IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE UNITED STATES OF AMERICA,
on its own behalf and on behalf of the
Pueblos of JEMEZ, SANTA ANA, and
the STATE OF NEW MEXICO, ex rel.
State Engineer,

Plaintiffs,

and THE PUEBLOS OF JEMEZ, SANTA ANA,
AND ZIA,

Plaintiffs-in-Intervention

vs.

No. 6:83 cv-1041 KWR/JHR
JEMEZ RIVER ADJUDICATION

TOM ABOUSLEMAN, et al.,
Defendants.

UNITED STATES' OPENING SUPPLEMENTAL BRIEF ON ISSUE NOS. 1 AND 2

Pursuant to this Court's *Order Denying Motion to Stay of Litigation*, Doc. 4470, the United States submits the following supplemental brief on Issue Nos. 1 and 2. This brief focuses on how the decision issued by the Tenth Circuit Court of Appeals, *United States, et al v. Abouselman,* 976 F.3d 1146 (10th Cir. 2020**) (**"*Tenth Cir. Dec*."), impacts the remaining issues before this Court regarding Threshold Issues 1 (extinguishment of aboriginal water rights by an affirmative sovereign act) and 2 (*Winans* rights). The Tenth Circuit ruled that Spain did not extinguish the aboriginal water rights of the Pueblos, finding that extinguishment required an affirmative sovereign act, which Spain failed to undertake. *Id*. at 1160. As explained below, the Tenth Circuit's reasoning regarding inaction applies with equal force to the question of whether Mexico extinguished the Pueblos' aboriginal water rights. The record before this Court contains

no evidence that either Spain or Mexico took such affirmative action. Nor did the United States extinguish the Pueblos' aboriginal rights. Thus, this Court should rule, as to Issue No. 1, that the Pueblos' aboriginal water rights remain intact today and have not been extinguished or modified by either Spain, Mexico, or the United States.

As to Issue No. 2, as will be explained below, the *Winans* doctrine applies to the Pueblos' aboriginal water rights.

I. Procedural Background

In 2012, the parties to this case requested this Court to rule on five threshold legal issues before proceeding to adjudication of the Pueblos' water rights. Doc. 4244. Magistrate Judge Lynch granted the parties' request and ordered the parties to submit briefs on these issues. Order dated July 5, 2012, Doc. 4253. This Court ruled on Issue No. 5 (dealing with claims to riparian rights), Doc. 4293. The parties have fully briefed Issue Nos. 3 and 4 and the Court has not ruled on these Issues.[1] This supplemental brief addresses Issue Nos. 1 and 2.

Issue No. 1 is: "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?" Doc. 4253 at 2.[2] Issue No. 2 is: "Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?" *Id*.

[1] Issue 3 is: "If the Pueblos have aboriginal water rights or *Winans* reserved water rights, what standards apply to quantify such rights?" and Issue 4 is: "Do the Pueblos have *Winters* reserved rights appurtenant to their trust lands and, if so, how are those rights to be measured" ?

[2]Issue No. 1 includes three sub-issues: (i) "Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights and, if so, what effect?;" (2) "Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect?;" and (3) "Did the Indian Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect?" *Id.*

On Issues No. 1 and 2, Magistrate Judge Lynch directed that discovery be conducted. *Id*. at 4. After discovery was completed, Magistrate Judge William P. Lynch held a three day hearing on Issue Nos. 1 and 2 on March 31 and April 1-2, 2014 ("2014 Hearing"). Expert historians gave live testimony and the historians' reports were admitted as exhibits. The parties then briefed Issue Nos. 1 and 2 and Magistrate Judge Lynch issued *Proposed Findings and Recommendation of Disposition of Issues 1 and 2 (*"Proposed Findings"). Doc. 4383. Magistrate Judge Lynch recommended that this Court rule that "the Pueblos of Jemez, Santa Ana, and Zia actually and exclusively used water continuously for a long time before the Spanish occupation of New Mexico and conclude that the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish." *Id*. at 11. No party objected to this proposed finding.

Magistrate Judge Lynch also recommended that this Court rule that the Spanish Crown extinguished the aboriginal water rights of the Pueblos of Jemez, Santa Ana, and Zia. *Id*. at 13. The United States and Pueblos objected to Magistrate Judge Lynch's recommended finding that the Spanish Crown extinguished the Pueblos' aboriginal rights. Following briefing, this Court issued an Order on September 30, 2017, adopting Magistrate Judge Lynch's Proposed Findings. *Memorandum Opinion and Order Overruling Objections to Proposed Findings Recommended Disposition Regarding Issues 1 and 2.* Doc. 4397 ("2017 Order"). This Court's decision is discussed below.

The United States and Pueblos filed motions with the Court requesting that the 2017 Order be certified to the Tenth Circuit Court of Appeals. Docs. 4404 and 4405. On September

11, 2018, the Court granted the United States' and Pueblos' motions and certified its 2017 Order to the Tenth Circuit. Doc. 4421. The United States and Pueblos sought and were granted interlocutory appeal from this Court and the Tenth Circuit. On September 29, 2020, the Tenth Circuit reversed the 2017 Order. The reasoning of the Tenth Circuit's decision is addressed below.

After the Tenth Circuit issued its decision, Magistrate Judge Ritter directed the parties to submit proposed schedules to resolve the remaining issues in this litigation. Doc. 4441. The parties submitted various proposals, but did not agree on the extent to which further briefing was necessary. Magistrate Judge Ritter issued a Scheduling Order on October 28, 2021 and ruled that "supplemental briefing is warranted," Doc. 4452 at 3, and ordered the United States and Pueblos to file briefs on Issues Nos. 1 and 2 by March 1, 2022. *Id*. at 5. This Court extended the deadline to file briefs to September 14, 2022. Doc. 4470.

