No. 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,

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

PUEBLO OF SANTA ANA, et al.,
Intervenor-Plaintiffs/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 Vázquez)

OPENING BRIEF FOR THE UNITED STATES

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

The petitions for permission to appeal under 28 U.S.C. § 1292(b) that gave rise to these interlocutory appeals were docketed in this Court as Nos. 18-707 and 18-708 on September 21, 2018. Otherwise, there are no prior or related appeals.

INTRODUCTION

The United States claims water rights in the Jemez River System in northern New Mexico on behalf of the Pueblos of Jemez, Santa Ana, and Zia (collectively, the "Pueblos"), which have been situated along the Jemez River since time immemorial. The United States claims these water rights based in part on the doctrine of "Indian aboriginal rights." The district court concluded that the Pueblos' aboriginal rights to use water from the Jemez River were extinguished by the mere extension over the area of Spanish colonial law—which allowed the Spanish crown to resolve disputes among the users of a common water source—even though the Spanish crown took no affirmative action to limit the Pueblos' water use. That was error as a matter of law: as this Court recently explained in *Pueblo of Jemez v. United States*, 790 F.3d 1143 (10th Cir. 2015) (*Jemez*), aboriginal rights may only be extinguished by a plain and unambiguous act of the sovereign, which is indisputably absent here. The district court's conclusion to the contrary should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331.

On September 30, 2017, the district court issued a Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2. On January 9, 2018, the Pueblos and the

United States filed motions to certify the Decision for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted the motions on September 11, 2018.

On September 21, 2018, the Pueblos and the United States timely filed petitions for permission to appeal under 28 U.S.C. § 1292(b), and the Court granted the petitions on October 31, 2018.

STATEMENT OF THE ISSUE

Whether the aboriginal water rights of the Pueblos of Jemez, Santa Ana, and Zia were extinguished by the extension of Spanish colonial law over the area even though the Spanish crown took no affirmative action to reduce or alter the water use of the Pueblos.

STATEMENT OF THE CASE

A. Legal background

This Court recently analyzed the history of aboriginal title (also referred to as "Indian title") in *Jemez*, 790 F.3d at 1152-61, which addressed the Pueblo of Jemez's claimed aboriginal title to land in the Valle Caldera National Preserve north of the Pueblo. This Court began with Congress's 1787 declaration of our national policy toward Indians: the "utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be

invaded or disturbed, unless in just and lawful wars authorized by Congress." *Id*. at 1153 (quoting Northwest Ordinance of July 13, 1787).

The Supreme Court first addressed aboriginal title in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in deciding whether federal courts may recognize grants of land made by Indian nations without the consent of the "discovering" sovereign. In holding that the grantees in that case did not hold valid title against the United States, the Court explained that a discovering sovereign acquired title "against all other European governments," but that "the original inhabitants" remained "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." *Id.* at 573-74. The United States succeeded to the title of the discovering sovereigns "subject . . . to the Indian right of occupancy." *Id*. at 584-85.

The Supreme Court confirmed these fundamental principles of aboriginal title in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), in holding that Georgia could not exercise jurisdiction over land possessed by the Cherokee Nation. The sovereign right of discovery "shut out the right of competition among [the sovereigns] who had agreed to it," but it could not "annul the previous rights of those who had not agreed to it." *Id.* at 544. The Supreme Court elaborated on the doctrine of aboriginal title in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835), in holding that a grant of land in Florida by Creek and Seminole Indians that had

been confirmed by Spain lawfully conveyed title. The Supreme Court described the broad scope of Indian title:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and from their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

Id. at 746. The court emphasized that Indian title, which is "as sacred as the fee simple of the whites," *id*., continues to exist unless the sovereign extinguishes it:

> [B]y the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed.

Id. at 734.

In *Jemez*, this Court pointed out that the Supreme Court has held that aboriginal title continued to exist even "as against grants made by the United States in the absence of explicit extinguishment of Indian title." 790 F.3d at 1157 (discussing *Buttz v. Northern Pacific Railroad Co.*, 119 U.S. 55, 66-73 (1886), and *Cramer v. United States*, 261 U.S. 219, 229 (1923)). This Court particularly emphasized the Supreme Court's analysis in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 346-47 (1941), holding that the aboriginal rights of the Walapais outside their Arizona reservation were not extinguished until 1883 when that reservation was created for them at their request. *See Jemez*, 790 F.3d at

1159-61. The Supreme Court had reaffirmed "the policy to respect Indian right of occupancy," stating: "*Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy*." *Id*. at 1160 (emphasis by this Court) (quoting *Santa Fe Pacific*, 314 U.S. at 346-47). While "aboriginal title may be extinguished 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise,' " the Supreme Court did not find any "clear or plain indication that Congress intended by [several earlier] acts to extinguish aboriginal title." *Id*. (quoting *Santa Fe Pacific*, 314 U.S. at 347).

B. Factual background

The Pueblos of Jemez, Santa Ana, and Zia have been situated along the Jemez River in northern New Mexico since time immemorial. Like other Pueblo Indians, they have resided in settled communities, practiced agriculture, and they have used the surrounding land for hunting, gathering, grazing livestock, and collecting other resources. *See, e.g., Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 504 (1964).

The Spanish empire included a vast area in South America, Central America, and North America during the sixteenth through nineteenth centuries. Spain ruled, at one time or another, the majority of the territory that became the lower 48 states. Spanish occupation began in the Jemez River Basin in 1598 with the arrival of Juan de Onate and his followers. App. 370 [Cutter Report at 26]. Spain

recognized that Indians were the true owners of their property. App. 361 [*id*. at 17]; *Jemez*, 790 F.3d at 1152-53. The Spanish crown typically described the extent of a Pueblo's landholding as "a square formed by measuring one league in each cardinal direction from a central point" (called the "Pueblo league"), which was considered the "minimum guarantee for Pueblo territorial integrity" rather than a limitation on their landholdings. App. 375-378 [Cutter Report at 31-34]. The Pueblos' occupancy and use of the Jemez River Basin and its resources extended to a large area beyond the boundaries of their Pueblo leagues throughout the periods of Spanish and Mexican rule. *Pueblos of Zia, Jemez & Santa Ana v. United States*, 19 Ind. Cl. Comm. 56 (1968).

Spain ruled the Jemez River Basin until 1821, when Mexico achieved independence. App. 315 [2004 Decision at 8]. The new Mexican government, like Spain, recognized the Pueblos' land titles. App. 408 [Cutter Report at 64]; s*ee also New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976). In 1848, Mexico ceded the area to the United States in the Treaty of Guadalupe Hidalgo, in which the United States agreed to protect rights recognized by the Spanish and Mexican governments. *Id*.

Following an investigation by the Surveyor General of New Mexico Territory, Congress confirmed the claims of the three Pueblos to their landholdings. Ch. 6, 11 Stat. 374 (1859) (Jemez and Zia); ch. 26, 15 Stat. 438

(1869) (Santa Ana); *see also* Pueblo Lands Act, ch. 331, 43 Stat. 636 (1924). The government thereafter issued patents to Jemez (17,510 acres), Zia (17,515 acres), and Santa Ana (17,361 acres) (the "grant lands"). *See Pueblos of Zia, Jemez & Santa Ana v. United States*, 11 Ind. Cl. Comm. 130, 136-37 (1962). Unlike most Indian land that is held by the United States in trust for the benefit of tribes, the Pueblos hold fee-simple title to the grant lands. *United States v. Sandoval*, 231 U.S. 28, 39 (1913). The United States also holds in trust for the three Pueblos a total of more than 150,000 acres in the vicinity of the grant lands (the "trust lands"), which were reserved for the Pueblos from 1906 to 1986 in a series of executive orders and statutes. *See* App. 321-322 [2004 Decision at 14-15].

There was significant confusion about the status of Pueblo Indians following the incorporation of their territory into the United States. It was originally believed that "the Pueblos were outside the protection of federal laws" because they held complete title to their lands, lived in settled communities, and had their own governments. *Aamodt*, 537 F.2d at 1105. In the New Mexico Enabling Act, however, Congress provided that Indian country includes "all lands now owned or occupied by the Pueblo Indians of New Mexico." Ch. 310, § 2, 36 Stat. 557, 558 (1910). The Supreme Court upheld this provision's constitutionality, confirming that "the Pueblos of New Mexico" were entitled to the federal government's "aid

and protection, like other Indian tribes." *Sandoval*, 231 U.S. at 47; *accord United States v. Candelaria*, 271 U.S. 432 (1926).

In proceedings before the Indian Claims Commission and the Court of Claims seeking compensation for the taking of their aboriginal lands, the Pueblos established that they had held aboriginal title to 298,634 acres surrounding their grant lands. *Pueblo de Zia*, 165 Ct. Cl. at 507-09. The Commission held that the Pueblos retained their aboriginal title to three parcels of trust lands (two reserved for Jemez and one reserved for Zia), but also held that their aboriginal title to most of the land was extinguished by the federal government's creation of the Jemez Forest Reserve in 1905, the creation in 1936 of Grazing District No. 2 under the Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934), and the filing of 114 homestead entries authorized by federal laws starting in 1887. *Pueblos of Zia, Jemez & Santa Ana*, 19 Ind. Cl. Comm. at 59-66.

C. Proceedings below

The United States initiated this water-rights adjudication for the Jemez River System in 1983. The United States claims water rights on behalf of the Pueblos of Jemez, Santa Ana, and Zia for their past, current, and future uses on both their grant lands and their trust lands. The United States relies on the doctrine of aboriginal rights for water rights for the Pueblos' grant lands and for the three parcels of trust lands described above. As relevant to this appeal, the United States

claims that the aboriginal rights doctrine entitles the Pueblos to a quantity of water sufficient to satisfy their current and future "homeland" needs, with a priority date of "time immemorial" for all of the uses. The water rights claimed for the other trust lands do not depend on the question whether Spanish law extinguished the Pueblos' aboriginal water rights.

2004 Decision. New Mexico and the defendants filed motions for partial summary judgment in 1988, asking the district court to hold that the Pueblos' water rights are limited to their actual, historical uses. Among other arguments, they asserted that a right to use water may not be based on aboriginal title, and that Supreme Court decisions protecting Indians' use of resources within their aboriginal territory—specifically *United States v. Winans*, 198 U.S. 371 (1905), and *Winters v. United States*, 207 U.S. 564 (1908)—do not apply to the Pueblos' grant lands. The district court granted these motions in part and denied them in part. It concluded that "aboriginal title includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title." App. 327 [2004 Decision at 20] (citing *Winans*, 198 U.S. at 381; *United States v. Adair*, 723 F.2d 1394, 1413-14 (9th Cir. 1983); and *Joint Board of Control v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987)). It held that the "policy of respecting aboriginal rights applies to the lands ceded by Mexico in the Treaty of Guadalupe Hidalgo,"

and that aboriginal title "can form the basis for ownership of a water right." App. 327-328 [2004 Decision at 20-21].

The district court described the rights protected in *Winans* as "governmentally recognized aboriginal rights." App. 333 [2004 Decision at 26]. In its view, "*Winans* dealt with fishing rights, but the doctrine applies also to water rights." App. 334 [*id*. at 27]. The court explained that the doctrine's applicability to the Pueblos' grant lands depends on "whether there has been governmental recognition of the Pueblos' aboriginal rights," which it could not resolve at that time. App. 334-335 [*id*. at 27-28].

