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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

Plaintiffs,

No. CIV 83-1041 KWR/JHR
JEMEZ RIVER ADJUDICATION

and

PUEBLOS OF JEMEZ, ZIA and SANTA ANA,

Plaintiffs-in-Intervention,

v.

TOM ABOUSLEMAN, et al.,

Defendants.

PUEBLO OF SANTA ANA'S OPENING SUPPLEMENTAL BRIEF ON ISSUES 1 AND 2

Plaintiff-Intervenor Pueblo of Santa Ana, by and through its counsel, hereby submits its opening supplemental brief on Issues 1 and 2, as called for by this Court's Scheduling Order entered on October 28, 2021 (Doc. 4452), as amended by the Order Granting Motion to Extend Stay of Litigation, entered on March 1, 2022 (Doc. 4462), and as further amended by the Order Denying Motion to Extend Stay of Litigation, entered on June 3, 2022 (Doc. 4470).[1] This brief

[1]This brief is submitted only by the Pueblo of Santa Ana. The Pueblos of Jemez and Zia have negotiated a settlement of their claims, that must be approved by Congress, and they have entered into an agreement with the State and the non-Indian Coalition that they would not seek to change their positions in the settlement, regardless of the outcome of this case. They are thus not participating actively in this phase of this proceeding.

should be read in conjunction with the relevant portions of the Opening Brief of the Pueblos of Santa Ana, Zia and Jemez and the United States, on Issues 1 and 2, filed on August 19, 2014 (Doc. 4362); the Response of Pueblos of Santa Ana, Zia and Jemez and the United States to Opening Briefs of State of New Mexico and Coalition on Issues 1 and 2, filed on October 20, 2014 (Doc. 4364): and the Reply Brief of Pueblos of Santa Ana, Zia and Jemez and the United States to Response Briefs of State of New Mexico and Coalition on Issues 1 and 2, filed on November 19, 2014 (Doc. 4370).

I. INTRODUCTION and PROCEDURAL HISTORY

Following the breakdown of settlement negotiations in this case in early 2012, the parties proposed, and the Court agreed, by Order entered on July 5, 2012 (Doc. 4253), that five sets of legal issues would be decided before the case would be ready for a trial regarding the Pueblos' water rights. But the United States and the Pueblos had filed, on May 25, 2012 (Doc. 4246), a joint motion proposing that additional discovery and submission of expert testimony should be allowed by the court with respect to whether the Pueblos' aboriginal water rights were affected by any actions of Spain or Mexico, or by the Pueblo Lands Act, and as to congressional intent in setting lands aside for the Pueblos. Both the State and the Jemez River Basin Water Users' Coalition (the "Coalition") filed responses opposing any further factual development, arguing that the Court could decide the issues based on the then-existing record (*see* Doc. 4248, filed June 8, 2012, and Doc. 4249, filed June 11, 2012). In its July 5, 2012 Order, however (Doc. 4253), the Court granted the joint motion, but only with respect to Issues 1 and 2.[2] It granted the United States and the Pueblos four months in which to identify an expert and produce an expert report on Issues 1 and 2, and the State and the Coalition had one month thereafter to identify

[2] Issues 1 and 2 are set forth *infra*, in Part III of this brief.

their expert and produce a report. (Those deadlines were extended by Order entered on October 25, 2012, Doc. 4279, and again by Stipulated Order entered on December 6, 2012, Doc. 4288.) The July 5, 2012 Order set a briefing schedule on the remaining issues, and briefing on those issues proceeded.[3]

On December 19, 2012, the United States identified Dr. Charles Cutter of Purdue University as its expert on Spanish and Mexican law relative to the Pueblos' water rights (Doc. 4292), and produced a report by him, entitled, "Land and Water Rights of the Pueblo Indians of New Mexico during the Spanish and Mexican Eras of Sovereignty, with Emphasis on the Pueblos of Jemez, Zia and Santa Ana in the Jemez River Valley" (the "Cutter Report"). The State, on March 14, 2013, identified Prof. G. Emlen Hall, an emeritus professor of law at the University of New Mexico Law School, as its expert,[4] and produced a report by Prof. Hall entitled, "The Water Rights of New Mexico Pueblos and Their Neighbors as of the End of Mexican Sovereignty in 1848" (the "Hall Report"). Both experts were deposed in 2013, and on March 31 through April 2, 2014, the Court held an evidentiary hearing at which the two experts testified and were cross-examined. Then, all parties filed briefs on Issues 1 and 2. Briefing was completed on November 19, 2014.

On October 4, 2016, Magistrate Judge Lynch issued his Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (Doc. 4383) ("Recommended Disposition"), in which he proposed that the Court find that while the Pueblos had possessed aboriginal water rights prior to the arrival of the Spanish, those rights were extinguished by the imposition of Spanish sovereignty over the territory (presumably in 1598 when Juan de Oñate

[3] By Order entered on December 20, 2012, the Court stated that it would not determine Issue 5, regarding riparian water rights, since no Pueblo claimed any such rights.
[4] The Coalition joined in identifying Prof. Hall, on March 15, 2013 (Doc. 4300).

established the first permanent Spanish settlement at Yunque, near present-day Española). The Pueblos and the United States objected, but on September 30, 2017, District Judge Vázquez issued her Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (Doc. 4397), in which she adopted Magistrate Judge Lynch's Proposed Findings in their entirety.

