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Nos. 18-2164 and 18-2167

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, on its own behalf and on behalf of the Pueblos of Jemez, Santa Ana, and Zia,
***Plaintiff/Appellant*,**

STATE OF NEW MEXICO, ex rel. State Engineer, et al.,
Plaintiffs/Appellees,

PUEBLOS OF SANTA ANA, JEMEZ and ZIA,
Plaintiffs-in-Intervention/Appellants,

v.

TOM ABOUSLEMAN, et al., *Defendants/Appellees*.

On Appeal from the United States District Court for the District of New Mexico
No. 6:83-cv-01041 (Hon. Martha Vazquez)

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S AND ASSOCIATION OF COMMUNITY DITCHES OF THE RIO SAN JOSÉ'S AMICI CURIAE BRIEF IN SUPPORT OF APPELLEES STATE OF NEW MEXICO, EX REL. STATE ENGINEER, AND THE JEMEZ RIVER BASIN WATER USERS' COALITION AND IN SUPPORT OF AFFIRMANCE OF THE SEPTEMBER 30, 2017 MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, there is no parent corporation and no publicly held corporation that owns 10% or more of Tri-State Generation and Transmission Association, Inc., including any stock. Tri-State is a not-for-profit rural electric cooperative corporation. The Association of Community Ditches of the Rio San José ("RSJ Acequias") is a non-profit New Mexico corporation whose member acequias and community ditches are all political subdivisions of the State of New Mexico. NMSA 1978, §73-2-28 (1965). The RSJ Acequias has no parent corporation or stock.

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STATEMENT OF INTEREST

Tri-State Generation and Transmission Association, Inc. ("Tri-State") and the Association of Community Ditches of the Rio San José ("RSJ Acequias") submit this brief as *amici curiae,* in support of the appellees State of New Mexico ex rel. State Engineer ("State") and Jemez River Basin Water Users' Coalition ("Coalition") to affirm the September 30, 2017, Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 by the United States District Court for the District of New Mexico, ("*Dist. Ct. Decision*") (App. 281-287) that adopted the October 4, 2016, Magistrate Judge William Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 ("*Findings*") App. 288-302.[1]

Tri-State's and the RSJ Acequias' interest in these appeals arises from a common, contested issue in both appeals by the United States (U.S.) and the Pueblos of Jemez, Santa Ana, and Zia ("Jemez Pueblos") and in the adjudication in the Rio San José stream system where Tri-State is a party and owns water rights and where the RSJ Acequias along with its member acequias and community ditches are parties and represent the interests of the individual acequia and ditch

[1] Fed. R. App. P. 29(a)(4)(E) Statement: Pursuant to Rule 29(a)(4)(E), Tri-State and the RSJ Acequias certify that their counsel authored this brief in whole, no party or party's counsel contributed money that was intended to fund preparing or

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members who are also parties and own water rights. This contested issue is the extinguishment of Pueblo aboriginal water rights by the conquest and sovereignty of Spain and Mexico, including the Pueblos' increase of their use of public waters without restriction in the future.

By way of identification, Tri-State is a not-for-profit rural electric cooperative corporation which generates and transmits wholesale electric power and energy to its member-system rural electric distribution cooperatives located in Colorado, Nebraska (including public power districts), New Mexico, and Wyoming. In turn, these distribution cooperatives and public power districts provide electric service to mostly rural customers. To aid in supplying reliable wholesale power and energy to its member-systems, Tri-State owns and operates the Escalante Generating Station ("Escalante") near Prewitt, New Mexico, in the Rio San José basin. Existing water rights within the Rio San José stream system totaling 4,392 acre-feet per year were purchased and transferred to Escalante, which depends on these water rights to operate.

Also by way of identification, the RSJ Acequias is a non-profit New Mexico corporation whose members are the acequias and community ditches that provide water diverted from the Rio San José basin to their approximately five hundred

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submitting the brief, and no person other than Tri-State and the RSJ Acequias contributed money to fund the preparation or submittal of this brief.

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individual members or "parciantes" for irrigation and stock uses. The member acequias and community ditches are political subdivisions of the state of New Mexico, NMSA 1978, §73-2-28, and together they represent essentially all of the non-Indian irrigation in the Rio San José basin. "The community irrigating ditch or acequia is an institution peculiar to the native people living in that portion of the southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation." *Snow v. Abalos*, 1914-NMSC-022, 18 N.M. 681, 140 P. 1044, 1047. Tri-State is a member and owner of a substantial portion of the water rights within the Bluewater-Toltec Irrigation District, one of the community ditches of the RSJ Acequias.

On the Rio San José stream system, the U.S. filed for a separate adjudication of water rights in 1982, around the same time that it filed the adjudication in the Jemez River Adjudication now on appeal to this Court. The Rio San José stream system roughly adjoins the Jemez River Area. The Pueblos of Acoma ("Acoma") and Laguna ("Laguna"), now participating as *amici curiae* in this appeal, claim massive aboriginal water rights in the New Mexico state court adjudication of the Rio San José stream system styled *New Mexico ex rel. State Engineer v. Kerr-McGee Corp.*, Nos. CB-83-190-CV/CB-83-220-CV (N.M. Thirteenth Dist.) ("*Kerr-McGee*"). Tri-State and the RSJ Acequias, along with its member acequias and

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community ditches and their individual members, are participating party-defendants in *Kerr-McGee*.

