

NO. 20-2145

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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PUEBLO OF JEMEZ, a federally recognized Indian Tribe,  
*PLAINTIFF-APPELLANT,*

v.

UNITED STATES OF AMERICA,  
*DEFENDANT-APPELLEE;*

NEW MEXICO GAS COMPANY,  
*DEFENDANT INTERVENOR-APPELLEE.*

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On Appeal from the United States District Court  
For The District of New Mexico  
Case No. 1:12-CV-0800-JB-JFR  
Honorable James O. Browning, District Court Judge

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**BRIEF OF *AMICI CURIAE* AMERICANS FOR INDIAN OPPORTUNITY,  
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INDIAN LAND TENURE  
FOUNDATION, INDIAN LAW RESOURCE CENTER AND INDIAN LAND  
WORKING GROUP, IN SUPPORT OF APPELLANT AND URGING REVERSAL**

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GREGORY P. BARBEE, ESQ.  
Sheppard Mullin Richter & Hampton, LLP  
333 S. Hope Street, 48<sup>th</sup> Floor  
Los Angeles, CA 90071  
Telephone: (213) 620-1780  
Facsimile: (213) 620-1398  
Email: [gbarbee@sheppardmullin.com](mailto:gbarbee@sheppardmullin.com)  
*Counsel for Amici Curiae*

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**STATEMENT OF IDENTITY OF *AMICI CURIAE*,  
INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE<sup>1</sup>**

*Amicus* Americans for Indian Opportunity (“AIO”) is a national non-profit 501(c)(3) organization, headquartered in Albuquerque, New Mexico. AIO advances, from an Indigenous worldview, the cultural, political and economic lives of Indigenous peoples in the United States and around the world. Founded by LaDonna Harris (Comanche) and a cohort of her fellow Native American activists in 1970, AIO draws upon traditional Indigenous philosophies to foster value-based leadership, inspire stakeholder-driven solutions, and convene visionary leaders to probe contemporary issues and address challenges of the new century. Governed by a Board of international Indigenous leaders, AIO seeks to create new avenues for international Indigenous interaction.

*Amicus* Association on American Indian Affairs (“AAIA”) is a national non-profit 501(c)(3) publicly supported organization, headquartered in Rockville, Maryland. AAIA is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building capacity. AAIA was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its history, AAIA has provided national advocacy on watershed issues that support sovereignty and culture,

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<sup>1</sup> Pursuant to FRAP 29(a)(4)(E), neither a party nor party’s counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici curiae*, its members, or its counsel) contributed money that was intended to fund its preparation or submission. Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief.

while working at a grassroots level with Tribes to support the implementation of programs.

*Amicus* Indian Land Tenure Foundation (“ILTF”) is a non-profit 501(c)(3) organization created in 2001 whose mission is to help obtain Indian ownership, management and control of land within the original boundaries of every reservation and other areas of tribal significance through education, cultural awareness, economic opportunity and legal reform.

*Amicus* Indian Law Resource Center (“ILRC”) is a non-profit 501(c)(3) law and advocacy organization established in 1978, and directed by American Indians. ILRC provides legal assistance to Indian and Alaska Native nations who are working to protect their lands, resources, human rights, environment and cultural heritage. ILRC’s principal goal is the preservation and well-being of Indian and other Native nations and tribes; ILRC provides legal assistance to indigenous peoples of the Americas to combat racism and oppression, to protect their lands and environment, to protect their cultures and ways of life, to achieve sustainable economic development and genuine self-government, and to realize their other human rights.

*Amicus* Indian Land Working Group (“ILWG”) is a 501(c)3 organization. ILWG was formed over thirty years ago with its vision and mission “to keep Indian land Indian.” ILWG’s mission is to set goals to provide assistance and guidance to individual Indians managing their individual allotments within aboriginal territory and original boundaries of a reservation.



## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

None of the *amici curiae* is a subsidiary of any other corporation. Each *amicus curiae* is a non-stock corporation; therefore, no publicly held corporation owns 10% or more of its stock. Fed. R. App. P. 26.1.

## **SUMMARY OF ARGUMENT**

For decades, the *amici curiae* organizations herein have worked tirelessly (at times collectively) to dismantle a well-documented history of federal Indian laws, regulations and policies that are based on the rationale that Native Nations and peoples are inferior. Such organizations' efforts include working through the federal legal system to achieve justice and equality for diverse sovereign nations.

Federal courts must be careful not to continue precedent that is based on historic policies meant to assimilate and destroy the rights of Native Nations. Instead, federal courts should follow precedent meant to uphold Native Nations' political sovereignty and their ability to protect the health, welfare and safety of their people. Considering the historical facts that give rise to the land rights in this case, the importance of the canons of construction and the evidentiary reliability of Tribal testimony must not be ignored.

Federal courts, applying the special deference and trust relationship afforded Indian tribes in the Constitution and by well-settled Supreme Court precedent, have developed special canons of construction and interpretation for use in cases involving Indian law, tribes and people. That special fiduciary trust relationship between the United States and Indian Tribes, and the related canons of construction, must form the backdrop for any case – including the instant case – between the United States and an Indian tribe



as an equalizer to protect Native Nations against assimilationist historic actions meant to destroy them. Indeed, this Court used the trust relationship and deference to Indian tribes' understanding of agreements, laws and regulations in reversing the District Court's dismissal of Appellant's case back in 2014-15. On remand, however, the District Court largely ignored this important equalizing special trust relationship and Indian law canons of construction.

The Court should also consider the important tribal oral history offered by Appellant and rejected by the District Court. Allowance of that oral history, which fits within enumerated exceptions to the hearsay rule, will further facilitate the dismantling of racist and assimilationist laws, policies and regulations. Indeed, several international courts have already created exceptions to the hearsay rule to allow such tribal oral history to be admitted in trials. This Court should ensure that all voices and testimony are heard and acknowledged in historic cases involving indigenous rights.

## **ARGUMENT**

### **I. THE UNITED STATES GOVERNMENT'S TRUST RELATIONSHIP AND INDIAN LAW CANONS OF CONSTRUCTION REQUIRE DEFERENCE TO APPELLANT'S EVIDENCE**

#### **A. The United States Government Has a Special Trust Relationship with Indians and Indian Tribes**

Cohen's Handbook of Federal Indian Law states unequivocally that "[o]ne of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes. Courts have invoked language of guardian and ward, or more recently trustee and beneficiary, to describe this relationship in a variety of legal

settings. . . . Today, the trust doctrine is one of the cornerstones of Indian law.” Cohen’s Handbook of Federal Indian Law § 5.04[3][a], at 412 (Nell Jessup Newton ed., 2012) [hereinafter, Cohen’s Handbook]. In the prior appeal in this case, the Tenth Circuit recognized that relationship in its recounting of the history of Indian law and aboriginal title, where the Court stated:

The Northwest Ordinance [of July 13, 1787] declared our national policy towards Indians, stating: “The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.”

*Pueblo of Jemez v. United States*, 790 F.3d 1143, 1153 (10<sup>th</sup> Cir. 2015) (citing Felix S. Cohen, “Original Indian Title,” 32 Minn. L.Rev. 28, 41 (1947)). Later in the first *Pueblo of Jemez* decision, the Court emphasized that the lands of the pueblos in New Mexico “had long been considered by the United States Congress as Indian Country, subject to the special protection of the government.” *Id.* at 1159 (citing *United States v. Sandoval*, 231 U.S. 28, 45 (1913)).

