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 SUPPLEMENTAL REPLY BRIEF ON ISSUES 1 AND 2

The Pueblo of Santa Ana hereby submits this Reply to the State's *Response to Opening Supplemental Briefs of the United States and the Pueblo of Santa Ana on Issues 1 and 2* (Doc. 4485) ("State Response") and the Coalition's *Response to Opening Supplemental Briefs of the United States and the Pueblo of Santa Ana on Issues 1 and 2* (Doc. 4484) ("Coalition Response"). The State and the Coalition contend in their Responses, among other things, that the Pueblos do not have and cannot prove that they ever had aboriginal water rights; that aboriginal water rights, if they exist, amount only to actual uses prior to 1848, and that any rights the Pueblos may have acquired after that date are based on actual use with a priority as of the date of

first use; that Santa Ana's claim of aboriginal water rights means a right to expand its water use endlessly, to the detriment of existing users; that the Tenth Circuit opinion in *United States v. Abouselman*, 976 F.3d 1146 (10th Cir. 2020), only decided a narrow issue of law, and that the court's statements about the lack of any affirmative action by the Spanish territorial government that affected Pueblo water rights should be disregarded; and that in fact, the Spanish government *did* take actions that were intended to and did extinguish (or modify) the Pueblos' aboriginal water rights. As will be shown below, none of these contentions has merit, and several of them are refuted by decisions of this Court or the court of appeals.[1]

Two points in particular should be cleared up at the outset. First, both the State and the Coalition repeatedly refer to the rights that Santa Ana claims as an "expanding aboriginal right," as if the Pueblo were claiming the right to use an infinitely expanding quantity of water. This effort to denigrate the Pueblo's claim is simply untrue, and in any event the contention has no place in the instant proceeding. The quantification of Pueblo aboriginal water rights is the subject of Issue No. 3, which is not currently before the Court. But the Pueblo would note that in its briefing on Issue No. 3, it (along with the United States and the other two Pueblos) long ago proposed that because its aboriginal rights serve the same purpose as federally reserved rights—

[1]On October 14, 2022, a brief (Doc. 4481) was filed in this proceeding on behalf of Charlotte Mitchell, who supposedly resides in the Rio Jemez basin (but who is not shown as having any water rights adjudicated to her in the Addendum to the Partial Final Judgment and Decree on Non-Pueblo, Non-Federal Proprietary Water Rights issued on December 1, 2000 (Doc. 3948)), that consisted of a 25-page screed purporting to describe the development of federal Indian law and policy over the history of the country (though largely devoid of any citation of authority for the mostly revisionist views it expresses), and that ends with the assertion that the doctrine of federal reserved water rights for Indian tribes and the case of *United States v. Winans*, 198 U.S. 371 (1905), no longer constitute good law. The Pueblo expresses no opinion on the views set forth in that brief, except to note that the Pueblo has not claimed any federally reserved rights in this phase of this litigation (regarding Issues 1 and 2), and that *Winans* does not deal with reserved rights, but is rather about Indian aboriginal rights that have been recognized in some fashion by the United States. *See, e.g.*, *United States v. Abousleman*, No. 83-cv-01041 (D.N.M.), *Memorandum Opinion and Order* filed October 4, 2004 (Doc. 4051), at 26-28. The Pueblo submits that the Mitchell brief should be disregarded.

that is, to enable the Pueblo to maintain its land as a permanent homeland for its people—they thus could be quantified in the same manner as federally reserved rights are, by determining the practicably irrigable acreage within the Pueblo's aboriginal lands in the Rio Jemez Basin. *See United States and Pueblos of Jemez, Santa Ana and Zia's Opening Brief Regarding Quantification of Pueblos' Aboriginal Water Rights (Issue No.3)* (Doc. 4281), filed herein on November 13, 2012, at 11-12. No claim is made in this case to an infinitely expanding water right.

Second, both the State and the Coalition repeatedly refer to and quote extensively from the *dissenting* opinion of Judge Tymkovich in the *Abouselman* decision. *See, e.g.*, State's Response at 9, 10, 12, 13,[2] 14, 24; Coalition Response at 17, 23-24. But of course, it is the majority opinion, by Judge Ebel, that binds and directs this Court. It is ironic that the State and Coalition rely so heavily on the dissent, considering that they argue that the Court should disregard key parts of the majority opinion. Santa Ana submits that the State's and Coalition's arguments based on Judge Tymkovich's dissent should be rejected, and that, as will be shown, all parts of the majority opinion should guide this Court.[3]

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[2]Indeed, the State goes so far as to cite Judge Tymkovich's erroneous citation to *New Mexico ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375 (2004), for the proposition that the state Supreme Court rejected the claim that the Treaty of Guadalupe Hidalgo protected "an expanding pueblo water right." State Response at 12-13. The right at issue in *Martinez* was a state-law-based *non-Indian* pueblo (*i.e*., municipal) water right, that the state Supreme Court had previously upheld in *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64 (1958) (which was overruled in *Martinez,* but on the ground that that doctrine was inconsistent with the constitutionally mandated prior appropriation doctrine, not for any reason related to the treaty). The case had nothing whatever to do with the water rights of Pueblo Indians, which rights are defined by federal law.