Acoma and Laguna, among others, were movants in their Unopposed Motion of All Pueblo Council of Governors ("Council"), Pueblos of Acoma, Isleta, Laguna, et al. for Leave to File Brief as *Amici Curiae* filed on April 19, 2019 ("*amici* Pueblos' Motion"). By its April 30, 2019 Order, this Court granted the Council and *amici* Pueblos leave to file as *amici curiae* and accepted their April 19, 2019 *amici* brief ("*amici* Pueblos' Br.").

The issue of extinguishment of the Pueblos' aboriginal water rights (including extinguishment of the increase of the Pueblos' use of water without restriction) that is squarely before this Court on appeal was decided by United States District Judge Martha Vasquez in her *Dist. Ct. Decision*. By adopting the *Findings*, the *Dist. Ct. Decision* decided "that Spain imposed a legal system to administer the use of public waters which extinguished the Pueblos' right to increase their use of public water without restriction, and that Spain's exercise of complete dominion over the use of public waters extinguished the Pueblos' aboriginal water rights." App. 285-287, 301 [*Dist. Ct. Decision* at 5-7; *Findings* at 14].

Extinguishment of Acoma's and Laguna's claimed aboriginal water rights by the conquest, sovereignty, and laws of Spain and Mexico is a contested issue in

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Kerr-McGee that has *not* been decided by the state district court, the special master or New Mexico appellate courts. In *Kerr-McGee,* dispositive motions filed in 2015 on such extinguishment have been briefed and orally argued before the special master, but have been stayed at the request of some parties, not including Tri-State, to allow settlement discussions to occur.

The state district court in 1993 did *not* hold and the special master in 1992 did *not* recommend in *Kerr-McGee* that the Pueblos have aboriginal water rights that were not extinguished by Spain or Mexico, contrary to the *amici* Pueblos' assertion in their *amici* brief (at 2) claiming the state district court adopted the Special Master's ruling that the Pueblos have aboriginal water rights that were not extinguished by Spain or Mexico. This matter has never been decided in *Kerr-McGee*.

Importantly, the New Mexico Court of Appeals in Acoma's and Laguna's interlocutory appeal of the state district court's 1993 order in *Kerr-McGee* succinctly stated that "neither our holding nor this discussion should be interpreted as a comment on the nature, scope, or existence of aboriginal water rights or their rights under Spanish or Mexican water law. Our holding is limited to the *Winters* issue." *Kerr-McGee,* 1995-NMCA-041, 898 P.2d 1256, 1265, *cert denied,* 1995-NMCERT-006, 898 P.2d 120. *Amici* Pueblos ignore the Court of Appeals' statement. With respect to *Winters,* the court held that "the *Winters* doctrine does

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not apply to the Pueblo grant lands."[2] *Id.* at 1265. The issue decided in *Kerr-McGee* pertained to whether claimed water rights of Acoma and Laguna were extinguished in federal Indian Claims Commission ("ICC") settlements and proceedings in the American period after the 1848 Treaty of Guadalupe Hidalgo in which Mexico ceded what is now New Mexico to the United States – not to extinguishment of Pueblo aboriginal water rights from the conquest of Spain and Mexico. The Court of Appeals held that neither the ICC settlements nor determinations preclude the claims of the Acoma and Laguna to water rights appurtenant to retained lands. *Id.* Accordingly, the matter of extinguishment by the sovereignty of Spain and Mexico of the Pueblos' claimed aboriginal water rights decided by the *Dist. Ct. Decision* and before this Court on appeal has never been decided in *Kerr-McGee.*

STATEMENT OF THE ISSUE

The *Dist. Ct. Decision* in adopting the *Findings* held:

> Spain imposed a legal system to administer the use of public waters which extinguished the Pueblos' right to increase their use of public water without restriction, and that Spain's exercise of complete dominion over the use of public waters extinguished the Pueblos' aboriginal water rights.

[2] The Court of Appeals defined the *Winters* doctrine from *Winters v. United States,* 207 U.S. 564 (1908), as recognizing that when the federal government reserved land for an Indian reservation, it implicitly reserved sufficient water rights for reservation needs. *Kerr-McGee,* 898 P.2d at 1264.

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App. 287, 301 [*2017 Dist. Ct. Decision* at 7; *Findings* at 14]. The issue on appeal, therefore, is: Whether Spain's imposition of a legal system to administer the use of public waters and Spain's exercise of complete dominion over the use of public waters (i) extinguished the Pueblos' right to increase their use of public water without restriction, and (ii) extinguished the Pueblos' aboriginal water rights.