Regarding water rights under *Winters*, the district court held that the "*Winters* doctrine" does not apply to the Pueblos' grant lands, relying principally on this Court's decision in *Aamodt* (which addressed the rights of Nambe, Pojoaque, San Ildefonso, and Tesuque Pueblos to water in the Nambe-Pojoaque River System). App. 328-335 [2004 Decision at 21-26]. In *Aamodt*, this Court traced the doctrine of reserved rights to water—i.e., that the federal government's reservation of land for particular purposes impliedly reserves sufficient water to carry out the reservation's purposes—as set forth in *Winters*, 207 U.S. at 576-77; *Arizona v. California*, 373 U.S. 546, 600 (1963); and *Cappaert v. United States*, 426 U.S. 128, 138-40 (1976). This Court held that the *Winters* doctrine was not "technically applicable" to the Pueblos' grant lands, but it explained that "the

Pueblos are to be treated like other Indian communities," and that the "United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law." 537 F.2d at 1111. The district court emphasized that its holding "does not mean that Pueblos do not have aboriginal use rights on the grant lands," but noted that the issue of extinguishment had not been raised and would not be addressed at that time. App. 332-333 [2004 Decision at 25-26].

Evidence and Briefing on Extinguishment. The litigation was then suspended for settlement negotiations. When the litigation resumed in 2012, the parties and the magistrate judge agreed that five threshold legal issues should be briefed and decided, including the following:

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

App. 304 [2012 Order at 2].

The parties exchanged expert reports on Spanish and Mexican law drafted by Charles R. Cutter, Ph.D., for the United States (App. 344-418) and by G. Emlen Hall, Esq., for New Mexico (App. 419-499). Dr. Cutter's report first broadly examined "the nature of Indian property rights during the Spanish period, especially rights to communal lands and other resources." App. 345 [Cutter Report at 1]. Based on his analysis of numerous primary and secondary sources, he

concluded that "Spanish colonial law recognized the native inhabitants of the New World—the 'Indians'—as the true, rightful owners of their property, and it allowed for a significant degree of self-governance based on indigenous customs, usages, and practices." App. 380-381 [*id*. at 36-37].

Dr. Cutter then focused specifically on Indian water rights in the Spanish empire. App. 381-396 [*id*. at 37-51]. He began by acknowledging the widely held political theory that the sovereign had supreme power (called "regalía" in Spanish) "over the administration, licensing, and adjudication of certain spheres of activity and kinds of resources." App. 382 [*id*. at 38]. The natural resources potentially subject to regalía included "lands, fields, woodlands, pasturage, rivers and public waters" (quoting 17th-century jurist Juan de Solorzano y Pereyra), but Cutter explained that regalía did not extend to privately held property, "including property owned by Indians." *Id*. "While the crown insisted in principle on the right of regalía to intervene judicially to allocate water," including through a proceeding called a "repartimiento de aguas," it did not ordinarily do so without a conflict. App. 383 [*id*. at 39]; *see also* App. 617 [Tr. 52] (in response to a complaint, "a judicial investigation" could take place "with the outcome being a formal allocation of water"). A repartimiento had never been conducted for the Jemez River. App. 395 [Cutter Report at 51]. Dr. Cutter concluded that through "numerous cedulas, instrucciones, ordenanzas, and other measures, the crown

recognized and protected Indian water rights, in much the same way that the crown recognized Indian land rights." App. 384 [*id*. at 40].

Professor Hall's report took issue with some of Dr. Cutter's interpretations of Spanish law, emphasized that the right to use "public waters" like rivers was treated differently from title to land, and discussed the resolution of some disputes regarding water during the Spanish and Mexican periods that he interpreted to restrict Indian water use (but none on the Jemez River). App. 419-499.

The experts testified at an evidentiary hearing before Magistrate Judge William Lynch on March 31-April 2, 2014. App. 604-725.

Following the hearing, the parties briefed Issue No. 1 and Issue No. 2 (Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?). The United States and Pueblos relied heavily on the Supreme Court's admonition in *Santa Fe Pacific*, 314 U.S. at 346, that it takes "plain and unambiguous action to deprive a tribe of aboriginal rights," and they argued that there could be no extinguishment of aboriginal water rights by Spain or Mexico in the absence of a repartimiento proceeding that actually limited the Pueblos' use of the water. The State and a group of defendants (the "Coalition") argued that the extension of Spanish law over New Mexico was sufficient to extinguish the Pueblos' aboriginal water rights even though it did not extinguish their aboriginal title to land.

Magistrate Recommendation. On October 4, 2016, Magistrate Judge Lynch issued his Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 (Recommendation). App. 288-302. He concluded that the Pueblos possessed aboriginal water rights before Spanish occupation based on the undisputed facts that each Pueblo "continuously used and occupied the lands within their pueblo leagues," and had "actually and exclusively used water continuously" for a long time before the Spanish arrived in 1598. App. 288, 298 [Recommendation at 1, 11]. He then concluded, however, that "the Spanish crown exercised complete dominion and control over New Mexico in a manner adverse to the Pueblos and thus extinguished the Pueblos' aboriginal water rights." App. 288 [*id*. at 1]. This conclusion was assertedly based on the experts' reports and testimony. App. 292-295 [*id*. at 5-8].

Magistrate Judge Lynch described four general principles of Spanish law: (1) a conquering sovereign possesses supreme authority (regalía), App. 293 [*id*. at 6]; (2) "regalía included the power to determine rights to public shared water," such as rivers, which were "a common resource for use by everybody," App. 294 [*id*. at 7]; (3) when there was a conflict among water users, the crown could allocate water through an adjudication (repartimiento), App. 295 [*id*. at 8]; and (4) as a "general principle," one could not use public water "to the detriment of other users," App. 294 [*id*. at 7]. He accepted the fact that no conflict over water in

the Jemez River Basin ever necessitated a repartimiento, App. 295 [*id*. at 8], but he rejected the United States and Pueblos' position that there could be no extinguishment in the absence of a repartimiento. In his view, the Spanish "legal system to administer the use of public waters" "ended the Pueblos' exclusive use of the public waters and subjected the Pueblos' later use of public waters to potential repartimientos"; the Spanish legal system in and of itself constituted a "plain and unambiguous" "exercise of complete dominion adverse to the Pueblos' aboriginal right to use water." App. 300 [*id*. at 13]. The United States and Pueblos filed detailed objections. Docs. 4384, 4385, 4386, 4391, 4392.

District Court Decision. In its September 30, 2017 Decision (Decision), the district court overruled all objections and adopted Magistrate Judge Lynch's Recommendation in its entirety. App. 281-287. The court summarized the analysis it believed to be relevant to the extinguishment conclusion in a single paragraph, reiterating with minor elaboration the general principles described in the Recommendation. App. 286 [Decision at 6]. Because the district court concluded that Spanish law extinguished the Pueblos' aboriginal water rights, it did not reach the other issues briefed as part of Issue No. 1 or address what specific water rights the Pueblos would have absent that extinguishment.

SUMMARY OF ARGUMENT

The right to use water is a critical component of aboriginal title. The district court correctly concluded that the Pueblos had aboriginal water rights, but its conclusion that those rights were extinguished by the mere assertion of Spanish sovereignty over the Jemez River Basin does not meet the Supreme Court's exacting standard and should be reversed.

The Supreme Court has repeatedly held that aboriginal title to land survived Spanish and Mexican rule absent express extinguishment. For the district court to conclude that the Pueblos' aboriginal rights to the flow of the Jemez River through their lands did not survive Spanish rule, it needed to identify action by a Spanish official clearly targeting and limiting the Pueblos' use of water. It did not do so, and there is no record evidence of any such action. The simplistic assertion that water rights were considered separate from title to land does not suffice.

The experts agreed on the legal principle that the Spanish crown had authority, under its powers of regalía, to determine rights to use water from common sources like the Jemez River. But that authority is not by itself a sufficient basis for extinguishment of aboriginal rights. As the Supreme Court explained in *Johnson v. M'Intosh*, all conquering sovereigns held paramount power, but all sovereigns nonetheless recognized the Indian right of occupation. The district court's conclusion that the unexercised power over the use of water

nonetheless extinguished the Pueblos' aboriginal water rights ignores this foundational precedent.

Although Spanish colonial law included the general principle that a water user should not cause harm to other water users, the district court failed to credit the more specific provisions of Spanish colonial law that protected the Indians' right to use water sufficient for their needs. In addition, courts have not interpreted that general principle to limit the right of *non-Indian communities* established under Spanish law to use water sufficient for their needs, and there is no basis for reaching a different conclusion with respect to Indian communities.

Under *Santa Fe Pacific* and other precedent, the Pueblos' rights to use Jemez River water could have been extinguished only by specific action by the Spanish sovereign, such as a repartimiento proceeding, that plainly and unambiguously limited the Pueblos' use of Jemez River water. The district court's extinguishment conclusion was error, as both parties agreed that neither Spanish nor Mexican authorities had ever conducted a repartimiento proceeding for the Jemez River, or had otherwise prevented the Pueblos from using the river water as they desired. Nor does the mere fact that non-Indians also used water from the Jemez River after Spanish occupation provide a basis for concluding that the Pueblos no longer satisfied the exclusive-use requirement for aboriginal title.

The Decision of the district court should be reversed.

STANDARD OF REVIEW

The question whether Spanish colonial law extinguished the Pueblos' aboriginal rights is a question of law, which this Court reviews de novo. *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015).

ARGUMENT

As this Court explained in *Jemez*, 790 F.3d at 1152-61, the Supreme Court has articulated an exacting standard for determining whether a sovereign has extinguished aboriginal title. There must be proof of "plain and unambiguous action" by the sovereign to extinguish aboriginal title. *Santa Fe Pacific*, 314 U.S. at 346. Aboriginal title may be extinguished in various ways, but whatever the means, there must be a "clear and plain indication" of the sovereign's intent to extinguish. *Id.* at 353. Any "doubtful expressions" of the sovereign's intent are to be resolved in favor of the native Indians "who are wards of the nation and dependent wholly upon its protection and good faith." *Id*. at 354.

In *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Supreme Court reiterated the "strong policy of the United States from the beginning to respect the Indian right of occupancy," and it reaffirmed that extinguishment of Indian title "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefit of that policy." *Id*. at 248 (quoting *Santa Fe Pacific*, 314 U.S. at 346). Passing references to possible extinguishment

are insufficient to demonstrate "plain and unambiguous intent to extinguish Indian title." *Id*.

I. The district court correctly held that the Pueblos held aboriginal title to their grant and trust lands prior to Spanish occupation, including the right to use water.

Aboriginal title is established through actual, exclusive, and continuous use for a long time. *See, e.g.*, *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975). It "flows from settled government policy" and does not require affirmative sovereign recognition through a "statute or other formal government action." *Cramer*, 261 U.S. at 229. Aboriginal title to land entitles tribes to the full use and enjoyment of the land's *resources*. *See, e.g.*, *United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938) (tribe's aboriginal title includes all "constituent elements of the land itself"). Tribal aboriginal rights have repeatedly been recognized to extend beyond the land itself to include fishing rights and the use of water. *Winans* and *Winters* teach that, unless and until the sovereign extinguishes aboriginal rights, a tribe retains (as against all third parties) its right to the beneficial use of water.

In *Winans*, the Supreme Court upheld the right of members of the Yakima Nation to fish in the Columbia River outside the boundaries of their reservation established by treaty in 1859:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, *the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted*.

198 U.S. at 381 (emphasis added).

The Supreme Court then held in *Winters*, 207 U.S. at 576-77, that the Gros Ventre and Assiniboine Tribes retained their rights to the flow of waters within their aboriginal territory, confirming that a tribe's aboriginal rights include the use of water within its aboriginal territory. The Fort Belknap Reservation had been created by treaty in 1888 within the "very much larger tract which the Indians had the right to occupy and use." *Id*. at 576. Within that larger area, the "Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." *Id*. The Court concluded that the Indians did not give up the waters within their aboriginal territory when they ceded their rights to the land outside the reservation. *Id*. at 576-77. Those waters were impliedly reserved for their use on the Reservation.