[3]Similarly, the Coalition's claim that "the guts of the 2017 Opinion [the opinion under review in the *Abouselman* appeal] are still correct and were not reversed," Coalition Response at 16, and its citation to that opinion in support of its claim that the Pueblos did not have an "expanding or increasing first priority right under Spanish or Mexican law," *id*. at 22, cannot be taken seriously. That decision was reversed by the Tenth Circuit, in its entirety. All of its very brief reasoning was in support of its ruling that the imposition of the Spanish regime extinguished the Pueblos'

I. This Court Found that the Pueblos Had Aboriginal Water Rights at the Time of the Arrival of the Spanish, and That Finding Was Not Challenged by Any Party, and Was Confirmed by the Court of Appeals; and the State's and Coalition's Claims as to What Must be Shown to Establish Aboriginal Water Rights Misapprehend the Basis of Such Rights.

Both the State and the Coalition contend, essentially, that the Pueblos cannot establish that they have aboriginal water rights, because they cannot "meet the standard for proof of aboriginal title, which requires proof of actual, historic and exclusive use and occupancy." State Response at 8 n.9; *see also* Coalition Response at 17 (quoting Judge Tymkovich's dissent). But these arguments proceed on a wholly mistaken notion of the basis of aboriginal water rights, besides being refuted by rulings of this Court and the court of appeals.

It is of course correct that aboriginal title to *land* is established by proof that a tribe used and occupied the land exclusively over a long period of time. *See, e.g., United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941). There has never been any dispute that the Pueblos in this case have used and occupied what are considered their "grant" lands exclusively since long before the arrival of the Spanish, and the State's expert, Prof. Hall, acknowledged that. Trans. at 352. But aboriginal title to land includes the right to all of the appurtenances to the land, such as the rights to timber and minerals, and especially the right to use appurtenant water, and there is no requirement that the tribe show any prior use at all of those appurtenant resources. That this is so is shown plainly by decisions such as *United States v Northern Paiute Nation,* 393 F.2d 786 (Ct.Cl. 1968), in which the court held that the Northern Paiutes were entitled, as part of the compensation due them for the taking by the United States of some 50 million acres of aboriginal lands, to the value of the subsurface minerals, which, as of the date of taking, happened to include the legendary Comstock silver lode, even though the Paiutes had never exploited the

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aboriginal water rights. There is no reason to think that any part of that decision survives as good law.

minerals in any way. *See also United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1984) (aboriginal title to land includes hunting and fishing rights, and right to use appurtenant water). In an opinion issued in this case, on which the State and the Coalition strongly rely, Judge Martha Vázquez addressed this issue directly, stating, "In addition to the right of occupancy of lands, aboriginal title includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title." *Memorandum Opinion and Order* issued October 4, 2004 (Doc. 4051) ("2004 Opinion"), at 20.[4]

In other words, once aboriginal title to land has been established, there is no need for a tribe to show actual use of the natural resources appurtenant to that land. The right to those resources, especially including water, is an elemental aspect of the aboriginal title to the land.[5]

Importantly, moreover, Magistrate Judge Lynch's *Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* (Doc. 4383) ("Proposed Findings"), which were adopted in their entirety by Judge Vázquez in her *Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2,* issued on September 30, 2017 (Doc. 4397) ("2017 Opinion"), found that "the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish." Proposed Findings at 14. That language was quoted by Judge Vázquez in the 2017 Opinion, at 3. The Tenth Circuit opinion notes that the district court, "adopting the magistrate judge's findings

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[4]This point similarly disposes of the Coalition's baseless argument that the Pueblo's claim to an aboriginal water right that encompasses some amount for future needs is "analogous to aboriginal title to lands that have expanding boundaries to meet future needs." Coalition Response at 18. As is explained in the text, aboriginal title to lands is established by proof of long, exclusive use and occupancy. Once the lands subject to aboriginal title are determined, their boundaries do not change. But the tribe's use of water appurtenant to those lands could grow (up to an adjudicated amount) as the tribe's needs grow.

[5]Similarly, when the two Spanish grants on which the State and the Coalition place so much emphasis were made, they said nothing about any right to use water appurtenant to the land, but as both experts testified at the 2014 hearing in this case, the right to use of the water was implied, and its extent was not fixed by the making of the grants.

and recommendations, determined that the Pueblos did, at one point, possess aboriginal rights to the Jemez River in connection with their aboriginal title. No party disputes this determination." *Abouselman*, 976 F.3d at 1152.

