND GRANTS TO SPANISH SETTLERS IN THE RIO JEMEZ BASIN DID NOT EXTINGUISH THE PUEBLOS' WATER RIGHTS.

Rather than trying to support the rationale of the Recommended Decision, both the State and the Coalition construct a new argument, contending primarily that the making of the San Ysidro Grant in 1786 and the Cañon de San Diego Grant in 1798 amounted to affirmative acts that somehow extinguished the water rights of the three Pueblos. The State contends that the making of these grants "impos[ed] sharing of the water" on the Pueblos, and placed the Pueblos' uses of water "under Spanish and Mexican jurisdiction and control," State Resp. at 7, and amounted to assertion by the Spanish crown of "its dominion over waters once exclusively used by the Pueblos." *Id*. at 10. The Coalition makes similar assertions. These claims are simply unsupported by the testimony and evidence in this case, including the testimony of the State's own expert, Prof. Hall, and they ignore a critically important body of expert opinion in the record that utterly refutes the claims.

The Pueblos do not dispute that the San Ysidro and Cañon de San Diego Grants were, as Prof. Hall described them, "classic community land grants," Tr. 239, and that the settlers on these grants had implied rights to use water from appurtenant sources. Both grants straddled the Rio Jemez. But contrary to the Coalition's assertions, the *implied right* to use water does not make either grant a "grant of substantial water rights to Spanish settlers," or even an "implied grant of

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untrue. Dr. Cutter made clear that absent a complaint by a user, "[p]eople were free to use water." Tr. 175-77. *Only* when a conflict arose did the government step in. *Id*.; Tr. 113, 114. And as will be shown below, in such instances (which, to be sure, *never* occurred on the Rio Jemez), Indian rights to water were plainly given priority and protection by the Spanish.

water," Coalition Resp. at 8, and there is no support in the record for such extravagant claims.[6] Consequently, the Coalition's argument that these grants extinguished the Pueblos' water rights fails, because there was no express grant of water, nor any determination whatever in connection with either grant as to how much water the settlers on these grants could use from the Rio Jemez, if any. Indeed, there is nothing in the record that shows that the making of either of these grants imposed any burden on any of the three Pueblos of any kind,[7] much less brought them under some new Spanish "system" of water rights administration (a fanciful concept to which the State and the Coalition repeatedly advert but that simply did not exist in pre-1848 New Mexico; *see, e.g.,* Tr. 333-34).

Importantly, not even Prof. Hall, in his report or in his testimony, ventured the opinion that it was the making of these two grants that accomplished the extinguishment of the Pueblos' aboriginal rights to the use of water. As was explained above, this is a new proposition that the State and the Coalition have recently invented. But it fails, as noted above, because nothing in the record indicates that either grant contains any language expressly granting any right to use water from any particular source, and because there was never any subsequent proceeding that purported to do so. This is the critical point: despite the making of these two grants near the end of Spanish sovereignty, no dispute ever arose between either group of settlers and any of the

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[6]Prof. Hall states in his report that there were "few or no mercedes de agua [i.e., grants of water] to either non-Indians or Pueblos prior to 1846 in New Mexico." Hall Report at 34. Prof. Hall cites to none in his report or testimony.

[7]Ralph E. Twitchell, in 1 SPANISH ARCHIVES OF NEW MEXICO 167 (1914), discussing document 608, an 1810 document that appears to be a petition by the original settlers of the Cañon de San Diego Grant, states that the settlers "protested that they would not injure the Indians."

three Pueblos over water. And there is simply no authority for the proposition that just because someone else uses water from a river that is also used by an Indian tribe, the tribe's prior rights suddenly vanish.

Had a dispute ever arisen, moreover, the complaining party could have gone to the Spanish or Mexican governor, and there could have been a repartimiento instituted to determine how water use should be allocated. All agree that that never happened here. *E.g.*, Tr. 334-35. But even if it had occurred, there is no basis in the record for the assumption–which the State and the Coalition indulge over and over–that the Pueblos' uses would have been limited to any extent. In fact, the record strongly suggests the contrary.

The State and the Coalition both disregard entirely the important testimony of Prof. Hall in which he acknowledges the work of Dr. William B. Taylor, published in the New Mexico Historical Review, in which Dr. Taylor examined the actual records of 22 repartimientos that took place in Mexico during the period of Spanish rule and that involved disputes between Indian and non-Indian communities. Tr. 310-20. Prof. Hall repeatedly claimed in his report and testimony that in a repartimiento, all users ended up getting some water, and Indians never were given total control over common water sources. *See, e.g.,* Hall Report at 40; Tr. 313. But Prof. Hall cites no documentary evidence to support that claim, and the only record of a formal repartimiento in New Mexico during the entire quarter of a millennium of Spanish and Mexican rule in New Mexico, the 1823 Taos repartimiento, does not support it, as will be shown below. Dr. Taylor's work, moreover, thoroughly refutes Prof. Hall's contentions as to how repartimientos turned out, and it completely undermines the State's and the Coalition's claims in their Responses that the mere making of land grants to non-Indians somehow extinguished the

Pueblos' water rights.