Subsequently, Judge Vázquez certified her Memorandum Opinion and Order for interlocutory appeal, the 10th Circuit Court of Appeals agreed to hear an interlocutory appeal from that Opinion and Order, and on September 29, 2020, the Tenth Circuit issued its decision reversing the September 30, 2017 Memorandum Opinion and Order, and remanding the case for further proceedings "consistent with this opinion." *United States v. Abouselman*,[5] 976 F.3d 1146, 1160 (10th Cir.2020).

II. THE TENTH CIRCUIT OPINION

After first determining that this interlocutory appeal was properly before the court, the Tenth Circuit's opinion briefly reviewed the history of Spanish sovereignty over New Mexico (noting, as had Magistrate Judge Lynch, that it "resolved all factual questions in favor of Dr. Cutter's opinion," 976 F.3d at 1154 n.6), and observed that "the Spanish crown was protective of Indian property rights." *Id*. at 1155. It concluded that review with the determination that "'the governments of Spain and Mexico took no action to intervene in the uses that these Pueblos made of their water supply; nor did Spain or Mexico act to reduce or modify such use.'" *Id*. (quoting Cutter Report at 51).

The court then moved to a discussion of the law of aboriginal title, and noted that the

[5] For reasons that are unclear, during the pendency of the appeal the Court began using a caption that misspelled the name of the first-named non-Indian defendant in the case, and this was never corrected.

district court had found that the Pueblos had established aboriginal title to their lands and its resources—including water resources--at the time the Spanish arrived in New Mexico, a finding that had not been challenged by any party. *Id*. at 1156. It then engaged in an extensive examination of the law regarding extinguishment of aboriginal title, and held that "a sovereign cannot extinguish aboriginal rights without affirmatively acting in a manner adverse to the specific aboriginal rights at issue." *Id*. at 1158. It further ruled that "a sovereign must affirmatively take an action to exercise complete dominion in a manner adverse to the Indians' right of occupancy sufficient to extinguish aboriginal title." *Id*. at 1160.

Having established those binding principles, the court returned to the record of this case, and held that "[t]here is no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos." *Id.* The court found no evidence in the reports or testimony of the experts "that Spanish sovereignty had any impact on the Pueblos' use of the water from the Jemez River at all." *Id.*

III. REMAINING ISSUES

This phase of this case was intended to resolve Issues 1 and 2 as identified in this Court's Order entered on July 5, 2015 (Doc. 4253). Those issues are:

Issue No. 1: Have the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, have those aboriginal water rights been modified or extinguished in any way by any actions of Spain, Mexico or the United States?

Sub-issue: Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights, and if so, what effect?

Sub-issue: Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights, and if so, what effect?

Sub-issue: Did the Indian Claims Commission Act have any effect on the Pueblos' water rights, and if so, what effect?

Issue No. 2: Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?

The Tenth Circuit opinion clearly establishes that, as this Court found, the Pueblos did have aboriginal rights to water when the Spanish established sovereignty in New Mexico, and the Tenth Circuit clearly ruled that the Spanish territorial government did nothing whatever to modify or extinguish those rights. The court of appeals also observed that neither Spain *nor Mexico* acted in any way to interfere with or restrict those rights, 976 F.3d at 1155, but since actions by Mexico were not specifically addressed in the district court decision of September 30, 2017 (Doc. 4397) that was under review in the court of appeals, we believe it would be prudent for this Court on remand to consider the issue whether Mexico took any such action. Consequently, the issues that remain for decision in this phase of the case may be summarized as follows:

1. Did any action of Mexico modify or extinguish the aboriginal water rights of these Pueblos?

2. Did any action of the United States modify or extinguish the aboriginal water rights of these Pueblos? Specifically, were those rights affected in any way by the Acts of 1866, 1870 or 1877, by the Pueblo Lands Act of 1924 or the Pueblo Compensation Act of 1933, or by the Indian Claims Commission Act of 1946?

As will be shown, the record in this case, especially when viewed in the light of the Tenth Circuit opinion, forces the conclusion that the answer to each of those questions must be "No."

IV. ARGUMENT

A. NO ACTION OF THE MEXICAN GOVERNMENT AFFECTED THE WATER RIGHTS OF THE PUEBLOS.

The Cutter Report, at pp. 51-69, describes the changes in the legal status of Indian communities under the Mexican regime after 1821, and the inconsistency in how Mexican laws and policies affecting Indian people were applied. But Dr. Cutter notes that despite the change in the legal status of Indian people, "continuity—rather than change—was the hallmark of legal administration in Mexican New Mexico." Cutter Report at 52. Most importantly for present

purposes, Dr. Cutter stated in his report and testified in the evidentiary hearing that under Mexican rule, the Pueblos continued to have the legal status of self-governing communities. Cutter Report at 62-69, 71; Hearing Transcript ("Tr.") at 54-56. Dr. Cutter also testified that Mexico made no changes regarding the administration or allocation of surface water, and did nothing to restrict the water uses of these three Pueblos, Cutter Report 64-65, 71; Tr. 56-59 (Pueblos could continue using water during the Mexican period and expand those uses if their needs expanded); Tr. 131-132, 145, 157-160. Mexican law, Dr. Cutter explained, until 1856 (eight years *after* New Mexico had become a territory of the United States by virtue of the Treaty of Guadalupe Hidalgo), "protected the lands, water and other property of the Pueblo Indians of New Mexico." Cutter Report at 64. In particular, Dr. Cutter noted, "[w]ater regulation and judicial solutions . . . remained much the same as in the Spanish colonial era." *Id.* at 65 (footnote omitted). This was evidenced by the fact that a leading treatise on land and water law in Mexico, published in 1849, contained a tract on water law issues written in 1761 (*i.e.*, under Spanish sovereignty), that the author of the Mexican publication considered to be still valid. That fact, Dr. Cutter observed, "underscores the point that the Mexican government took no measures to intervene in the water uses or water rights of the Pueblo Indians during the period of Mexican sovereignty in New Mexico." *Id.*[6]