The issue on appeal arises from the district court's order. The appellate issue does not originate from issues framed by the Appellants U.S. or Jemez Pueblos or even from an issue certified by the district court. *Paper, Allied-Industrial, Chemical and Energy Workers Int'l. Union v. Cont'l Carbon Coal Co.,* 428 F. 3d 1285, 1291 (10th Cir. 2005) ("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. An appellate court can and should address a different legal question if it controls the disposition of the certified order." (internal citation omitted.) *See* App. 276 [Sept. 11, 2018 District Court Memorandum Opinion and Order certifying *Dist. Ct. Decision* for immediate appeal ("*Certification*") at 3].

The district court certified for interlocutory appeal to this Court its Order (the *Dist. Ct. Decision*) "ruling that Spain extinguished the Pueblos' aboriginal water rights." App. 279-280, [*Certification*, 6-7] *see also id.* 275, 278 [*Certification* 2, 5.]

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The issue of "whether the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act" was developed by the U.S.'s and Jemez Pueblos' motions seeking certification. App. 275-278, [*Certification* at 2-5.]; *see also* U.S. Br. at 2; Jemez Pueblos' Br. at 3. Their statement of issues assume that some discrete affirmative act beyond the imposition of Spain's legal regime treating public water separate from land was necessary to extinguish the Pueblos' aboriginal water rights. The district court rejected this assumption and explained that "[w]hile several cases cited by the United States and the Pueblos show that Indian title was extinguished by affirmative acts, the United States and the Pueblos have not cited, and the Court has not found, any authority which expressly states an affirmative act is required to extinguish Indian title." App. 277 [*Certification* at 4]

STANDARD OF REVIEW

The U.S. and Jemez Pueblos fail to state the complete standard of review. The U.S. cites to *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201 (10th Cir. 2015), stating the standard is *de novo* for legal questions. This Court, however, stated that it reviews mixed questions of law and fact "de novo 'with the presumption of correctness continuing to apply to any underlying findings of fact.'" *Id.* at 1207 (citation omitted).

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The Pueblos' statement is similarly incomplete. FRCP 44.1 states that a determination on an issue of foreign law "must be treated as a ruling on a question of law." However, this case does not solely involve a legal issue. Instead, it involves a mixed question of law and fact. *See Dalzell*, 781 F.3d at 1207. Moreover, although the Pueblos cite to *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) for the proposition that questions of law are reviewable de novo, they omit the remainder of the sentence, which recognizes that "questions of fact are reviewable for clear error." (Internal quotation marks & citation omitted).

In cases involving a mixed question of law and fact, the Tenth Circuit has applied both *de novo* and clearly erroneous standards. The clearly erroneous standard is appropriate where a mixed question involves a primarily factual inquiry; *de novo* review is appropriate where a mixed question primarily involves legal principles. *Gallardo v. United States*, 752 F.3d 865, 870 (10th Cir. 2014) (citation omitted).

In this case, the Findings were integral to the holding regarding the extinguishment of the Pueblos' aboriginal rights and involved a mixed question of law and fact. *Id.* This Court should apply the clearly erroneous standard to the factual findings and a *de novo* standard to the questions of law. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1155 (10th Cir. 1992).

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ARGUMENT

I. Introduction and Summary of Argument

The district court should be affirmed. It correctly held by adopting the *Findings* that:

> Spain imposed a legal system to administer the use of public waters which extinguished the Pueblos' right to increase their use of public water without restriction, and that Spain's exercise of complete dominion over the use of public waters extinguished the Pueblos' aboriginal water rights.

App. 287, 301 [*Dist. Ct. Decision* at 7; *Findings* at 14.]

Spain's conquest in the 1500s and complete dominion of the area now known as New Mexico imposed its legal regime over the Pueblos.[3] Under Spanish law, surface land interests and water interests to public, common waters were separate, as both the U.S.'s and Jemez Pueblos' witness, Dr. Cutter ("Cutter"), and the State's witness, Professor Hall ("Hall"), concurred at trial. Dr. Cutter testified that under "Spanish and Mexican law…private parties had split separate interests for land, minerals, and for public water…water was a common…for use by everybody." App. 631 [Cutter Tr. 112-113]. According to the *Recopilacion de Indias* ("a compilation of laws pertaining to Spain's overseas empires") [citation omitted] "rivers were to be used by everyone" but not to the damage or detriment of

[3] Spain imposed its "prerogative or regalia" upon the Pueblos and others. "'Regalia' refers to the right of 'the Crown [to exercise] supreme power over the administration, licensing, and adjudication of certain spheres of activity and kinds of resources.'" App. 283, 293 [*Dist. Ct. Decision* at 3; *Findings* at 6]

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others, and "waters were to be common to both the Spaniards and the Indians." App. 286; 631-32, 645 [*Dist. Ct. Decision* at 6; Cutter Tr. 112-115, 168-169]. Likewise, Professor Hall testified that "we both [Cutter and Hall] agree that land and water were separate" and that after the imposition of Spanish sovereignty the "non-Indians and Indian pueblos share those public waters. They don't share land in the same way." App. 655-657 [Hall Tr. 203, 207, 211]. Professor Hall also concluded that the "pueblo discretion to use water in whatever way it chose to was limited by the imposition of that law, and simply by the imposition of it." App. 655 [Hall Tr. 204]. Dr. Cutter concurred "that Spain retained an interest in the use of all public waters sufficient to allow it 'to adjust and readjust access' to public waters according to a complex list of factors, none of which was absolute and all of which applied simultaneously." App 286, 635 [*Dist. Ct. Decision* at 6; Cutter Tr. 128.]