The United States' supplemental brief is limited to the discussion of how the Tenth Circuit's decision affects resolution of Issue Nos. 1 and 2. Some of the matters thoroughly addressed in previous briefs (in particular, the sub-issues relating to Issue Nos. 1 and 2) are not affected by the Tenth Circuit's decision, and this supplemental brief in the interest of judicial economy will not repeat arguments relating to these sub-issues that are ready for a decision by this Court.

II. The 2017 Certified Order

This Court ruled that Spain extinguished the Pueblos' aboriginal water rights. 2017 Order at 7. This Court explicitly found that "Spain allowed the Pueblos to continue their use of water and did not take any affirmative act to decrease the amount of water the Pueblos were

using." *Id*. The Court nevertheless found that Spain extinguished the Pueblos' aboriginal water rights because Spain "exercised complete dominion over the determination of the right to use public waters adverse to the Pueblos' pre-Spanish aboriginal right to use water." *Id*. The Court relied on the general principles of Spanish law that water from public sources were to be shared and that such waters could not be used to the detriment of others:

> Prior to the arrival of the Spanish, the Pueblos were able to increase their use of public waters without restriction. After its arrival, the Spanish Crown insisted on its exclusive right and power to determine the rights to public shared waters. Spanish law plainly provided that the waters were to be common to both the Spaniards and the Pueblos, and that the Pueblos did not have the right to expand their use of water if it were to the detriment of others.

Id. at 6-7 (citing to testimony of Dr. Charles R. Cutter, the expert historian for the United States).

This Court failed to note, however, that Dr. Cutter testified at the 2014 Hearing, and discussed in his Report, that these general principles of Spanish law did not, in themselves, impose any restrictions on how much water the Pueblos could use. Dr. Cutter explained that, unless and until the Spanish Crown actually interceded through a repartimiento[3] or other action and directed the Pueblos to reduce their water uses, the Pueblos' right to use water, including the right to increase uses as needs expanded, continued unabated. Dr. Cutter concluded: "I don't think the mere possibility that a repartimiento could take place meant a limitation on the water that could be used." Tr. at 54; *see also id*. at 175-76 (absent direct governmental intervention by

[3]A repartimiento was a proceeding in which a Spanish official would allocate the right to use water in a public source by applying various factors. Transcript of 2014 Hearing ("Tr.") at 51-52. A repartimiento was initiated only after a complaint was filed by a water user of the public source alleging that others were using water to the complainants' detriment. *Id*.

the Spanish Crown, "the Pueblos were free to use the water"). The expert for the State of New Mexico ("State"), Professor Emlen Hall, agreed that if there was no repartimiento, there was "no limitation on the Pueblos' right to use [water]." *Id*. at 338. None of the experts submitted evidence of a repartimiento.

III. Tenth Circuit Decision

The Tenth Circuit reversed the 2017 Order, holding that:

> We conclude 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. There is no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos.

Tenth Cir. Dec., 976 F.3d at 1160.

The Tenth Circuit recognized that the Spanish had the *power* to restrict Pueblo water use. *Id.* at 1155 ("[I]t was within Spain's regalia, that is the prerogative of the Crown, to ensure effective use of water. that didn't mean it always exercised its prerogative, but it did have that prerogative"). But, citing to the seminal Supreme Court decision on extinguishment of aboriginal rights, *United States v. Santa Fe Pacific R.R. Co*., 314 U.S. 339 (1941), the Tenth Circuit held that "*Santa Fe Pacific* requires a sovereign to *exercise* complete dominion, not merely to *possess* complete dominion." *Id.* at 1158 (emphasis supplied by the Court). The Tenth Circuit noted that "[a]lthough Spain possessed the right to conduct repartimientos to allocate water, it never exercised that right as to the Pueblos here." *Id*. at 1160.

The Tenth Circuit emphasized, repeatedly, that extinguishment of aboriginal rights required specific actions by the sovereign that *actually* interfered with the Pueblos' rights to use

water. After discussing federal court decisions regarding the extinguishment of aboriginal rights, the Tenth Circuit stated:

> In all cases addressing extinguishment courts have pointed to specific sovereign action that was directed to a right held by an Indian tribe. They have then looked at the actual adverse impact of that directed action on the tribal right at issue. Only when that review has shown a sovereign intent to extinguish an Indian right, have courts found that an extinguishment was effectuated. An intent to extinguish can only be found when there is an affirmative sovereign action focused at a specific right that is held by an Indian tribe that was intended to, and did in fact, have a sufficiently adverse impact on the right at issue.

Id. at 1158.[4]

The Tenth Circuit recognized "two main principles guiding Spain's control of water. First, public waters were held in common and shared by everyone. Second, one could not use public waters to the detriment of other users." *Id*. at 1155. The Tenth Circuit also found that, if there were a conflict regarding uses of water on a public source, the Crown had the power to intervene and allocate water through a repartimiento, which considered various factors. *Id*. After acknowledging the same principles of Spanish water law that this Court found dispositive, the Tenth Circuit held that these were only general principles of law and were not sufficient to extinguish aboriginal rights. The court stated that "even if we narrow our focus to Spain's

[4] The court cited to *Plamondon ex rel. Cowlitz Tribe of Indians*, 467 F.2d 935 (Ct. Cl. 1972); *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 524 (1998); *United States v. Gemmill,* 535 F.2d 1145, 1148–49 (9th Cir. 1976); and *Mitchel v. United States*, 34 U.S. 711 (1835). S*ee also Tenth Cir. Dec.* at 1159 (courts "repeatedly refer to 'acts' or 'action' when discussing extinguishment . . . we could find no case that determined that aboriginal rights were extinguished without pointing to a specific governmental act" and "without 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").

system for administering water, this system was guided by general principles, none of which specifically mention any Indian tribe let alone the Pueblos of Jemez, Santa Ana, and Zia." *Id*. at 1160. The Tenth Circuit stressed that the power to restrict uses of water was not the same as *exercising* such power:

> *Although Spain possessed the right to conduct repartimientos to allocate water, it never exercised that right as to the Pueblos here.* There is no showing that Spain clearly intended to extinguish the rights of these specific Pueblos, when nothing presented by the parties indicates that Spain had any issues with the Pueblos' water use. *The passive implementation of a generally applicable water administration system does not establish Spain's clear intent to extinguish the water rights of these three Pueblos.*

Id. at 1160 (emphasis added).