The Ninth Circuit has likewise acknowledged that Indian aboriginal rights encompass the right to use water:

> Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian" title to all its vast holdings … [including] an aboriginal right to the water used by the Tribe as it flowed through its homeland.

Adair, 723 F.2d at 1413. The court emphasized that an 1864 treaty "confirmed the continued existence of these rights," but it did not "create[]" the rights. *Id*. at 1414. Because the aboriginal right to fish would be worth little without the continued flow of the waterway in which the fish lived, the court held that the Klamath tribe was entitled to flows in the Williamson River. *See also Joint Board of Control*, 832 F.2d at 1131 ("when the Tribe exercised aboriginal title and rights to fish on the land and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial").

The Pueblos' grant and trust lands are within their aboriginal homelands. The district court properly adopted Magistrate Judge Lynch's recommended conclusion that the Pueblos possessed aboriginal water rights in connection with their grant and trust lands prior to the arrival of the Spanish. App. 298, 301 [Recommendation at 11, 14]. That conclusion means that—if they retain those rights—their rights are *not* limited to their actual, historical uses of water under the New Mexico law of prior appropriation and beneficial use. *Cf. Aamodt*, 537 F.2d at 1106 (under the law of prior appropriation, a right to use water is acquired by "diversion and application to a beneficial use," and "[p]riority of appropriation

gives the better right"). This appeal seeks recognition of the Pueblos' aboriginal water rights—which the United States contends entitle the Pueblos to sufficient water to maintain their tribal communities in their homelands into the future—but it does not seek quantification of the specific amount of water to which the Pueblos would be entitled under those rights. *Winans*, *Winters*, *Aamodt*, and other cases recognizing aboriginal rights would guide the quantification in future proceedings in the district court.

II. The district court correctly recognized that the Pueblos' aboriginal title to their grant and trust lands survived Spanish and Mexican rule and the Treaty of Guadalupe Hidalgo, but it erred in concluding that aboriginal water rights did not survive.

It is well established that the doctrine of aboriginal title applies in the Mexican cession area, including to the Pueblos of New Mexico. *Jemez*, 790 F.3d at 1160-61 (citing *Santa Fe Pacific*, 314 U.S. at 346); *accord Cramer*, 261 U.S. at 227; *Pueblo de Zia*, 165 Ct. Cl. at 503; *Pueblo of San Ildefonso*, 513 F.2d at 1389. Consistent with the district court's 2004 Decision, App. 327 [2004 Decision at 20], Magistrate Judge Lynch acknowledged that the "doctrine of aboriginal title applies to the lands ceded to the United States by Mexico in the Treaty of Guadalupe Hidalgo," App. 290 [Recommendation at 3]. The district court did not reject that conclusion.[1]

[1] The district court noted Professor Hall's testimony that the phrase "aboriginal title" "does not appear anywhere in Spanish or Mexican law," App. 286 [Decision

But Magistrate Judge Lynch wrongly distinguished aboriginal title to *land* from aboriginal title to *the use of water*. Citing testimony by Dr. Cutter (Tr. 112-16, 119-22) and Professor Hall (Tr. 211), he asserted that the "right to use public waters was an interest separate from land ownership," App. 294 [Recommendation at 7], and concluded:

> According [to] the US/Pueblos' expert, Dr. Cutter, under Spanish and Mexican law, rights to land were separate from rights to water, and the Spanish and Mexican governments held the power to determine rights to public waters. Thus the Spanish government appears to have recognized aboriginal title to land, but did not recognize aboriginal title to the use of water.

App. 300 [Recommendation at 13]. The district court adopted this conclusion. App. 284-285 [Decision at 4-5]. This was error.

Magistrate Judge Lynch's qualified assertion that the Spanish government "appears" to have drawn a distinction between aboriginal title to land and aboriginal title to water plainly falls short of the requirement of a "clear or plain indication" of sovereign intent as required by *Santa Fe Pacific*, 314 U.S. at 347. In addition, he and the district court inappropriately seized on a general statement by

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at 6. n.5], but that is not significant as that specific phrase describing the Indian right of occupation was not commonly used in American law until the twentieth century. And in quoting (*id*.) the Indian Claims Commission's 1962 statement—"neither the Mexican nor Spanish governments at any time recognized that the Indians had 'aboriginal title' to these lands in the legal sense in which that term is used in our courts today"—the district court failed to note that the Court of Claims in *Pueblo de Zia*, 165 Ct. Cl. at 508-09, reversed the Commission's conclusion that the Pueblos of Zia, Jemez, and Santa Ana had not established any aboriginal rights.

Dr. Cutter and ignored his more detailed testimony that explained the relationship between interests in land and interests in water. Given the physical difference between flowing waters and stationary land surfaces (whether dry or submerged), such waters have always presented special considerations:

> As long ago as the Institutes of Justinian, running waters like the air and the sea, were *res communes*—things common to all and property of none. Such was the doctrine spread by civil-law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law.

United States v. Gerlach Live Stock Co., 339 U.S. 725, 744-45 (1950).

The "basic doctrines of American water law" were then drawn from these sources. *Id*. at 745. The right to use flowing water has been characterized as a "usufruct." *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954) ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right . . . ."); *see also* 2 *Blackstone's Commentaries* 18 (1771 reprint) ("water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein"); App. 530 [Deposition of Santiago Onate at 34] (same regarding Spanish colonial law). Although rights to water and land were different in that respect, the interests were not completely "separate" as relevant to the analysis here. If the mere assertion of sovereign authority over an area were sufficient to extinguish usufructuary rights, even though not sufficient to

extinguish rights to land, aboriginal water rights and other aboriginal usufructuary rights would not exist anywhere in the United States, given the commonly held distinction between these rights and title to land.

Professor Hall conceded that "the earliest Spanish law may have guaranteed to Pueblos their lands and waters without further definition," "as Cutter suggests." App. 440 [Hall Report at 22]. But while Professor Hall asserted that "by 1848 the view of water had become much more nuanced," *id*., the record evidence does not support his suggestion of a complete separation of interests in land and water in 1848 or at any time. To the contrary, Dr. Cutter testified that Spanish land grants to non-Indians typically included "an implied right to water, so they are not completely separate." App. 634 [Tr. 122]; *see also* App. 390 [Cutter Report at 46]. The State agreed. App. 501 [State's Exhibit 16] (water right implied in grant of land under Mexican law).

Dr. Cutter further explained that Indians' right to use water was similarly implied from their right to their land, even though Spanish officials did not typically make formal land grants to Indian communities. App. 641, 646 [Tr. 151-52, 172]. While Spanish and Mexican law included the concept of an explicit grant of water ("merced de agua"), the experts agreed that such grants were rare. App. 501 [State's Exhibit 16]; App. 452 [Hall Report at 34] (water grants were sometimes made for mills but there "were few or no mercedes de agua to

either non-Indians or Pueblos prior to 1846 in New Mexico"); App. 390 [Cutter Report at 46] ("explicit grants of water were rare"); App. 646 [Tr. 172 (Cutter)] (in order to use water, non-Indians—unlike Indians—needed "some kind of grant, either a land grant or, in rare, rare occasions, a water grant").

Magistrate Judge Lynch stated that where Dr. Cutter and Professor Hall disagreed, he assumed that Dr. Cutter was correct and "resolved all factual questions in favor of Dr. Cutter's opinion." App. 297-298 [Recommendation at 10-11]. But the evidence properly supports the conclusion that, while rights to land and water may have been treated differently in certain respects, they were not treated as completely separate interests in any respect relevant here. This Court characterized Pueblo water rights as "appurtenant" to land. *Aamodt*, 537 F.2d at 1110; s*ee also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981).

The common understanding that "the lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy," *Santa Fe Pacific*, 314 U.S. at 339, including as expressed by this Court in *Jemez*, should not be disregarded based on a simplistic distinction between interests in land and in water. This Court specifically stated in *Aamodt*, 537 F.2d at 1111, that the "United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law." The district court's conclusion

that the Pueblos' aboriginal rights to their lands survived, but that their rights to the flow of the Jemez River through their lands did not, lacks the predicate identification of sovereign action clearly targeting the water rights, and there is no legal or record support for that conclusion.

III. The district court erred in concluding that the Pueblos' aboriginal rights to use water were extinguished by operation of Spanish law.

In concluding that the Pueblos' aboriginal rights to use water were extinguished by Spain's exercise of "complete dominion over the determination of the right to use public waters," App. 294 [Decision at 7], the district court identified no affirmative exercise of Spain's power to restrict the Pueblos' use of water, but instead relied on the mere existence of that power under Spanish colonial law. As explained above (pp. 14-15), Magistrate Judge Lynch and the district court identified four general principles that applied throughout the Spanish empire. The first three principles described the relevant scope of the Spanish sovereign's authority, which can be summarized as the power of any conquering sovereign to resolve conflicts among users of a common source of water. The fourth general principle may be considered substantive in nature: one user could not use public water to the "detriment" of others. This principle similarly was not unique to Spanish law. The district court's reliance on these general principles to

strip the Pueblos of their rights failed to meet the exacting standard for concluding that the Pueblos' aboriginal rights were extinguished.[2]

A. The mere existence of sovereign authority to resolve conflicts among users of a common water source did not extinguish the Pueblos' aboriginal rights to use the water.

In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 573-74, the Supreme Court reviewed the law of all the sovereigns that had claimed territory within North America—Spain, France, Holland, and England—and explained that the law of "discovery" was "universal[ly] recogni[zed]." Under the law of discovery, the conquerors "asserted the ultimate dominion to be in themselves" with respect to all resources, subject to the Indian right of occupation. *Id*. at 574. The Spanish crown, as the conquering sovereign of the area that included the Jemez River Basin, unquestionably had the authority to resolve disputes among those who shared a common water source. Any dominant sovereign has the authority to control resources in its territory. But it unquestionably did not exercise that authority as to the use of water in the Jemez River Basin.

Dr. Cutter provided an eighteenth-century definition of regalía consistent with *Johnson v. M'Intosh*: the "prerogative, or exception that, by virtue of its

[2] The district court did not expressly address Mexican law, which was in place between Mexican independence and the Treaty of Guadalupe Hidalgo, but no evidence indicated any material change from Spanish law to Mexican law with respect to these principles.

supreme authority and power, *any sovereign exercises in his kingdom or states*." App. 382 [Cutter Report at 38] (emphasis added) (citing the first edition of the *Diccionario de Authoridades* (1726-1739)). That definition, on which Magistrate Judge Lynch relied, App. 293-294 [Recommendation at 6-7], expressly acknowledged that this power is not unique to the Spanish crown. The experts' discussion in this case about the Spanish crown's authority over common water sources merely confirmed what the Supreme Court had first explained in 1823—that the Spanish Crown as conqueror "asserted the ultimate dominion to be in" itself, just like all of the other conquering sovereigns. *Johnson*, 21 U.S. (8 Wheat.) at 574. The Supreme Court's recognition of aboriginal rights in *Johnson* assumed that the conquering sovereign held paramount power. The mere existence of that power thus cannot be the basis for a determination that any aboriginal rights were extinguished.

Dr. Cutter properly considered the sovereign's respect for Indian occupancy, along with its ultimate power to control resources, in his discussion of the historical Spanish texts. This Court undertook a similar analysis in *Jemez*: the "main concepts of aboriginal title can be traced back to 'Spanish origins, and particularly to doctrines developed by Francisco de Victoria, the real founder of modern international law.' " 790 F.3d at 1152 (quoting Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 44 (1947)); *cf.* App. 356 [Cutter Report at 12]

(Dr. Cutter's reliance on Victoria). Under that doctrine, "discovery of new lands gave 'title to lands not already possessed,' but because the 'Indians were true owners, both from the public and the private standpoint, the discovery of them by the Spanish had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property.' " *Id*. at 1152-53 (quoting Cohen, *supra*, at 45). The doctrine was supported by Pope Paul III in 1537, who affirmed that "Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property." *Id*. at 1153 (quoting Cohen, *supra*, at 45). In sum, "the doctrine of respect for Indian possession first proposed by Victoria 'became the guiding principle of Spain's Laws of the Indies.' " *Id*.