In short, there can be no argument that the Pueblos did not have aboriginal rights to water appurtenant to their lands at the time their lands came under the domination of the Spanish. The question here is simply whether those rights were ever extinguished.

II. There is No Basis for the Contention that Aboriginal Water Rights Are Solely Based on Actual Use Prior to 1848.

The State and the Coalition contend that aboriginal water rights, if they exist, are limited to actual uses as of 1848, and that after that date, any rights the Pueblos acquired were acquired by actual use, with a priority as of the date of first use. State Response at 4 n. 6; Coalition Response at 17. Somewhat inconsistently with its claim that the Pueblo's aboriginal rights ended in 1848, the Coalition also cites an unpublished opinion in the *Aamodt* litigation, *New Mexico v. Aamodt*, Dkt. 6639-M (D.N.M.), in which Judge Edwin Mechem stated that "Historically irrigated acreage (HIA) [up to 1924] is the standard used to determine the grant or reserved acreage to which aboriginal water rights are appurtenant." Coalition Response at 11 (quoting *Aamodt*, *Memorandum Opinion and Order*, issued December 29, 1993 (Doc. 4267), at 3.

The claim that after 1848, any new water uses by the Pueblos were governed by state-law concepts of actual beneficial use, with a priority as of the date of first use, runs head-on into the ruling of the Tenth Circuit in *New Mexico v. Aamodt*, 537 F.2d 1102, 1111-12 (10th Cir. 1976) ("*Aamodt I*"), in which that court held that "[t]he United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law. . . . The water rights of the Pueblos are not subject to the laws of New Mexico because the United States has never surrendered its jurisdiction and control." There is simply no authority to the

contrary.

Judge Mechem's unpublished 1993 opinion in *Aamodt* is puzzling. In the one published opinion he authored in that case, reported at 618 F.Supp. 993 (D.N.M. 1985) (often referred to as "*Aamodt II*"), he adopted certain of the Special Master's conclusions of law stating:

1. Spanish and Mexican law recognized that the lands and waters traditionally used and occupied by the Pueblos, belong to them. *The Pueblos' claim to such properties was never extinguished by either sovereign*.
2. The Pueblos' lands and waters were expressly recognized and protected by Spanish law from the time of the Conquest, and this recognition by law was equivalent to legal ownership. After independence, Mexico recognized and protected the Pueblos' properties.

. . . .

4. The water rights of the Pueblos, which were recognized and protected by Spain and by Mexico, were defined as *a prior and paramount right to a sufficient quantity to meet their present and future needs*.

618 F. Supp. at 998 (emphasis added). Later in the opinion he ruled that "[t]he Pueblos came into the United States with these long-established priorities and with their aboriginal rights to use the water for irrigation purposes." *Id*. at 1009.[6]

In one of his last written opinions in the *Aamodt* case, before he passed away in 2002, Judge Mechem returned to his original view of the Pueblos' aboriginal rights, ruling, in an opinion handed down in early 2001, that

> Pueblos are entitled to federal water rights based on past, present *and future uses* developed up to 1924. . . . Before the Spanish conquest, they developed all the water rights in the stream

[6]Elsewhere in that opinion, however, Judge Mechem ruled that the Pueblos' aboriginal rights had been cut off by Congress in the 1924 Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 636, c. 331. 618 F.Supp. at 1009-10. The opinion cites no specific provision or language of that Act that, it claims, effected such an extinguishment, and neither the State nor the Coalition has relied on that portion of the 1985 *Aamodt* opinion in support of a claim that the Pueblos' rights were extinguished in this litigation. The State's and Coalition's expert, Prof. Hall, acknowledged in his testimony that there was no provision of the Pueblo Lands Act that addresses Pueblo aboriginal rights at all. *See* Trans.at 360-63. The *Aamodt* case was ultimately settled, and the settlement was approved by Congress, so there was no opportunity to have this peculiar aspect of Judge Mechem's 1985 decision tested on appeal. *See* Claims Resolution Act of 2010, Pub.L. 111-291, Title VI, 124 Stat. 3134 (Aamodt Settlement Act).

> system *including the right to use water in the future*. . . . Spanish and Mexican law recognized and preserved these rights and their first priority. . . .
>
> The 1848 Treaty of Guadalupe Hidalgo . . . recognized and preserved the Pueblos' property rights as they existed in 1846. …This protection extended to all water rights *including the Pueblos' right to develop future uses in an amount necessary to sustain the community*.