The Tenth Circuit, after examining the record evidence, held that Spain "never actually ended the Pueblos' exclusive use of water or limited their use *in any way*," that "there is no evidence that the Pueblos ever decreased their water usage or were unable to increase their usage," and that "there is no evidence that Spanish sovereignty had any impact on the Pueblos' uses of the water from Jemez River *at all*." *Id*. (emphasis added). Thus, the Tenth Circuit's decision establishes that Spain did not extinguish the Pueblos' aboriginal water rights and that the Pueblos had the right to use water, and increase their usage, with no restrictions.

IV. There are No More Issues to be Determined by this Court Regarding Whether Spain Extinguished the Pueblos' Aboriginal Water Rights Because the Tenth Circuit Decided this Issue

The State and Jemez River Basin Water Users Coalition ("Coalition") contend that, notwithstanding the Tenth Circuit's decision, there are still issues that need to be resolved by this Court regarding whether Spain extinguished the Pueblos' aboriginal rights. The State and

Coalition make three arguments: (1) in its 2017 Order, this Court allegedly did not rule on whether the Crown took any affirmative acts to extinguish the Pueblos' aboriginal water rights and, thus, on remand, the State and Coalition seek another chance to present evidence of what they contend are affirmative acts of the Crown – land grants issued to non-Indian communities in 1786 and 1798, *State's Reply To Coalition's Response to the United States and Pueblos and State of New Mexico's Proposed Scheduling Order*), Doc. 4451, at 5-6; *Coalition's Response to the United States and Pueblos and State of New Mexico's Proposed Scheduling Order*, Doc. 4448, at 9 ("on remand, this Court should first determine whether there is any evidence of affirmative acts and what legal effect they had. In particular, the Court should determine whether Spain's establishment of the San Ysidro Grant in 1786 and the Cañon de San Diego Grant in 1798, including an implied right to use water from the same source as the Pueblos, constituted affirmative acts"); (2) the Tenth Circuit lacked the jurisdictional authority to issue a ruling on whether there were any affirmative actions taken by the Crown to extinguish the Pueblos' aboriginal water rights; Doc. 4451 at 5; Doc. 4448 at 7; and (3) the Tenth Circuit did not address whether the land grants to the non-Pueblo communities extinguished the Pueblos' aboriginal water rights. Doc. 4451 at 6; Doc. 4448 at 8. For the reasons explained below, the State and Coalition's positions are specious.

A. The Tenth Circuit had the jurisdictional authority to issue a ruling on whether there were any affirmative actions taken by the Spanish Crown to extinguish the Pueblos' aboriginal water rights

The State and Coalition assert that the Tenth Circuit erred because it lacked the authority to rule on whether Spain took affirmative actions to extinguish the Pueblos' aboriginal water rights. Doc. 4451 at 5; Doc. 4448 at 7. As the Tenth Circuit itself explained, interlocutory

appeals "originate from the district court's order itself, not the specific question certified by the district court or the specific question framed by the appellant." *Tenth Cir. Dec*, 976 F. 3d at 1151. Appellate courts have the authority to address "any issue fairly included within the certified order because it is the *order* that is appealable." *Id.* (emphasis in original). The Tenth Circuit explained that "the correct test for determining if an issue is appropriate for interlocutory review is (1) whether that issue was raised in the certified order; and (2) whether the issue can control the disposition of the order." *Id.* In so ruling, the court relied on *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), in which the Supreme Court held that upon acceptance of a certification, appellate review is not restricted to the "controlling question" on which the appeal was based; it reaches "any issue fairly included within the certified order." *Id*.

The issue addressed in Section V.B of the Tenth Circuit's decision—whether the Spanish government limited the Pueblos' aboriginal right to use water from the Jemez River—was raised in the certified Order. *See* 2017 Order at 9. This issue controlled the disposition of the Order. The Tenth Circuit unquestionably had the authority to review this aspect of this Court's Order.

B. The mandate rule requires this Court to strictly comply with the Tenth Circuit's decision in its entirety

The Tenth Circuit issued a mandate to this court, stating that "these cases are remanded to the United States District Court for the District of New Mexico for further proceedings in accordance with the opinion of this court." Doc. 4439-2. This Court is "bound to follow the mandate," *Proctor and Gamble Co v. Haugen,* 317 F.3d 1121, 1126 (10th Cir. 2003), which constitutes "instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Id*. When the mandate, as here, is general (i.e. it does

not direct specific proceedings to be conducted), "a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal." *Id*.