[6] We have cited Dr. Cutter's findings as to the effect, or more correctly, the lack thereof, of Mexican governmental actions on Pueblo aboriginal rights, in light of the statements by both the Court of Appeals, *see* 976 F.3d at 1154 n.6, and Magistrate Judge Lynch in his Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, (Doc. 4383) at 11 (which Judge Vázquez adopted in its entirety), that they "resolved all factual questions in favor of Dr. Cutter's opinion." Prof. Hall spends a considerable amount of space discussing the changed legal status of Indian communities under Mexican law, *see* Hall Report at 34-51, but his discussion is largely influenced by his theory that the mere possibility that a *repartimiento* could be imposed on their water usage effectively extinguished the Pueblos' aboriginal rights to water. That theory, of course, was completely demolished by the Court of Appeals' decision, and Prof. Hall does not point to any affirmative action of the Mexican government purportedly intended to limit, restrict, modify or, far less, extinguish any of the aboriginal rights of the Pueblos.

In short, Dr. Cutter's report and testimony makes crystal clear that the aboriginal rights to water held by the Pueblos under the 227 years of Spanish rule in New Mexico were completely unaffected by the 25 years of Mexican rule, and there is nothing in the record that suggests anything to the contrary,

B. THE ACTS OF 1866, 1870 AND 1877 HAD NO EFFECT ON THE ABORIGINAL WATER RIGHTS OF THE PUEBLOS.

Counsel for the Coalition[7] have argued repeatedly that three statutes enacted by Congress in the mid-nineteenth century extinguished Indian aboriginal water rights; and subjected their rights to state law of prior appropriation, but this argument has been rejected by every court that has considered it, including the United States Supreme Court, and especially after the Tenth Circuit's opinion in this case it is indisputable that these Acts had, and could have had, no effect whatever on tribal aboriginal water rights.

Section 9 of the Act of July 26, 1866, 14 Stat. 251, and as amended by Section 17 of the Act of July 9, 1870, 16 Stat. 217, 218, now codified at 43 U.S.C. § 661, and Section 1 of the Act of March 3, 1877, 19 Stat. 377, codified at 43 U.S.C. § 321 (and, together with subsequent sections, commonly called the "Desert Land Act") all address the use of water on public lands of the United States. In effect, they sever the water rights from the land, and impose state law doctrines of prior appropriation on uses of water on such lands. But all of those enactments make clear that any right claimed or obtained under their terms is "subject to existing rights." 43 U.S.C. § 321. Unquestionably, the aboriginal water rights of the Pueblos were "existing rights."

More importantly, the Pueblo lands with which we are concerned here are not, and never have been, public lands. They are lands that have been in Pueblo ownership since time

[7]The State agrees that the three nineteenth century Acts had no "direct effect" on the water rights of the Pueblos that they held sat the time of the Treaty of Guadalupe Hidalgo. *See* State of New Mexico's Opening Brief on Issues 1 and 2, filed on August 19, 2014 (Doc. 4363), at 13-15.

immemorial, and were recognized as such by the Spanish and Mexican governments. *See* Cutter Report at 28 ("Spaniards continued to consider Indians as original owners of their property"); *cf. Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (United States not justified "in treating the lands of these Indians—to which . . . they have complete and perfect title—as lands of the United States").

As was noted above, this argument (that the Desert Land Act and the related enactments trump tribal claims to aboriginal water rights) has been made in many Indian water rights cases, and always rejected. The earliest such occasion was in an early stage of what became the seminal Indian water rights case, *Winters v. United States*. The district court had ruled that the non-Indians who had constructed a dam on the Milk River, upstream of the Ft. Belknap Reservation in Montana, had to allow at least 5000 inches[8] flow past their dam to the reservation. The non-Indians appealed, and argued, among other things, that their appropriation of water was protected under the Desert Land Act and the law of prior appropriation. The court of appeals rejected that argument, noting that the Act only applied to public lands of the United States, and that "land once reserved by the government or appropriated for any special purpose ceases to be a part of the public lands." *Winters v. United States*, 143 F. 740, 748 (9th Cir. 1906). It concluded with a quote from the district court opinion, saying,

> "when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk River, at least to an extent reasonably necessary to irrigate their lands. The right so reserved still exists against the United States and its grantees, as well as against the state and its grantees."

Id. The case eventually reached the Supreme Court, which affirmed the district court and court

[8] A "miner's inch" is an old measure of streamflow, that varied between 38.4 and 50 miner's inches per cubic-foot per second, depending on the location. In Montana, 5000 miner's inches would have been about 100 cfs, or about 72,380 acre-feet per year.

of appeals in a decision that became the foundation of the "reserved rights" doctrine. *Winters v. United States,* 207 U.S. 564 (1908).