As Prof. Hall acknowledged, Dr. Taylor found that in several cases that he studied, the Indian community was awarded *all* of the water from the common source, and non-Indian users were cut off entirely. Tr. 313. Moreover, he found that grants to non-Indians were sometimes cancelled or annulled because "'they infringed on the property rights and well-being of local Indian communities." Tr. 314 (Prof. Hall, quoting from Taylor, "Land and Water Rights in the Viceroyalty of New Spain," 50 NEW MEXICO HIST. REV. 189, 196 (No. 3, July, 1975) ("Taylor")).

Prof. Hall also contended that in a repartimiento, water users would be allocated water based on their existing uses, not their future needs. *E.g.*, Tr. 316. But Dr. Taylor found that that was not necessarily true with respect to Indian communities, saying,

> None of the repartimientos consulted determined that the Indians had water rights only for the lands that they had actually irrigated before the Conquest. 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) and that they [*sic*] were owned at the time of the repartimiento.

Tr. 316-17 (Prof. Hall, quoting from Taylor at 204).

These results were not unique to central Mexico, moreover. Very similar rulings may be seen in the one formal repartimiento known to have occurred in New Mexico before 1848, and in another water dispute, extensively discussed in the record but oddly not mentioned by either the State or the Coalition in their Responses, the Santa Clara case.

The one repartimiento that is documented in the archives of the Spanish and Mexican periods in New Mexico was the Taos case, the dispute between Taos Pueblo, joined by the

Spanish communities of Don Fernando de Taos and Los Estiercoles, against the squatter community of Arroyo Seco. This case is described in detail in the Pueblos' Objections, Doc. 4384, at 15-17, but a few aspects of its treatment in the record of this case bear closer examination.

When Prof. Hall gave his description of the case in his direct testimony, Tr. 243-47, he described the ruling of the *ayuntamiento* (the local governing body that actually conducted the proceeding) by stating,

> What it says is that [the Arroyo Seco settlers] will get un surco de agua de Rio Lucero quando este in abundancia, when it may be in abundance, y quando esta es caso, and when it's not in abundance, se les diera a proporcion.
>
> And what that means is that the water–the Arroyo Seco should be given one surco of water from the Rio Lucero when the water is abundant, and proportionately less when there is a scarcity of water.
>
> This is a–this is an absolute, but reducible, grant to Arroyo Seco. It means that shortages will be shared as between the other claimants of the Rio Lucero, at least the Taos Pueblo, and this.
>
> That's what it means. That's what that language means.
>
> So that–in the language of prior appropriation, as I say, there's no pri- –absolute priority in the Taos Pueblo. They don't have a prior and paramount right to the Rio Lucero.

Tr. 244 (Prof. Hall, quoting from and translating SANM I, No. 1292). But as Dr. Cutter pointed out when he testified in rebuttal, Prof. Hall "didn't read [the] last portion" of the ayuntamiento's ruling. Tr. 445. After the word "proporcion," the last word quoted by Prof. Hall, the ruling goes on to say,

> y a juicio de este ayuntamiento, para que no haya falta a los primeros que gozan la antiquidad y primacia que son hijos del citado pueblo.

Tr. 444-45. Dr. Cutter translated that passage as follows: in proportion "as determined by the ayuntamiento, so that there would be *no lack of water to the first users who enjoy the antiquity*

and superiority, or primacia, who are the sons of the above-mentioned pueblo owned [*sic*]. That would be the Pueblo of Taos." *Id*. at 445 (emphasis added). Contrary to Prof. Hall's contention, and as stated by Dr. Cutter, the document shows that the ayuntamiento clearly recognized the Pueblo's priority–*antiquidad y primacia*-- as to use of the Rio Lucero,[8] and according to Dr. Cutter's interpretation of the entire document (not the redacted version given by Prof. Hall), "it means that [the Pueblo's] flow would not be cut back, and that they would not be forced to share in the shortage. . . . The only one to suffer a cutback would be the Village of Arroyo Seco." *Id*. at 446; *see also id*. at 450-52. The Taos repartimiento, thus, yielded a result that is fully consistent with what Dr. Taylor found in the records of the 22 repartimientos he studied from central Mexico–that Indians did in fact receive a clear preference, based on their longstanding use of the water, and received full protection for their longstanding rights when the water supply was insufficient to meet the needs of other users.[9]

That principle is perhaps even more clearly shown in a case that was extensively discussed in the reports and testimony of the two experts, and that was discussed in some detail in the Pueblos' Objections, at 17-18, but that was not mentioned by either the State or the Coalition in their Responses–the Santa Clara case involving the waters of Santa Clara Creek.

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[8]Earlier in the document, the ayuntamiento describes the Pueblo as the "*dueño despotico*, the complete owner of the river." Tr. 310 (testimony of Prof. Hall).

[9]It is important to keep in mind that the Taos proceeding occurred under the *Mexican* administration, when, as both experts testified, Indian people had technically lost any preferential status they might have previously enjoyed on account of their "Indianness." The Coalition attempts to make much of this; but the Taos case demonstrates that notwithstanding the change in the legal status of Indians in New Mexico with the change in sovereignty, the undisputed priority of Pueblo communities in their use of appurtenant waters was considered to be a major factor in a repartimiento, and as in the Taos case, could be determinative.