The Tenth Circuit's opinion, in Section V.B of its decision squarely held that "there is no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos." *Tenth Cir. Dec.,* 976 F. 3d at 1160. The court further stated that "there is no evidence that Spanish sovereignty had any impact on the Pueblos' use of the water from the Jemez River at all. Because Spain's water administration system had no impact, let alone a negative impact, on the Pueblos' right to use water, it cannot be said that the system was "adverse" to the Pueblos." *Id*. The Tenth Circuit disposed of these issues and, pursuant to the mandate rule, this court is bound by the Tenth Circuit's holding.[5]

The State of New Mexico filed a Petition for Rehearing with the Tenth Circuit, seeking a ruling that Section V.B of the panel's decision was "unnecessary" and that such Section went "beyond the scope of the court's jurisdiction on interlocutory appeal." *United States v. Abouselman,* No. 18-2164, 18-2167, Doc. 010110437893 (10th Cir. Nov. 13, 2020), at 3. The State requested the Tenth Circuit to either grant a rehearing to delete Section V.B, or, in the alternative, to "clarify" that is opinion "does not apply to the question of whether Spain modified the aboriginal rights of the Pueblos in any way." *Id.* at 7. The Tenth Circuit denied the State's

[5] The State and Coalition contend that the Tenth Circuit did not rule on the issue as to whether Spain "modified" the Pueblos' aboriginal water rights, as the court allegedly only focused on whether Spain extinguished such rights. *State of New Mexico's Request for Order Staying Proceedings and Setting Status Conference,* Doc. 4446 at 12; *Coalition's Response to the United States and Pueblos and State of New Mexico's Proposed Scheduling Order*, Doc. 4448, at 9. The alleged distinction between "modifying" or extinguishing the Pueblos' aboriginal rights is a false issue, as the Tenth Circuit held that Spain "never actually ended the Pueblos' exclusive use of water or limited their use in *any way." Tenth Cir. Dec.* at 1160 (emphasis added). The court's holding is clear: the Pueblos' right to use water as they needed remained fully intact.

Petition. Doc. 4438. By denying the State's Petition, the Tenth Circuit necessarily rejected the State's contention that Section V.B went beyond the court's jurisdictional authority. This Court has no authority to second guess the Tenth Circuit on the jurisdictional issue, as this Court is bound by any issue "expressly or impliedly disposed of on appeal," *Proctor and Gamble*, 317 F.3d at 1126. This Court is bound by the entire Tenth Circuit decision, including Section V.B.

C. Contrary to the State's and Coalition's allegations, the 2017 Order ruled on the issue of whether the Spanish Crown took any affirmative acts to extinguish the Pueblos' aboriginal water rights

The State and Coalition contend that this Court did not consider whether Spain took any affirmative acts to extinguish the Pueblos' aboriginal rights. *State of New Mexico's Reply to Coalitions' Response to Filings of the United States and Pueblos and the State of New Mexico Regarding Proposed Scheduling Order,* Doc. 4451 at 6; *Coalitions' Response to Filings of the United States and Pueblos and the State of New Mexico Regarding Proposed Scheduling Order*, Doc. 4448, at 8-9. The State and Coalition misstate the record. This Court made a specific finding that Spain did not take any affirmative acts. Evidence and arguments were submitted to the Court regarding whether there were any affirmative actions and the Court made a decision on the issue, finding no affirmative actions.

The wording of Issue No. 1 is: "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?" (emphases added). Doc. 4253 at 2. Resolution of this issue encompassed consideration of *any* actions by the Crown. Thus, at the 2014 Hearing, and in the briefs filed to this Court regarding

Issue No. 1, the State and Coalition had the burden to present all evidence and arguments of any acts taken by any sovereign to extinguish the Pueblos' aboriginal water rights.

The State and Coalition took advantage of this opportunity.[6] The State's expert historian Professor Emlen Hall discussed the land grants to non-Indian communities at the 2014 Hearing several times. Transcript of 2014 Hearing ("Tr.) at 239, lines 7-9; *id*. at 266, lines 12-25; *id.* at 268, lines 1-3. Professor Hall contended that these grants made the Jemez River a public water source and thus were actions that extinguished the Pueblos' aboriginal rights. *Id*. at 267-269. Further, both the State and Coalition argued in briefs to the Court regarding Issue Nos. 1 and 2 that the issuance of these land grants to the non-Pueblo communities were affirmative acts of the Crown that extinguished the Pueblos' aboriginal water rights. *State's Opening Brief on Issues 1 and 2*), Doc. 4363 at 10-11; *State's Response Brief on Issues 1 and 2*, Doc. 4366 at 11-12. The State, in its Response to the United States' and Pueblos' Objections to Magistrate Judge Lynch's Proposed Findings, again mentioned the land grants, arguing that:

> Even if affirmative actions were required to extinguish aboriginal title, Judge Lynch's *Proposed Disposition* is correct. *There is undisputed evidence in the record that the Spanish crown took one or more affirmative actions that were unmistakably adverse to the [Indian] right of occupancy*. In 1786, the Spanish crown granted the establishment of the San Ysidro Spanish community land grant on the Jemez River. Cutter, V1, p. 136, lines 16-19. In 1798,

[6] Santa Ana Pueblo correctly points out in its Opening Supplemental Brief on Issues 1 and 2 that the State and Coalition's focus at the 2014 Hearing was that the Pueblos' aboriginal water rights were extinguished by the imposition of the Spanish legal system and that the mere *possibility* that a repartimiento could have been imposed on the Pueblos to allocate waters in the Jemez River was allegedly enough to extinguish the Pueblos' rights. *Santa Ana Pueblo's Opening Supplemental Brief on Issues 1 and 2*, Doc. 4475 at 20. But this was not the only position asserted by the State and Coalition. Both the State and Coalition put on evidence at the 2014 Hearing regarding the land grants to San Ysdiro and Cañon de San Diego and argued in briefs thereafter, referring to such evidence at the Hearing, that the issuance of the land grants were allegedly affirmative acts by the sovereign that extinguished the Pueblos' aboriginal water rights.

> Cañon de San Diego was established upstream of Jemez Pueblo. Hall, V2, pp. 267, lines 6-7. Both are Spanish community land grants, with implied rights to use water from the Jemez River. Hall, V2, p. 228, lines 21-23, p. 267, lines 4-5; Cutter, V1, p. 134, lines 9-17. By these grants the Spanish crown manifested its authority over the waters of the Jemez River as a shared, public source of water. All users, including the Pueblos, were now subject to the requirements of sharing and the principle of "no new or increased uses to the detriment of others.