The Ninth Circuit reached the same result in *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939), in which the court rejected a claim by non-Indian successors to an Indian allotment that they could claim a prior right to appropriate water from a stream that ran through the reservation, based on the 1866 Act. The court held that that act only applied to public lands, which their lands were not, and had never been.

In *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955), the Supreme Court was faced with the question whether the Federal Power Commission had the authority to license a dam project that would be located entirely on lands that, on one side of the Deschutes River, were owned by the United States and had been reserved by the United States for power generation and, on the other side, were part of the Warm Springs Indian Reservation. The State of Oregon claimed that under the 1866, the 1870 and the 1877 Acts, the project required state approval, because the appropriation of water would be governed by state law under those Acts. The Court rejected that argument, ruling that "these Acts are not applicable to the reserved lands and waters here involved," but only to "public lands." 349 U.S. at 448.

These cases are dispositive of this issue. Moreover, nowhere in the language of any of those enactments, or in their exceedingly sparse legislative histories, is there any indication of an intent to extinguish any rights of any Indian tribe; and notably, were the argument correct that these Acts extinguished any Indian aboriginal rights, they would apply to *all* such rights, not just those of the Pueblos. Yet other courts have found tribal aboriginal rights to water still extant. *See, e.g.*, *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983) ("[t]his uninterrupted use and occupation of land and water created in the Tribe aboriginal or 'Indian' title to all its vast

holdings . . . [including] an aboriginal right to the water . . ."); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 90-91, 97 (1985). Under the standard set forth in the Tenth Circuit opinion in this case, there is no basis whatever for finding that any of these Acts had any effect on any Indian aboriginal rights.

C. NEITHER THE 1924 PUEBLO LANDS ACT NOR THE 1933 PUEBLO COMPENSATION ACT LIMITED, MODIFIED OR EXTINGUISHED ANY PUEBLO ABORIGINAL RIGHTS.

The Pueblo Lands Act of 1924, 43 Stat. 636, was enacted to solve the set of problems that arose after the Supreme Court, in the case of *United States v. Sandoval*, 231 U.S. 28 (1913), corrected the erroneous position it had taken in *United State v. Joseph*, 94 U.S. 614 (1877), and ruled that the Pueblo Indians and their lands were indeed subject to the federal guardianship and to federal supervision. That meant, as the Court later held squarely, in *United States v. Candelaria*, 271 U.S. 472 (1926), that Pueblo lands or interests therein could not be alienated without congressional approval. Before the *Sandoval* decision was rendered, however, and relying on the erroneous ruling in *Joseph* that Pueblo lands were not subject to federal restrictions on alienation, as many as 12,000 non-Indian New Mexicans had settled on Pueblo lands, some with color of title, many without, but none with any federal approval. After the *Sandoval* decision, those people were technically trespassers, and the United States Attorney for New Mexico began preparing ejectment suits to oust them from their homes. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240-44 (1985). Finally, Congress stepped in, and after a fairly tortuous process, enacted the Pueblo Lands Act.[9]

The Pueblo Lands Act embodied a decision by Congress to allow non-Indians occupying

[9] For a detailed account of the very interesting circumstances leading up to the enactment of the Act, and its subsequent implementation, *see* Ebright, Hendricks and Hughes, FOUR SQUARE LEAGUES: PUEBLO INDIAN LAND IN NEW MEXICO (UNM Press; 2014) at 267-91. ("FOUR SQUARE LEAGUES")..

Pueblo land who met certain criteria, such as payment of taxes and length of tenure, to receive patents to the land they had occupied, with the Pueblos receiving compensation for the land lost, and non-Indians whose claims were rejected to receive compensation for the improvements they had constructed on the land.

Water rights are mentioned in the Act only in Sections 6 and 7, in which the Pueblo Lands Board (a three-member board created by the Act, which would make the initial determinations as to which non-Indian claims met the criteria set forth in the Act) was directed to ascertain the value of the water rights appurtenant to the lands lost by the Pueblos, and the value of the water rights lost by the unsuccessful non-Indians, for purposes of determining the compensation due each for their losses. Importantly for present purposes, there is *no language at all* in the Act that purports to limit or determine the water rights of the Pueblos associated with the lands that they retained. It would be extraordinarily anomalous to construe an Act that was specifically intended to staunch the losses of Pueblo lands and associated water rights, and to provide compensation to the Pueblos for the value of the lands and water rights they had lost, as also silently implying an uncompensated *taking* of water rights associated with the lands that the Pueblos *retained*. Neither any language in the Act nor its purposes evinces any such intent by Congress.