Aamodt, *Memorandum Opinion and Order*, issued January 31, 2001 (Doc. 5642) at 2-3 (emphasis added; citations to *Aamodt I* and *Aamodt II* omitted). So, the 1993 Order cited by the Coalition is something of an anomaly. Judge Mechem's earlier and subsequent views in *Aamodt* plainly support the position that the Pueblos' aboriginal water rights are not at all limited to actual use in 1848, but rather include rights for future needs, and that those rights were fully recognized and protected by Spain and Mexico. No other case known to the Pueblo's counsel holds otherwise.

III. Part V(B) of the *Abouselman* Decision is Neither *Dicta* nor Improper Fact-Finding, and the Court's Rulings Should Bind This Court.

In Part V(B) of its opinion in *Abouselman*, having concluded that no extinguishment of aboriginal rights can occur absent an affirmative act of the sovereign intended to effectuate such an extinguishment, the court went on to rule that there was no indication in the record of any intent on the part of the Spanish government to extinguish the aboriginal water rights of the Pueblos. *Abouselman*, 976 F.3d at 1160. Predictably, the State and the Coalition attack these passages vehemently, arguing that they are *dicta*, or amount to improper fact-finding, and repeatedly cite to statements by the Pueblo and the United States that the issue presented to the court was a "narrow" one. *See, e.g.*, State's Response at 15-21; Coalition Response at 7, 12-15. These arguments disregard the permissible scope of a ruling on an interlocutory appeal as established by the Supreme Court, and mischaracterize the Tenth Circuit's rulings.

As the Supreme Court held in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996),

> appellate jurisdiction [in an interlocutory appeal] applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court. . . . . the appellate court may address any issue fairly included within the certified order because "it is the *order* that is appealable, and not the controlling question identified by the district court."

(Quoting 9 J. Moore & B. Ward, MOORE'S FEDERAL PRACTICE ¶ 110.25[1], p. 300 (2d ed. 1995).) (emphasis in the original). *See also, Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union v. Continental Carbon Co*., 428 F. 3d 1285, 1291 (10th Cir. 2005) ("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.") The Pueblo submits that the rulings in part V(B) of the *Abouselman* opinion plainly pass both parts of the *Paper, Allied Industrial* test, and that the State's and the Coalition's arguments about the narrowness of the issue as proposed by the Pueblos and the United States or as certified by the district court are simply irrelevant.

In the 2017 Opinion, this Court not only adopted in its entirety Magistrate Judge Lynch's Proposed Findings, in which he had concluded that the extension of Spanish sovereignty over New Mexico, alone, had extinguished the Pueblos' aboriginal water rights, but this Court also ruled that "[a]lthough Spain allowed the Pueblos to continue their use of water, *and did not take any affirmative act to reduce the amount of water the Pueblos were using*," it nonetheless indicated an intent to extinguish the Pueblos' right to increase their uses. 2017 Opinion at 7 (emphasis added)[7]. That passage clearly looks to the entire extent of Spanish rule in New

[7]The State contends that this passage "was not the basis of [the district court's] ruling and is not dispositive on the question of extinguishment." State Response at 18-19. That is a dubious claim, but it is of no consequence. That passage raises an issue that is "fairly included within the

Mexico, and thus invites the court of appeals to take its own look at the record to ascertain if there were any affirmative acts that could have amounted to extinguishment, under the high standard the court held was applicable. Despite the urgings of the State and the Coalition that there *were* such acts, the court plainly concluded that they did not meet that standard.

That leads to another claim that the State and the Coalition press, that this portion of the opinion amounts to improper fact-finding. *See* State Response at 15; Coalition Response at 14. But this claim simply misconstrues the court's rulings. There is no dispute as to the facts—they are historical facts, well established in the record. The court was merely determining the *legal effect* of the facts before it, *i.e*., whether any of the Spanish actions shown in the record effectuated an extinguishment of the Pueblos' aboriginal water rights, under the standard that the court had found applicable. That was clearly the point of the 2017 Opinion, that the legal effect of the imposition of the Spanish laws regarding water use had the effect of extinguishing those rights. The court of appeals was thus plainly entitled to consider the undisputed facts presented and to arrive at its own conclusion as to their legal effect.

And if that is so, then there can be no basis at all for the State's and the Coalition's attempts to label this section of the opinion as *dicta*, that this Court should ignore. State Response at 20; Coalition Response at 14. The Tenth Circuit has defined dicta as "'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.'" *United States v. Barela*, 797 F.3d 1186, 1190 (10th Cir. 2015 (*quoting Rohrbach v. Celotex Corp*., 53 F.3d 1181, 1184 (10th Cir. 1995)). By that definition this passage in the *Abouselman* opinion is clearly not dicta. Rather, it is a substantive ruling, directly pertinent to the ruling below and that in fact directly overrules a

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certified order," and thus is subject to consideration on interlocutory review. And it was clearly dispositive, as it went directly to the issue of whether there were any affirmative acts by the Spanish that could have extinguished the Pueblos' rights.