State of New Mexico's Response Brief to Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez (Doc. 4384) and United States' Objections (Doc. 4385) to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (Doc. 483), Doc. 4389 at 9-10 (emphasis added).

The Coalition made the same argument as the State, again in multiple briefs to this Court. *Coalition's Opening Brief on Issues 1 and 2*, Doc. 4361 at 17-18; *Coalition's Response to United States' and Pueblos' Objections to Proposed Findings*, Doc. 4388 at 7-8; *Coalition's Response to Filings of United States and Pueblos and State of New Mexico on Proposed Scheduling Order*, Doc. 4448 at 8 ("the Coalition and the State *put on evidence in the 2014 trial of specific affirmative acts of the Spanish Crown* by making land grants, including the right to use water, to Spanish settlements along the Rio Jemez generally upstream of the Pueblos by establishment of the San Ysidro Grant in 1786 and the Cañon de San Diego Grant in 1798") (emphasis added).

The record here is indisputable: the State and Coalition at the 2014 Hearing and in multiple briefs contended that the San Ysidro and Cañon de Diego land grants were affirmative acts that extinguished the Pueblos' aboriginal water rights. The United States disputed such assertion. *United States' Amended Reply in Support of Objections to Proposed Findings and Recommended Disposition Regarding of Issues 1 and 2*, Doc. 4391 at 9 ("the mere existence of

the land grants (and accompanying implied water rights) has no legal consequence here, *unless* Spanish or Mexican officials, precisely as a result of the consideration of the non-Indians' implied water rights, ordered the Pueblos to reduce the amount of water they were using. As explained above, that never happened").

This Court, after considering the competing positions of the parties on the issue, found that there were no affirmative acts extinguishing the Pueblos' rights, holding that "Spain allowed the Pueblos to continue their use of water, and *did not take any affirmative act* to decrease the amount of water the Pueblos were using." 2017 Order at 7 (emphasis added). When this Court certified its 2017 Order for interlocutory appeal, it again presented the issue as "whether the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority *without any affirmative act*." Doc. 4421 at 3 (emphasis added). If this Court agreed with the State and Coalition (asserted numerous times in briefs) that the land grants to non-Indians were in and of themselves sufficient to constitute affirmative acts by the Crown that extinguished the Pueblos' aboriginal water rights, this Court would have so ruled. It did not. Instead, this Court expressly found that there were no affirmative acts by Spain to extinguish the Pueblos' aboriginal water rights. Thus, the land grants to non-Indian communities provide no new issue for the Court to address and the State and Coalition should not be permitted to relitigate the issue.

Further, to the extent the State or Coalition contend that they should have the opportunity to present evidence to this Court of affirmative acts other than the non-Indian land grants, this Court should summarily reject such position. The State and Coalition had the burden at the 2014 Hearing to present evidence of any affirmative acts that allegedly extinguished the Pueblos'

rights. It is far too late, more than eight years after the 2014 Hearing, for the State and Coalition to present evidence on this issue.

D. The Tenth Circuit rejected the State and Coalition's argument that grants to non-Pueblo communities were affirmative actions that extinguished the Pueblos' aboriginal water rights.

The State and Coalition argued to the Tenth Circuit, just as they had before this Court, that land grants issued to the non-Pueblo communities of San Ysidro and Cañon de San Diego were affirmative actions that extinguished the Pueblos' aboriginal water rights. *State of New Mexico's Response Brief*, Docket No. 18-2164, 18-2167, 2019 WL 3543514 (C.A.10) (Appellate Brief), at 30 ("Spain made grants to Spanish settlers in the Jemez River Valley with implied grants to water and those actions transformed the Jemez River into a shared public resource, forever ending the Pueblos' ability to increase their use without regard to others"). The State referred to the land grants numerous times in its Response Brief, repeatedly contending that the land grants were affirmative acts that allegedly extinguished the Pueblos' aboriginal rights. *Id.* at 7, 21-22, 27, 33, 42-43. The Coalition made the same argument to the Tenth Circuit. *Response Brief of Defendant-Appellee Jemez River Basin Water Users Coalition*, Docket No. 18-2164, 18-2167, 2019 WL 3543515 (10th Cir.) (Appellate Brief) at 39 ("[W]hen the Spanish Crown asserted jurisdiction over the Rio Jemez valley and made land grants with implied water rights to Spanish settlers, the Rio Jemez became public shared waters necessarily extinguishing any aboriginal right to expand to the detriment of those settlers"). Like the State, the Coalition referred to the land grants as affirmative acts adverse to the Pueblos multiple times in its brief. Id at 30, 34, 38, 39, 51, 52, 53. The Tenth Circuit did not agree with the argument

that the land grants were adverse to the Pueblos' aboriginal water rights, as the court held that Spain had not restricted the Pueblos' right to use water as their needs required in any way:

> Nor is there evidence in the record indicating that Spain's water administration system was adverse to the Pueblos, as it never actually ended the Pueblos' exclusive use of water or limited their use in any way. A repartimiento was never undertaken on the Jemez River, and there is no evidence that the Pueblos ever decreased their water usage or were unable to increase their usage. Indeed there is no evidence that Spanish sovereignty had any impact on the Pueblos' uses of the water from Jemez River at all.

Tenth Cir. Dec, 976 F.3d at 1160.