Nearly two hundred years ago, the Supreme Court first defined the special trust relationship between the United States and Indian tribes. In *Johnson v. M’Intosh*, 21 U.S. 543 (1823), the Supreme Court acknowledged that Indian tribes had a “legal as well as a just” ownership interest in their land, as well as sovereigns’ rights to govern the usage of that land by their constituents. *Id.* at 574, 593. Chief Justice Marshall expanded upon the special trust relationship between the United States and Indian tribes in *Cherokee Nation*



*v. Georgia*, 30 U.S. 1, 17 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832), grounding the deference owed by the United States and its courts in the sovereign to sovereign relationship between the United States and Indian tribes.

In *Cherokee Nation*, the Supreme Court likened the government's relationship with Indian tribes to that of a "ward to his guardian." 30 U.S. at 17. Over time, the (federal) government to (Indian) government relationship has been understood "as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities." Cohen's Handbook § 5.04[3][a], at 413. The special trust relationship between Indian tribes and the government has been recognized by Congress, administrative agencies and presidents.<sup>2</sup>

Two Supreme Court cases illustrate judicial application of the trust relationship. First, in *Seminole Nation v. United States*, 316 U.S. 286 (1942), the plaintiff sought reimbursement for amounts owed pursuant to two treaties, various agreements and various acts of Congress. In reversing and remanding the Court of Claims' denial of a particular reimbursement, the Supreme Court invoked private trust law principles to hold

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<sup>2</sup> See, e.g., 25 U.S.C. § 3701 ("the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); 20 U.S.C. § 7401 ("[i]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children"); 25 C.F.R. § 225.1 (Secretary of the Interior "continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement"); President William J. Clinton, Remarks to Indian and Alaska Native Tribal Leaders, 1994 Pub. Papers 800 (Apr. 29, 1994) ("It is the entire government, not simply the Department of the Interior, that has a trust responsibility with Tribal governments. And it is time the entire government recognized and honored that responsibility.").

the United States to “the most exacting fiduciary standards.” *Id.* at 297 and n.12. The Court found that the United States government had “charged itself with moral obligations of the highest responsibility and trust.” *Id.* at 297. Using those principles, the Court found that payment of funds to agents known to be dishonest would violate private trust law standards. *Id.*

Second, in *United States v. Mitchell*, 463 U.S. 206 (1983), the Supreme Court found the United States liable for money damages for a breach of trust related to its mismanagement of forest resources on Indian lands. The Court found that statutes governing timber management, road building and rights of way, and Indian funds management and government fees, as well as the regulations promulgated thereunder, imposed fiduciary duties on the United States. Specifically, the Tucker Act (28 U.S.C. § 1491) and its counterpart for claims brought by Indian tribes known as the Indian Tucker Act (28 U.S.C. § 1505) waived the United States’ sovereign immunity and allowed the Indian tribe to bring a case to the Court of Claims. *Id.* at 212. After examining the history of the underlying statutes, the Court concluded that the statutes’ plain language created a trust relationship between the United States government and the plaintiffs. *Id.* at 219-24. As Justice Thurgood Marshall explained for the Court:

Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” This principle has long dominated the Government’s dealings with Indians.



*Id.* at 225-26 (citations omitted). The Court thus acknowledged its consistent recognition that “the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.” *Id.*

**B. Statutory and Contract Interpretation Canons Applicable to Indian Tribes Require Deference to the Tribes’ Understandings**

As the Supreme Court has acknowledged, “[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law.” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Originally developed in the context of treaty interpretation, basic canons of construction in cases involving Indian law *require* that courts liberally construe treaties, agreements, statutes, executive orders and federal regulations in favor of Indians, and resolve all ambiguities in Indians’ favor. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit”); *Ramah Navajo School Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.”); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)) (“treaties are construed more liberally than private agreements . . . Especially is this true in interpreting treaties and agreements with the Indians [which are to be

construed] ‘in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians],’”); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (Indian treaties are interpreted “to give effect to the terms as the Indians themselves would have understood them,” and also applying construction canons to executive order and statutory interpretation); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973) (“any doubtful expressions in [treaties] should be resolved in the Indians’ favor”); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (“[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians”); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n. 7 (D.C. Cir. 2008) (statutes are “to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”).