As the Supreme Court explained in *Santa Fe Pacific*, 314 U.S. at 346, the proposition that previous sovereigns, including Spain, recognized the aboriginal rights of native Indian occupants "should now be considered no longer open." *See also Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 493 (1967) (stating that it was the "consensus of the whole western world" that the sovereign right of discovery was always subject to the Indian right of use and occupancy, and citing Supreme Court cases so holding with respect to the original 13 states, Louisiana Purchase, Mexican Cession, Florida, Oregon, and Alaska). If the ultimate power to control a resource was enough to extinguish aboriginal rights to that resource, the

Supreme Court's detailed analysis in *Santa Fe Pacific* regarding whether the sovereign took specific actions to extinguish aboriginal rights, and this Court's similar analysis in *Jemez*, would have been unnecessary. The short decision by the district court here adopting the Recommendation did not address our objection to the Recommendation on this ground.

Spain's power to control resources was expansive. Even with respect to the surface of private land, as to which regalía was not typically invoked, the sovereign could invoke the power of "eminent domain" if "some major project were being planned and some kind of right-of-way had to be exercised." App. 617 [Tr. 50 (Cutter)]. Yet it has never been held that the mere existence of this power extinguished aboriginal rights to land within the area once under Spanish dominion. For example, "woodlands" (like rivers) were a shared resource that was subject to the Spanish crown's regalía. *See supra* p. 12; App. 286 [Decision at 6]. Under the district court's logic, Spain also extinguished aboriginal rights to woods. That conclusion, however, is inconsistent with the Supreme Court's conclusion in *Shoshone Tribe*, 304 U.S. at 117-18, that the scope of the Shoshone Tribe's Indian title included timber and minerals. The land at issue was within the Wind River Reservation in Wyoming, an area that was under Spanish rule for almost 40 years. From 1762 to 1800, Spain ruled the area that was incorporated into the United States through the 1803 Louisiana Purchase, an area extending from the

Mississippi River on the east to the continental divide on the west and stretching from the Gulf of Mexico in the southeast to the Canadian border on the north. *See* Paul W. Gates, *History of Public Land Law Development* 76 (1969) (Bureau of Land Management map); *United States v. Louisiana*, 363 U.S. 1, 72 (1960) ("By a secret Treaty executed at Fontainebleau on November 3, 1762, France ceded to Spain 'all the country known under the name of Louisiana, as well as New Orleans and the island in which the place stands.' By the secret Treaty of San Ildefonso, signed October 1, 1800, Spain retroceded the 'colony and province of Louisiana' to France.").

Shoshone Tribe is also important in this analysis because Spanish law provided for an even greater degree of sovereign power over mineral resources than over shared resources like rivers and timber. *See* App. 431-432 [Hall Report at 13-14]. Minerals were not just subject to Spain's potential adjudication of conflicts, but as the Supreme Court explained in *Chouteau v. Molony*, 57 U.S. 203, 229 (1853), mines "formed a part of what was termed the royal patrimony," "whether they were on public or private lands, and whether they were of the precious or baser ores." The terms under which the Spanish crown allowed its mines to be worked varied through time, but some portion of the profits had to be rendered to the crown. *Id*. at 230. Yet, as *Shoshone Tribe* demonstrates, it has never been understood that this maximal degree of sovereign power extinguished

aboriginal title to the unextracted minerals underlying the lands once subject to Spanish dominion.

Dr. Cutter's analysis is further supported by the Supreme Court's lengthy discussion in *Chouteau* of Spain's solicitude for the rights of Indians within its domain—in that case the Fox Indians residing in an area near Dubuque, Iowa that was later part of the Louisiana Purchase. The Court referred to a provision of the *Recopilacion de las Leges de las Indias*—a compilation of legislation pertaining to Spain's overseas empire first published in 1681, *see* App. 350-351 [Cutter Report at 6-7]—directing Spanish governors to swear in their official oath "that they would look to the welfare, augmentation, and preservation of the Indians." 57 U.S. at 237. The Court also cited another Spanish text stating that "Indians are considered as persons under legal disability, and their protectors stand in the light of guardians," and it noted that "[m]any other citations of a like kind might be given from the king's ordinances for the protection of the Indians." *Id*. at 238.

Moreover, although French law was not directly at issue, the Court observed that the Indians "were protected very much by similar laws when Louisiana was a French province." *Id*. Despite all of Spain's sovereign authority, the Supreme Court held that the land at issue "had been in the occupancy of the Indians during the whole time of the dominion of Spain in Louisiana," and "was not yielded by them until it was bought from them by treaties with the United States." *Id*. at 237.

"It is a fact in the case, that the Indian title to the country had not been extinguished by Spain . . . ." *Id*. This Court should reach the same conclusion with respect to the Pueblos' aboriginal water rights.

Professor Hall sought to draw a distinction between Pueblos and other Indian tribes:

> [T]he conquest of the Southwest by Spain and the imposition of Spanish rule over the Pueblos and their resources extinguished the unfettered command that the Pueblos may have had over all the resources to which they had access prior to 1540.[19] From 1540 on, Pueblo sovereignty extended only as far as the law of the succeeding sovereigns allowed it to. It was first the Spanish and then the Mexican law of natural resource ownership that determined Pueblo ownership of resources, not the Pueblo command of those resources.
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> [19] Compare *Winters v. United States* 207 U.S. 564 (1908) where the Supreme Court suggested that prior to the treaty establishing the Fort Peck reservation, the "Indians had command of the lands and the waters—command of all of their beneficial use . . . ." This "command" was precisely what was lost with the imposition of Spanish sovereignty, especially when it came to common water sources.

App. 429, 488 [Hall Report at 11, 70]. Professor Hall was just plain wrong. The mere existence of Spanish law is not a sufficient basis for the extinguishment of aboriginal rights. And he failed to appreciate that the aboriginal territory and reservation of the tribes at issue in *Winters* is in the part of Montana that was

included in the Louisiana Purchase, *an area that was under Spanish sovereignty for almost 40 years*.[3]

In seeking to distinguish the Pueblo tribes in New Mexico from other tribes, the State and Coalition have ignored the vast expanse of Spanish rule. In specifically focusing on Spanish authority to resolve disputes over shared sources of water, they have also failed to acknowledge that other discovering sovereigns had the same authority. For example, while scholars may debate the specific principles of English common law governing use of shared waters, there is no dispute that the English crown allocated such water through an adjudicatory process when conflicts arose, just like the Spanish crown. *See, e.g.*, 1 Amy K. Kelley, *Waters and Water Rights* §§ 7.01, 7.03 (3d ed. 2019). Carried to its logical conclusion, the district court's conclusion that the unexercised sovereign power to adjudicate water disputes in and of itself extinguished aboriginal rights completely negates the established doctrine of aboriginal rights and must be rejected.

B. The general principle of "no injury to other water users" did not necessarily preclude the Pueblos' right to increase their use of water as needed.

The district court's analysis of the unapplied no-injury principle of Spanish colonial law similarly failed to meet the exacting standard for concluding that the

[3] The reservation at issue in *Winters* was actually the Fort Belknap Reservation, not the Fort Peck Reservation, both of which were once under Spanish rule.

Pueblos' aboriginal water rights were extinguished. Magistrate Judge Lynch described the no-injury principle of Spanish colonial law as follows:

> The general principle was one could not use public waters to the detriment of other users. (Cutter Tr. at 114-15; Hall Tr. at 269.) A user could increase his use of water so long as that increased use was not to the detriment of other users. (Cutter Tr. at 130; Hall Tr. at 215.) If one user's increased use caused detriment to another user, the crown could intervene in the conflict and make an allocation. (Cutter Tr. at 124, 130.)

App. 294-295 [Recommendation at 7-8]. Dr. Cutter readily acknowledged the general no-injury principle. But his report and testimony explained in detail that Spain nevertheless respected the right of Indian communities to use the water "they may need" and that, in the event of a repartimiento, the Spanish adjudicator would not necessarily restrict the Pueblos (or other Indian communities) to the amount of water they historically used even if that meant non-Indian water users received less than what they wanted, or even no water. App. 384-385, 614-615 [Cutter Report at 40-51; Tr. 38-45].

Despite the United States' objections pointing out that Magistrate Judge Lynch failed to address this critical evidence, the district court similarly failed to grapple with Dr. Cutter's testimony as a whole, summarizing his testimony on the no-injury principle in one sentence: "Dr. Cutter stated that in Spanish civil and water law there was a general principle of no harm to other users and that under Spanish law the Pueblos did not have a right to expand their use of water if it were

to the detriment of others." App. 286 [Decision at 6] (citing Tr. 111-15, 138-39). Based on this characterization, the district court concluded: "Although Spain allowed the Pueblos to continue their use of water, and did not take any affirmative act to decrease the amount of water the Pueblos were using, the circumstances cited by the expert for the United States and Pueblos plainly and unambiguously indicate Spain's intent to extinguish the Pueblos' right to increase their use of public waters without restriction." App. 287 [*id*. at 7]. As with its analysis of regalía, the court erred in reaching this conclusion.

The district court failed to appreciate that the general principle that one user of a common source of water could not take water to the injury of another user did not in and of itself determine priorities or allocate specific quantities of water. The principle would have been applied in the Jemez River Basin if a user had complained to a Spanish (or Mexican) official about another user. But there is no record of that ever happening. And as with the principle of regalía, there is no evidence that the mere existence of the no-injury principle had any practical effect on the Pueblos' water use during the Spanish colonial period or Mexican period. Importantly, too, in the absence of an actual adjudication having been conducted, there is no way to know whether the no-injury principle would have resulted in an allocation to the Pueblos of the amounts that they were using when a new user settled in the Jemez River Basin, the amounts that they were using at the time of an

adjudication, the amounts they anticipated using in the future, or some other amounts. The no-injury principle would not necessarily have precluded an allocation that allowed for the growth of Indian communities.

Magistrate Judge Lynch quoted the Supreme Court's admonition that congressional intent to extinguish "must be expressed on the face of [a federal statute] or be clear from the surrounding circumstances and legislative history." App. 299 [Recommendation at 12] (quoting *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985)). He also noted that the Second Circuit applied " 'a similar standard to Indian treaties negotiated by . . . a prior sovereign.' " App. 292 [Recommendation at 5] (quoting *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 n.17 (2d Cir. 2004)). But neither he nor the district court actually undertook such an analysis. The court generally referenced "the circumstances cited by" Dr. Cutter, App. 287 [Decision at 7], but the "circumstances" to which the Supreme Court was referring in *Mountain States* are those considered when interpreting a statute that turns out to be ambiguous, such as legislative purpose and historical context. Consideration of "circumstances" is not a substitute for textual analysis. The district court noted a brief statement by Dr. Cutter on two *Recopilacion* provisions, App. 286 [Decision at 6], but it failed to analyze the text of the provisions on which Dr. Cutter principally relied, or even to cite them. The district court's failure to address the

relevant provisions of Spanish law could be taken as an acknowledgment that there was no clear intent by the Spanish crown to extinguish the right of Indian communities to use water as they needed.