specific ruling of this Court in the 2017 Opinion. But even if these passages in *Abouselman* could plausibly be characterized as dicta, that would still not mean that they could be disregarded here. The Tenth Circuit recently had occasion to comment at some length on the significance to be accorded to dicta. In *Navajo Nation v. Dalley*, 896 F.3d 1196, 1208 n. 6 (10th Cir. 2018), considering an argument by the appellees that the court of appeals should disregard as dicta certain language in a Supreme Court opinion that spoke directly to the issue before the court of appeals, the court said, “we are bound to follow both the holding and the *reasoning*, even if dicta, of the Supreme Court.” (Emphasis in the original.) It quoted its opinion in *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008), in which the court had observed, “even if the Court’s rejection of the reasonable apprehension test could be plausibly characterized as *dicta*, our job . . . is to follow the Supreme Court’s directions, not pick and choose among them as if ordering from a menu.” The Pueblo submits that the same principle should apply to a district court considering statements in a court of appeals opinion that are directly on point and address an issue directly raised in the proceeding.

It is nothing short of ironic that the State and the Coalition attack this aspect of the *Abouselman* opinion so vigorously, considering that they both, in their briefs and arguments to the court of appeals, just as vigorously contended that the Spanish government *did* take affirmative actions to extinguish the Pueblos’ aboriginal water rights, in the form of two non-Indian community land grants, the San Ysidro Grant of 1786, and the Cañon de San Diego Grant of 1798, both of which spanned the Rio Jemez. (Even if this Court considered the legal effect of those grants to remain an open question here, in the next section of this brief the Pueblo will show that there is simply no basis for the conclusion that the making of those grants extinguished any Pueblo rights, especially given the exacting standard that must be met to show

extinguishment as the court of appeals held in *Abouselman*.) Santa Ana suspects that had the court of appeals held that the making of these two grants did in fact extinguish the Pueblos' aboriginal water rights, the State and the Coalition would be urging that that ruling is binding here, and not dicta. But the point is that given the repeated references to the grants in the Coalition's and the State's briefs in the court of appeals (nearly 20 references in all), it can hardly be contended that that court did not consider these grants in the course of determining that there was "no indication, let alone a clear and plain indication, that Spain intended to extinguish any aboriginal rights of these three Pueblos." *Abouselman*, 976 F.3d at 1160.

In short, the State's and the Coalition's arguments for disregarding these aspects of the court of appeals decision are no more persuasive than are their claims that this Court should follow the reasoning of the dissent. The court of appeals emphatically ruled that only an express, affirmative act of the sovereign, deliberately intended to extinguish Indian rights, could have extinguished the aboriginal water rights of the Pueblos, and despite the urgings of the State and the Coalition it found no such actions, including the two acts they urged did effectuate the extinguishment, that met that standard. Its determination on that point should be conclusive.

IV. There is No Basis in the Record for Any Finding that the Making of the Cañon de San Diego Grant or the San Ysidro Grant Were Intended to or Did Extinguish (or "Modify") the Aboriginal Water Rights of the Pueblos

The State's and the Coalition's arguments ultimately come down, as they must, to the contention that the Spanish territorial government did in fact take affirmative actions that extinguished the Pueblos' aboriginal water rights. State Response at 17, 22-23; Coalition Response at 19.[8] But the only actions the State and the Coalition, or anyone else, can point to in support of this claim are the making of the San Ysidro Grant in 1786, and the making of the

[8]Importantly, neither the State nor the Coalition makes any claim that the Mexican government took any action to extinguish or "modify" the Pueblos' aboriginal water rights.

Cañon de San Diego Grant in 1798. Remarkably, there is no evidence at all in the record of this case concerning either of these two grants, except the brief testimony of Dr. Cutter that as these were community grants, there was an implied right on the part of the grantees to use water appurtenant to the grant lands, and that the Rio Jemez, which flows through both grants, became "public waters" under Spanish law. Trans. 136-37. Prof. Hall gave similar brief testimony about the grants (although he acknowledged that had there been a dispute between the grantees and Jemez Pueblo over water, Jemez would have had the stronger case, given its "antiquity;" Trans. 239, 266-67). But no documents pertaining to either grant were introduced into evidence, nor was there any other evidence of any purpose or intent on the part of the Spanish Governor in making the grants with respect to their possible impact on the three Pueblos downstream from them.[9] The State and the Coalition are thus left to urge, as they do (and as they did to the court of appeals), that the mere fact that the grants made the Rio Jemez "public water," alone (for there are no other facts on which to base such an argument), shows an intent to and did in fact extinguish the aboriginal water rights of the Pueblos. But the Tenth Circuit's ruling that "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," 976. F.3d at 1160, should fully dispose of that claim.