Spain's imposition of its legal regime separating public water use from land interests and its ultimate control and dominion over public water use extinguished the Pueblos' aboriginal water rights, along with their pre-conquest exclusivity of use and the notion of expansion regardless of the detriment of others. Even assuming arguendo that an affirmative act was required – which it was not – to extinguish the Pueblos' aboriginal water rights, the sheer imposition of sharing common, public waters, apart from land, under the Spanish legal regime sufficed.

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Spain's law and dominion separately recognizing shared water interests of common public waters differently from exclusive land interests is the controlling factor in extinguishing the Pueblos' claim to aboriginal water rights. The United States Supreme Court cases upon which the U.S. and Pueblos principally rely for the proposition that a specific affirmative act is required to extinguish aboriginal water rights are decisions pertaining to lands or non-water resources of Indian tribes – not to shared water use in common, public waters. As such, they do not dictate that a specific affirmative act is required to extinguish water uses or rights. In *United States v. Santa Fe Pac. R. R.,* 314 U.S. 339, 343-347 (1941), (*Santa Fe Pacific*), a mainstay of the U.S.'s and Pueblos' authority, the Court held that the Santa Fe Pacific railroad's grant in fee of lands (by way of its predecessor) from the U.S. by an 1866 Act was subject to the prior right of occupancy and aboriginal possession of lands of the Walapais Tribe in Arizona that had not been extinguished prior to 1865. *Santa Fe Pacific* involved only lands – not water. The concept of Indian right of occupancy and aboriginal possession of lands morphed into the concept of Indian title. *Id.* at 345-346. The fact that tribal claims to lands outside the Walapais reservation were extinguished by an 1883 executive order with relinquishment by the Tribe within the meaning of the 1866 Act does not mandate a specific affirmative act is necessary for extinguishment of the Pueblos' aboriginal water rights. Earlier Supreme Court decisions pertaining to lands – not water –

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relied upon and cited from *Santa Fe Pacific* by the U.S. and Pueblos are not controlling for the same reason. *Id.* at 345.

The *amici* Pueblos also rely on *New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976) ("*Aamodt I"*) and *New Mexico ex rel. Reynolds v. Aamodt,* 618 F. Supp. 993 (D.N.M. 1985) ("*Aamodt II"*). The *Dist. Ct. Decision* does not deviate from the *Aamodt I* holdings and *Aamodt II* does not control the *Dist. Ct. Decision*, as shown *infra.*

Likewise, the U.S.'s and Pueblos' reliance is misplaced on United States Supreme Court cases deciding that Indian tribes on Indian reservations are entitled to new reserved water uses from the reservation date sufficient for "a use which would be necessarily continued through the years." *Winters,* 207 U.S. at 575, 577 ("[T]he case…turns on the agreement [treaty] of May, 1888, resulting in the creation of Fort Belknap Reservation" despite the Indians having occupied and used a larger tract and having had command of lands and waters prior to the Reservation.) This Court in *Aamodt I* recognized that *Winters* and other decisions "recognizing reserved water rights on reservations created by the United States are not technically applicable [to Pueblos]." 537 F. 2d at 1111.

With Spain's legal regime ending the Pueblos' exclusive use of water in favor of sharing common, public waters during Spanish and Mexican rule, the Pueblos had the right in 1848 under the Treaty of Guadalupe Hidalgo ("1848

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Treaty") (9 Stat. 922 (1848)) (with Mexico ceding to the United States the area now New Mexico) to use public water "in the amount and for the purposes they were then using it." App. 469 [Hall Rept. 51] The 1848 Treaty protected actually-used rights as perfected rights and treated the Pueblos the same as every other Mexican citizen. App. 674 [Hall Tr. 279-80] Inchoate or claimed future rights by the Pueblos or anybody else did not survive the 1848 Treaty. App. 473, 674, 705 [Hall Rept. 55; Hall Tr. 279, 404-405]. Thereafter, any expansion of uses would be governed by the law of the United States or American law. App. 706 [Hall Tr. 407-08]. Although Spain's legal regime extinguished the Pueblos' aboriginal water rights, their actual uses at the date of the 1848 Treaty were protected.

The Pueblos and U.S. claim a future expanding right for "future needs" with a first or "superior priority" as part of their claim to aboriginal water rights. Jemez Pueblos' Br. at 33; U.S. Br. at 8-9, 42-44; *Amici* Pueblos' Br. at 18. Such a future, ever-expanding water right was extinguished by "Spain's intent to extinguish the Pueblos' right to increase their use of public waters" and the "Pueblos did not have the right to expand their use of water if it were to the detriment of others." App. 287 [*Dist. Ct. Decision* at 7].