We recognize that in his only published decision in the long-running case of *New Mexico v. Aamodt*, 618 F.Supp. 993, 1010 (D.N.M. 1985), the general stream adjudication of the Rio Tesuque-Rio Nambé-Rio Pojoaque stream system north of Santa Fe, Judge Edwin Mechem ruled that although the Pueblos came into the United States with their aboriginal water rights intact, those rights were terminated by the Pueblo Lands Act, but he cites no specific provision of the Act for that proposition. That passage of Judge Mechem's opinion has not been advanced by the

State or the non-Indians in support of an argument that the Pueblos have lost their aboriginal water rights, and in the evidentiary hearing in this case, the State's and Coalition's expert, Prof. Hall, acknowledged that there is no provision of the Act that addresses the character or measurement of Pueblo water rights, and that the only references to water rights in the Act, as noted above, deal with valuation for compensation purposes. Tr. at 360-66. In short, that passage from Judge Mechem's 1985 decision is unsupportable, and should be disregarded.[10]

Early in the course of its proceedings, the Pueblo Lands Board began reducing its awards of compensation to the Pueblos for the lands they lost to non-Indians to about one-third of appraised value, but without giving any reasons for such reductions. The Pueblos and their advocates objected, and several Pueblos filed independent suits to eject the non-Indians, as Section 4 of the Act allowed. The dispute finally reached Congress, and a bill was introduced to raise the awards to the Pueblos to nearly full appraised value. FOUR SQUARE LEAGUES, at 283-85.

In the hearings on the bill, Herbert J. Hagerman, a former territorial governor of New Mexico and the only person who served on the Pueblo Lands Board throughout its existence, asserted that the lower awards were justified by Hagerman's novel (and thoroughly mistaken) claim that although the Pueblos lost the land that was patented to non-Indians, they did not lose the water rights appurtenant to the land. This theory was much disputed throughout the hearings, and no member of the committees holding the hearings accepted it. *Survey of Indian Conditions Throughout the United States: Hearings Before a Subcommittee of the Committee on Indian*

[10]In early 2000, the parties to the *Aamodt* litigation commenced settlement negotiations, and those negotiations were eventually successful. *See* Claims Resolution Act of 2010, Pub. L. 111-291, Title VI ("Aamodt Litigation Settlement Act"), 124 Stat. 3134. Thus, there was never any opportunity to have Judge Mechem's theory of the effect of the Pueblo Lands Act on the Pueblos' water rights tested on appeal.

Affairs, United States Senate ("*Survey of Conditions*"), Pt. 11 (Jan. 30, 1931), at 4456-78; (Feb. 5, 1931) 4692-720; *Survey of Conditions*, Pt. 20 (May 2, 1931), at 10705-56. But Northcutt Ely, an attorney who was serving as executive assistant to the Secretary of the Interior, repeatedly expressed his concern, and the concern of the Department, that by compensating the Pueblos for water rights they had lost by the transfer of lands to the non-Indians (to which the Department was not objecting), the bill might be construed as implying that the Pueblos would be surrendering their senior priority water rights associated with the lands remaining in their possession. *Id.* (Jan. 27, 1932) at 11136-38, (Jan. 28, 1932), at 11205-09, (Jan. 29, 1932) at 11256-68.

When the House Committee on Indian Affairs convened to consider the bill, H.R. 1041, Ely presented a proposed amendment to ensure that the Pueblos' senior priority water rights appurtenant to their retained lands were protected. *Authorization of Appropriations to Pay in Part the Liability of the United States to Certain Pueblos: Hearings Before the Committee on Indian Affairs*, House of Representatives, 72d Cong. (1932), at 127. His proposed language, with no modifications, was added by the House Committee as Section 9 of the bill, and it remained in the bill as it was enacted in 1933. It reads,

> Sec. 9 Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands remain in the Indians.

This language directly refutes Judge Mechem's ruling that the 1924 Act somehow cut off the Pueblos' aboriginal rights, as it clearly reflects a recognition that the Pueblos retained the right to use water they needed for irrigation, stock watering and domestic needs on the lands that

remained in their ownership, and that the water rights appurtenant to such land would have an immemorial priority, and would remain in place despite non-use. In short, far from having any adverse effect on the Pueblos' aboriginal water rights, Section 9 of the 1933 Act constitutes an express congressional *recognition* of and protection of such rights.

That was precisely the holding of the Tenth Circuit Court of Appeals when the *Aamodt* litigation went up on interlocutory appeal in 1976. *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir.1976). The court described Section 9 as a congressional "mandate" that the Pueblos' first priority water rights for the retained lands be preserved and protected, holding,

> A recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violates the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to [*sic*] a prior right to the use of water.

Id. at 1113.

Finally, it bear emphasis, again, that the 1924 Act and the 1933 Act were intended to resolve the problem of unlawful non-Indian settlement on Pueblo land. While the 1924 Act did result in the loss of substantial Pueblo lands to the non-Indian settlers, it did provide compensation, that was greatly enhanced by the 1933 Act. Moreover, Section 17 of the 1924 Act ensured that no interest in Pueblo land would be lost in the future without the Pueblo's consent and the approval of the Secretary of the Interior. Nothing in either Act reflects the affirmative adverse action deliberately intended to extinguish Pueblo water rights without which, the Tenth Circuit has now held, there can be no finding of extinguishment of aboriginal rights.