Moreover, the premise on which this contention rests is that once a tribe loses the *exclusive* right to a water source, its aboriginal rights are extinguished. But that premise has no support in the record or in logic. A Pueblo's aboriginal right to water is, as Judge Mechem noted in the 2001 opinion cited *supra*, the right to an amount of water "necessary to sustain the community." *Aamodt*, *Memorandum Opinion and Order*, issued January 31, 2001 (Doc. 5642)

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[9]The San Ysidro Grant actually lies between the lands of Jemez Pueblo and Zia Pueblo. The Cañon de San Diego is upstream of all three Pueblos. Trans. 239.

at 3. If the available water source contains more water than the amount the community needs, there is no reason that it could not accommodate other users as well. That was presumably the case with the Rio Jemez in the 18th and 19th centuries. The non-Indians who resided on the two grants were there for approximately half a century of Spanish and Mexican rule, yet there is no record of any dispute between them and the Pueblos—who were mostly downstream of the non-Indians and would have suffered had the non-Indians been taking water that the Pueblos needed—at any time during that half-century.

The Tenth Circuit held in *Abouselman* that "[a]n 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." 976 F.3d at 1158. Here, the Pueblo would agree that there are two affirmative sovereign acts, the making of the two grants. But none of the other elements in the Tenth Circuit's elucidation of the standard that must be met to show extinguishment can be established here. There is no evidence whatever of any intent that the grants have an adverse impact on an Indian right. Indeed, there is published evidence to the contrary. In the only comprehensive compendium of the surviving records of the Spanish regime in New Mexico, compiler Ralph Emerson Twitchell lists an 1810 document that is a petition for land in the canyon of the Rio Jemez, but that appears to contain a relatively detailed account of the making of the Cañon de San Diego Grant in 1798. It lists the names of the 20 grantees, recites the boundaries that were petitioned for, and states, "They also protested that they would not injure the Indians." It notes that possession of the grant was given in the presence of natives of the Pueblo of Jemez. I Twitchell, SPANISH ARCHIVES OF NEW MEXICO (Sunstone Press 2008 (reprint of original edition by Torch Press, 1914)) 167 (Doc. 608). There is nothing in that account that suggests any intent

to deprive the Pueblos of any of their rights, and rather, the settlers' insistence that they would "not injure the Indians" strongly suggests a concern that Pueblo rights would be respected and protected. And these acts must be seen in the context of overall Spanish policy, which, as the court of appeals held, "was protective of Indian property rights." 976 F.3d at 1155. There is no evidence in the record that demonstrates any departure from that policy, by the making of these two grants or otherwise.

Nor is there any evidence that the making of these grants had any adverse effect on the Pueblos' use of water. As was noted above, during the next 60 years after the San Ysidro Grant was made, and the 48 years after the Cañon de San Diego Grant, there is no record of any dispute between any of the Pueblos and any settlers of either grant over water. Again, the State's and the Coalition's claims rest solely on the thoroughly erroneous proposition that an aboriginal right must be an *exclusive* right to the water source, a claim for which there is no support. The bare fact that those two grants were made, thus, falls far short of meeting the Tenth Circuit's standard for a showing of actual extinguishment of a Pueblo water right.[10]

V. The Coalition's Arguments that the Pueblos' and United States' Claims Here are Barred by the 19th Century Public Land Acts are Unavailing.

The Coalition continues to hammer away at its unsupported argument that the public land acts of 1866, 1870 and 1870 (described in detail in Santa Ana's *Opening Supplemental Brief on Issues 1 and 2* (Doc. 4475) ("*Opening Supplemental Brief*"), at 8) bar the Pueblo's and the United States' arguments that the Pueblos hold aboriginal water rights, despite the fact, as is shown in the *Opening Supplemental Brief*, at 9-10, that essentially the same argument has been

[10]The Pueblo has not addressed the matter of "modification" of Pueblo aboriginal water rights, an issue suggested by the wording of Issue No. 1, for the reason that, as noted in the Pueblo's opening brief, the Pueblo's counsel is unaware of any court ruling that ever adverted to a "modification" of an aboriginal right, and counsel has no idea what a "modification" would look like. Neither the State nor the Coalition offer any assistance in this regard. Santa Ana suggests that the Court should disregard that language of Issue No. 1.

rejected by every court that has entertained it. The Coalition's error is clearly reflected in its statement, Coalition Response at 26, that those Acts confirmed rights vested under prior appropriation "whether on public or private land." Each of the decisions that has rejected the same argument that the Coalition makes here has done so on the basis that those Acts "appl[y] *only to public lands* and waters of the United States. . . . [and] when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands." *Winters v. United States*, 143 F. 740, 747-48 (9th Cir. 1906) (emphasis added). It is worth noting that not only is Indian land, including the lands of the Pueblos, not subject to those Acts, but neither are the two Spanish grants on which the Coalition's members reside. Those lands have never been public domain. Thus water, even unappropriated water, appurtenant to those lands, is not subject to the terms of those Acts. And, as was noted in Santa Ana's *Opening Supplemental Brief*, at 10, there is no indication in the language of any of those Acts of an intent to extinguish Indian rights.