The canons are “rooted in the unique trust relationship between the United States and the Indians.” *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Indeed, in *Worcester v. Georgia*, 31 U.S. 515 (1832), Chief Justice Marshall relied on the trust relationship described above as one rationale for the special Indian law canons of construction. *Id.* at 551-54 (interpreting Treaty of Hopewell as Cherokees would have understood its meaning).

This Court expressly agreed in the first *Pueblo of Jemez* appeal “that ‘the rule of construction recognized without exception for over a century has been’ that if there is doubt whether aboriginal title has been validly extinguished by the United States, any ‘doubtful expressions, instead of being resolved in favor of the United States, are to be

resolved in favor of the Indians.” 790 F.3d at 1162 (citing *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941)).

The District Court’s underlying judgment in this case appears to have largely ignored the special trust owed by the United States, and the canons of construction applicable here (by construing any ambiguities in favor of the government and against the Pueblo of Jemez). *See Pueblo of Jemez v. United States*, 430 F.Supp.3d 943 (D.N.M. 2019).<sup>3</sup> At the very least, vesting quiet title in the United States – as opposed to an Indian tribe – violates the trust relationship. *See id.* at 1229. As in the first *Pueblo of Jemez* appeal, “[i]t is against this backdrop and the history of Indian law” that the Court must address Appellees’ arguments and the District Court’s decision. 790 F.3d at 1162. The trust obligations and canons must form the bedrock upon which this Court’s ruling will stand.

## **II. TRIBAL ORAL HISTORY EVIDENCE SHOULD HAVE BEEN ADMITTED UNDER HEARSAY EXCEPTIONS**

Federal Rules of Evidence Rule 801(c) defines hearsay as an out of court statement offered into evidence to prove the truth of the matter asserted. Rule 802 provides that hearsay is inadmissible unless provided otherwise by a federal statute, the Rules of Evidence or by other rules prescribed by the Supreme Court. Rule 803 sets forth 23 exceptions to the hearsay rule, finding evidence within such exceptions admissible

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<sup>3</sup> By way of example, while the District Court found that the All Indian Pueblo Council supported Jemez Pueblo’s Valles Caldera claim, as admitted evidence showed the Council’s Resolution calling “upon the United States as Indian trustee to recognize the Pueblo of Jemez’ continuing aboriginal title to the lands encompassed by the VCNP and to return ownership and control of these lands to the Pueblo of Jemez” (*id.* at 1077 (Fact 559)), such evidence appears to have had no effect on the Court’s determination.



regardless of whether the declarant is available as a witness. Rule 804(b) provides 5 additional exceptions where a declarant is unavailable. Rule 805 allows hearsay within hearsay to be admitted “if each part of the combined statements conforms with an exception to the rule.” Finally, Rule 807 (the “Residual Exception”) currently allows admission of a hearsay statement if:

- (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
- (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Federal Rules of Evidence, Rule 807(a).

At the time of trial in 2018, and when the District Court rendered its decision in 2019, Rule 807 allowed for the admission of hearsay statements not covered by Rules 803 and 804 when the statement had “equivalent circumstantial guarantees of trustworthiness,” was “offered as evidence of a material fact,” was “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts,” and “admitting it will best serve the purposes of these rules and the interests of justice.” *See Pueblo of Jemez*, 430 F.Supp.3d at 1170-71. Under the previous Rule, therefore, this Circuit had found that because residual hearsay exceptions are intended for “exceptional circumstances,” offerors of such evidence bear a “heavy burden” of presenting the court with sufficient indicia of trustworthiness. *See id.* at 1171-72 (citing *United States v. Trujillo*, 136 F.3d 1388, 1395-96 (10<sup>th</sup> Cir. 1998)).<sup>4</sup>

