Nos. 18-2167 and 18-2164

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,

and

PUEBLO OF JEMEZ, PUEBLO OF SANTA ANA, and PUEBLO OF ZIA,

Intervenors-Plaintiffs-Appellants,

v.

STATE OF NEW MEXICO, ex rel. STATE ENGINEER, JEMEZ RIVER BASIN WATER USERS COALITION, 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-MV-JHR before the Honorable Martha Vázquez

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REPLY BRIEF OF INTERVENORS-PLAINTIFFS-APPELLANTS PUEBLOS OF JEMEZ, PUEBLO OF SANTA ANA, AND PUEBLO OF ZIA

ORAL ARGUMENT REQUESTED

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Paper, Allied-Indus., Chem. and Energy Workers Int'l Union v. Cont'l Carbon Co.,
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Pueblo of Jemez v. United States,
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Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.,
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United States v. McIntire,
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United States v. Northern Paiute Nation,
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United States v. Pueblo of San Ildefonso,
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United States v. Santa Fe Pacific R.R. Co.,
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United States v. Shoshone Tribe of Indians,
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43 U.S.C. § 661 22

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Rules

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Fed. R. Civ. P. 56 8

Other Authorities

Ebright, Hendricks & Hughes, FOUR SQUARE LEAGUES: PUEBLO INDIAN LANDS IN NEW MEXICO (UNM Press, 2014) 23

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Treaty of Guadalupe Hidalgo,
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William B. Taylor, "Land and Water Rights in the Viceroyalty of New Spain,"
NEW MEXICO HISTORICAL REVIEW, (Jul. 1975)..... 14, 31, 32

I. INTRODUCTION

The response briefs of the State of New Mexico ("State") and the Jemez River Basin Water Users' Coalition ("Coalition") (collectively, "Appellees"), and the briefs of *amici curiae* Tri-State Generation, *et al.* ("Tri-State"), and El Rito Ditch Association, *et al.*, ("El Rito") (collectively, "Amici") are primarily remarkable for the fact that they vigorously respond to claims that neither the Pueblos nor the United States have ever made in this case, and they fail entirely even to acknowledge, much less respond to, arguments that the Pueblos and the United States did make in their Opening Briefs. Their most emphatic assertions are based on distorted characterizations of the record below and misstatement of the applicable case law. And perhaps most significantly, they do little more than give lip service to the actual reasoning of the decision below: rather than defend or attempt to justify it, they try to rewrite it altogether, and raise numerous alternative arguments that are clearly beyond the scope of what this Court may consider in this appeal (besides being wholly unsuccessful in trying to salvage the decision below). These arguments demonstrate all the more conclusively that the decision below is wrong, and must be reversed.

Appellees strongly rely upon two Spanish land grants as a basis for claiming that Spain actually *did* take affirmative acts adverse to the Pueblos' water rights (contrary to the premise of the decision below, that no affirmative acts need be

shown). But these land grants are nowhere mentioned in the district court's decision or in Magistrate Judge Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (hereinafter, "Recommended Disposition"), and for good reason: in the extremely limited record in the district court relating to these grants, there was absolutely *no* evidence demonstrating that they in any way operated to limit or restrict the water uses or rights of the Pueblos, and they were not shown to be "adverse" to the Pueblos, as would be required for extinguishment.

Appellees and Amici endlessly repeat their objection to the Pueblos' supposed claim of "expanding" aboriginal water rights. But the Pueblos have never claimed an "expanding" water right in this case; rather, they have always acknowledged that their aboriginal rights should be quantified and fixed.[1] More importantly, however, these objections and arguments actually relate to the *quantification* of the Pueblos' aboriginal water rights, an issue that the district court has not addressed in any respect, and thus they are outside the scope of this appeal. If this Court finds that the Pueblos' aboriginal water rights were not extinguished by Spain or Mexico, as it should, the nature and measure of the Pueblos' aboriginal water rights are issues that should be determined in the first instance by the district court on remand.

[1] *See* The United States'/Pueblos' Opening Brief on Issue No. 3, ECF No. 4281, filed on November 13, 2012, at 10–13.

Finally, neither the State nor Amici even cite to, much less discuss, the command of Congress in Section 9 of the Pueblo Compensation Act of 1933, Act of May 31, 1933, 48 Stat. 108, 111, that the Pueblos are to have water rights on the lands remaining in their ownership that are prior in time to the rights of any non-Indian, and that cannot be lost by non-use or abandonment, and the Coalition's brief discussion of Section 9 is clearly erroneous. That provision should have precluded the decision below altogether.

Contrary to the Appellees' arguments, the Supreme Court and this Court have repeatedly emphasized the very high standard that must be met for finding extinguishment of aboriginal rights, in some cases finding that even land grants by the sovereign or the forcible removal of a tribe from its lands were not sufficient for finding extinguishment. Spain's occasional administrative involvement in disputes over water does not even approach this heightened standard, particularly given the district court's express finding that extinguishment of the Pueblos' water rights occurred in the absence of any affirmative action by Spain. The district court's conclusion that all of the Pueblos' aboriginal water rights had been completely extinguished by Spanish law was thus a clear misapplication of the law, and must be reversed.

II. ARGUMENT

A. This Court Acted Correctly in Granting Interlocutory Review

The State devotes a significant portion of its brief to rearguing its claim that this appeal is inappropriate for interlocutory review because it does not present a "pure" question of law, relying almost entirely on a Seventh Circuit decision, *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674 (7th Cir. 2000). *See* State Br. at 18–24. The State previously made this same argument to both the district court[2] and this Court,[3] and both times it was correctly rejected, *see* App. 274–80; App. 271–73. When certifying its Order for interlocutory appeal, the district court properly found that "[t]he issue of whether the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act" was a "novel and difficult question of first impression," and that its September 30, 2017, Memorandum Opinion and Order "involves a controlling question of law." App. 276–77.[4] The requirements of 28 U.S.C. § 1292(b) are thus

[2] *See* State's Response to Motions to Certify and Motion for Action and Entry of Partial Final Judgment and Decree, ECF No. 4413 (Feb. 20, 2018) at 3–5.
[3] *See* State of New Mexico's Responses to Petitions for Permission to Appeal Pursuant to 28 U.S.C. § 1292(B), Case Nos. 18-707, 18-708 (Oct. 11, 2018), at 9–12; *see also* Jemez River Basin Water Users' Coalition's Consolidated Answer in Opposition to the Petitions of the Pueblos and the United States for Permission to Appeal Pursuant to 28 U.S.C. § 1292(B), Case Nos. 18-707, 18-708 (Oct. 11, 2018), at 8–13.
[4] This language in the district court's certification order directly repudiates the State's contention that the Pueblos have "misstate[d] the question presented" in this appeal, State Br. at 18, as well as the State's claim that the district court did

plainly met in this case. *See Paper, Allied-Indus., Chem. and Energy Workers Int'l Union v. Cont'l 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 State contends that the question of extinguishment is "largely a question of fact," that would require a "deep dive" into the evidentiary record. State Br. at 22–23. This is simply untrue. The primary issues in this appeal are the standard for extinguishment of aboriginal rights and the legal effect on aboriginal rights of the extension of Spanish sovereignty over the territory, both of which are questions of law. Even if the Court must review the expert testimony regarding Spanish law, Rule 44.1 provides that the district court's determination on such a foreign law issue "must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. And findings of historical fact in the district court's decision are not in dispute in this appeal; both of the experts were working from the same historical record, and in