D. NEITHER THE INDIAN CLAIMS COMMISSION ACT NOR ANY PROCEEDINGS UNDER IT EXTINGUISHED OR MODIFIED ANY OF THESE PUEBLOS' ABORIGINAL WATER RIGHTS

In 1946, Congress enacted the Indian Claims Commission Act, Act of August 13, 1946, 60 Stat. 1049, c. 959 ("ICCA") (formerly codified as amended at 25 U.S.C. §§ 70-70v; now

repealed). The purpose of the Act was to create a quasi-judicial body (the Commission) that would hear and decide claims by Indian tribes against the United States that accrued before the date of the Act and fell within any of five broadly worded categories (including, for example, "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity;" 25 U.S.C. § 70a). Plainly, the Act itself, which was intended to provide compensation to tribes for wrongs committed by the United States, did not in and of itself extinguish (or modify) any rights then held by tribes, but questions have arisen whether the adjudication or settlement of particular tribal claims might have barred subsequent assertions of tribal rights.[11]

The three Pueblos of Jemez, Zia and Santa Ana had been joint grantees of a Spanish land grant, known as the Ojo del Espiritu Santo (Holy Ghost Spring) Grant, consisting of about 410,000 acres, that was made on August 6, 1766, by Spanish Governor Tomas Velez Gachupin. The Pueblos sought to have the grant confirmed by the Court of Private Land Claims in 1892, but that court ruled that the grant was merely a grazing permit, for the taking of which the Pueblos were not entitled to compensation, and its decision was affirmed by the United States Supreme Court. *Pueblo of Zia v. United States*, 168 U.S. 198 (1897). The Pueblos filed a joint petition in the ICC, and in the first three counts of their petition claimed that the lands within the

[11]*See*, for example, *New Mexico ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, 120 N.M. 118, a phase of a general stream adjudication of the Rio San José, in which, after the district court had adopted a Special Master's report finding that Laguna and Acoma Pueblos' aboriginal water rights had been extinguished by the settlement of their Indian Claims Commission cases, the New Mexico Court of Appeals reversed that ruling, finding that the records of the cases gave no indication that the settlements included any compensation for the taking of any aboriginal water rights.

It is true that in a number of ICCA cases, claims attorneys stipulated to "takings" of Indian aboriginal lands, when in fact, under the law governing extinguishment of aboriginal title, as shown by the Tenth Circuit's opinion in *Abouselman*, no actual taking could have taken place. *See* Richard W. Hughes, "Indian Law," 18 N.M.L.Rev., 403 (1988) at 416-20. That is not the case here, however.

grant had been theirs by aboriginal title, and they sought damages for the taking of those lands, though as the ICC later noted, the Pueblos were only claiming a taking as to the portion of the lands that became part of the public domain of the United States, and made no claim to their patented "grant" lands (or to other lands that had been included in subsequent Spanish grants). *Pueblo de Zia et al. v. United States*, 11 Ind.Cl.Comm. 131, 131-32 (1962). The fourth count of the petition seems to be based on the same grant, but had a slightly different description of its boundaries, such that the area comprised 520,000 acres, but again, "exclusive of the lands patented to the three Pueblos." *Id*. at 132. The Commission noted specifically that the lands within the grants patented to the Pueblos, as well as lands within certain other Spanish land grants within the area claimed in the petition, had never become part of the public domain. *Id*. at 142. The area for which the Pueblos could claim compensation—that is, the land within the grant boundaries that had become federal public domain--comprised 298,634 acres. *Id.* at 145..

But the Commission ruled that the Pueblos had failed to present sufficient evidence to show that they had had aboriginal title to that area, and it dismissed their claim. *Id*. at 146. The Pueblos appealed, and the Court of Claims reversed, *Pueblo de Zia et al. v. United States*, 165 Ct.Cl. 501 (1964), holding that the uses the Pueblos proved they had made of the grant lands were sufficient to support a finding of aboriginal title. After further proceedings, the Commission determined certain "takings" dates proposed by the Pueblos (*see supra* n. 12), and found that the value of the public domain lands on the dates of takings was $938,000. 24 Ind.Cl.Comm. 270 (1970). The United States was allowed certain offsets, that the Court of Claims generally affirmed, *United States v. Pueblo de Zia,* 200 Ct.Cl. 601, 474 F.2d 639 (1973), and in 1974 the case was settled for approximately $750,000. *Pueblo de Zia v. United States*, 33 Ind.Cl.Comm. 1 (1974).

The dispositive point here is that nowhere in the Pueblos' petition or in the opinions of the Commission or the Court of Claims is there any reference to water rights, and the Pueblos' grant lands (which are the lands to which the Pueblos' aboriginal water rights are appurtenant) were excluded from the claim from the outset and to the claim's conclusion. There is consequently no basis for any claim that these Pueblos' aboriginal water rights were in any way affected by the proceedings under the ICCA.[12]

E. THERE IS NO WARRANT FOR THE REOPENING OF THE EVIDENTIARY RECORD

In the State of New Mexico's Request for Order Staying Proceedings and Setting Status Conference, filed herein on July 23, 2021 (Doc. 4446), the State claimed that the Tenth Circuit Court of Appeals "imposed an evidentiary requirement that was not the subject of prior briefing before the Court on Issues 1 and 2." The State therefore proposed that this Court "allow the parties to supplement the evidentiary record at least as to Issue 1 with any evidence of affirmative acts by Spain, Mexico and United States regarding the water rights of the Pueblos." *Id*. at 12. The State is seriously mistaken. The Tenth Circuit opinion addressed points that had been fully briefed in proceedings in this Court, and the State had full opportunity to put on evidence of the matters as to which it now claims need further evidentiary development.[13] That it did not focus on those matters to the extent the State now wishes it had is simply the result of the choice it made at the time, to adhere to the opinion of the expert it selected.

It should be recalled that the State and the Coalition both opposed *any* new evidentiary

[12]It should be noted that in the State of New Mexico's Opening Brief on Issues 1 and 2, filed on August 19, 2014 (Doc. 4363), at 12-13, the State acknowledged that the ICCA had no effect on the aboriginal water rights of the Pueblos.