Even if a future expanding claim had not extinguished by imposition of Spanish law, it was inchoate and for that reason did not survive the 1848 Treaty. Despite *amici* Pueblos' suggestion that New Mexico Pueblos are "agrarian

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communities" (*amici* Pueblos' Br. at 1), many have diversified into other businesses, such as Indian gaming casinos and golf clubs. See, e.g., *Mendoza v. Isleta Resort & Casino,* 2018-NMCA-038, 419 P.3d 1256, 1259 ("Isleta Casino is a Class III tribal gaming enterprise located in the State of New Mexico that is wholly owned and operated by the Pueblo of Isleta."); cert. granted 2018-NMCERT-005; *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, 219 P.3d 12, 14 ("Laguna Development Corporation is a Native American corporation that does business as Route 66 Casino."); *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, 232 P.3d 901, 904 ("[T]he Pueblos of Isleta, Laguna, Nambe, Ohkay Owingeh, Pojoaque, and San Felipe . . . [are] engaged in the enterprise of gaming."); *Sanchez v. Santa Ana Golf Club, Inc.* 2005-NMCA-003, 104 P.3d 548, 550 (Santa Ana Golf Club, Inc. is owned by Santa Ana Pueblo). Unless the *Dist. Ct. Decision* is upheld, the Pueblos could seek to increase unrestrictedly their water uses into the future claiming a superior or first priority to meet future needs and leave nothing for non-Indian water right owners.

II. The *Dist. Ct. Decision* holding that Spain extinguished the Pueblos' claimed aboriginal water rights is not contrary to decisions by the U.S. Supreme Court or by this Court.

The *Dist. Ct. Decision* does not deviate from this Court's holdings or from holdings by the Supreme Court. The U.S. and Pueblos have made this Court's decision in *Pueblo of Jemez v. United States,* 790 F.3d 1143 (10th Cir. 2015)

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("*Jemez"*), a centerpiece for their argument that "aboriginal rights may only be extinguished by a plain and unambiguous act of the sovereign." U.S. Br. at 1; *amici* Pueblos Br. at 6. But, this Court's holding in *Jemez* involved only lands – not water. In *Jemez,* this Court held that the U.S.'s 1860 Baca grant did not extinguish the Jemez Pueblo's alleged aboriginal title to the *lands* in question, which were the "subject of this action." 790 F.3d at 1147. Extinguishment by Spain was not the issue, contrary to *amici* Pueblos' Br. at 11. This Court in *Jemez* characterized the Supreme Court cases, including *Santa Fe Pacific,* as "holding aboriginal title cannot be extinguished by the grant to a third party of fee title to the *land at issue* except by clear and unambiguous congressional intent. *See, e.g.* Santa Fe, 314 U.S. at 346, 354 (congressional intent to extinguish aboriginal title must be 'plain and unambiguous' and will not be 'lightly implied.')" [citations omitted] (emphasis added). 790 F.3d at 1170. This Court's holding that alleged aboriginal title to lands was not extinguished by the United States' grant of the Baca Location No. 1 in *Jemez* does not extend to requiring an affirmative act by Spain to extinguish the Pueblos' aboriginal water rights.

At trial in the instant case, the expert for the U.S. and Jemez Pueblos, Dr. Cutter, testified that under "Spanish and Mexican law…private parties had split separate interests for land,…and for public water." App. 631 [Cutter Tr. 112-113.] With separate interests, this Court's holding in *Jemez* does not extend beyond the

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narrow holding on lands during U.S. sovereignty or disturb Spanish sovereignty that ended the Pueblos' exclusive use of commonly shared public water.

Likewise, the Supreme Court's cases pertaining to *lands* cited by this Court in *Jemez* (790 F.3d at 1170) and *Santa Fe Pacific* (314 U.S. at 345) and relied upon by the U.S. and Pueblos are not contrary to the *Dist. Ct. Decision's* holding that Spain's legal regime recognizing shared public waters were separate from surface lands resulted in extinguishment of the Pueblos' aboriginal water rights. App. 285, 287 [*Dist. Ct. Decision* at 5,7]. This line of Supreme Court cases pertained to lands – not water.

As to *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), the U.S. sets up a strawman and then tears it down. The U.S. essentially argues that under the *Dist. Ct. Decision's* logic woodlands as a shared resource were extinguished by Spain's regalia, because the "land at issue" was under Spanish rule for almost 40 years by a secret treaty from 1762 to 1800 when Spain retroceded the area back to France by secret treaty. U.S. Br. at 31-33. The U.S.'s argument is flawed that the *Dist. Ct. Decision's* conclusion is inconsistent with the Supreme Court's conclusion in *Shoshone* that title to timber and minerals remained in the tribe. First, Spain's rule by secret treaty or extinguishment were not issues in *Shoshone.* Rather, the issues were whether the U.S. had intended to retain a beneficial interest in the standing timber and minerals in the reservation created by treaties between the U.S. and

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Shoshone Tribe after 1850 or whether the tribal right included the timber and minerals for compensation from the U.S.'s taking. *Shoshone,* 304 U.S. at 117-18. Secondly, water was not at issue – only land, minerals, and timber on the land were at issue. Third, Spain's rule under a secret treaty for 40 years is hardly analogous to Spain's dominion through outright conquest – not simply discovery – and colonization in the Mexican cession area of New Mexico for over 200 years and Spain's altogether separate recognition of shared public waters.