The fact that the Tenth Circuit did not expressly mention the non-Pueblo land grants in its decision is of no consequence. First, the Tenth Circuit was aware of the land grants, as they were part of the record in the case and the State and Coalition repeatedly referred to the land grants in their briefs. In holding that was "no evidence" in the record supporting a finding of extinguishment, the Tenth Circuit rejected the arguments of the State and Coalition that the land grants were evidence of extinguishment. Second, application of the core of the Tenth Circuit's reasoning leads to only one reasonable conclusion: the land grants did not extinguish the Pueblos' rights. The essence of the State's and Coalition's argument regarding the non-Indian land grants is that the grants gave an implied right to use water to the non-Pueblo communities, thereby making the Jemez River a "public source" of water and thus subject to sharing and the no harm principle. The Tenth Circuit squarely held, however, that the Spanish water law principles governing "shared public waters" and "no harm" were only general principles of law and these principles alone, without further action by Spanish authorities resulting in the actual restriction of the Pueblos' uses of water, did not extinguish the Pueblos' aboriginal water rights. *Id* at 1160. The grants to San Ysidro and Cañon de San Diego in and of themselves, therefore,

have no legal consequence. At the most, they support the position that the Jemez River was a public, shared resource. The Tenth Circuit held that this fact alone is not enough to extinguish the Pueblos' aboriginal water rights. *Id*. The land grants are a red herring.

V. The Tenth Circuit's Reasoning as to Why Spain did not Extinguish the Pueblos' Aboriginal Water Rights Applies with Equal Force to Mexico.

At the 2014 Hearing before Magistrate Judge Lynch, the parties presented evidence regarding two historical periods: (1) when Spain controlled the territory occupied by the Pueblos and (2) when the Republic of Mexico controlled such territory. Magistrate Judge Lynch concluded in his Proposed Findings that Spain extinguished the Pueblos' aboriginal rights and, as a consequence, whether Mexico extinguished the Pueblos' aboriginal water rights was moot. Thus, neither Magistrate Judge Lynch nor this Court addressed whether Mexico extinguished the Pueblos' aboriginal water rights. Given the Tenth Circuit's decision, whether or not Mexico extinguished the Pueblos' aboriginal rights is no longer moot. For the reasons explained below, the Tenth Circuit's reasoning mandates the conclusion that the Mexican government did not extinguish the Pueblos' aboriginal water rights. Mexico did not alter Spanish water law principles, Mexico undertook no repartimiento of the Jemez River during the Mexican period, and no Mexican official took *any* actions to interfere with or restrict the Pueblos' right to use water.

At the 2014 Hearing, Dr. Cutter explained that when Mexico took over the territory, one thing changed: the Plan of Iguala abolished all racial classifications. Tr. at 54-55. Thus, unlike Spain, Mexico did not grant the Pueblos any special protections as Indians. For two reasons, this change did not affect the Pueblos' aboriginal water rights. First, aboriginal rights are not

contingent upon express recognition by a sovereign. *See Santa Fe Pacific*, 314 U.S. at 347 (rejecting the argument that an Indian aboriginal right must be based on treaty, statute, or other formal governmental recognition by the sovereign), citing to *Cramer v. United States*, 261 U.S. 219, 229 (1923). The fact that Mexico abolished so-called "racial" classifications, therefore, is not relevant, as the critical issue before this Court is not whether Mexico granted special protections to the Pueblos as Indians, nor is it whether Mexico recognized the Pueblos' aboriginal rights. Instead, the issue is: did Mexico take affirmative actions to extinguish the Pueblos' aboriginal rights. Mexico did not.

Second, both experts at the 2014 Hearing testified that the Mexican water rights system was the same as that of Spain. Nothing changed for the Pueblos. Upon Mexico's independence from Spain, Mexico continued to recognize the Pueblos' right to use water as a community. Tr. at 55-57.[7] Further, as far as the Pueblos' right to use water was concerned, the rules in place during the Spanish regime continued under the Mexican regime. Dr. Cutter explained:

> Q: With regard to the right to use water during the time that Mexico held control of the territory, do you have an opinion as to whether the Indians status as a community remained intact with regard to the right to use water as a community?
>
> A: I believe that the rules in place under the Spanish regime continued under the Mexican regime.

[7]Only one repartimiento took place in New Mexico, and it was during the Mexican period, not the Spanish period; it involved Taos Pueblo. *Id*. at 52 (testimony of Dr. Cutter). The State's expert, Professor Hall, testified that in the Taos repartimiento, the ayuntamiento (local government body conducting the repartimiento) recognized Taos Pueblo as the "dueno despotico, the complete owner of the river" and that factors in Taos Pueblo's "favor" included the fact that the Pueblo had "antiquitdad, prioridad y primacia." *Id.* at 310.

> In fact throughout the country of Mexico there was virtually no change in water administration. And because New Mexico did not have its own state constitution, which might have had an effect on water administration, it was a not a state but rather a territory. And the central Mexican government made no provision for changing the laws regarding water allocation and use.
>
> So, essentially, we're talking about a situation where nothing changed with respect to the Pueblos' use of water in New Mexico during the Mexican period.

Id. at 56-57. *See also id*. at 145 (Dr. Cutter testified that uses of water by the Pueblos that "had been made and were continuing to be made" remained intact "unless the Spanish Crown *or Mexican state* stepped in to adjudicate otherwise" (emphasis added) and water administration during the Mexican period "continued much as it had or exactly as it had under the Spanish rule").

The expert historian for the State of New Mexico, Professor Emlen Hall, also testified that water law during the Mexican regime remained the same as it was during the Spanish period.

> Q; Now, the state has offered as Exhibit 15 on the taxonomy of water and associated rights under Mexican law as of 1848.
>
> *I wonder if you could use this slide to describe the taxonomy of water under Spanish law, rather than Mexican law, and was there ever any difference*?
>
> A: *I don't think there was any difference*. I've got this taxonomy and a clear statement of it from Molina Enriquez, who was a Mexican commentator with respect to natural resource law, and this was his taxonomy.
>
> He was writing as a Mexican during the Mexican period, but attributed this to deep roots in Spain.

Id. at 221 (emphases added).

Both expert historians testified that Mexico maintained the principles of Spanish law and, specifically, that in the Mexican regime (like the Spanish regime) the Pueblos could continue to use water unless and until a governmental official intervened in a repartimiento or other intervention. *Id.* at 145 and at 176-177 (Dr. Cutter) and *id*. at 338 (Professor Hall).