[13]The Coalition's Opening Brief on Issues 1 & 2, filed on August 19, 2014 (Doc. 4361), correctly noted, at 3, that "there has now been full factual development with respect to Spanish and Mexican law and the law applicable to the determination of the Pueblos [*sic*] water rights."

presentations on any of the five issues that the parties and the Court agreed needed to be decided before a trial could be held on quantification of the Pueblos' rights. *See supra* at 2. The Court granted the Pueblos' and United States' motion to allow the parties to present additional expert evidence, but only as to Issues 1 and 2. But the expert evidence that was to be presented was to cover the entirety of those two issues, not just the effect of the imposition of Spanish sovereignty.

Importantly, in his direct testimony at the evidentiary hearing held in 2014, Prof. Hall, the State's and Coalition's expert, when asked what he was asked to do in this case, responded,

> The state asked me to investigate Spanish and Mexican law, especially with respect to the issues that had been posed by Judge Vazquez in her order with respect to this proceeding. [*Sic*; the order was actually signed by Magistrate Judge Lynch.]
>
> And that she had asked that the issue *whether Spanish and Mexican law had modified or extinguished pueblo rights to – aboriginal title* is what it formerly [*sic*; probably should be "formally"] said. And I was asked to do that work for the state.

Trans. at 198 (emphasis added). The attorney for the State, John Stroud, then asked, "Is it possible that that issue was whether pueblos' aboriginal water rights were modified or extinguished?" Prof. Hall replied, "Yes. I'm sorry. I misspoke." *Id*.. at 198-99. In response to further questioning, Prof. Hall also said that he had investigated various Acts of Congress, including the 1851 statute that extended the Nonintercourse Act to New Mexico, the Pueblo Lands Act of 1924, the "supplemental Pueblo Lands Act of 1933" (also known as the Pueblo Compensation Act), and the Treaty of Guadalupe Hidalgo. *Id*. at 200-02. After conducting this wide-ranging investigation of the questions posed in Issue 1, Prof. Hall produced a report, the Hall Report, which was introduced as the State's Exhibit 2. When asked what the "nature" of the report was, Prof. Hall responded,

> The nature of the report is it tries, with respect to Spanish and Mexican

> law and with respect to these other issues, it tries to take Judge Vazquez' identification of the issue. That is, did – were the water rights of the pueblos – how were they defined by Spanish and Mexican law? Were they modified?

Id. at 202-03.

In short, as contemplated by the Court's Order allowing evidentiary presentations on Issues 1 and 2, Prof. Hall sought to cover the entire field of the questions posed, at least as to Issue 1. His report, however, took the position that Pueblo aboriginal water rights were extinguished merely by the possibility that a *repartimiento* (a Spanish and Mexican proceeding for allocating waters when the users have a dispute) could be imposed on them, once Spain imposed its sovereignty over the territory. (He thus had no reason to address Issue 2, which asked whether the doctrine of *United States v. Winans*, 198 U.S. 371 (1905), which deals with American recognition of a tribe's aboriginal title, would apply to the Pueblos.) Prof. Hall acknowledged that no other historian or legal scholar who is expert in regard to this time period (of New Mexico history) had ever adopted his view of the effect of the possibility of *repartimiento*. Trans. at 339. But that was the case presented by the State and the Coalition. Their failure to focus on specific acts of the Spanish or Mexican territorial governments that, they might have contended, extinguished Pueblo aboriginal water rights, at least at first, was their own choice, influenced, of course, by the opinion of their expert. But they were never prevented from doing that (and as will be explained, below, they did in fact make such arguments eventually).

The evidentiary presentations that the parties made in 2014, through the two experts they retained, were intended to, and did, cover all aspects of Issue 1 (Issue 2 being primarily a legal question). The fact that the State's and the Coalition's case went off on what turned out to be the wrong tangent, especially in light of the Tenth Circuit's opinion, is solely attributable to the

choice they made. There can be no justification now to give the State an opportunity to try to invent some new theory for extinguishment or "modification"[14] of the Pueblos' water rights.

The State's contention that the Tenth Circuit "did not consider what affirmative actions were taken by Spain and what legal effect they had," and that "[i]n determining . . . that an affirmative act is required to find extinguishment of an aboriginal water right by the sovereign, the Tenth Circuit imposed an evidentiary requirement that was not the subject of prior briefing before the Court on Issues 1 and 2," State of New Mexico's Request for Order Staying Proceedings and Setting Status Conference, filed July 23, 2021 (Doc. 4446), at 12, is patently incorrect. The requirement that an affirmative adverse act is legally required to support a finding of extinguishment has been a central theme of the Pueblos' and the United States' case throughout these proceedings. Dr. Cutter's lengthy report concluded that "the crown *took no measures* that reduced the Pueblos' land or water rights," and that "the Mexican government *took no action* to reduce [the Pueblos'] land or water rights." Cutter Report at 71 (emphasis added).