The U.S. maintains there has never been a holding that Spain's mere power to control extinguished aboriginal rights to land. U.S. Br. at 31. But, land – as opposed to public water – was not shared by the Pueblos and non-Indians. Professor Hall testified they "don't share land in the same way" App. 656-57 [Hall Tr. 207, 211] It is not relevant, therefore, whether a case exists to extinguish land interests on the basis of the imposition of Spain's legal regime, because land interests were separate from public shared waters.

Also, the Supreme Court in *Santa Fe Pacific* underscored that it was not deciding rights under Spanish law: "[w]hatever may have been the rights of the Walapais under Spanish law, the Cramer case assumed that *lands* within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy." 314 U.S. at 345 (emphasis added). The Supreme Court in *Santa Fe Pacific* did recognize that the U.S. had the exclusive right during its sovereignty to

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extinguish Indian title, including "by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Id.* at 347.

Moreover, decisions do not assist the U.S. and Pueblos that involve Indian treaties and reservations, *e.g.*, *Winters,* 207 U.S. 564 (1907). The *Winters* doctrine recognizes that "when the federal government reserved land for an Indian reservation, it implicitly reserved sufficient water rights for reservation needs." *Kerr-McGee,* 1995-NMCA-041, 898 P.2d at 1264. This Court in *Aamodt I* recognized that *Winters* "recognizing reserved water rights on reservations created by the United States are not technically applicable [to Pueblos]." 537 F. 2d at 1111. Unlike Indian tribes occupying reservations created by treaty, the Pueblos' grant lands were not reservations created by treaty between the Pueblos and United States. *Aamodt II,* 618 F. Supp. at 996, 1010.

Likewise, decisions that recognize reserved rights by treaty to Indian tribes according them non-consumptive fishing rights (*albeit* acknowledging their pre-existing right to fish when expressly reserved by treaty) do not protect the Pueblos against extinguishment by the Spanish legal regime of their aboriginal water rights, which were consumptive use, not fishing rights. *See, e.g. United States v. Winans,* 198 U.S. 371, 378-79, 381-82, 384 (1905) (By an 1859 Treaty whereby Indian title to certain lands was ceded and extinguished, the Yakima Indian Nation reserved an exclusive right of fishing within certain boundaries and fishing rights outside the

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boundaries "at all usual and accustomed places" from which they could not be excluded.) As the district court stated in its 2004 Memorandum Opinion and Order (*2004 Order*), "there is no treaty or agreement between the Pueblos and the United States that fairly specifically recognizes the Pueblos' aboriginal rights." App. 335 [*2004 Order* at 28]. Only the 1848 Treaty between Mexico and the U.S. protected existing property of all Mexican citizens – non-Indians and Pueblos alike. The Pueblos and their property were not expressly mentioned or singled out for special treatment.

III. Spain's legal regime ended the Pueblos' exclusive use of water and imposed sharing of public waters and thereby extinguished the Pueblos' aboriginal water rights without requiring a further affirmative act.

Spain's imposition of its legal system over common, shared public waters was sufficient to extinguish the Pueblos' aboriginal water rights without any further affirmative act. Imposition of this legal regime by Spain's conquest ending the Pueblos' exclusive use of water in favor of its system of public shared waters constituted the act of extinguishing the Pueblos' aboriginal water rights.

Despite the U.S.'s and Pueblos' efforts to extend the reach of cited cases to the issue of extinguishment of the Pueblos' aboriginal water rights, they pertain solely to lands. *See, e.g., Santa Fe Pacific,* 314 U.S. 339; *Jemez,* 790 F.3d 1143. The U.S. and Pueblos fail to cite any applicable case authority which holds that an affirmative act is required to extinguish Pueblo aboriginal water rights.

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Spain's intent as the sovereign was plain and unambiguous – that public water use was a separate interest from land and that public waters were shared. The testimony of experts for all parties agreed. "[W]e both [Cutter and Hall] agree that land and water were separate" and that after the imposition of Spanish sovereignty the "non-Indians and Indian pueblos share those public waters. They don't share land in the same way." App. 655-657 [Hall Tr., 203, 207, 211].

IV. The *Dist. Ct. Decision* does not deviate from *Aamodt I*.

In *Aamodt I* this Court did not decide the issue of extinguishment by Spain or Mexico of the Aamodt Pueblos' or other Pueblos' aboriginal water rights, because it was not an issue. This Court, accordingly, did not hold the Aamodt Pueblos' or other Pueblos' aboriginal water rights were not extinguished by Spanish or Mexican law. In fact, this Court did not use the term "aboriginal water rights" in the majority opinion. *Amici* Pueblos do not and cannot contend the *Dist. Ct. Decision* deviates from *Aamodt I's* holdings. Instead, they argue that the *Dist. Ct. Decision* deviates from the "framework" and predicated "premise" of *Aamodt I* that the Pueblos' aboriginal water rights had not been extinguished at the time of the 1848 Treaty, because otherwise the Pueblos would have had no water rights over which the United States could extend protection. A*mici* Pueblos Br. at 15, 17. *Amici* Pueblos' argument simply begs the issue first decided in the *Dist. Ct. Decision*. Far from making such a decision or even a premise in *Aamodt I*, this Court explained:

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> Much evidence was received by the Special Master on the meaning and effect of the laws of Spain and Mexico pertinent to the Indians and the use of water. Evidence offered by the United States on the issue was rejected. The district court did not decide what was the controlling law when the area was within the dominion of either Spain or Mexico. We decline to make such decision in the first instance.