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<sup>4</sup> The amended Rule (effective December 1, 2019) apparently loosened the standard for determining whether hearsay evidence is considered “trustworthy.” The prior Rule



Indigenous oral history statements fall squarely within Rule 801's definition of hearsay. In the underlying case, Appellant sought the admission of such statements through several exceptions to the hearsay rule, including Rule 803(3) (statements of declarant's then existing state of mind), Rule 803(19) (reputation concerning personal or family history), Rule 803(20) (reputation concerning boundaries or general history), Rule 803(21) (reputation concerning character), and Rule 807 (residual exception). *See Pueblo of Jemez*, 430 F.Supp.3d at 1163-73.

The District Court proceeded to examine several cases that admitted such evidence but discredited it, as well as cases and commentary related to the admission and weight of such evidence in other cases. *Id.* at 1174-80.<sup>5</sup> The District Court admitted limited evidence but rejected other oral history evidence.

It is the understanding of *amici curiae* filing this brief that other *amicus* parties are briefing the issue of the value of Oral Tradition Evidence. This brief focuses on two specific hearsay exceptions that demonstrate the propriety of admission of Tribal Oral History.

First, Rule 803(16) provides the "ancient document" exception to the hearsay bar. Under that exception, a statement in a sufficiently "ancient" document (the Rule currently

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required "equivalent circumstantial guarantees of trustworthiness" as opposed to the current Rule's requirement that a statement "is supported by sufficient guarantees of trustworthiness" under the totality of the circumstances. Additionally, the prior Rule did not allow for the consideration of corroborating evidence in determining whether a statement is trustworthy, as opposed to the new Rule.

<sup>5</sup> Inexplicably, the District Court omitted from its analysis the Ninth Circuit's admission of oral testimony to establish how an Indian tribe's members interpreted treaty language. *See Cree v. Flores*, 157 F.3d 762, 773-74 (9<sup>th</sup> Cir. 1998).

covers all documents prepared before January 1, 1998) whose authenticity is established will not be barred under the hearsay rule. As the Advisory Committee noted regarding this exception:

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore §2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* §2145. . . . As pointed out in McCormick §298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy.

Here, as pointed out by Appellant in the underlying case, tribal oral history is sufficiently old that it absolutely pre-dates the present controversy. Furthermore, to the extent tribal oral history is subject to remembrance, retelling and repeated recounting, it has been subject to correction of any variation from the actual history of the Indian tribes.

Second, Rule 807, particularly in its amended form, should be a proper basis for the admission of Tribal Oral History. So long as the statements sought to be admitted fit within the requirements of the Rule, and are properly corroborated, they should be admitted. By way of example, expert opinions rendered pursuant to Federal Rules of Evidence 702 can rely on hearsay. *See, e.g., United States v. Sims*, 514 F.2d 147 (9<sup>th</sup> Cir. 1975). Such opinions, particularly regarding an Indian Tribe's historical use of land, can form the basis of such corroboration. Consistent with the special trust relationship and Indian law canons of construction set forth above, deference should be given to Indian tribes to allow admission of their evidence.

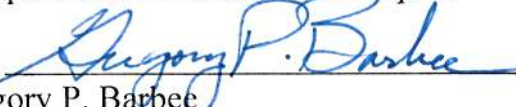
Finally, as described more fully in a recent Tribal Law Journal Article, international tribunals (including Canadian courts, the Inter-American Court of Human Rights, and Norwegian courts) provide for the admission of indigenous oral histories as an exception to the prohibition against hearsay without issue. *See* Virupaksha Katner, Max. “Native American Oral Evidence: Finding a New Hearsay Exception.” *Tribal Law Journal* 20, 1 (2021) (electronically available at <https://digitalrepository.unm.edu/tlj/vol20/iss1/3>). Admission of hearsay evidence by such courts demonstrates that it can be done with sufficient indicia of trustworthiness.