As to specific affirmative actions by Mexican officials, Dr. Cutter testified that he was unaware of any repartimiento taking place during the Mexican period with regard to the Pueblos of Jemez, Santa Ana, and Zia. *Id.* at 57-58. Nor was he aware of any other kind of affirmative act or intervention by any Mexican official to restrict in any way the use of water by these Pueblos. *Id*. at 58. *See also Id.* at 176-177. When asked if the Pueblos had the right to continue using water "for their needs as needs expanded" in the Mexican period, Dr. Cutter stated "I don't see any limitation placed on their use of water. There's no documentation that talks about limiting the use of water of any of the Pueblos." *Id*. at 57.

Professor Hall also conceded that there was never any repartimiento involving the Pueblos of Jemez, Santa Ana, and Zia:

> A. There was never a formal repartimiento.
>
> Q. And in fact, we have no record of any dispute, do we, between pueblo and non-Indian settlers on the Rio Jemez over water?
>
> A. Not that I know of.
>
> Q. Okay. And for all we know, during the 250 years of Spanish *and Mexican* rule in New Mexico, Jemez, Zia, and Santa Ana utilized the waters of the Rio Jemez without interference. Yes?
>
> A. Yes.

Id. at 334-335 (emphasis added).

The Tenth Circuit's decision made it clear that the imposition of a general body of water law, including provisions establishing a "no harm to other" principle and the sharing of common waters, was insufficient, in itself, to extinguish the Pueblos' aboriginal rights. It logically follows that Mexico's imposition of the same general laws, without specific actions, such as a repartimiento or intervention, did not extinguish the Pueblos' aboriginal rights. Like the Spanish, the Mexican government at most exercised a "passive implementation of a generally applicable water administration system," which, according to the Tenth Circuit, was not enough to sustain a finding of extinguishment. *Tenth Cir. Dec*, 976 F.3d at 1160. No Mexican officials ever intervened to allocate uses of water by the Pueblos in a repartimiento or otherwise.[8] The reasoning of the Tenth Circuit's decision regarding the Spanish period, therefore, applies with equal force to the Mexican period. This Court is bound by the Tenth Circuit's decision and therefore should rule, as a matter of law, that Mexico did not extinguish the aboriginal water rights of the Pueblos.

VI. **The United States did not Extinguish the Pueblos' Aboriginal Water Rights.**

A. The Treaty of Guadalupe Hidalgo did not Extinguish the Pueblos' Aboriginal Water Rights

Issue No. 1 includes the following question: whether any acts of the United States extinguished or modified the Pueblos' aboriginal water rights. The Tenth Circuit's decision addresses, by implication, one issue relevant to Issue No. 1: the Treaty of Guadalupe Hidalgo, 9

[8] There is no need for any further evidentiary hearings regarding the Mexican period, as the State and Coalition had the opportunity at the 2014 Hearing to present evidence of any actions during the Mexican period that allegedly extinguished the Pueblos' aboriginal water rights. The State and Coalition are not entitled to yet another bite of the apple.

Stat. 922 (1848) ("Treaty"). The State and Coalition contend that the Treaty extinguished the Pueblos' aboriginal water rights by limiting such rights to those that were in "actual use" as of the date of the Treaty. The State, citing to this Court's 2004 Order, Doc. 4051 at 24, asserts that the purpose of the Treaty was to maintain the status quo and that, at the time of the Treaty, the Pueblos' water rights were "already limited" by Spanish law, that the Treaty "did not create any new rights" and "the central, defining basis of aboriginal rights – free, unfettered and exclusive use of the resource – no longer existed." *State of New Mexico's Reply to 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*, Doc. 4369, at 4. The Coalition makes a similar argument. *Coalition's Opening Brief on Issues 1 and 2*, Doc. 4361 at 18 (at the "eve of American sovereignty," (immediately before the execution of the Treaty), the Pueblos' right to use of water allegedly limited because Jemez River was a common public source). The State's and Coalition's arguments fail as they are refuted by the Tenth Circuit's decision.

The underlying premise of the State's and Coalition's position is that, at the time of the Treaty, the Pueblos' right to use water had been limited by Spain. The Tenth Circuit refuted this position, as it held that there was no "evidence in the experts' reports or testimony that Spain's water administration system was adverse to the Pueblos, as it never actually ended the Pueblos' exclusive use of water or limited their use *in any way"*) (emphasis added). *Tenth Cir. Dec*, 976 F.3d at 1160. Further, for the reasons explained in Section V of this brief, the rationale of the Tenth Circuit's decision applies to the Mexican regime, and thus Mexico did not extinguish the Pueblos' aboriginal water rights either. Therefore, as a matter of law, at the time of the Treaty, the Pueblos retained unextinguished aboriginal water rights, as Spain did not end the Pueblos'

exclusive use of water, nor did Mexico. This Court held in 2004 that the Treaty did not "reserve additional property rights[9]" but instead it maintained the status quo. Doc. 4051 at 24. Given the Tenth Circuit's decision, this Court is compelled to rule that the status quo for the Pueblos at the time of the Treaty was that the Pueblos held unextinguished aboriginal water rights.

It should be emphasized that aboriginal rights are not contingent upon an express recognition by a sovereign. *See Santa Fe Pacific*, 314 U.S. at 347 (rejecting the argument that an Indian aboriginal right must be based on a treaty, statute, or other formal governmental recognition). Thus, the issue before this Court is not whether the Treaty recognized the Pueblos' aboriginal rights, as that was not legally necessary. Instead, the issue is whether the Treaty indicated an unambiguous intent to extinguish the Pueblos' aboriginal rights. Tenth Cir. Dec, 976 F.3d at 1156, citing *Santa Fe Pacific*, 314 U.S. at 354. The Treaty did not, as the Treaty protected the Pueblos' rights as they existed at the time (i.e., unextinguished aboriginal rights).