537 F.2d at 1112. The assertion that the *Dist. Ct. Decision* deviates from the *Aamodt I* decision is wrong.

V. *Aamodt II* does not control the *Dist. Ct. Decision*.

Amici Pueblos expound on the findings and conclusions of *Aamodt II* as if they are precedent binding the *Dist. Ct. Decision*. *Amici* Pueblos Br. at 17-20. *Aamodt II* does not control the *Dist. Ct. Decision*, of course. Fundamentally, the decision by one judge in a judicial district does not bind another district judge. *See Camreta v. Greene*, 563 U.S. at 709 n. 7 (2011) quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed.2011) ("[A] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") *see also United States v. Johnson*, 921 F.3d 991, 999-1000 (11th Cir. 2019) ("Nor can we overlook that the opinion of a district court is not precedential."); *Daubert v. NRA Group, LLC*, 861 F.3d 382, 395 (3d Cir. 2017) ("[A] district court's decision, whether published in a reporter or note, binds only the parties in *that* case and 'no judge in any other case.'"); *Smentek v. Dart*, 683 F.3d 373, 377 (citation omitted);

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(7th Cir. 2012) (recognizing "the principle that a district court decision does not have precedential effect"). Tellingly, the *Dist. Ct. Decision* cites to *Aamodt II* only in a footnote and then only for a definition. App. 283 [*Dist. Ct. Decision* at 3, note 3.][4]

Amici Pueblos also argue that *Aamodt II* has guided litigation and settlement for four decades implying that it has been settled law in all other adjudications. *Amici* Pueblos' Br. at 19. To the contrary, *Aamodt II* binds only the parties in *Aamodt II*, which was ultimately settled without appellate review on the merits. See *New Mexico ex rel. State Engineer v. Carson*, 908 F.3d 659, 666-667 (10th Cir. 2018) (did not disturb settlement in rejecting appellants' claim for standing to challenge settlement).

Finally, *amici* Pueblos try to bootstrap *Aamodt II* into significance by arguing that its conclusions about extinguishment were based on the same Supreme Court cases that guided *Jemez*. But, these cases pertained to lands – not water – and thus do not apply to Spain's dominion over rights to public water (separately from rights to land) that ended the Pueblos' exclusive use to public waters and their aboriginal water rights. App. 285-287 (*Dist. Ct. Decision* at 5-7]

[4] Even if *Aamodt II* supported an expanding Aamodt Pueblo aboriginal water right for irrigated acreage from 1846 to 1924, the district court in *Aamodt II* held the 1924 Pueblo Lands Act (43 Stat. 636) terminated an expanding right to irrigate new

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VI. The United States' and Pueblos' claim for an expanding water right without restriction for "future needs" was extinguished by Spain and also did not survive the 1848 Treaty as an inchoate claim.

The United States and Pueblos claim an expanding water right without restriction for "future needs" with a superior or first priority as part of their claim for aboriginal water rights.[5] Jemez Pueblos' Br. at 33; U.S. Br. at 8-9, 42-44; *Amici* Pueblos' Br. at 18. This claim is antithetical to Spain's ending the Pueblos' exclusive use of public waters and extinguishing the Pueblos' aboriginal water rights.

Even apart from Spain's extinguishment, the 1848 Treaty protected only existing or vested rights – not inchoate or imperfect rights. It protected only the Pueblos' existing or actual uses – not future expanding or new uses. Inchoate or claimed future rights by the Pueblos or by anybody else did not survive the 1848 Treaty. App. 473, 674, 705 [Hall Rept. 55; Hall Tr. 279, 404-05] Thus, the claim that expanding future or new uses are protected under the umbrella of aboriginal water rights also conflicts with the 1848 Treaty. The U.S. argues (U.S. Br. at 44) that the Pueblos' aboriginal rights survived the 1848 Treaty because they are governed by federal law. But, the 1848 Treaty is federal law.

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land by the Aamodt Pueblos in response to need as of 1924. *Aamodt II,* 618 F. Supp. at 1010.

[5] Claimed Pueblo water rights for trust or executive order lands are not involved in this appeal.

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The U.S.'s argument is likewise untenable that there is no basis for excepting aboriginal water rights from Supreme Court decisions holding "aboriginal rights" survived in the Mexican cession area. *Id.* The U.S., however, conflates aboriginal land occupancy in the Mexican cession area with aboriginal water rights. They are not equivalent. The Supreme Court decisions, namely *Santa Fe Pacific,* involved only lands with existing occupancy – not future, inchoate water claims extinguished by Spain and also unprotected by the 1848 Treaty.