Dr. Cutter highlighted three provisions of the *Recopilacion* to support the conclusion that the Spanish crown intended Indians to have the water they needed "at the present and in the future for the ongoing sustenance of their villages." App. 387 [Cutter Report at 43]; *see also* App. 386-388, 611 [*id*. at 42-44; Tr. 26-28]. Book 3, Title 2, Law 63 (which may be cited as *Recopilacion* 3.2.63) ordered that the appropriate officials name judges "that they may distribute water to the Indians, so that they may irrigate their farms, gardens, and croplands, and water their livestock, and that the distributions be such that no harm be done [to the Indians] and that they be allocated the [water] that they may need." App. 387 [Cutter Report at 43]. *Recopilacion* 4.12.14, which dealt with the future expansion of village lands, provided that Spanish officials should "distribut[e] amply to the Indians what they may need to farm, sow their fields and raise livestock, confirming them in what they now hold, *and giving them again what is necessary*." App. 386 [Cutter Report at 42] (emphasis added). Most importantly, *Recopilacion* 4.12.18 ordered "that the sale, benefaction, and adjustments (venta, beneficio, y composición) of land be done with such care that there be left to the Indians, *with excess*, all that may belong to them, whether as individuals or as communities, as

well as their water and irrigation; and the lands where they may have built acequias or any other improvement, which by their personal industry they have made fruitful, shall be reserved first for them." *Id*.

Dr. Cutter also pointed to a fourth provision, which addressed the Spanish crown's creation of new Indian villages through "congregacion." *Recopilacion* 6.3.8 provided that these villages "must have ample water, lands and woodlands" and an area for "livestock, without it being mixed in with that of the Spaniards." App. 385, 614 [Cutter Report at 41; Tr. 39-40].

Dr. Cutter acknowledged that the Spanish Crown, as the dominant sovereign, had the power to determine the right to use water from a common source as an exercise of its powers of regalía. App. 382 [Cutter Report at 38]. But he explained that the laws protecting the Indians' use of water for present and future needs was one way of exercising regalía:

> One can detect in all of the above cited laws the crown exercising its regalía with respect to water, ensuring that its Indian subjects had an ample supply. Seen in a wider sense, this legislation embodies the crown's strategy to safeguard Indian interests by seeing to it that the resources belonging to native villages be defended. Tellingly, these laws do not designate with any precision the allotment of water that Indians were to have, only that they were to have what "they may need" at the present and in the future for the ongoing sustenance of their villages. Therefore, this legislation must be seen not as giving a specific *grant* of water to Indians, but rather as a confirmation of Indian *rights* to water.

App. 357 [*id*. at 43].

This interpretation of Spanish law was not undercut by Professor Hall, who relied on two different provisions for his conclusion that Spanish law extinguished the Pueblos' aboriginal water rights—*Recopilacion* 4.17.5 and 4.17.7. App. 437, 490 [Hall Report at 19 and n.50]. His report quoted these provisions in their original Spanish, but he referred to translations provided by another expert on Spanish law (Santiago Onate) in his 1988 deposition. According to Onate, 4.17.5 provided that "the use of grazing land, woods, and waters in the provinces of the Indies ought to be common to all neighbors, the ones that now exist and those that will later come so that they can enjoy them freely." App. 551 [Onate Tr. 122]. And 4.17.7 provided that "the woods, the trees, the grass, grazing lands, and the waters that are included within the limits of grants made by the kingdom of Spain in the Indies ought to be considered as common for Spaniards and Indians, and that is what we dispose to viceroys and to the authorities in order that they enforce this rule." App. 550 [*id*. at 121].

But Onate does not support Professor Hall's conclusion. He went on to explain that *Recopilacion* 4.12.18 (discussed above at 39-40) more specifically applied to existing Indian communities, as it "specifies that they can use water, and they can own the lands without specific title of the Crown, just merely because they have possessed those lands since immemorial times, since they have aboriginal possession of those lands." App. 553-554 [Onate Tr. 123-24]. This

view is supported by the Supreme Court's analysis in *United States v. Mayor of Philadelphia*, 52 U.S. (11 How.) 609 (1850), a decision addressing a Spanish grant to the Baron de Bastrop in Louisiana. The Court noted that the only limitation on such *colonization* grants in the *Recopilacion* Book 4, Title 12 was "that of not causing injury to third parties," presumably those persons who were already located in that area. *Id.* at 660. The district court's decision failed to apply this principle, but instead turned it on its head by deploying it *against* the persons who were to be protected by it.

Nor has the general principle of no-injury been understood by state courts to preclude an expanding community water right. The Supreme Courts of California and New Mexico have interpreted Spanish and Mexican law to provide an expanding water right for non-Indian communities (similarly called "pueblos") that were established by Spanish and Mexican land grants. The New Mexico Supreme Court analyzed "the doctrine of Pueblo Rights" at length in *Cartwright v. Public Service Company*, 343 P.2d 654, 665-69 (1958), and held that the City of Las Vegas, New Mexico, which had been established by an 1835 Mexican colonization grant, held a "pueblo water right" guaranteeing it the right to use as much of the water of streams and other water sources as the City needed for its present and future needs. Such communities were given a preference over individuals, and particularly when the pueblo right was prior, the pueblo had a preference "as may

be necessary for its inhabitants and for general municipal purposes.'" *Id*. at 666. The right "expand[s]" as the community expands, "even to the use of all the water of the stream." *Id*. at 667. The New Mexico Supreme Court relied on the line of California cases recognizing the Pueblo Rights doctrine, beginning with *Lux v. Haggin*, 10 P. 674, 713-19 (Cal. 1886). *Cartwright*, 343 P.2d at 667-68. The court concluded its opinion by emphasizing the reason for this community right:

> [T]he King[] but bespoke a fact of life as ancient as the hills when he became author of the Plan of Pictic. Water is as essential to the life of a community as are air and water to the life of an individual. It is frequently mentioned as the "life blood of a community." It is precious. It is priceless. . . . Without it we perish.

Id. at 669.

The California Supreme Court's detailed analysis in *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1271-85 (Cal. 1975), similarly interpreted Spanish law in upholding the existence of the expanding pueblo water right and Los Angeles' entitlement to that right. Notably, the court specifically rejected the opponents' reliance on *Recopilacion* 4.17.5 and 4.17.7 "to the effect that the use of waters should be in common." *Id*. at 1280.

In a subsequent decision by the New Mexico Supreme Court, *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004), the court did not disturb its interpretation of Spanish and Mexican law, but concluded that it had incorrectly held in *Cartwright* that the expanding pueblo water right survived New Mexico's

adoption of the law of prior appropriation. In the court's new view, the Treaty of Guadalupe Hidalgo did not require New Mexico courts to protect "inchoate" rights—among which it included the pueblo future water right—but allowed the New Mexico legislature to determine whether to honor such rights as a matter of state law. *Id*. at 60. The court concluded that the legislature had decided not to do so. But that interpretation of non-Indian rights under the Treaty has no bearing on the different question whether the Pueblos' aboriginal rights, which are a matter of federal law, survived when the Pueblos came under American rule. As argued in Part II above, there is no basis under federal law for excepting aboriginal water rights from the Supreme Court's decisions holding that aboriginal rights survived in the Mexican cession area.

While it is true that the New Mexico Supreme Court expressed some doubt in *Martinez* about its earlier interpretation of Spanish and Mexican law, *Cartwright* and *City of Los Angeles* demonstrate that—even if it was not completely certain that Spanish and Mexican law afforded such an expanding water right to non-Indian communities—the law did not clearly preclude such a right. For the same reason, unapplied Spanish and Mexican law does not meet the exacting standard for extinguishment of Pueblo aboriginal water rights.

C. There was no affirmative action by Spanish authorities that could constitute the "exercise of complete dominion and control" adverse to aboriginal water rights.

During the entire Spanish colonial period, the Pueblos used all the water they needed without limitation by the Spanish crown. App. 617-618 [Tr. 53-54 (Cutter)]. It is undisputed that a repartimiento was never undertaken for the Jemez River under Spain. In fact, Spain never exercised its authority to allocate water in any New Mexico river through a repartimiento. There was no change in the repartimiento procedure after Mexican independence. App. 662 [Tr. 232 (Hall)]. Although the Mexican government undertook a repartimiento involving Taos Pueblo, as explained below, it never undertook a repartimiento for the Jemez River. Nor was there evidence of any other kind of affirmative act by the Spanish or Mexican governments restricting the Pueblos' rights to use water from the Jemez River. App. 617-619, 687-688 [Tr. 52-54, 57-58 (Cutter); Tr. 334-35 (Hall)]. In contrast, in determining whether the federal government had extinguished the Pueblos aboriginal title to the lands surrounding their grant lands, the Indian Claims Commission identified specific acts by the federal government that actually restricted the Pueblos' use of those lands. *See supra* p. 8.

Professor Hall suggests multiple factors that could have been considered in a repartimiento based on historians' analysis of repartimientos in central Mexico: prior use, needs of the parties, purpose of use, legal rights of the parties, injury to

third parties, and equity and the common good. App. 662-663 [Tr. 234-38]. But no provision of the *Recopilacion* or other Spanish document describes how a repartimiento was to take place. App. 682 [Tr. 312 (Hall)]. It is not possible to predict the outcome of a hypothetical repartimiento for the Jemez River under Spanish or Mexican law.

The Mexican government undertook one formal repartimiento in New Mexico—an 1823 proceeding involving Taos Pueblo. The Pueblo and two non-Indian communities (Don Fernando de Taos and Los Estiercoles) protested an effort by a new, squatter community of non-Indians (Arroyo Seco) to divert water from the Rio Lucero. App. 394-395, 460-464, 617, 639, 664-666, 680-681, 716-717 [Cutter Report at 50-51; Hall Report at 42-46; Tr. 52, 143-144, 443-446 (Cutter); Tr. 242-248, 306-10 (Hall)]. The decision of the ayuntamiento (the local governing body that conducted the proceeding) referred to Taos as the "*dueno despotico* or absolute owner" of the river. App. 462, 681 [Hall Report at 44; Tr. 310 (Hall)]. As Dr. Cutter read the decision, Arroyo Seco was allocated a surco of water when the supply was "in abundance," App. 717 [Tr. 445], but during times of water shortage, its allocation would be reduced, "as determined by the ayuntamiento, so that there would be no lack of water to the first users who enjoy the antiquity and superiority, or primacia, who are sons of the above-mentioned pueblo owned." *Id.* Professor Hall interpreted the decision to require

all parties, including Taos Pueblo, to reduce their uses in times of shortage. App. 681 [Tr. 309]. But that interpretation failed to give effect to the express language that Arroyo Seco received the "sobrantes" (what was left over) and that there would be "no lack of water" to Taos Pueblo. App. 639, 717 [Tr. 143-44, 445 (Cutter)]. Moreover, Professor Hall acknowledged that Dr. Cutter was better at reading 19th-century Spanish. App. 681 [Tr. 307]. Dr. Cutter reasonably interpreted the 1823 repartimiento decision to protect Taos Pueblo's right to receive water.

Professor Hall's interpretation was further undercut when he agreed that a historical analysis of repartimientos involving Indian communities in central Mexico indicated that the communities were not limited to the amount of water that they were currently using. App. 682-684 [Tr. 312-20]. In an effort to minimize the effect of that concession, however, he stated that he did not "see anything in there that says that they can use any water they want to any old time they want to in the future." App. 684 [Tr. 319]. That characterization of the claimed water rights is a straw man set up by the State and Coalition and accepted by the district court. App. 286-287 [Decision at 6-7] (before the Spanish arrived, "the Pueblos were able to increase their use of public waters without restriction"). The United States is not claiming such an unfettered right. The three Pueblos shared the water in the Jemez River for centuries before the Spanish occupation,

and there is no reason to believe that they ever used that water profligately. The United States instead claims on behalf of the Pueblos water adequate for both their grant and trust lands, such that their lands serve their homeland purpose.