In part, it appears that the Coalition's persistent assertion of this claim is premised on its misunderstanding (or mischaracterization) of the rights claimed by the Pueblo. In responding to Santa Ana's observation that all of the Acts in question make clear that rights claimed under them are subject to existing rights, such as the Pueblos' aboriginal rights, the Coalition states that it agrees that "the Pueblos' actual use of water as of 1848 was . . . protected by the Treaty and confirmed under those Acts." Coalition Response at 26. But the Pueblos' rights that were protected by the Treaty were not merely based on existing uses. Rather, they were aboriginal rights, the right to use the amount of water needed to sustain the community, for its present and future needs (although, as is noted, *supra* at 2-3, Santa Ana and the United States agree that those rights should be quantified in this litigation).

Again, the Coalition cannot cite a single case in which these 19th century Acts were held to bar a claim of water tights by an Indian tribe, and it cannot distinguish the cases that have repeatedly held to the contrary. This argument must be rejected here, as it has been everywhere else it has been raised.

VI. The Coalition's Claims as to the 1933 Pueblo Compensation Act are Without Merit.

The Coalition claims, in the heading of its section VIII, that "[t]he 1924 [Pueblo Lands Act] and 1933 [Pueblo Compensation Act] Acts only recognized the Pueblos' actual uses [of water]." Coalition Response at 28. The text of that section, however, only addresses the 1933 Act. There is, indeed, no provision of the 1924 Act that refers to the nature or measurement of Pueblo water rights, as Prof. Hall acknowledged in his testimony. Trans. at 363.[11] The Coalition's argument as to the 1933 Act is based primarily on its claim as to certain testimony in the hearings that preceded that Act, not on the language of the 1933 Act itself (apart from Section 9, as to which see below). The Tenth Circuit, in *Aamodt 1* addressed the purposes of the 1933 Act in some detail, essentially rejecting the Coalition's arguments here. 537 F.2d at 1109. As to Section 9, the Coalition's utterly unfounded claim in its Response is dealt with in detail *infra*, at n. 13. But apart from Section 9, there is nothing in the 1933 Act at all dealing with Pueblo water rights. In short, neither Act "only recognized the Pueblos' actual uses of water," and in fact, as is shown below, Section 9 of the 1933 Act plainly recognized Pueblo rights to uses based on future needs.

VII. The *Winans* Doctrine, Though Not Essential to Establishing an Enforceable Pueblo Aboriginal Water Right, is Clearly Applicable Here.

Issue No. 2 in the list of legal issues approved by this Court as needing to be decided before any trial could be held to quantify Pueblo water rights in the Rio Jemez Basin reads,

[11] *And see* n. 6 *supra*.

"Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?" The *Winans* doctrine arises from the Supreme Court decision in *United States v. Winans*, 198 U.S. 371 (1905), in which the Court held that the right to take fish "at all usual and accustomed places" that the Yakima (now spelled "Yakama") Indians reserved in an 1859 treaty was not a right created by the treaty, but rather one that long predated the treaty, an aboriginal right that was reserved by the tribe, and one which was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id*. at 381. The treaty gave formal recognition to the right. As this Court said in the 2004 Opinion, "*Winans* rights are governmentally recognized aboriginal rights." 2004 Opinion at 26.

To be sure, as the Supreme Court made clear in *Santa Fe Pacific*, aboriginal rights need not be "recognized" in order to be valid and enforceable. 314 U.S. at 347. But obviously, governmental recognition amounts to virtually conclusive evidence that such rights exist.

The State argues that the *Winans* doctrine has no applicability here, because the Pueblos do not have aboriginal water rights, and even if they dd, none of the acts of the United States government that the Pueblos and the United States have pointed to as amounting to recognition of those rights in fact constitute such recognition. State Response at 28-29. (The Coalition Response does not address the *Winans* issue.) As is shown above, the Pueblos believe the record is clear that the Pueblos had aboriginal water rights at the onset of Spanish rule, the Tenth Circuit ruled, consistent with the record in this case, that the Spanish government never took any action that affected the water rights of the Pueblos, no one claims that the Mexican government took any such action, and thus the Pueblos' aboriginal water rights remained intact when New Mexico became part of the United States.