This was not a formal repartimiento, but it was a dispute over public waters, *see* Tr. 326-27; Hall Report at 29, in which the Spanish territorial government was extensively involved, between an Indian community and a family of non-Indian land grantees.[10] It extended over nearly 40 years, but the result was that a 1724 grant to non-Indians for land upstream of the Pueblo in Santa Clara Canyon was annulled in 1763 by Governor Tomas Vélez Cachupin because of the injury the settlers were causing to the Pueblo by their use of the water from Santa Clara Creek. Vélez Cachupin made a new grant to the Pueblo encompassing the entirety of Santa Clara Canyon. The Pueblo, in short, ended up being entitled to *all* of the water of Santa Clara Creek. *See* Tr. 46-47.

What Dr. Taylor's study and the Taos and Santa Clara cases in New Mexico demonstrate is that the mere making of a grant to non-Indians in no way affects or determines the water rights of nearby Indian communities. Only if a dispute arose over water would that issue be addressed, and even then, the overriding Spanish policy of protection of Indian communities from prejudice or injury could result in the non-Indians being sharply limited in their ability to use water, or having their grant cancelled altogether, and the respect for the longstanding uses of Indian communities carried over even into the Mexican period.[11] In this case, however, there is no evidence at all that any dispute ever arose between the settlers on the San Ysidro or Cañon de San Diego Grants and any of the Pueblos over water, so there was never any occasion for the

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[10]Although the case is discussed in detail in the expert reports and the testimony, the Pueblos would also note that it is described in even more detail in a book recently published by UNM Press, Ebright, Hendricks & Hughes, FOUR SQUARE LEAGUES: PUEBLO INDIAN LANDS IN NEW MEXICO (Albuquerque: UNM Press, 2014), at 155-61.

[11]Prof. Hall acknowledged that in the event of a repartimiento on the Rio Jemez, the two land grant groups "probably would have had a standing as a community . . . though probably not as strong–obviously not [as strong] as the Jemez Pueblo, . . . by virtue of its antiquity and its long continuing standing as a community."

Spanish or Mexican governments to intervene and act with respect to the water rights of any of them. Absent any such action, the rights of the Pueblos remained absolutely unaffected.[12] In short, the new claim of the State and the Coalition that the making of those two grants amounted to actions that extinguished the Pueblos' aboriginal rights to the use of the Rio Jemez is simply unsupportable, and cannot be a basis for upholding the Recommended Decision.

CONCLUSION

The Recommended Decision's theory, that the mere imposition of Spanish power over New Mexico, wholly apart from any exercise of that power adverse to the Pueblos, effectuated the extinguishment of the Pueblos' aboriginal rights to the use of water, has no support in the case law or the record of this proceeding, or, now, from any of the parties. The original claim of the State and the Coalition, Prof. Hall's contention that the possibility of the imposition of a repartimiento on the Rio Jemez, though none ever occurred, extinguished the Pueblos' rights, has been abandoned by its proponents. The latest argument, that the making of two community land grants in the Rio Jemez Basin extinguished the Pueblo's rights, lacks any legal or factual basis,

[12]The State and the Coalition argue that the adjudication in this proceeding of water rights to non-Indian persons residing within the San Ysidro and Cañon de San Diego Grants, with pre-1848 priorities, somehow supports their claims that the making of those grants extinguished the Pueblos' aboriginal water rights. State Resp. at 10-11; Coalition Resp. at 7-8. These arguments make no sense. A ruling by an American court, more than a century and a half after the Treaty of Guadalupe Hidalgo, applying state law of prior appropriation to the claims of non-Indian water users, has no bearing whatever on the question of how Spanish or Mexican authorities might have decided a dispute over water use between the predecessors of those users and the three Pueblos. It is moreover abundantly clear that even under American law, those non-Indian rights are completely subordinate to the rights of the Pueblos, both under prior appropriation principles (were they applicable) and, more importantly, under principles of federal law, especially Section 9 of the Pueblo Compensation Act, Act of May 31, 1933, 48 Stat. 108, 111. *See* Tr. 413-14 (testimony of Prof. Hall; under Section 9, "the pueblo rights would be *prior and paramount to any non-Indian right*, not just those rights that were confirmed inside the pueblo grant at that time") (emphasis added).

and is refuted by the record.

In short, there is no basis on which the Court could conclude that the Pueblo's aboriginal water rights were extinguished during the Spanish or Mexican periods in New Mexico. The Court should reject Magistrate Judge Lynch's recommended finding that those rights were extinguished, and find instead that those rights were fully intact when the Treaty of Guadalupe Hidalgo became effective in 1848 and were protected by the Treaty, and were expressly protected by section 7 of the Act of February 27, 1851, 9 Stat. 574, 587.

Respectfully submitted, this 13th day of January, 2017,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of January, 2017, 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 13th day of January, 2017, I served the foregoing on the following non-CM/ECF participants by first class mail, postage prepaid, addressed as follows:

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