The U.S. mistakenly relies on *New Mexico ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 89 P.3d 47, 60 (*Martinez)* to bootstrap its argument for future expanding uses. The court in *Martinez* flatly rejected future expanding water rights holding the "expanding quality of the pueblo right, being inchoate, was not guaranteed by the [1848] Treaty." *Id.* The court in *Martinez* overruled the "pueblo rights doctrine" and the notion of "increased water usage in response to the growing needs of the pueblo" in overruling an earlier case, *Cartwright v. Public Service Co.*, 343 P.2d 654, adopting the pueblo rights doctrine. *Martinez* at 48, 60. Although the "pueblo rights doctrine" applied to municipalities rather than Indian Pueblos, the ever-expanding nature is precisely the same "right" claimed by the Pueblos here.

In reversing expanding water rights as incompatible with prior appropriation in New Mexico, *Martinez* explained "[t]o the extent that Spanish and Mexican law recognized a pueblo water right,…[it] would have been a matter of grace not a

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matter of right, future expansion…would have been subject to the sovereign's power of real-location [*sic* re-allocation] according to a change in circumstances." *Id.* at 60. Thus, *Martinez* supports the "Spanish crown insisted on its exclusive right and power to determine the rights to public shared waters" and "Spain's intent to extinguish the Pueblos' right to increase their use of public waters without restriction." App. 287 [*Dist. Ct. Decision* at 7]

CONCLUSION

For the foregoing reasons and authorities, the *District Ct. Decision* should be affirmed. The Pueblos and U.S. attempt to cherry-pick and conflate an aboriginal first priority for prior uses with the concept of new uses attaching to Indian reservation rights and coin a new expanding Pueblo water right. There is no expanding Pueblo water right with a first priority claimed as aboriginal, combined with expanding new uses for future undefined needs over unlimited time periods. Otherwise, the Pueblos' unlimited future uses could subsume all non-Indian water rights, both those which existed before the 1848 Treaty of Guadalupe Hidalgo and those which have been developed subsequent to the Treaty. In 1848, the Pueblos had the right to use their actual uses. A claim for unlimited expanding water rights for future needs under the umbrella of aboriginal water rights was extinguished by Spain and, even apart from Spain's extinguishment, was inchoate, and for that

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reason would not have survived the 1848 Treaty, which protected only existing, perfected rights.

Respectfully submitted,

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CERTIFICATE AND STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* Tri-State Generation and Transmission Association, Inc. ("Tri-State") and Association of Community Ditches of the Rio San José ("RSJ Acequias") certify that their counsel authored this brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than Tri-State and the RSJ Acequias contributed money to fund the preparation or submittal of their brief.

/s/ Sunny J. Nixon
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/s/ Rebecca Dempsey
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Tri-State Generation and Transmission Association, Inc.'s and Association of Community Ditches of the Rio San José *Amici Curiae* Brief in Support of Appellees State of New Mexico, ex rel. State Engineer, and the Jemez River Basin Water Users' Coalition and in Support of Affirmance of the September 30, 2017 Memorandum Opinion and Order of the District Court complies with the word limits set forth in Fed. R. App. P. Rule 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i), in that, excluding items excluded in the length limit pursuant

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to Fed. R. App. P. 32(f), it contains 6,370 words, as shown by the computer word count feature of the word processing program by which it was produced using Microsoft Office Word 2010 14-point Times New Roman font.

/s/ Sunny J. Nixon
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Tri-State Generation and Transmission Association, Inc.'s and Association of Community Ditches of the Rio San José *Amici Curiae* Brief in Support of Appellees State of New Mexico, ex rel. State Engineer, and the Jemez River Basin Water Users' Coalition and in Support of Affirmance of the September 30, 2017 Memorandum Opinion and Order of the District Court, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Protection, version 14 (14.0 RU1 MP2), build 3929 (14.0.3929.1200), Definition File updated August 6, 2019 r3, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Sunny J. Nixon
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, that I caused the foregoing Tri-State Generation and Transmission Association, Inc.'s and Association of Community Ditches of the Rio San José's *Amici Curiae* Brief as Attachment 1 to the Motion in Support of Appellees State of New Mexico, ex rel. State Engineer, and the Jemez River Basin Water Users' Coalition and in Support of Affirmance of the September 30, 2017 Memorandum Opinion and Order of the District Court to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. The CM/ECF system will cause all CM/ECF participants to be served by electronic means.

I further certify that I caused the foregoing Tri-State Generation and Transmission Association, Inc.'s and Association of Community Ditches of the Rio San José's *Amici Curiae* Brief as Attachment 1 to the Motion in Support of Appellees State of New Mexico, ex rel. State Engineer, and the Jemez River Basin Water Users' Coalition and in Support of Affirmance of the September 30, 2017 Memorandum Opinion and Order of the District Court to be served on August 6, 2019 by depositing the same in first class mail, postage prepaid, to the following non-CM/ECF participants:

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