B. Neither the Public Land Acts of 1866, 1877, or 1877; the Pueblo Lands Acts of 1924 and 1933, nor the Indian Claims Commission Act extinguished the Pueblos' aboriginal water rights

Issue 1 includes three sub-issues: (1) "Did the Acts of 1866, 1870, and 1877 have any effect on the Pueblos' water rights and, if so, what effect?"; (2) "Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect?"; and (3) "Did the Indian Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect? Doc. 4253 at 2. The Tenth Circuit did not address any of the acts of Congress

[9] The Treaty states, at Article VIII, that "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

referenced in the sub-issues and there is, therefore, no need to address such issues in this supplemental brief. The sub-issues have been fully briefed by the parties and are ready for decision by this Court**.** For the reasons asserted in previous briefs on Issues Nos. 1 and 2,[10] this Court should conclude, as a matter of law, that none of the acts of Congress referenced in sub-issues nos. 1-3 extinguished the Pueblos' aboriginal water rights.

VII. **The Pueblos' Grant Lands Enjoy *Winans* Rights.**

Issue No. 2 is "does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?" When Magistrate Judge Lynch issued his Proposed Findings, he stated that "[B]ecause I recommend that the Court conclude that Spain extinguished the Pueblos' aboriginal water rights, there are no aboriginal water rights for the United States to recognize. Therefore, I recommend that the Court conclude that the *Winans* doctrine does not apply to any of the Pueblos' grant or trust lands." *Proposed Findings* at 14. The Tenth Circuit decision leaves no doubt that the Pueblos' aboriginal water rights remain fully intact. Thus, Issue No. 2 must be decided by this Court.

In *Winans v. United States*, 198 U.S. 371 (1905), the Supreme Court held that aboriginal rights possessed by the Yakima Tribe were not created by the 1859 treaty at issue in the case but were "part of larger rights possessed by the Indians" prior to the treaty. *Id.* at 381. The court

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[10] See *Opening Brief of the Pueblos of Santa Ana, Jemez, and Zia and the United States on Issues 1 and 2*, Doc. 4362, at 23-39; *Response of Santa Ana, Jemez, and Zia and the United States to Opening Briefs of State of New Mexico and Coalition on Issues 1 and at 2*, Doc. 4364, at 17-29; and *Reply Brief of Pueblos of Santa Ana, Jemez, and Zia and the United States to Response Briefs of State of New Mexico and Coalition on Issues 1 and at 2*, Doc. 4370, at 20-24. In addition, Santa Ana Pueblo addressed the sub-issues in its Opening Supplemental Brief at Sections B, C, and D. *Santa Ana Pueblo's Opening Supplemental Brief on Issues 1 and 2*, Doc. 4475 at 8-18. The United States agrees with Santa Ana's analysis and will not repeat the same arguments here.

held that the treaty recognized the aboriginal rights, it did not create them, and that the Treaty "was not a grant of rights to the Indians, but a grant of rights from them,–a reservation of those not granted." *Id.* This Court held in its 2004 decision that "Winans rights essentially are governmentally recognized aboriginal rights." Doc. 4051 at 26. The United States and Pueblos have demonstrated in briefs filed with this Court on Issue No. 2 that the federal government has recognized the Pueblos' aboriginal rights in a manner consistent with the *Winans* doctrine. *See* Doc. 4362 at 39-41; Doc. 4364 at 29-30; and Doc. 4370 at 24-25. The arguments asserted in previous briefs on the *Winans* issue will not be repeated here, for the sake of judicial economy.

CONCLUSION

For the reasons asserted above, the United States requests this Court to rule that:

(1) the Tenth Circuit held that Spain did not extinguish the Pueblos' aboriginal water rights and there is nothing more for this Court to decide on that issue because it has been entirely resolved by the Tenth Circuit;

(2) the State and Coalition should not be permitted to present evidence on the land grants to the communities of San Ysidro and Cañon de Diego, as the State and Coalition have already presented arguments to this Court on the land grants issue and this Court rejected the argument that the grants were affirmative actions that extinguished the Pueblos' aboriginal water rights; moreover, the Tenth Circuit rejected the argument that the land grants extinguished the Pueblos' aboriginal water rights and this Court is bound by the Tenth Circuit's decision;

(3) to the extent the State or Coalition contend that they should have the opportunity to present evidence to this Court of affirmative acts other than the non-Indian land grants, this Court should summarily reject such position, as the State and Coalition had the burden in the

2014 Hearing to present evidence of any affirmative acts that allegedly extinguished the Pueblos' rights and it is far too late, more than eight years after the 2014 Hearing, for the State and Coalition to present evidence on this issue that they could have, but did not, present in 2014;

(4) the reasoning of the Tenth Circuit as to why Spain did not extinguish the Pueblos' aboriginal water rights applies with equal force to the Mexican period, as all relevant facts are the same–thus, as matter of law, Mexico did not extinguish the Pueblos' aboriginal water rights;

(5) the Treaty of Guadalupe Hidalgo did not extinguish the Pueblos' aboriginal water rights, as the Treaty protected the status quo and the status quo was that the Pueblos held unextinguished aboriginal water rights;

(6) for the reasons asserted in the briefs filed in connection with the sub-issues related to Issue No. 1, this Court should find that the acts of Congress referenced in the sub-issues have not extinguished the Pueblos' aboriginal water rights; and

(7) for the reasons asserted in briefs filed in connection with Issue 2, the Pueblos hold *Winans* rights to their grant lands.

Respectfully Submitted,

UNITED STATES DEPARTMENT OF JUSTICE

Date: September 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will cause all CM/ECF participants to be served by electronic means. I hereby also certify that, on this 14th day of September, 2022, I have mailed by United States Postal Service the foregoing document to the following non CM/ECF participants:

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