There are two actions of the United States after the Treaty of Guadalupe Hidalgo that

clearly recognized the aboriginal rights of the Pueblos, and one of which was expressly intended to recognize and protect the Pueblos' aboriginal water rights. In 1851, in an Act making appropriations for the Indian Department and to fulfill various Indian treaty stipulations, Act of February 27, 1851, 9 Stat. 574, Congress expressly extended over the Indian tribes in the territories of New Mexico and Utah[12] the provisions of the Indian Trade and Intercourse Act of June 30, 1834. 9 Stat. 587 (Section 7), As the Supreme Court observed in *Santa Fe Pacific*, the enactment of that section "plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal government to recognize [the Indian] right of occupancy." 314 U.S. at 348. Previously, in *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926), the Court had expressly held that the language of that section "easily includes Pueblo Indians."

Consequently, the 1851 Act must be seen as an unmistakable recognition of the Pueblos' aboriginal rights. Perhaps more importantly, though, in Section 9 of the Pueblo Compensation Act, Act of May 31, 1933, 48 Stat. 108, 111, which is discussed in considerable detail in Santa Ana's *Opening Supplemental Brief*, at 13-15, Congress extended express protection to what can only be understood as the Pueblos' aboriginal water rights. At the urging of Northcutt Ely, an attorney serving as executive assistant to the Secretary of the Interior, the House committee considering the bill added Section 9, which had been drafted by Ely and was unchanged when the bill was enacted. That section reads as follows:

> 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

[12] In 1851, the New Mexico Territory included New Mexico and Arizona and parts of what would become Nevada and Colorado. The Utah Territory included Utah and the rest of what would become Nevada. California had become a state in 1850.

> water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands remain in the Indians.

Under the Pueblo Lands Act of 1924, Act of June 7, 1924, 43 Stat. 636, which sought to resolve the problem of non-Indians who had settled on Pueblo lands without federal approval, by giving those settlers patents for the tracts they had occupied if they could show continuous occupancy for specified periods of time, the Pueblos lost much of their best irrigable lands, for little compensation. The 1933 Act increased the compensation to the Pueblos, but Section 9 was intended to protect the Pueblos' immemorial priority for the right to water appurtenant to the lands remaining in their ownership. That section did not require that those lands ever have been irrigated previously, and it thus refutes the claim that the Pueblos only had water rights based on actual use (as well as Judge Mechem's discredited theory that their rights to water for future uses had been cut off by the 1924 Act; *see* n. 6, *supra*). Santa Ana submits that by extending protection to the Pueblos' water rights for lands that could be irrigated in the future, the section can only be referring to the Pueblos' aboriginal water rights, the right to sufficient water to sustain the community.[13]

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[13]The Coalition contends that the immemorial priority referred to in Section 9 only applies as against the rights of persons who gained titles to their land under the Pueblo Lands Act, but not to those, like the settlers on the San Ysidro or Cañon de San \Diego Grants, whose lands are outside of the Pueblo grants. Coalition Response at 28. It relies on a statement in *Aamodt I*, 537 F.2d at 1137, in which the court of appeals, discussing Section 9, stated that the Pueblos' rights protected by that section were "prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts." But this argument by the Coalition grossly mischaracterizes the court's ruling. In the sentence quoted, the court was responding specifically to an argument by the State that the persons who obtained their titles under the Pueblo Lands Act should have the *same* priority for their water rights as the Pueblos, an argument the court rejected in the quoted sentence. But in the paragraph that immediately precedes the one in which that issue was addressed (but which the Coalition does not acknowledge), the court stated,

> A recognition of *any priority for the Indian 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.

That Section of the 1933 Act, thus, constitutes exactly the sort of official recognition of the Pueblos' aboriginal water rights that the Supreme Court found in the treaty in *Winans* with respect to the fishing rights of the Yakimas, and it further demonstrates the understanding of Congress that those rights were still intact, and deserved protection.

Conclusion

For all of the reasons set forth above, and for those set forth in Santa Ana's *Opening Supplemental Brief*, Santa Ana submits that this Court should rule that the Pueblo's aboriginal water rights have not been extinguished by the Spanish, Mexican or American governments and that they have been formally recognized by the United States, by Section 7 of the Act of February 27, 1851, and by Section 9 of the Pueblo Compensation Act, Act of May 31, 1933.

Respectfully Submitted,

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Ibid. (Emphasis added.) At the evidentiary hearing in 2014, under questioning by one of counsel for the Coalition, Prof. Hall, the Coalition's and State's expert, when asked about Section 9, stated,

> Section 9 is not limited in that way. And if it's read in its broadest sense, then that superior priority applies to all non-Indians whether their titles arise from a decision of the Pueblo Lands Board or not.

Trans. 414. In short, the Tenth Circuit held, and Prof. Hall agreed, that the senior priority of Pueblo rights recognized in Section 9 applies as against *all* non-Indian rights. The Coalition's argument on this point is thoroughly baseless.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November, 2022, the foregoing Supplemental Reply 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 21st day of November, 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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