Magistrate Judge Lynch and the district court plainly erred in concluding that the Pueblos' aboriginal rights to use water from the Jemez River System were extinguished without any affirmative act by the sovereign. The "exercise of complete dominion and control" adverse to the exercise of aboriginal rights contemplated in *Santa Fe Pacific*, 314 U.S. at 347, requires considerably more than the existence of the Spanish legal system. There is no record evidence demonstrating that a repartimiento would necessarily have restricted the Pueblos to the amount of water they had historically used. The district court's extinguishment conclusion cannot survive application of the correct legal principles or a fair reading of the historical record. *Santa Fe Pacific*, 314 U.S. at 354 (doubts regarding a sovereign's intent preclude a finding of extinguishment).

D. The Pueblos did not lose their aboriginal water rights by their own actions or by any actions of non-Indians in the Jemez River Basin.

Magistrate Judge Lynch's conclusion that Spain extinguished the Pueblos' aboriginal right to use water appears to have resulted at least in part from misplaced reliance on decisions addressing whether the *acts of Indians themselves* caused them to no longer satisfy the requirements of aboriginal title to an area.

Magistrate Judge Lynch correctly explained that, in order to establish aboriginal title, a tribe must prove that it "'used and occupied the land to the exclusion of other Indian groups.' " App. 290-291 [Recommendation at 3-4] (quoting *Pueblo of San Ildefonso*, 513 F.2d at 1394). Thus, "[m]ultiple tribes using one parcel of land, so called mixed use, precludes any of the tribes from establishing aboriginal title, unless the tribes 'occupy a defined area in joint and amicable possession.' " *Id*. (quoting *Uintah Ute Indians v. United States*, 28 Fed. Cl. 768, 785 (1993)). In concluding that "the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish," he appropriately stated that there was "no evidence that other Indian groups besides the Pueblos of Jemez, Santa Ana, and Zia occupied the lands and used the water." App. 298 [Recommendation at 11].

But Magistrate Judge Lynch incorrectly referred to the exclusive-use requirement in his conclusion that Spain extinguished the Pueblos' aboriginal water rights by imposing "a legal system to administer the use of public waters" that "ended the Pueblos' exclusive use of the public waters." App. 300 [Recommendation at 13]. Spain did not settle another Indian tribe within the Jemez River Basin, nor did it terminate the "joint and amicable" sharing of the Jemez River by the three Pueblos. The use of water by non-Indians in the Jemez River Basin was irrelevant to the requirement of "exclusive" Indian use.

The district court adopted the Recommendation over the United States' objection based on *Jemez*. In *Jemez*, this Court rejected the similar argument that Jemez Pueblo no longer held aboriginal title to certain lands within the Valles Caldera Valley because the lands had been used by non-Indians. It held that "the 'exclusive' use part of the test meant only that in order to establish Indian title, a tribe must show that it used and occupied the land to *exclusion of other Indian groups*." 790 F.3d at 1165-66 (quoting *Pueblo of San Ildefonso*, 513 F.2d at 1394). The Court recognized that the United States' action in authorizing the use of lands by non-Indians was a factor to be considered when determining if the United States extinguished aboriginal title, but use by non- Indians alone is not dispositive. *Id*. at 1167. Aboriginal title is extinguished only if the "conduct of the government sufficiently interfered with the pueblos' traditional ways of living so as to effect a taking of their aboriginal titles." *Id*. at 1168. The critical inquiry is "whether anyone has *actually interfered* with the Jemez Pueblo's traditional occupancy and uses." *Id*. (emphasis added). Magistrate Judge Lynch's conclusion, adopted by the district court, that the very existence of Spanish law "ended the Pueblos' exclusive use of the public waters" is contrary to this Court's ruling in *Jemez*. There was no actual interference with the Pueblos' uses of water at any time during the Spanish colonial period.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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April 12, 2019
DJ Number 90-6-7-341

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would assist the Court. As evidenced by the Court's decision to grant the petitions for interlocutory appeal, the question presented is important and there are substantial grounds for a difference of opinion on that question.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, typeface requirements, and type-style requirements of Fed. R. App. P. 32(a). This brief contains 12,542 words (excluding the parts of the brief exempted by Rule 32(a)(7)) and was prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Mary Gabrielle Sprague
MARY GABRIELLE SPRAGUE

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that this brief, as submitted in digital form, was scanned for viruses by Windows Defender: Antivirus Definition 1.271.246.0, as updated on April 12, 2019, and, according to the program, is free of viruses.

I certify that the paper copies submitted to the clerk's office are exact copies of the ECF filing.

I certify that all required privacy redactions have been made.

/s/ Mary Gabrielle Sprague
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CERTIFICATE OF SERVICE

I hereby certify that, on April 12, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system and that all case participants, with the exceptions listed below, were served through that system.

I certify that I served the foregoing brief on this date by hand delivery, mail, third-party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email on the following unregistered case participants:

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ATTACHMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, on its
own behalf and on behalf of the
PUEBLOS OF JEMEZ, SANTA ANA, and ZIA

and

STATE OF NEW MEXICO, *ex rel.*
State Engineer,

Plaintiffs,

and

THE PUEBLOS OF JEMEZ, SANTA ANA, and ZIA,

Plaintiffs-in-Intervention,

v.

CV 83-1041 MV/WPL
JEMEZ RIVER ADJUDICATION

TOM ABOUSLEMAN, *et al.*,

Defendants.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING ISSUES 1 AND 2

THIS MATTER comes before me on Opening, Response and Reply briefs of the Jemez River Basin Water Users Coalition ("Coalition") (Docs. 4361, 4375, 4371), the Pueblos of Santa Ana, Zia, and Jemez, and the United States ("US/Pueblos") (Docs. 4362, 4364, 4370), and the State of New Mexico ("State") (Docs. 4363, 4366, 4369), on Issues 1 and 2. As explained herein, I recommend that the Court find that the Pueblos possessed aboriginal water rights prior to the Spanish occupation of New Mexico, but conclude that the Spanish crown exercised complete dominion and control over New Mexico in a manner adverse to the Pueblos and thus extinguished the Pueblos' aboriginal water rights.

Issues 1 and 2

The parties requested that the Court rule on the following legal issues before proceeding with the adjudication of the Pueblos' water rights claims:

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

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

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

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

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

(Doc. 4363 at 2.)

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

In addressing Issue No. 1, its sub-issues, and Issue No. 2, I have considered the briefs of the parties, the testimony, and expert reports of the expert witness for the US/Pueblos, Charles R. Cutter, Ph.D., and the expert witness for the State, Professor G. Emlen Hall, and the relevant law.

Aboriginal Rights

"Aboriginal title denotes an interest that an Indian tribe possesses in land based solely on rights acquired by the Indians as original inhabitants of the land and not upon a statute, treaty, or grant by the sovereign." *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 784 (Fed. Cl. 1993) (citing *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543, 574 (1823)). Aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and

protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). In addition to the right to occupancy of lands, aboriginal title includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (treaty reserved to the Indians their pre-existing right to fish at all usual and accustomed places); *United States v. Adair*, 723 F.2d 1394, 1413-1414 (9th Cir. 1983), *cert. denied* 467 U.S. 1252 (1984) (tribe's aboriginal title included timber rights, aboriginal hunting and fishing rights, and water right to support its hunting and fishing lifestyle); *Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dist. v. United States*, 832 F.3d 1127, 1131 (9th Cir. 1987) (treaty preserved aboriginal fishing rights). The doctrine of aboriginal title applies to the lands ceded to the United States by Mexico in the Treaty of Guadalupe Hidalgo. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1160-91 (10th Cir. 2015) (stating that *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941), "reaffirmed principles first established in *Johnson v. M'Intosh*, reaffirmed that aboriginal title is not determined by treaty, and applied the doctrine of aboriginal title to the Mexican cession area").

The first part of Issue No. 1 asks whether the Pueblos have ever possessed aboriginal water rights in connection with their grant or trust lands. For a tribe or pueblo to establish aboriginal title, it must provide proof "of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land." *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (quoting *Confederated Tribes of the Warm Springs Reservation v. United States*, 177 Ct. Cl. 184, 194 (1966)) (internal punctuation omitted). Aboriginal title is a question of fact. *Id.* Exclusive possession means that the tribe "used and occupied the land to the

exclusion of other Indian groups." *Strong v. United States*, 518 F.2d 556, 561 (Ct. Cl. 1975) (quoting *Pueblo of San Ildefonso*, 513 F.2d at 1394), *cert. denied*, 423 U.S. 1015. Multiple tribes using one parcel of land, so-called mixed use, precludes any of the tribes from establishing aboriginal title, unless the tribes "occupy a defined areas in joint and amicable possession." *Uintah Ute Indians*, 28 Fed. Cl. at 785. To prove use and occupancy, a tribe generally provides "evidence regarding its way of life, habits, customs and usages of the land." *Id.* (citing *Mitchel v. United States*, 34 U.S. 711, 746 (1835)). The "long time" requirement means that the tribe must have "made the area into domestic territory." *Id.* (citing *Confederated Tribes*, 177 Ct. Cl. at 194).

Extinguishment of Aboriginal Title

The second part of Issue No. 1 asks whether those aboriginal water rights have been modified or extinguished in any way by any actions of Spain, Mexico, or the United States.

Congress possesses the supreme power to extinguish any claims of aboriginal title. *Santa Fe Pac.*, 314 U.S. at 347. Issues related to Congress's exercise of this authority are political issues, not justiciable ones. *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 66 (1886). "[T]he exclusive right of the United States to extinguish [Indian] title . . . has never . . . been doubted." *M'Intosh*, 21 U.S. at 586. Regardless of the means used to exercise this right, that exercise "is a question of governmental policy, and is not a matter open to discussion." *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877); *see also Santa Fe Pac.*, 314 U.S. at 347.

The United States can extinguish aboriginal title in numerous ways, including a determination that the tribe failed to satisfy any of the elements required to establish aboriginal title. *Uintah Ute Indians*, 28 Fed. Cl. at 787. As such, a "sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title." *Id.* (citing *Quapaw Tribe v. United States*, 120 F. Supp. 283, 286 (Ct. Cl. 1954), *overruled on other*

grounds by United States v. Kiowa, 166 F. Supp. 939 (Ct. Cl. 1958), *cert. denied* 359 U.S. 934 (1959)). In *Quapaw Tribe*, the Court of Claims stated that "when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands," as such, "the Indians lose their right to claim and assert full beneficial interest and ownership to such land." 120 F. Supp. at 286 (citations omitted). Furthermore, "the United States cannot be required to pay therefor on the same basis as if it were a recognized treaty reservation." *Id.*; *see also Uintah Utes Indians*, 28 Fed. Cl. at 787 (quoting *Quapaw Tribe*).

While the United States can extinguish aboriginal title and aboriginal title can be lost by various actions that cease to meet the requirements of aboriginal title, extinguishment of aboriginal title "cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe. Pac.*, 314 U.S. at 354; *see Pueblo of San Ildefonso*, 513 F.2d at 1390. "It is well-settled that an intention to authorize the extinguishment of Indian title must be 'plain and unambiguous,' either 'expressed on the facts of the [instrument] or . . . clear from the surrounding circumstances.'" *Seneca Nation of Indians v. New York*, 382 F.3d 245, 260 (2d Cir. 2004) (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985)) (alterations in original). In *Seneca Nations*, the Second Circuit went on to "see no reason not to apply a similar standard to Indian treaties negotiated by . . . a prior sovereign." *Id.* at 260 n.17.