### CONCLUSION

The Court should reverse the District Court and remand the case for further proceedings consistent with consideration of (1) the United States’ trust relationship with the Pueblo of Jemez and the canons of construction applicable to the current case, and (2) the oral history evidence of the Pueblo of Jemez.

February 16, 2021

Respectfully submitted,  
Sheppard Mullin Richter & Hampton LLP

By:   
Gregory P. Barbee

333 S. Hope Street, 48th Floor  
Los Angeles, CA 90071

Telephone: (213) 620-1780

Facsimile: (213) 620-1398

Email: [gbarbee@sheppardmullin.com](mailto:gbarbee@sheppardmullin.com)

*Counsel for Amici Curiae*



**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

Pursuant to FRAP 32(g)(1), the undersigned counsel certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(a)(4)(G) because this brief contains 4,281 words excluding the parts of the brief exempted by FRAP 32(f). The brief complies with the typeface requirements of FRAP 32(a)(5) and 10<sup>th</sup> Circuit Rule 32(A), and the type style requirements of FRAP 32(a)(6) and 10<sup>th</sup> Circuit Rule 32(a) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point Times New Roman font (pursuant to 10<sup>th</sup> Circuit Rule 32(A)).

By: 

Gregory P. Barbee  
Sheppard Mullin Richter & Hampton, LLP  
333 S. Hope Street, 48th Floor  
Los Angeles, CA 90071  
Telephone: (213) 620-1780  
Facsimile: (213) 620-1398  
Email: [gbarbee@sheppardmullin.com](mailto:gbarbee@sheppardmullin.com)  
*Counsel for Amici Curiae*

February 16, 2021



**CERTIFICATE OF DIGITAL SUBMISSION**

The undersigned counsel hereby certifies that

- (1) All required privacy redactions have been made;
- (2) With the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed or that will be filed with the Clerk, and;
- (3) The digital submission has been scanned for viruses with the most recent version of the commercial virus scanning program Symantec Endpoint Protection, and, according to the program, is free of viruses.

February 16, 2021

By: 

Gregory P. Barbee  
333 S. Hope Street, 48th Floor  
Los Angeles, CA 90071  
Telephone: (213) 620-1780  
Facsimile: (213) 620-1398  
Email: [gbarbee@sheppardmullin.com](mailto:gbarbee@sheppardmullin.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on February 16, 2021, I electronically filed the foregoing **BRIEF OF AMICI CURIAE AMERICANS FOR INDIAN OPPORTUNITY, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INDIAN LAND TENURE FOUNDATION, INDIAN LAW RESOURCE CENTER AND INDIAN LAND WORKING GROUP, IN SUPPORT OF APPELLANT AND URGING REVERSAL** with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on the participants that follow will be accomplished by the CM/ECF system:

Randolph Henry Barnhouse, Karl E. Johnson, Tierra Marks and Christina S. West  
Barnhouse Keegan Solimon & West  
7424 Fourth Street, NW  
Los Ranchos de Albuquerque, NM 87107-6628

Thomas E. Luebben, Jr.  
Law Offices of Thomas E. Luebben PC  
PO Box 1134  
Sandia Park, NM 87047

Mary Gabrielle Sprague  
United States Department of Justice, Environment & Natural Resources Division  
P.O. Box 7415  
Ben Franklin Station  
Washington, DC 20044

Kirk R. Allen and Elizabeth M. Retzel  
Miller Stratvert  
500 Marquette NW, Suite 1100  
Albuquerque, NM 87102

By: 

Gregory P. Barbee  
Sheppard Mullin, Richter & Hampton, LLP  
333 S. Hope Street, 48th Floor  
Los Angeles, CA 90071  
Telephone: (213) 620-1780  
Facsimile: (213) 620-1398  
Email: [gbarbee@sheppardmullin.com](mailto:gbarbee@sheppardmullin.com)  
*Counsel for Amici Curiae*