The Pueblos and the United States argued vigorously throughout the briefing following the evidentiary hearing that an affirmative act adverse to the tribes was *required* in order to find any extinguishment of aboriginal rights. *See* Opening Brief of Pueblos of Santa Ana, Zia and Jemez and the United States on Issues 1 and 2, filed August 19, 2014 (Doc. 4362, at 3 ("Neither the Spanish nor Mexican governments ever *acted* to limit or restrict the Pueblos' uses of the Aboriginal lands or the waters on, under or adjacent to those lands, . . ."") (Emphasis added); Response of Pueblos of Santa Ana, Zia and Jemez and the United States to Opening Briefs of State of New Mexico and Coalition on Issues I and 2, filed on October 20, 2014 (Doc. 4364), at

[14]There is no case law known to Santa Ana's counsel that mentions, much less addresses, the subject of "modification" of Indian aboriginal rights of any kind.

5 ("It is undisputed that neither the Spanish nor the Mexican authorities ever took *any action* during their 250 years of colonial rule to limit the water uses of Jemez, Zia or Santa Ana Pueblos.") (Emphasis added). And it is abundantly clear that the central issue of the interlocutory appeal to the Tenth Circuit was whether an affirmative act of the sovereign, clearly intended to be adverse to the Indian right, was needed to extinguish aboriginal rights. There was nothing new or unexpected about the Court of Appeals' ruling that a showing of an affirmative action is required for a finding of extinguishment, and that none was shown in the record.

Moreover, contrary to the State's claim, both the State and the Coalition urged this Court and the Court of Appeals that there *had* been affirmative acts by the Spanish government that should be viewed as having extinguished the Pueblos' aboriginal water rights. After Magistrate Judge Lynch issued his Recommended Disposition on October 4, 2016 (Doc. 4383), the United States and the Pueblos filed objections, in which they urged that "extinguishment of aboriginal title can only be found when there is proof of 'plain and unambiguous action' to extinguish such title." United States' Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, filed on November 1, 2016 (Doc. 4385), at 3; and *see* Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, filed on November 1, 2016 (Doc.4384). In response, both the State and the Coalition argued in their responsive briefs (for the first time in the briefing on this issue) that the Spanish government *had* taken affirmative acts that extinguished the Pueblos' aboriginal water rights, specifically by making two land grants to Spanish settlers (about two centuries after the imposition of Spanish control over the territory), one of them upstream of all three Pueblos, the other between Jemez and Zia lands. *See* Coalition's Response to US/Pueblos' Objections to Magistrate Judge Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1

and 2, filed on December 16, 2016 (Doc. 4388), at 8-9[15]; State of New Mexico's Response Brief to Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez and United States' Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, filed on December 16, 2016 (Doc. 4389) at 8-11 ("Spain took affirmative acts that actually interfered with the Pueblos' traditional uses and control of the waters of the Jemez River.").

The State and the Coalition reiterated those arguments in their briefing to the Court of Appeals. *See, e.g.*, Response Brief of Defendant-Appellee Jemez River Basin Water Users' Coalition at 4, 30 n. 12 ("the Spanish crown carried out substantial acts, including making the San Ysidro Grant in 1786 and the Cañon de San Diego Grant in 1798"), 34, 38, 51-52; State of New Mexico's Response Brief, at 21, 26, 27, 30-31, 33, 42-43 ("undisputed evidence shows that the Spanish crown took multiple affirmative actions on the Jemez River that were unmistakably adverse to the Pueblos' prior unrestricted use of water" (citing the making of the San Ysidro and Cañon de San Diego Grants)). So both this Court and the Court of Appeals had that information before them, and undoubtedly "considered" those actions (*i.e.*, the making of the two community grants) and their claimed effect. The Court of Appeals was plainly not persuaded by the State's and Coalition's claims. But that is no reason to allow these parties to try now to come up with a new way to frame their arguments.

CONCLUSION

The Tenth Circuit correctly held that "[w]ithout an affirmative adverse act, there is neither directed sovereign action nor consequences from that action from which a court may find a clear and plain indication that the sovereign intended to extinguish aboriginal title."

[15]The Coalition in fact argued that these included grants of "substantial water rights" to the settlers, but this is plainly incorrect. While a community grant, as these were, would imply a right to use appurtenant water, there were no actual *mercedes de agua* (grants of water) in New Mexico under Spanish sovereignty. Hall Report at 34.

Abouselman, 976 F.3d at 1159. There is no such "affirmative adverse act" by any of the three sovereigns that have ruled New Mexico since 1598 that is shown in the record of this case. The conclusion must be, thus, that these Pueblos' aboriginal water rights remain fully intact. And as was shown in the Pueblos' and the United States' Opening Brief on Issues 1 and 2, filed on August 19, 2014 (Doc. 4362), at 39-41, and as shown above, those rights have been expressly recognized by Congress, by Section 7 of the Act of February 27, 1851, 9 Stat. 574, 587, and by Section 9 of the Pueblo Compensation Act of 1933, Act of May 31, 1933, c. 45, 48 Stat. 108, 111. This Court should thus rule that the answer to Issue No. 1 is that the Pueblos have possessed aboriginal water rights, and that those rights were never modified or extinguished by Spain, Mexico or the United States, and that as to Issue No. 2, the answer is yes, the *Winans* doctrine applies fully to those rights, in that Congress has expressly recognized the Pueblos' aboriginal water rights.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of September, 2022, the foregoing Opening Supplemental Brief on Issues 1 and 2 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 7th day of September, 2022, I caused the foregoing non-CM/ECF participants to be served with said document by first class mail, postage prepaid, addressed as follows:

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