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not find that there was "no affirmative act adverse to the Pueblos' right of occupancy," *id.* at 21. Both Magistrate Judge Lynch and Judge Vázquez found that the Pueblos' aboriginal water rights had been extinguished simply by the extension of Spanish sovereignty over the territory, not by any affirmative adverse action. *See, e.g.*, App. 299 ("I am not persuaded that the Pueblos' aboriginal water rights were not extinguished or modified because there was *no repartimiento or other affirmative act* limiting their use of water.") (emphasis added). And Judge Vázquez found this to be the controlling question of law at issue in this appeal. *See* App. 276–77.

any event Magistrate Judge Lynch stated in his Recommended Disposition that he "resolved all factual questions in favor of Dr. Cutter's [the United States' and Pueblos' expert's] opinion." App. 298. Thus, even under the Seventh Circuit's unduly narrow reading of Section 1292(b) in *Ahrenholz*, this interlocutory appeal would still be appropriate because the issues in dispute are "pure" questions of law.[5]

The State's argument against this interlocutory appeal also ignores the efficiency objectives of Section 1292(b), which allows "an immediate appeal" where it may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Here, the district court correctly determined that an interlocutory appeal would avoid the district court "proceed[ing] under an incorrect legal standard" that, if reversed, would require the court and parties to "expend time and resources to re-litigate the issue." App. 278–79. This efficiency concern is particularly relevant in long-running water adjudications, such as this one, where the parties could spend many years or even decades litigating under an incorrect

[5] The Pueblos submit that the Seventh Circuit's reading of Section 1292(b) as only allowing appeal of "pure" questions of law is at odds with the language of the statute, which provides that the entire "order" is appealable, and that the order need only "involve" a controlling question of law. 28 U.S.C. § 1292(b); *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("the appellate court may address *any issue* fairly included within the certified order because it is the *order* that is appealable") (quotation marks omitted, first emphasis added).

legal standard. This interlocutory appeal thus falls squarely within the language and purpose of 28 U.S.C. § 1292(b).

B. The Standard of Review is *De Novo*

The parties all agree that the district court's conclusions of law are reviewed *de novo*. *See* State Br. at 17; Coal. Br. at 18–19. But the State, the Coalition, and *amicus* Tri-State contend that this appeal involves factual questions, or mixed questions of law and fact, that are reviewed under a more deferential standard. *See* State Br. at 17–18; Coal. Br. at 19; Tri-State Br. at 9. This is incorrect because there are no material factual issues in dispute in this appeal. The controlling question of law at issue, as certified by the district court, is whether aboriginal water rights were extinguished merely by the imposition of Spanish sovereignty. *See* App. 276–77. This is a question of law that is reviewed *de novo*. Similarly, the district court's determination of Spanish law during the period of Spanish control over New Mexico is a determination of foreign law that is also reviewed *de novo*. *See* Pueblos' Br. at 12. Under Rule 44.1 of the Federal Rules of Civil Procedure, the fact that the district court heard expert testimony and evidence to determine Spanish law does not transform the district court's determination into one of fact. Fed. R. Civ. P. 44.1 ("[i]n determining foreign law, the court may consider *any relevant material or source, including testimony*," and "[t]he court's determination *must be treated as ruling on a question of law*") (emphasis added). The Pueblos'

arguments that the district court misapplied the record in finding that Spanish protocol in water disputes extinguished Pueblo rights, *see* Pueblos' Br. at 34–43, is thus a question of law that is reviewed *de novo*.

The Appellees argue that extinguishment of aboriginal rights is predominantly a question of fact, *see* State Br. at 22; Coal. Br. at 19,[6] but they have identified no disputed material facts at issue in this appeal, and it would have been improper for the district court to issue a ruling as a matter of law if there were any. *See* Fed. R. Civ. P. 56.[7] The few historical facts that were addressed in the district court's decision are not disputed by any party. The parties agree, for example, that there is no record of a *repartimiento* ever occurring on the Rio Jemez and that Spain never took any action to limit the Pueblos' water uses.[8] This Court also does

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[6] The Coalition incorrectly cites *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1166 (10th Cir. 2015) for the blanket proposition that "[e]xtinguishment of aboriginal title is a question of fact." Coal. Br. at 19. That passage in *Pueblo of Jemez* (which actually begins on page 1165) actually stands for the more limited, and very different, proposition that the question of whether a tribe sufficiently used and occupied land to *establish* aboriginal title is a question of fact. *See id.* at 1163, 1165. In this case, the district court found that the Pueblos had established aboriginal water rights prior to the arrival of the Spanish, and that ruling is not in dispute in this appeal. *See* App. 298.

[7] The district court purported to be ruling on certain threshold legal issues that had been identified by the parties. *See* Pueblos' Br. at 7–8. The State's arguments regarding the standard of review for a jury finding in a criminal case, State Br. at 18, are thus entirely inapplicable to this appeal.

[8] The parties, including the Pueblos, also do not dispute the fact that Spain made two land grants to non-Indians on the Rio Jemez, which is an issue relatively newly raised in the State and Coalition's briefs. Rather, the only dispute regarding those grants is the legal effect of these land grants on the Pueblos' aboriginal water

not need to weigh any competing testimony between experts in this appeal because Magistrate Judge Lynch "assume[d] that the US/Pueblos' expert, Dr. Cutter, is correct and . . . resolved all factual questions in favor of Dr. Cutter's opinion." App. 298. This Court can thus conclusively rely on Dr. Cutter's report and testimony as undisputed for purposes of this appeal. *See* State Br. at 18.

C. The Scope of Review in an Interlocutory Appeal is Circumscribed by the Certified Order, and the Principal Arguments Pressed by Appellees and Amici Fall Well Outside That Scope

In interlocutory appeals under Section 1292(b), the Court of Appeals' jurisdiction "is confined to the particular order appealed from." *United States v. Stanley*, 483 U.S. 669, 677 (1987). The Court of Appeals "may address any issue fairly included within the certified order," but it "may not reach beyond the certified order to address other orders made in the case." *Yamaha Motor Corp.*, 516 U.S. at 205; *see also Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 720 F.3d 1269, 1278 (10th Cir. 2013). That binding constraint necessarily means that many of the arguments made by the Appellees and Amici should not be considered by the Court in this proceeding.

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rights, if any, which is a question of law. As discussed below, that issue is actually outside the scope of this appeal.

1. Neither the Certified Order Nor the Recommended Disposition Addresses the Making of Non-Indian Grants on the Rio Jemez, and the Making of Those Grants Had No Effect on the Pueblos' Aboriginal Water Rights

Rather than defend the district court's stated justification for its decision, the State and Coalition argue that Spain *did* take affirmative acts that effected the extinguishment of the Pueblos' water rights. In particular, they argue that two land grants to Spanish settlers in the Jemez Basin, which were made nearly two hundred years *after* Spain imposed sovereignty over New Mexico, were affirmative acts that support a finding of extinguishment. *See* Coal. Br. at 51–54; State Br. at 21–22, 27, 30, 42–43.[9] These contentions are wrong on their merits, as will be explained below, but they are also completely beyond the scope of the district court's decision.

The two grants, the San Ysidro (made in 1786) and the Cañon de San Diego (made in 1798), which the State's expert acknowledged were the events that caused the Rio Jemez to become public water under Spanish law, *see* App. 671 (Tr.

[9] The State goes so far as to claim that the district court's ruling that the Pueblos' aboriginal water rights were extinguished was actually based, at least in part, on the making of the two non-Indian land grants. State Br. at 21–22. There is no basis for this claim. The decision never mentions those grants, and in her Memorandum Opinion and Order certifying the 2017 decision for interlocutory appeal Judge Vázquez acknowledged that the question whether the Pueblos' rights were extinguished "without any affirmative act" was raised in the Court's Order. App. 276. The district court thus did not place *any* reliance on these grants as affirmative acts resulting in extinguishment.

267–68); *see also* State Br. at 43, were made nearly two centuries after Spanish sovereignty, including its legal rules regarding the use of public waters, was imposed on New Mexico. That fact alone demonstrates that the making of these grants was not part of the district court decision, which rested entirely on the imposition of Spanish rule (in 1589, presumably) as the event that extinguished the Pueblos' aboriginal water rights.

More importantly, neither Judge Vázquez' decision nor the Recommended Disposition even mentions, let alone relies upon, these land grants as a basis for finding extinguishment of the Pueblos' water rights. *See* App. 281–302. Instead, these decisions cite the extension of Spanish sovereignty, including the asserted imposition of a "legal system" to administer the use of public waters, as the basis for finding extinguishment.[10] Indeed, as was noted above, Judge Vázquez, in her Memorandum Opinion and Order certifying her 2017 decision for interlocutory appeal, affirmed that "[t]he issue of whether the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority *without any affirmative act* was raised in the Court's Order." App. 276 (emphasis added).

[10] *See* App. 300 ("I find that Spain imposed a legal system to administer the use of public waters and that regalía ended the Pueblos' exclusive use of the public waters and subjected the Pueblos' later use of public waters to potential repartimientos."); App. 287 ("Spain exercised complete dominion over the determination of the right to use public waters adverse to the Pueblos' pre-Spanish aboriginal right to use water.").

In short, the argument that the making of the San Ysidro or the Cañon de San Diego grants had some effect on the Pueblos' aboriginal water rights is not properly made in this appeal and is outside the scope of this Court's jurisdiction. That issue was not "raised in the certified order," and thus is not appropriate for interlocutory review. *Paper, Allied-Industrial Chemical & Energy Workers Int'l Union*, 428 F.3d at 1291–92.

Even if these arguments were properly before this Court, moreover, the extremely limited record relating to these grants[11] would not support a finding that the making of these grants somehow extinguished the Pueblos' rights. It is correct that Dr. Cutter and Prof. Hall agreed that these were community grants that "impl[ied] the right to use of water." *See* Coal. Br. at 34–35 (quoting App. 637 and App. 643).[12] But, notably, there is nothing in the record showing that these land

[11] The reason there is so little information in the record relating to these land grants is because the Appellees did not rely on these grants as a basis for extinguishment in the proceedings before Magistrate Judge Lynch. Instead, Appellees primarily contended, through the State's expert Prof. Hall, that it was the *possibility* of a *repartimiento* that resulted in extinguishment of the Pueblos' water rights. *See, e.g.*, App. 657 (Tr. 211–14). It was only in their responses to the Pueblos' and United States' objections to the Recommended Disposition that they first began arguing that these land grants constituted affirmative acts adverse to the Pueblo' rights. *See* Coalition's Response to US/Pueblos' Objections, ECF No. 4388, at 8; State of New Mexico's Response Brief to Objections, ECF No. 4389, at 8–10. It appears that Appellees have now abandoned this argument, that the mere possibility of a *repartimiento*, by itself, extinguished the Pueblos' rights.

[12] They were not, however, "sovereign grant[s] of water," as the Coalition refers to them, Coal. Br. at 54, nor even "implied grants of water," *id*. at 52.

grants in any way restricted or limited the water uses of the Pueblos, and thus there is no basis for finding that these grants were "adverse" to the Pueblos, as would be required for a finding of extinguishment.[13] Indeed, the uncontested fact that there was never any dispute leading to a *repartimiento* relating to the Rio Jemez shows that these grants did *not* adversely affect the Pueblos' water uses.

It is important to note that this contention by Appellees, that the making of these grants in effect extinguished the aboriginal rights of the Pueblos, rests on a completely false assumption. That assumption is that an aboriginal right to water necessarily means the *exclusive* right to that water, and that the loss of that exclusivity must therefore mean the extinguishment of that right. *See, e.g*., State Br. at 25, 33; Coal. Br. at 39. There is simply no basis for that assumption, in this record or in logic. The land grant settlers presumably took water from the Rio Jemez, but there is no evidence that there was not enough water left for the Pueblos to take what they needed, and the fact that there is no record that any dispute ever arose between the Pueblos and the non-Indians over water appears to confirm that there was sufficient water for all users. There was thus no impact on the Pueblos' rights to use the water of the Rio Jemez.

[13] A document dated 1810, that describes the making of the Cañon de San Diego Grant, states that the grantee settlers stated at the time the grant was made that "they would not injure the Indians." Ralph W. Twitchell, 1 SPANISH ARCHIVES OF NEW MEXICO 167 (Sunstone Press, 2008) (Doc. No. 608).

And even had a dispute arisen, evidence in the record that the Appellees and the Amici carefully avoid discussing strongly suggests that the Pueblos' rights would have been fully upheld. The State's expert, Prof. Hall, testified that if a *repartimiento* had occurred on the Rio Jemez, the claims of the non-Indian communities would have been "obviously not as [strong as that of] the Jemez Pueblo . . . by virtue of its antiquity and its long continuing standing as a community." App. 664 (Tr. 239). Prof. Hall also acknowledged on cross-examination that a study by Dr. William B. Taylor,[14] for whom Prof. Hall admitted he had "great respect," App. 682 (Tr. 311), showed that of twenty-two *repartimientos* that occurred in Mexico during the Spanish colonial period and that involved non-Indians and Indian communities, in virtually every instance the Indian community was given a significant preference, and in many instances was awarded *all* of the available water, App. 682–83 (Tr. 311–18). In some instances, grants to non-Indians were annulled or cancelled because it was determined that "'they infringed on the property rights and well-being of local Indian communities.'" App. 682 (Tr. 314) (Prof. Hall reading a passage from Taylor's study). Dr. Taylor even found that not only did the Indian communities receive first priority to the water for their existing irrigated lands, but they also received

[14] Taylor's study, entitled "Land and Water Rights in the Viceroyalty of New Spain," was published at pages 189–212 of the July, 1975, issue of the NEW MEXICO HISTORICAL REVIEW.

rights to additional water for their *future* needs, an apparent recognition of their aboriginal rights. App. 683 (Tr. 316–18).

Dr. Taylor's study, which Prof. Hall described as "very fine work," App. 661 (Tr. 229), is fully consistent with the other evidence presented in this case, including the abundant evidence contained in Dr. Cutter's report and testimony, described in the Pueblos' Opening Brief at 34–37, of the overriding emphasis in Spanish law and policy in its New World domain of protection of the rights and property of the native inhabitants of that domain. It is also entirely in line with the few known instances of disputes over water in New Mexico involving Pueblos during the Spanish and Mexican colonial regimes, such as the Taos *repartimiento* of 1823,[15] described in the Pueblos' Opening Brief at 40–41, in which Taos Pueblo was recognized as the "*dueño despotico*," the complete owner, of the Rio Lucero, and although a squatter non-Indian community was allowed to take a small amount of water from the river, it was required to cut back its diversions in times of shortage so that "there is *no lack* for the first user, Taos Pueblo." App. 681 (Tr. 309) (emphasis added). Just as noteworthy, and fully consistent with Dr. Taylor's

[15] The State refers to three minor disputes involving Tesuque Pueblo as "*repartimientos*," State Br. at 8, 42, but Dr. Cutter testified that the only proceeding in New Mexico that could really be called a *repartimiento* was the Taos proceeding. App. 617 (Tr. 52). *See also New Mexico v. Aamodt*, 618 F. Supp. 993, 999 (D.N.M. 1985) ("*Aamodt II*") ("The only recorded *repartimiento* . . . that anyone has knowledge of involved the Rio de Lucero and the Pueblo of Taos.").

study, was the long-running dispute between Santa Clara Pueblo and non-Indian grantees of land upstream from the Pueblo in Santa Clara Canyon, over the use of water in Santa Clara Creek. After years of objections from the Pueblo, the non-Indian grant was ultimately cancelled altogether, and Santa Clara was issued a new grant to the entire canyon, recognizing its right to all of the water in the Creek. *See* Pueblos' Br. at 41–42.

In short, the effort of Appellees and Amici to salvage the decision below by relying on the making of the San Ysidro and the Cañon de San Diego Grants fails. There is no basis for the claim that the making of those grants had any effect on the Pueblos' water rights, and any such argument is well beyond the permissible scope of this appeal.

2. Appellees' and Amici's Arguments Against an "Expanding" Water Right, Which the Pueblos Have Never Claimed, Concern the Quantification of the Pueblos' Aboriginal Rights, Which is an Issue Entirely Outside the Scope of the Certified Order.

Throughout their briefs, Appellees and Amici repeatedly assert that the Pueblos are seeking what they characterize as an "expanding," unlimited aboriginal water right. The Coalition even goes so far as to try to calculate the amount of water the Pueblos would be claiming if their aboriginal rights were upheld. *See*

Coal. Br. at 10–11, 22.[16] The assertion that the Pueblos seek a limitless expanding water right is completely untrue: the Pueblos have made no such claim in this case. More important here, however, is the fact that the arguments that the Pueblos are seeking an "expanding" water right is a claim about the *quantification* of the Pueblos' aboriginal rights, which is an issue that is entirely beyond the scope of the district court's decision. The district court found that the Pueblos' aboriginal rights had been fully extinguished, and thus it made *no* findings as to the nature of those rights or how they should be measured. Indeed, the issue of how aboriginal water rights should be quantified was designated Issue No. 3 in the list of issues the parties had agreed the district court needed to resolve before any trial could be held on the Pueblos' water rights. *See* Order Regarding Status Conference, ECF No. 4242, filed April 26, 2012, at 2. The Recommended Disposition, as its full title makes clear, addressed only Issues Nos. 1 and 2. *See* App. 288. The Appellees' and Amici's arguments against an "expanding" aboriginal water right are thus not within the jurisdiction of this Court in this appeal. *See Stanley*, 483 U.S. at 677 *Yamaha Motor Corp.*, 516 U.S. at 205.

[16] The Coalition relies heavily on the 1988 and 1991 reports of the Special Master in its efforts to quantify the Pueblos' claims. Besides the fact that this is all well beyond the scope of this appeal, *see Yamaha Motor Corp.*, 516 U.S. at 205, the Coalition fails to mention that the Special Master's 1988 report was rejected by the district court in its 2004 Memorandum Opinion and Order, and the court declined to rule on the 1991 report or the numerous objections to it. App. 341–43. Neither report, thus, should carry any weight here.

The suggestion that the Pueblos are seeking an "expanding" water right is also factually untrue. The Pueblos have never claimed to have an "expanding" water right, let alone the type of limitless expanding right that the State, the Coalition and Amici rail against. The Pueblos have asserted that their aboriginal water rights include an amount sufficient to satisfy their future needs, which is consistent with the case law, *see, e.g.*, *Aamodt II*, 618 F. Supp. at 1010,[17] but the meaning and quantification of those future needs is a question that the district court has yet to consider or decide. If this Court did reverse the district court and find that the Pueblos' aboriginal rights had not been extinguished, as it should, the meaning and quantification of these rights is an issue that should be briefed and

[17] In that 1985 ruling in the *Aamodt* litigation, Judge Mechem adopted a proposed finding of the Special Master stating, "[t]he 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 that opinion he noted that "[t]he Pueblo aboriginal water right . . . included the right to irrigate *new land in response to need*." *Id*. at 1010 (emphasis added). The Coalition cites to a later, unpublished opinion in that litigation, in which Judge Mechem stated, "[h]istorically irrigated acreage (HIA) is the standard used to determine the grant or reserved acreage to which aboriginal water rights are appurtenant." *New Mexico v. Aamodt*, No. 66-cv-06639, slip op. at 3 (D.N.M. Dec. 29, 1993). But in one of his last opinions in that case, to which the Coalition does not refer, Judge Mechem returned to his original view of aboriginal water rights, stating that the Treaty of Guadalupe Hidalgo protected the Pueblos' rights as they existed in 1846, and that that protection "extended to all water rights *including the Pueblos' right to develop future uses* in an amount necessary to maintain the community." *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-06639-M-ACE, 2001 WL 37125371, at *1 (D.N.M. Jan. 31, 2001).

decided by the district court in the first instance. *See New Mexico v. Aamodt*, 537 F.2d 1102, 1113 (10th Cir. 1976) ("*Aamodt I*") ("The quantification of the Pueblos' rights presents another problem and, in the first instance, it must be decided by the district court.").

The State, the Coalition, and *amicus* El Rito also argue that "expanding" or "future use" aboriginal rights are incompatible with the requirement that tribes show actual use and occupancy to establish aboriginal rights. *See* State Br. at 28–30; Coal. Br. at 48–51, 58; El Rito Br. at 16–18. These arguments are likewise outside the scope of the district court's decision, but they are also legally incorrect. Aboriginal water rights are part of the bundle of sticks comprising a tribe's property rights in land, and thus are established by showing actual use and occupancy of the land to which the water is appurtenant, not of the water itself. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117–18 (1938) (finding that tribe's aboriginal title to land included title to minerals and timber, without requiring any showing that tribe "used" those resources).[18] The district court

[18] In *Shoshone*, the Supreme Court affirmed that the value of the timber and minerals should have been included in the calculation of the value of the tribe's aboriginal land taken by the United States. 304 U.S. at 112, 118. The Court thus determined that these resources constituted part of the tribe's "right of occupancy" to its land—in other words, its aboriginal land right—notwithstanding that the minerals had never been actually mined and the timber had not been harvested prior to the taking. *Id.* at 117–18. This ruling thus shows that a tribe's aboriginal rights to land include rights to resources appurtenant to those lands, regardless whether the tribe has actually "used" those resources. To the same effect is *United*

previously expressed exactly this view in its Memorandum Opinion and Order filed on October 4, 2004, stating, "aboriginal title includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title." App. 327. To the extent the State is challenging the Pueblos' ability to establish that they had aboriginal rights in the first instance, these arguments come too late. Magistrate Judge Lynch correctly found that the Pueblos possessed aboriginal water rights prior to the arrival of the Spanish, App. 298, and that was part of the findings adopted by Judge Vázquez, App. 283, 287. Magistrate Judge Lynch found no need to ascertain how long the Pueblos had been using water, or how much they had used, in order to reach that conclusion. No party challenged that ruling or requested an appeal of that ruling to this Court.

Additionally, although there is scant case law on the issue, the few courts that have considered the subject have consistently held that the Pueblos had aboriginal water rights appurtenant to their aboriginal lands, that those rights were recognized and protected by the Spanish territorial government and by Mexico, and that the Pueblos retained those rights when they came under American sovereignty. *See, e.g., Aamodt II*, 618 F. Supp. at 1009 ("The Pueblos came into

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States v. Northern Paiute Nation, 393 F.2d 786, 796 (Ct. Cl. 1968), in which the Court of Claims determined that the Northern Paiutes were entitled to recover the value of the legendary Comstock silver lode, and adjacent silver lodes, as part of the aboriginal lands that were taken from them.

the United States with these long established priorities and with their aboriginal rights to use the water for irrigation purposes.").[19]

[19] Remarkably, *amicus* Tri-State claims that in the ongoing adjudication of the Rio San Jose, *New Mexico ex rel. State Engineer v. Kerr-McGee, et al*., Nos. D-1333-cv-1983-00190 and D-1333-cv-1983-00220 (consolidated) (13th Judic. Dist. Ct.), involving the water rights of Acoma and Laguna Pueblos, "[t]he state district court in 1993 did *not* hold and the special master in 1992 did *not* recommend . . . that the Pueblos have aboriginal water rights that were not extinguished by Spain or Mexico . . ." Tri-State Br. at 5 (emphasis in the original). Those statements are completely untrue. In that case, Plains Electric Generation & Transmission Coop. (the predecessor of Tri-State) and other non-Indian parties moved in 1991 for partial summary judgment, seeking a ruling that, among other things, the two Pueblos "have no aboriginal rights." On November 5, 1992, Special Master (and soon to become United States Magistrate Judge) Lorenzo Garcia issued his Special Master's Report and Recommendations, in which he discussed at length the Pueblos' use and occupancy of their land and use of the water from time immemorial, stating, at 43–44, "the Acomas and the Lagunas did, indeed, acquire aboriginal title. An aboriginal title is superior to that of any third person . . ." He also concluded that the Pueblos' aboriginal rights were not extinguished until the Pueblos settled their claims before the Indian Claims Commission, in 1970. *Id*. at 45. On May 18, 1993, the district court issued an order adopting the Special Master's Report in its entirety, but certifying it for interlocutory appeal. Only the two Pueblos sought interlocutory appeal, seeking review of that portion of the Report that concluded that their aboriginal rights had been extinguished. The state court of appeals granted interlocutory review. In its brief in the appeal, the State stated, at 28, "The State Engineer agrees that the Pueblos have aboriginal water rights." The court of appeals reversed the district court on the issue of extinguishment, ruling that the ICC settlements had not extinguished any aboriginal water rights the Pueblos had had, though it expressly declined to rule on the issue of *whether* the Pueblos had had such rights, since that issue was not before it. *See State ex rel. Martinez v. Kerr-McGee Corp.*, 120 N.M. 118 (1995). But the district court ruling adopting the Special Master's determination that the Pueblos held aboriginal water rights, at least until 1970, has never been disturbed.

3. Other Issues Raised by the Coalition are Completely Beyond the Scope of This Appeal, Besides Being Without Merit

The Coalition makes a number of other arguments that, while they are completely lacking in merit, are more importantly well outside the scope of this appeal, having not been addressed at all in the Recommended Disposition or the certified order, and they should thus be disregarded by this Court.[20]

For example, the Coalition argues that 43 U.S.C. § 321 (the "Desert Land Act"), 43 U.S.C. § 661, and the Act of July 9, 1870, 16 Stat. 217, 218, preclude the Pueblos' claims of aboriginal water rights. Coal. Br. at 40–45. Those Acts, in general, protect the rights of appropriators of water on the public lands. The Recommended Disposition expressly declined to address this argument, considering it "moot" in light of its determination that the Pueblos' rights had been extinguished, App. 300, and the Acts are not mentioned in the district court decision. Moreover, every court that has considered this claim in cases involving

[20] Interestingly, in its opposition to the Pueblos' and the United States' petitions to this Court to accept this interlocutory appeal, the Coalition stated that if this Court were to accept the appeal and reverse the district court, *on remand* the district court would then have to decide several more issues, which happen to be most of the very issues that the Coalition has now argued in its brief in this appeal. *See* Jemez River Basin Water Users' Coalition's Consolidated Answer in Opposition to Petitions of the Pueblos and the United States for Permission to Appeal Pursuant to 28 U.S.C. § 1292(B), filed on October 11, 2018 (Case No. 18-707), at 21. It should be noted that none of these arguments by the Coalition is consistent with or supports the certified Order.

Indian water rights has rejected it. *See, e.g.*, *Winters v. United States*, 143 F. 740, 748 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939); *Federal Power Comm'n v. State of Oregon*, 349 U.S. 435, 438–39 (1955); *New Mexico v. Aamodt*, No. 66-cv-06639, slip op. at 6 (D.N.M. Dec. 29, 1993). In essence, the courts have consistently held that those Acts apply only to appropriators of water on the public lands. Indian lands are not public lands. Moreover, nothing in any of those Acts could possibly be construed as extinguishing Indian aboriginal rights.

The Coalition argues that the Pueblos cannot claim aboriginal title for their "grant" lands,[21] because they own those lands in fee simple, and that in any event the confirmation of their titles by Congress in 1858 (1869 for Santa Ana) extinguished any aboriginal rights to water. Coal. Br. at 45–46. This issue comes nowhere near what was addressed in the certified order, and is utterly frivolous besides. Aboriginal title arises from the long, continuous, exclusive use and occupancy of lands by a tribe, which describes exactly the situation of these

[21] The Pueblos' lands were not "granted" to them by the Spanish government. *See* App. 635 (Tr. 129). Rather, the Spanish recognized the Pueblos' longstanding ownership of their lands (and their use of appurtenant waters). *See* App. 292. The documents that were confirmed by Congress in 1858 for Jemez and Zia, though represented to be 1689 land grants by the Spanish Governor, have been found to be fraudulent. There is no grant document for Santa Ana. *See* Ebright, Hendricks & Hughes, FOUR SQUARE LEAGUES: PUEBLO INDIAN LANDS IN NEW MEXICO (UNM Press, 2014), at 11–47, 205–34.

Pueblos and their lands, as the Recommended Disposition found. *See* App. 298. The fact that congressional confirmation of the Pueblos' pre-existing ownership of their lands in 1858 and 1869 had no effect on the Pueblos' aboriginal rights was clearly established in *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388 (Ct. Cl. 1975); *see also Aamodt II*, 618 F. Supp. at 1009.

The Coalition additionally argues that the Pueblos' aboriginal water rights were cut off by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, in that future use rights would be considered "inchoate," and the Treaty did not protect inchoate rights. Coal. Br. at 67–69. *Amicus* Tri-State makes the same argument. Tri-State Br. at 14, 24. Again, this issue is not addressed at all by the Recommended Disposition[22] or the district court's certified Order, and thus is not properly before this Court in this appeal, but like the Coalition's other points, it is simply wrong. The Coalition cites *Dent v. Emmeger*, 81 U.S. 308 (1871), which does indeed hold that inchoate rights are not protected by a treaty, but the Court in that case added that such rights could achieve "vitality and efficacy" if confirmed by Congress. *Id.* at 312–13. That is exactly what happened with respect to the aboriginal rights of

[22] The Recommended Disposition does point out that this Court, in *Pueblo of Jemez*, 790 F.3d at 1160–61, noted that the doctrine of aboriginal title had been applied by the United States to the tribes in the Mexican cession. App. 290. But as has been noted above, since the district court held that the Pueblos' rights were extinguished in 1589, discussion of the effect of an 1848 Treaty on those rights plainly falls far outside the certified Order.

tribes in the area of the Mexican cession. By section 7 of the Act of February 27, 1851, 9 Stat. 574, 587, Congress extended to the Indian tribes in the territories of New Mexico and Utah "all the laws now in force, regulating trade and intercourse with the Indian tribes." In *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 348 (1941), the Court held that that enactment "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." Thus, even if pre-existing aboriginal rights were not fully protected by the Treaty, the 1851 Act unquestionably gave those rights "vitality and efficacy." In *United States v. Candelaria*, 271 U.S. 432, 441–42 (1926), the Court expressly held that the Pueblos were among the Indians to which the 1851 Act applied.[23]

D. The Imposition of Spanish Sovereignty Over New Mexico Was Not an "Exercise of Dominion Adverse" to the Indian Right of Occupancy, Including the Right to the Use of Appurtenant Water

As the Pueblos explained in their Opening Brief, at 20–23, 34–38, a necessary premise for a finding of extinguishment of aboriginal rights is that the

[23] Amicus El Rito also makes an argument that is far outside the scope of this appeal—that the Pueblos' claims are barred by the doctrine announced in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), in which the Court held that the tribe's assertion of sovereignty over land that had been out of its possession for 200 years came too late. Plainly, this argument has no place in this appeal; but it is also frivolous. This is a general stream adjudication. No party's water rights had been adjudicated prior to the institution of this action. The Pueblos make no claim to anything but water rights appurtenant to their own land, which they have continuously held and occupied since time immemorial.

Spanish exercise of complete dominion had to be "*adverse* to the [Indian] right of occupancy." *Santa Fe Pacific*, 314 U.S. at 347 (emphasis added). And the intent to extinguish such rights must be manifested in "plain and unambiguous action." *Id.* at 346; *see also Pueblo of Jemez*, 790 F.3d at 1170; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) (aboriginal rights, once established, "could be terminated *only by sovereign act*") (emphasis added). The Pueblos cited extensive material in the record, from the testimony and report of Dr. Cutter, showing that Spanish law and policy in New Spain was strongly oriented toward the protection of Indian rights and property. There was no contrary testimony or evidence, and none of the Appellees' briefs even discusses that evidence, much less disputes it, so they must be assumed to have conceded that point.

Given that, the only possible defense of the decision below would have to be that despite the avowedly protectionist attitude of the Spanish towards Indian rights and property, there was something inherently "adverse" about the mere imposition of Spanish sovereignty or about the manner in which Spanish law dealt with disputes over use of water. But the case law and the record below show that neither is the case, and neither Appellees nor Amici present any arguments that overcome this deficiency.

It is well established that the mere extension of sovereignty over an area of the New World by a European conqueror did not, in and of itself, extinguish Indian

aboriginal rights. As the Pueblos explained in their Opening Brief at 26, that notion was expressly rejected in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), the case that is the foundation of American law of aboriginal rights. Were it otherwise, all Indian aboriginal rights within the United States would have been wiped out long ago by the extensions of sovereignty over various areas by different European countries at different times, and eventually by the United States itself.[24] And it would be especially ironic to hold that the imposition of Spanish sovereignty in 1598 had the

[24] The Pueblos and the United States argued both to Magistrate Judge Lynch and to Judge Vázquez that if the imposition of Spanish sovereignty had extinguished the Pueblos' aboriginal water rights, it made no sense that aboriginal land rights had survived, yet numerous cases have established that they did. Both the Recommended Disposition and the district court decision dealt with this by citing Dr. Cutter's testimony that Spanish law treated land differently than it treated water. *See* App. 300, 285. But that distinction in Spanish law does not address the Pueblos' and United States' argument, which is that the low *standard* for extinguishment being applied by the district court would logically result in the extinguishment of the Pueblos' aboriginal land rights as well, and thus cannot be correct. Moreover, although it is correct that Spanish law recognized exclusive rights in land, but viewed public waters as potentially available for use by all appurtenant landowners, there is no reason that that distinction would support a different finding as to extinguishment of the Pueblos' aboriginal water rights, especially given the overriding Spanish policy, embodied in its law, of respect for and protection of Indian property. Water rights are, after all, appurtenant to land, and land without water rights would be practically worthless to these Pueblos. Even the State's expert, Prof. Hall, admitted to having concern over this problem, saying, "I have a question about whether the . . . different treatment of the water rights could possibly extinguish the water rights – without extinguishing the aboriginal right to land." App. 694 (Tr. 359). Neither the Appellees nor the Amici offer any resolution of this incongruity, except to repeat that Spanish law regarding land was distinct from that pertaining to water. *See* Coal. Br. at 27; State Br. at 41–42. The Pueblos suggest that that is a distinction without a difference, certainly for these purposes.

effect of extinguishing any Indian rights, since the main thing that happened at that time with respect to the Pueblos was that Juan de Oñate met with Pueblo leaders and assured them repeatedly that in return for their loyalty to the Spanish king, they would "'live peaceably and safely in their countries, governed justly, *safe in their possessions*, protected from their enemies,'" and would be "'*secured in their estates, . . . without suffering harm.*'" App. 372 (Cutter Report at 28) (emphasis added).

The Recommended Disposition found that Spain "imposed a legal system to administer the use of public waters," that "ended the Pueblos' exclusive use of the public waters . . ." App. 300. That system, Magistrate Judge Lynch found, "is a plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water without restriction and as such is an exercise of complete dominion adverse to the Pueblos' aboriginal right to use water." *Id.* The district court decision similarly focuses on the imposition of "complete dominion over the determination of the right to use public waters adverse to the Pueblos' pre-Spanish aboriginal right to use water." App. 287. But it is important to remember that in fact, *nothing* ever happened during the Spanish or Mexican period that in any way restricted the right of any of the three Pueblos on the Rio Jemez to use as much water as they needed, even after the making of the two non-Indian land grants discussed above. So the imposition of this "system,"

and the "exercise" of this "complete dominion" that the Recommended Disposition and the district court decision refer to are entirely theoretical in this context.

The record shows, moreover, that the characterization of the Spanish handling of water disputes in both the Recommended Disposition and the district court decision is overblown.[25] The proceeding known as a *repartimiento de aguas* was the only form of "administration" of water uses under the Spanish and Mexican governments in New Mexico. A *repartimiento* was convened only in the event of a dispute among users of a body of public water that was brought to the attention of the local authorities. Until a dispute arose and a complaint was made, people were free to use what water they needed. *See* App. 630 (Tr. 108); App. 632

[25] The State and the Coalition go to much greater lengths in describing Spanish "control" over water, in terms that amount to sheer fantasy. For example, the Coalition states that "[i]n all cases the right to water from a common source was based on a choice made by the conquering sovereign, not the conquered subjects. . . . and the Pueblos' claims to water resources were still determined under the laws of the Sovereign." Coal. Br. at 28–29. The State goes even further, claiming that "the Pueblos lost discretion to use public water in whatever way they chose. The sharing of public water . . . was controlled by the Spanish government . . ."; "the Spanish crown regulated the use of the water by requiring supply to be shared – not only in cases of disputes but in allocating water to settlers. Users were restricted by a reduction in the available supply, . . ." State Br. at 5, 42. The State further asserts that once the non-Indian grants were made on the Rio Jemez, "the water source . . . was subject to the Spanish crown's jurisdiction and *its legal regime of complete control* over the determination and use of the shared source." *Id*. at 43 (emphasis added). Nothing in the record supports these extravagant characterizations of Spanish involvement in water matters in New Mexico. Rather the record shows that the Pueblos were free to increase their water uses as they saw fit until a dispute arose and a complaint was made, as discussed below.

(Tr. 114); App. 643 (Tr. 160); App. 647 (Tr. 176–77). Nothing in Spanish law dictated how a *repartimiento* would turn out. As Prof. Hall testified, there is nothing in the massive *Recopilacion de Leyes de Indias*, or any other written law that we know of, that specifies when or how a *repartimiento* was to be convened, or how it was to be conducted. App. 682 (Tr. 312) The "factors" that it is claimed governed the allocation determinations in a *repartimiento*, *see*, *e.g.*, Coal. Br. at 32, State Br. at 5, were not prescribed by any Spanish or Mexican law or policy, but were rather derived by Michael Meyer, an American historian, from his study of a number of *repartimientos*. App. 682 (Tr. 312). Nor was there any other administrative apparatus under the Spanish or Mexican governments for the management of water. App. 687 (Tr. 333–34). Indeed, it is especially telling that in the quarter millennium of Spanish and Mexican rule in New Mexico, only *one repartimiento* is known ever to have occurred, the Taos proceeding described in the Pueblos' Opening Brief at 40–41.

In short, to say that this amounted to "a legal system to administer the use of public waters," as the Recommended Disposition does, App. 300, or the "exclusive right and power to determine the rights to public shared waters," as the district court phrased it, App. 286, plainly exaggerates the actual extent to which the Spanish government was involved in issues of water use far beyond what the record will support.

More importantly, the record, and an important published report on how water disputes in New Spain were actually handled, show plainly that even in the very limited context of *repartimientos*, Indian communities virtually always were given preference in water disputes so that their rights would be fully protected.[26] The study, by Prof. William Taylor,[27] discussed *supra* at 14–15, emphasizes that in the making of land and water grants, Spanish officials consistently included language specifying that Indian lands and waters were not to be prejudiced. As was noted above, *repartimientos* involving Indian communities invariably gave preference to the Indians, and longstanding use of water by the Indians was a "crucial consideration[]." Taylor Study at 202.

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[26] The Coalition's brief essentially concedes that such a preference existed under the Spanish regime, a concession that largely undermines the premise of the certified Order, but it claims that such preference did not apply during the Mexican period, 1821–1848. Coal. Br. at 32–33. That is contrary to the record. Dr. Cutter testified very explicitly that "there was virtually no change in water administration" under Mexico, and that "nothing changed with respect to the pueblo Indians' use of water in New Mexico during the Mexican period." App. 618 (Tr. 57). He testified further that he was aware of "no document that talks about limiting the use of water of any of the pueblos." *Id*. Later, he added that while, during the Mexican period, the racial status of the Pueblos would not have added much to their claim to water, "people would recognize that it was a community of longstanding," and that that factor "would weigh heavily." App. 637 (Tr. 135–36). As is discussed in the text, the Taos *repartimiento*, which took place under the Mexican regime, was fully consistent with Dr. Cutter's testimony. The Coalition also relies on *United States v. Ritchie*, 58 U.S. 525 (1854), in support of its claim that there was no preference for Indians under the Mexican regime, but that opinion, in its concluding paragraph, excludes the Pueblo Indians from the views expressed therein. *Id.* at 541.

[27] *See* n.14, *supra*. The published paper is referred to in the text as "Taylor Study."

Indeed, one may conclude from Dr. Taylor's study that the principle of Spanish law that one could not expand one's use of public waters if such expansion would injure another user, which was so strongly relied on by the district court, App. 286–87, and is so vigorously asserted by the State and the Coalition as the basis for extinguishment of the Pueblos' aboriginal rights, *see* State Br. at 42; Coal. Br. at 37–38, was actually applied in most every case *in favor* of the Indian communities and *against* the non-Indians. That is, where the dispute involved an Indian community, the main inquiry was whether the Indians' rights, including rights to water for future needs, were being prejudiced. Taylor Study at 207. As Taylor said in the conclusion of his study,

> Where demand for water outran supply, distribution of available water was based primarily on prior use, need, and protection of Indian communities.

Id. Importantly, that statement holds true for the one *repartimiento* known to have taken place in New Mexico, the Taos proceeding of 1823, discussed in the Pueblos' Opening Brief at 40–41, in which the non-Indian squatter community, though it was allowed to take water when the water was abundant, was required to cut back on its uses in times of scarcity, "so that there would be no lack of water to the first users, . . . who are the sons of the above-mentioned pueblo [*i.e.*, Taos]." App. 717 (Tr. 445).

There is thus no basis for the bald conclusion that Spanish law regarding use of water from public water sources evidenced adversity towards Indian rights. Notwithstanding the extravagant characterizations by the Appellees, the Spanish and Mexican governments had little real involvement in matters regarding water (and, of course, never had *any* involvement in water use in the Rio Jemez basin), and when either did get involved, protection of Indian rights was considered a priority. There is thus no basis for finding "adversity" in Spanish or Mexican involvement in water disputes involving Indian communities.

E. Appellees Do Not Support the Position of the Decision Below That Extinguishment of the Pueblos' Aboriginal Water Rights Could Have Occurred in the Absence of Any Affirmative Act

Neither the State nor the Coalition makes much of an argument to support the proposition at the heart of the Recommended Disposition and the district court decision that extinguishment of the Pueblos' aboriginal rights could (and did) occur in the absence of any affirmative act by the Spanish territorial government.[28] They attempt to deny that that was the district court's ruling, *see, e.g.*, Coal. Br. at 3–4; State Br. at 20–21; and they insist that Spain actually did take many

[28] Appellees and Amici , somewhat inconsistently with their claims that Spain did take affirmative acts that extinguished the Pueblos' aboriginal water rights, also reject the relevance of the case law cited by the Pueblos on the ground that it mainly deals with aboriginal rights to land, not water. But as the district court said in its 2004 Memorandum Opinion and Order, "while aboriginal title is not a fee-simple property right, it can form the basis for ownership of a water right." App. 328.

affirmative acts that effectuated the extinguishment of the Pueblos' aboriginal water rights, *see* State Br. at 21–22; Coal. Br. at 4. But the "acts" they cite are imposition of laws, which of course was simply an aspect of the imposition of Spanish sovereignty, and the making of two land grants, two centuries after the Spanish established control over New Mexico, the ineffectiveness of which has been discussed above (and which are, in any event, well beyond the scope of this appeal). This insistence that there were "acts" of extinguishment, moreover, is an implicit repudiation of the district court's legal ruling that no acts are required for a finding of extinguishment.

Amicus El Rito, alone among the briefs filed in support of Appellees' position, makes the argument that no affirmative act was required to extinguish Indian aboriginal rights, but it cites no cases that actually support that proposition. It cites a passage from *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), but that was one of a peculiar class of cases before the Indian Claims Commission in which the parties had *stipulated* to the fact of extinguishment, and were simply arguing over the proper "valuation date." *See* Richard W. Hughes, "Indian Law," 18 N.M. LAW REV. 403, 416–21, esp. n. 96 (1988). It also cites *Seneca Nation v. New York*, 382 F. 3d 245, 260 (2d Cir. 2004), but in that case there was actually a treaty of cession. There is no case cited by Appellees or Amici or known to counsel for the Pueblos that holds that aboriginal rights may be

extinguished without some act—some "exercise of dominion"—that is adverse to the Indian right of occupancy. And the Supreme Court has held expressly to the contrary, ruling in *Oneida Indian Nation*, 414 U.S. at 667, that the Indian right of occupancy, good against all but the sovereign, "could be terminated only by sovereign act." No such "sovereign act" appears in the records of the Spanish or Mexican regimes in New Mexico, and thus the decision below, that extinguishment of aboriginal rights occurred despite the absence of any such act, cannot be sustained.

The Appellees' and Amici's responses thus further confirm that the legal standard for extinguishment that the district court applied simply has no support under the law, which is dispositive for this appeal. For the numerous reasons described in the Pueblos' Opening Brief, most of which are completely ignored by Appellants and Amici, the district court's ruling that extinguishment could be found based on the mere exercise of dominion, without an affirmative adverse act, is a misapplication of the law and facts of *Santa Fe Pacific*, and is also directly repudiated by nearly two hundred years of aboriginal rights case law. Pueblos' Br. at 14–34. This clear legal error in the district court's decision as to the applicable standard for extinguishment, alone, warrants reversal of the decision below.

F. The District Court's Decision Cannot be Reconciled With Section 9 of the Pueblo Compensation Act of 1933

The State's brief does not even cite, much less discuss, Section 9 of the Pueblo Compensation Act of 1933, Act of May 31, 1933, 48 Stat. 108, 111, nor do either of the Amici. The Coalition's only response to the arguments made based on Section 9, in the Pueblos' Opening Brief at 32–34, is its claim that "Section 9 did not concern relative priorities between the Pueblos and other water rights owners not asserting claims under the 1924 and 1933 Acts." Coal. Br. at 65. (No claims were asserted under the 1933 Act.) There is no support for that contention, and it is refuted by the express language of the section itself, the testimony of the State's expert, Prof. Hall, and by the ruling of this Court in *Aamodt I*.

As the Pueblos explained in their Opening Brief, Section 9 was added to the 1933 Act (by which Congress raised the compensation to the Pueblos for the loss of lands under the Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 636, to close to the appraised value of those lands) to avoid any implication that by providing nearly full compensation to the Pueblos, Congress was extinguishing their superior priority for the water rights appurtenant to their retained lands. The language of that section, which is set out in full in the Pueblos' Opening Brief at 33, assures that the Pueblos retain such a prior water right for all lands remaining in their ownership. There is no possible way to interpret that section to mean that that priority exists only relative to claimants under the 1924 Act, nor would such an

interpretation be consistent with the purpose of the section, or, indeed, make any sense. Moreover, Prof. Hall rejected that interpretation in his testimony, under questioning by an attorney for the Coalition. He said, "the pueblo rights would be prior and paramount to any non-Indian right, not just those rights that were confirmed inside the pueblo grant at that time." App. 707 (Tr. 413). The attorney tried to get Prof. Hall to back down from that position, but he clung to it, saying, "if it's read in the broadest sense, that superior priority applies to all non-Indians whether their titles arise from a decision of the Pueblo Lands Board or not." *Id*. (Tr. 414).

That was exactly the position that this Court took in *Aamodt I*, in which it devoted substantial attention to Section 9. It ruled that "[a] recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violates the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to [*sic*] a prior right to the use of water." 537 F. 2d at 1113.[29] This clear

[29] In the next paragraph of that opinion, the Court responded to an argument made by the State that the successful claimants under the 1924 Act should have the same priority as the Pueblos (essentially arguing that the Pueblo priority should only operate against landowners outside the grants—the opposite of what the Coalition argues here). The Court rejected that argument, saying, "[t]he water rights of the Pueblos are prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts." 537 F.2d at 1113. But that passage, which the Coalition now claims means that the Pueblo priority *only* applies to such non-Indians, in no way narrows the Court's earlier statement as to the meaning of the section, quoted in the text.

statement of the impact of Section 9, which can only be read as recognizing the Pueblos' aboriginal water rights, should have precluded the district court's determination that those rights had been extinguished 350 years earlier. Yet neither Magistrate Judge Lynch nor the district court made any reference to this important Act of Congress.[30]

III. CONCLUSION

For all of the foregoing reasons, and those set forth in the Pueblos' Opening Brief, the district court's decision should be reversed, and this Court should find that the Pueblos' aboriginal water rights were not extinguished by Spanish law.

Respectfully submitted, this 12th day of September, 2019,

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[30] This issue is properly considered by this Court in this appeal because it was presented to the district court in the briefing and its omission was itself an error warranting reversal. Congress's recognition of the persistence of Pueblo aboriginal water rights in Section 9 directly bears on, and contradicts, the district court's ruling regarding extinguishment, and thus the court erred in failing to address Section 9 in the decision.

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I hereby certify that a copy of the foregoing Reply Brief of Intervenors-Plaintiffs-Appellants Pueblos of Jemez, Pueblo of Santa Ana, and Pueblo of Zia, 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 Managed Antivirus version 5.3.28.761, updated 9/12/19, and, according to the

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s/ Richard W. Hughes

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I hereby certify that a copy of the foregoing Opening Brief of Intervenors-Plaintiffs-Appellants Pueblos of Jemez, Pueblo of Santa Ana, and Pueblo of Zia was filed using the Court's CM/ECF system, which will send notification of such filing to counsel for all case participants that have entered an appearance in this Appeal on this the 12th day of September, 2019.

s/ Richard W. Hughes