Spanish Sovereignty

The Spanish crown recognized the Pueblos' ownership of their land when it incorporated the Pueblos into the Spanish Empire. (Cutter Tr. Mar. 31, 2014, at 21 ("I believe that the crown,

from the earliest times, recognized that the Indians possessed their lands and were the true owners of the lands"); Doc. 4351 at 71 ("Cutter Report") ("Spanish authorities in New Mexico recognized the Pueblo Indians of New Mexico as original owners of their lands"); *but see* Hall Tr. Apr. 1, 2014 at 207 (under Spanish law, the pueblos "don't share land in the same way" that they share water).) The Spanish crown also recognized the Pueblo's right to use water based on their use of water before the arrival of the Spaniards. (Cutter Report at 71; *but see* Hall Tr. at 203-04 ("I conclude . . . that the arrival of Spain . . . and the imposition of Spanish sovereignty imposed the civil law of Spain on the pueblos and on New Mexico generally, and on the public shared water resources specifically. . . . I 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. And I concluded that public water – and this was agreed to by Professor Cutter – public waters were now held in common by pueblos and non-Indians, the resources to be shared, and the sharing was to be ultimately controlled by the broader government, not the pueblos themselves."), 211-12 ("it's the sovereign that adjusts and readjusts access to public shared waters between pueblos and non-Indians"), 225, 270 ("The pueblo rights at the time of sovereign – turned sovereign – were neither prior nor paramount nor permanent.").)

"The Spanish crown insisted on its prerogative, or regalía, in matters pertaining to land, water, and other resources, but this regalía did not apply to properties owned by Indians." (Cutter Report at 70.) "Regalía" 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." (*Id.* at 38 (quoting definition of "regalía" from the first edition of the Spanish Diccionario de Autoridades (1726-1739): "The private and exclusive preeminence, prerogative, or exception that, by virtue of its supreme authority and power, any sovereign exercises in his kingdom or

states"). The crown claimed regalía with regard to natural resources including "lands, fields, woodlands, pasturage and public waters, all of which [a 17th century jurist] termed 'realengas' (that is, belonging to the crown)." (*Id.*) Regalía "did not extend to all property in the New World, however, but rather only to that which was not considered to be held privately." (*Id.*) "Regalía wouldn't bear on the Indian lands unless some major project were being planned and some kind of right-of-way had to be exercised, eminent domain." (Cutter Tr. at 50.)

The crown's regalía included the power to determine rights to public shared waters. (*Id.* at 105 ("regalia included the power to determine rights to public shared water"); *see also id.* at 50 ("to oversee the use of water"), 51 ("That is the prerogative of the crown, to ensure effective use of water"), and 126 ("The crown reserved the right to allocate access to public shared waters.").) The right to use public waters was an interest separate from land ownership. (*Id.* at 112-16 ("the surface interests of land was a separate interest under Spanish and Mexican law from the mineral interests and from the interest in common public water sources"); *see also id.* at 119-22; Hall Tr. at 211 ("I think we both agree that land and water were separate. . . .[T]hey were separate legal regimes and different kinds of legal rights under Spanish/New Mexican law that govern these resources.").) Private waters, which include springs and groundwater on privately owned land, were the property of the landowner and were not subject to regalía. (Cutter Tr. at 59-61.)

Public water in rivers was a common resource for use by everybody. (*Id.* at 113-14; *but see* Hall Tr. at 226 (once a pueblo has diverted water into an irrigation system, the pueblo controls that water).) The general principle was one could not use public waters to the detriment of other users. (Cutter Tr. at 114-15; Hall Tr. at 269.) A user could increase his use of water so long as that increased use was not to the detriment of other users. (Cutter Tr. at 130; Hall. Tr. at

215.) If one user's increased use caused a detriment to another user, the crown could intervene in the conflict and make an allocation. (Cutter Tr. at 124, 130.)

One way the crown could resolve conflicts and allocate rights to public waters was through the process of "repartimiento." (*Id.* at 126; Hall Tr. at 212 (repartimiento is not an exercise of eminent domain because the sovereign never completely divested its interest in the public waters), 229 (repartimiento could be used to "formalize the existence of a water right").) The "allocation of water by repartimiento involved the simultaneous application to all parties of the following factors: One, prior use; two, need; three, purpose of use, [intent]; four, legal rights; . . . five, injury to third parties; and six, equity and the common good." (Cutter Tr. at 132-33; *see also* Hall Tr. at 212 ("The repartimientos parcel out the resource according to standards which can be specified and have been specified in this case. . . . [The sovereign] can do a lot with respect to adjusting and readjusting the resources.").) "The factors can be separately stated and analyzed, but they tended to blend together in decisions, with it being difficult to say what the relative weight of each factor was." (Cutter Tr. at 132-33.) No formal repartimiento ever took place in the Jemez Valley watershed with respect to the Pueblos of Jemez, Santa Ana, and Zia, due to lack of conflict over water. (*Id.* at 48; *see also id.* at 176-77 (no historical documentation that Jemez, Santa Ana, or Zia were limited in their ability to use river water at any time during the Spanish or Mexican regimes in New Mexico).)

Mexican Sovereignty

The then-new country of Mexico took over sovereignty from Spain by virtue of the Treaty of Cordova, which was August 21, 1821." (*Id.* at 54; Cutter Report at 54 ("by virtue of the Treaty of Córdoba (August 21, 1821).").) The treaty between Spain and the new Mexican government, and the Mexican declaration of independence, reaffirmed the principles of the Plan

of Iguala. *See United States v. Ritchie*, 58 U.S. 525, 538 (1854). The Plan of Iguala declared that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy," and that "the person and property of every citizen will be respected and protected by the [Mexican] government." *Id.*

"The laws governing land and water rights during the Mexican period remained substantially the same as during the Spanish colonial era." (Cutter Report at 71; Cutter Tr. at 57 ("the rules in place under the Spanish regime continued under the Mexican regime"), 232-34 (the repartimiento procedure did not change between the Spanish and Mexican regimes, except that the "standing of communities in the repartimiento process seems to have increased in the Mexican period").) Mexico ruled the area until it ceded the territory to the United States in 1848.

Treaty of Guadalupe Hidalgo

Mexico ceded the area to the United States in the Treaty of Guadalupe Hidalgo. 9 Stat. 922 (1848). "In the Treaty of Guadalupe Hidalgo, the United States agreed to protect rights recognized by prior sovereigns." *New Mexico v. Aamodt*, 537 F.2d 1102, 1109-10 (10th Cir. 1976); (*see also* Hall Tr. at 204 ("I concluded that the property rights of pueblos are no different than property rights of Mexicans. . . . The treaty did not treat [property rights of pueblos] specially, and it guaranteed the present protected rights of pueblos as Mexican citizens, as any other Mexican citizen."), 207 ("At that moment [--the Treaty of Guadalupe Hidalgo--] of the transfer of sovereignty, Mexican law protected primarily water that was then used by both the pueblos and the non-Indians from that common source."), 276 ("[T]here's no evidence that pueblo Indians . . . were given any special treatment with respect to . . . any of the terms of the Treaty of Guadalupe Hidalgo."), 279-80 (Indians were treated as Mexican citizens and "[t]he

treaty protected as presently perfected water rights, pueblo rights to water, that they actually used.").) The Treaty states in relevant portion:

ARTICLE VIII.

> Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, *retaining the property which they possess in the said territories*, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.
>
> Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.
>
> In the said territories, *property of every kind, now belonging to Mexicans not established there, shall be inviolably respected.* The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

> Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and *protected in the free enjoyment of their liberty and property*, and secured in the free exercise of their religion without restriction.

9 Stat. 922 (1848) (emphasis added).

DISCUSSION

I note at the outset that, while Dr. Cutter and Professor Hall largely agree, they do have material differences of opinion. For example, as noted above, Professor Hall opined that Spanish

civil law unilaterally divested the Pueblos of their aboriginal water rights, whereas Dr. Cutter opined that Spain recognized the Pueblos' preconquest right to use water. For purposes of this recommendation, I assume that the US/Pueblos' expert, Dr. Cutter, is correct and have resolved all factual questions in favor of Dr. Cutter's opinion.

The first part of Issue No. 1 asks whether the Pueblos have ever possessed aboriginal water rights in connection with their grant or trust lands. Establishing aboriginal water rights requires proof that the Pueblos made actual, exclusive, and continuous use of water for a long time. *See Uintah Ute Indians*, 28 Fed Cl. at 784-85. Professor Cutter reported that the "Pueblos used and exploited those sources of water before the arrival of Juan de Oñate and his followers in 1598." (Cutter Report at 44.) Professor Hall testified that it was his understanding that the Pueblos of Jemez, Santa Ana, and Zia continuously used and occupied the lands within their pueblo leagues for a long period of time preceding European occupation in New Mexico. (Hall Tr. Apr. 1, 2014, at 353.) The parties have presented no evidence that other Indian groups besides the Pueblos of Jemez, Santa Ana, and Zia occupied the land and used the water. *See Uintah Ute Indians*, 28 Fed. Cl. at 784-85 (establishing aboriginal title requires proof that a tribe "used and occupied the land to the exclusion of other Indian groups;" "mixed use of a given parcel precludes the establishment of any aboriginal title unless the tribes occupy a defined area in joint and amicable possession"). I find that the Pueblos of Jemez, Santa Ana, and Zia actually and exclusively used water continuously for a long time before the Spanish occupation of New Mexico and conclude that the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish.

The second part of Issue No. 1 asks whether those aboriginal water rights have been modified or extinguished in any way by any actions of Spain, Mexico, or the United States.

The US/Pueblos argue that extinguishing aboriginal title requires some affirmative act on the part of the sovereign, such as a repartimiento. (*See* Doc. 4362 at 20-21.) The US/Pueblos argue that if mere Spanish sovereignty extinguished aboriginal water rights, then the Pueblos would also have lost their aboriginal title to land, which did not happen. (*Id.*) Accordingly, claim the US/Pueblos, the lack of an affirmative act by the sovereign means that the Pueblos' aboriginal water rights were not extinguished by Spanish sovereignty. (*Id.*)

As support for this argument, the US/Pueblos assert that "*Santa Fe Pacific* confirmed that a tribe's aboriginal title can be extinguished *only* by an affirmative act of the sovereign," and include the following quotes from *Santa Fe Pacific*: "an extinguishment [of a tribe's aboriginal rights] cannot be lightly implied," "certainly it would take plain and unambiguous action to deprive" a tribe of such rights. (*Id.* at 12-13.) The US/Pueblos thus conclude that because there was never any repartimiento or other affirmative act limiting the Pueblos' use of water, the Spanish and Mexican sovereigns did not extinguish or modify the Pueblos' aboriginal rights.

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. *Santa Fe Pacific* indicates that Indian title can be extinguished in a number of ways including "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." 314 U.S. at 347. The Supreme Court more recently has indicated that "Congressional intent to authorize the extinguishment of Indian title must be 'plain and unambiguous,'—that is, it either 'must be expressed on the face of the Act *or be clear from the surrounding circumstances and legislative history*.'" *Mountain States Tel.*, 472 U.S. at 276 (emphasis added) (quoting *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1941) and *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

Furthermore, the US/Pueblos' argument that if "the mere extension of Spanish sovereignty over New Mexico, without more, had extinguished aboriginal Indian rights to use water, the Pueblos' aboriginal title to land also would not have survived Spanish and Mexican rule" is not persuasive. (Doc. 4362 at 20-21.) According the US/Pueblos' expert, Dr. Cutter, under Spanish and Mexican law, rights to land were separate from rights to water, and the Spanish and Mexican governments held the power to determine rights to public waters. Thus, the Spanish government appears to have recognized aboriginal title to land, but did not recognize aboriginal title to the use of water.

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. Such a system 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.

Sub-issues: Did the Acts of 1866, 1870, and 1877; the Pueblo Lands Acts of 1924 and 1933; or the Indian Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect?

Because I recommend that the Court conclude that the Spanish crown extinguished the Pueblos' aboriginal right to use water, the issues of whether the Acts of 1866, 1870, and 1877; the Pueblo Lands Acts of 1924 and 1933; and the Indian Claims Commission Act had any effect on those rights are moot.

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

"*Winans* rights essentially are recognized aboriginal rights." Waters and Water Rights § 37.02(a)(2) (Amy K. Kelley, ed., 3d ed. 2016). "[T]he scope of a *Winans* right is dependent on

actual use over an extended period of time, although it is not a function of the extent of land title. *Winans* rights preserve pre-existing uses, rather than establishing new uses." *Id.* Accordingly, the priority date for *Winans* rights dates from "time immemorial," that is, before white settlement. *Id.* "The quantity of *Winans* water rights reserved is not fixed on practicably irrigable acreage but is instead a 'needs-based' test." *Id.*

Because I recommend that the Court conclude that Spain extinguished the Pueblos' aboriginal water rights, there are no aboriginal water rights for the United States to recognize. Therefore, I recommend that the Court conclude that the *Winans* doctrine does not apply to any of the Pueblos' grant or trust lands.

CONCLUSION

As explained above, I recommend that the Court find that the Pueblos of Jemez, Santa Ana, and Zia actually and exclusively used water continuously for a long time before the Spanish occupation of New Mexico, and thus conclude that the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish. Further, I recommend that the Court find 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. Finally, I recommend that the Court conclude that the *Winans* doctrine does not apply to any of the Pueblos' grant or trust lands.

OBJECTIONS

The Parties are notified that within 28 days of the filing of this Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). A party must file any objections with the Clerk of the District

Court within the 28-day period if that party wants to have appellate review of the Proposed Findings and Recommended Disposition. If no objections are filed, no appellate review will be allowed. Responses are due within 28 days of service of objections. Replies are due within 14 days of service of responses.

William P. Lynch
United States Magistrate Judge

A true copy of this order was served on the date of entry--via mail or electronic means--to counsel of record and any pro se party as they are shown on the Court's docket.

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

UNITED STATES OF AMERICA, on its
own behalf and on behalf of the
PUEBLOS OF JEMEZ, SANTA ANA, and ZIA,

and

STATE OF NEW MEXICO, *ex rel.*
State Engineer,
Plaintiffs,

83cv01041 MV/WPL
JEMEZ RIVER ADJUDICATION

and

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

v.

TOM ABOUSLEMAN, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER OVERRULING OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION REGARDING ISSUES 1 AND 2

THIS MATTER comes before the Court on the Objections of Intervenors Pueblo of Santa Ana and Pueblo of Jemez to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, Doc. 4384, filed November 1, 2016 ("Pueblos' Objections"), and on the United States' Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, Doc. 4385, filed November 1, 2016 ("United States' Objections).[1] For the reasons stated below, the Court will **OVERRULE** the Objections and **ADOPT** United States Magistrate Judge William P. Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, Doc. 4383

[1] Intervenor Pueblo of Zia concurs and joins with Objections submitted by the United States and the Pueblos of Jemez and Santa Ana. *See* Doc. 4386, filed November 1, 2016.

("PFRD").

The parties requested that the Court rule on the following legal issues before proceeding with the adjudication of the Pueblos' water rights claims:

> Issue No. 1: Have the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, have those aboriginal water rights been modified or extinguished in any way by any actions of Spain, Mexico or the United States?
>
> > Sub-issue: Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights and, if so, what effect?
> >
> > Sub-issue: Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect?
> >
> > Sub-issue: Did the Indian Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect?
>
> Issue No. 2: Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?

Doc. 4363 at 2. "Aboriginal title denotes an interest that an Indian tribe possesses in land . . . [and] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against by intrusion by third parties . . .[and] includes the use of the waters and natural resources on those lands where the Indians hold aboriginal title." PFRD at 2-3 (citations omitted). "*Winans* rights essentially are recognized aboriginal rights." PFRD at 13 (citation omitted).

In addressing Issue No. 1, its sub-issues and Issue No. 2, United States Magistrate Judge William P. Lynch considered the briefs of the parties, the testimony and expert reports of the expert witness for the United States and Pueblos, Charles R. Cutter, Ph.D., and the expert witness for the State, Professor G. Emlen Hall, and relevant law. *See* PFRD at 2. Judge Lynch

concluded:

> I recommend that the Court find that the Pueblos of Jemez, Santa Ana, and Zia actually and exclusively used water continuously for a long time before the Spanish occupation of New Mexico, and thus conclude that the Pueblos possessed aboriginal water rights in connection with their grant or trust lands prior to the arrival of the Spanish. Further, I recommend that the Court find 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. Finally, I recommend that the Court conclude that the *Winans* doctrine does not apply to any of the Pueblos' grant or trust lands.

PFRD at 14.

The United States and the Pueblos object to Judge Lynch's findings and conclusion that Spain extinguished the Pueblos' aboriginal water rights. *See* Pueblos' Objections at 21-22; United States' Objections at 24-25.

In concluding that Spain extinguished the Pueblos' aboriginal water rights, Judge Lynch stated:

> "*Santa Fe Pacific* indicates that Indian title can be extinguished in a number of ways including 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.' 314 U.S. at 347. The Supreme Court more recently has indicated that 'Congressional intent to authorize the extinguishment of Indian title must by 'plain and unambiguous,'—that is, it either 'must be expressed on the face of the Act *or be clear from the surrounding circumstance and legislative history.*'" . . . . I find that Spain imposed a legal system to administer the use of public waters and that regalía[2] ended the Pueblos' exclusive use of the public waters and subjected the Pueblos' later use of public waters to potential repartimientos.[3] Such a system is a plain and unambiguous

[2] "'Regalía' 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.'" PFRD at 6.

[3] "One way the crown could resolve conflicts and allocate rights to public waters was through the process of 'repartimiento.'" PFRD at 8. "A *repartimiento* was a quasi-judicial and administrative proceeding in which government officials applied controlling principles of equitable distribution to apportion available water supplies." *New Mexico v. Aamodt*, 618 F.Supp. 993, 998 (D.N.M. 1985) (Mechem, S.J.).

> 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.

PFRD at 12-13 (*emphasis in original*).[4]

The United States and the Pueblos do not dispute that the sovereign can extinguish aboriginal title in a number of ways including "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *See United States v. Santa Fe Pacific R. Co. R. Co.*, 314 U.S. 339, 347 (1941); Pueblos' Objections at 4 (stating *Santa Fe Pacific* "is unquestionably the leading authority in Supreme Court jurisprudence on the subject of Indian aboriginal title"); United States' Objections at 5 (stating Judge Lynch "correctly noted" the ways a sovereign can extinguish aboriginal title) (quoting *Santa Fe Pacific*). The United States and Pueblos contend that the mere imposition of Spanish sovereignty was insufficient to extinguish the Pueblos' aboriginal water rights.

The United States and Pueblos argue that there was no affirmative act by Spain, such as a repartimiento, which shows plain and unambiguous intent to extinguish the Pueblos' aboriginal water rights. *See* United States' Objections at 6; Pueblos' Objections at 7-12. The Pueblos argue that "[i]f the mere imposition of a controlling legal regime, with no affirmative act adverse to Indian aboriginal rights, were nonetheless deemed to extinguish those rights, no aboriginal rights to land or water would have existed in the area of the Mexican cession at all. They would all have

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4 Extinguishment of the Pueblos' aboriginal water rights does not mean the Pueblos have no right to use the waters of the Jemez River stream system. When Mexico took over sovereignty from Spain by virtue of the Treaty of Cordova on August 21, 1821, the Mexican government affirmed that it would protect the property of all the inhabitants of New Spain. In the Treaty of Guadalupe Hidalgo of 1848, in which Mexico ceded the area to the United States, the United States agreed to protect rights recognized by prior sovereigns. *See* PFRD at 8-9.

been extinguished upon the establishment of Spanish control of the area." Pueblos' Objections at 7-8.

The United States and the Pueblos presented a similar argument to Judge Lynch who was not persuaded and stated: "According [to] the US/Pueblos' expert, Dr. Cutter, under Spanish and Mexican law, rights to land were separate from rights to water, and the Spanish and Mexican governments held the power to determine rights to public waters." PFRD at 13. Dr. Cutter testified that "the surface interest of land was a separate interest under Spanish and Mexican law from the mineral interests and from the interest in common public water sources." PFRD at 7 (quoting Dr. Cutter). Based on Dr. Cutter's statements, Judge Lynch concluded: "Thus, the Spanish government appears to have recognized aboriginal title to land, but did not recognize aboriginal title to the use of water." PFRD at 13. Judge Lynch also considered Dr. Cutter's statements in concluding that Spain's legal system was "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." PFRD at 13. "The Spanish crown insisted on its prerogative [exclusive right and power], or regalía, in matters pertaining to land, water, and other resources, but this regalía did not apply to properties owned by Indians." PFRD at 5-6 (quoting Dr. Cutter). The crown's "regalía included the power to determine the rights to public shared water" and "[t]he crown reserved the right to allocate access to public shared waters." PFRD at 7 (quoting Dr. Cutter).

Having reviewed the testimony and expert reports of the expert witness for the United States and Pueblos, Charles R. Cutter, Ph.D., and the expert witness for the State, Professor G. Emlen Hall, the Court will overrule the objections of the United States and the Pueblos, and

adopt United States Magistrate Judge William P. Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1 and 2.

According to the expert witness for the United States and Pueblos, Spain claimed its prerogative to "administrat[e], licens[e] and adjudicat[e] certain spheres of activity and kinds of resources," including "lands, fields, woodlands, pasturage, rivers and public waters." Cutter Report at 38. Although Spain recognized the Pueblos' pre-Spanish use of water and allowed the Pueblos to continue to use water,[5] Spain insisted on its exclusive right and power to determine the rights to public shared waters. *See* PFRD at 5-6 (quoting Dr. Cutter). Dr. Cutter agreed 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. Transcript at 128:3-17. Dr. Cutter stated that in Spanish civil and water law there was a general principle of no harm to other users and that under Spanish law the Pueblos did not have a right to expand their use of water if it were to the detriment of others. Transcript at 111-115, 138-139. According to Dr. Cutter, provisions in the *Recopilación de Indias*[6] provided that the woods, pastures, and waters were to be common to both the Spaniards and the Indians, and that the "rivers were to be used by everyone." Transcript at 168:19-169:2.

Prior to the arrival of the Spanish, the Pueblos were able to increase their use of public

[5] The State's expert, G. Emlen Hall, testified that the phrase "aboriginal title" does not appear anywhere in Spanish or Mexican law. Transcript at 284:22-285:1. *See also Pueblo de Zia v. United States*, 11 Ind. Cl. Comm. 131, 133 (1962) ("neither the Mexican nor Spanish governments at any time recognized that the Indians had 'aboriginal title' to these lands in the legal sense in which that term is used in our courts today)."

[6] The *Recopilación de Indias* is a compilation of the laws pertaining to Spain's overseas empires and was first published in 1681. Cutter Report at 6.

waters without restriction. After its arrival, the Spanish crown insisted on its exclusive right and power to determine the rights to public shared waters. Spanish law plainly provided that the waters were to be common to both the Spaniards and the Pueblos, and that the Pueblos did not have the right to expand their use of water if it were to the detriment of others. Although Spain allowed the Pueblos to continue their use of water, and did not take any affirmative act to decrease the amount of water the Pueblos were using, the circumstances cited by the expert for the United States and Pueblos plainly and unambiguously indicate Spain's intent to extinguish the Pueblos' right to increase their use of public waters without restriction and that 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. The Court will, therefore, overrule the Objections and adopt United States Magistrate Judge William P. Lynch's Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, Doc. 4383.

IT IS SO ORDERED.

MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE