Nos. 18-2164 and 18-2167

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

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

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)

RESPONSE OF APPELLANTS UNITED STATES OF AMERICA AND PUEBLOS OF JEMEZ, ZIA, AND SANTA ANA IN OPPOSITION TO PETITION FOR PANEL REHEARING

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INTRODUCTION

Appellee State of New Mexico (the "State") petitions for rehearing of this Court's September 29, 2020 decision ("Decision"), which held that Spain did not extinguish the aboriginal water rights of the Pueblos of Jemez, Zia, and Santa Ana. The State's Petition lacks merit and should be denied.[1]

This Court granted interlocutory appeal under 28 U.S.C. § 1292(b) to review the district court's September 30, 2017 order ("Certified Order") holding that Spain extinguished the Pueblos' aboriginal water rights. While the Petition does not generally contest the Court's jurisdiction, the State asks the Court to delete Section V.B of the majority opinion (Decision at 25-27) on the asserted ground that the Court lacked jurisdiction to determine whether Spain acted to extinguish the Pueblos' aboriginal water rights. Petition at 3-4. Contrary to the State's argument, this Court correctly construed the scope of its jurisdiction to review the Certified Order: the analysis in Section V.B addresses issues that were squarely raised in the Certified Order and that control the disposition of that Order.

The State's second argument for deleting Section V.B—that the Court overlooked or misapprehended evidence in the record about Spanish law, *see*

[1] The State does not expressly state whether it seeks panel rehearing, rehearing en banc, or both. We interpret the State's Petition to seek only *panel* rehearing under Federal Rule of Appellate Procedure 40 because it includes no argument to show that it meets the standard for rehearing en banc under Rule 35.

Petition at 4-6—is similarly unpersuasive. The Court's analysis of Spanish law is fully supported by the expert reports and testimony in this case. The State's effort to nullify the Decision by deleting Section V.B should be rejected.

Alternatively, the State asks this Court to amend its Decision to "clarify" that the Court did not decide the question "whether Spain *modified* the aboriginal water rights of the Pueblos." Petition at 2 (emphasis added); *see also id.* at 6-7. That amendment is similarly unwarranted. No party argued in the district court or in this Court that there is a doctrine of aboriginal rights "modification" that is distinct from the extinguishment doctrine. The State is actually concerned about *quantification* of the Pueblos' aboriginal water rights—an issue the district court has not yet decided. This Court clearly stated that "the quantification of the Pueblos' water rights is not before us" and remains to be decided on remand. Decision at 11. No further clarification is appropriate.

BACKGROUND

The parties and the district court agreed that five threshold legal issues would be decided before proceeding to trial on the Pueblos' water rights claims. Decision at 8; 3 Appendix 304-06.[2] Issue No. 1—the issue addressed in the Certified Order—addressed whether "the Pueblos ever possessed aboriginal water

[2] As in the text, Appellants' Consolidated Appendix filed on April 12, 2019 will be cited as "Appendix."

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." 3 Appendix 304. Issue No. 3, which the district court has not yet decided, asked "what standards apply to quantify" the Pueblos' aboriginal water rights if they were determined to have them. *Id.*

The district court decided Issue No. 1 by order dated September 17, 2017. The court determined therein that "Spain allowed the Pueblos to continue their use of water, and did not take any affirmative act to decrease the amount of water the Pueblos were using," but it nonetheless concluded that Spain extinguished the Pueblos' aboriginal water rights based on its "complete dominion over the determination of the right to use public waters." Decision at 9-10.

The State repeatedly opposed interlocutory appeal of the district court's order deciding Issue No. 1. That court nevertheless certified its September 30, 2017 order for interlocutory appeal on September 11, 2018. 3 Appendix 274-80. Likewise over the State's objections, this Court granted the United States' and the Pueblos' petitions for permission to appeal on October 31, 2018. 3 Appendix 271-73. Finally, before addressing the merits of the Certified Order in these appeals, the State asked the Court to dismiss the interlocutory appeal based on its previous unsuccessful arguments. State of New Mexico's Response Brief at 18-24 (Aug. 2, 2019) ("State's Response Brief").

The panel majority decided that it had jurisdiction to review the Certified Order under 28 U.S.C. § 1292(b), including any issue raised in that Order that controlled the disposition of the Order. Decision at 6-7. It described the question of law before it as whether "the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act." *Id*. at 5. Embodied in that question are the premises (1) that the Pueblos had established aboriginal water rights, and (2) that Spain did not take any "affirmative act" to extinguish them. The Court indicated that it could review the factual question whether the Pueblos established aboriginal rights under the "clearly erroneous" standard, but that it need not do so because no party challenged that finding. *Id*. at 13 n.5. It characterized the issue of "the extent and impact of Spanish law" as a question of foreign law subject to de novo review. *Id*. at 13.

The Court reviewed "both experts' reports and testimony as to the legal principles in place during the time of Spanish sovereignty." *Id*. at 14 n.6. But like the district court, this Court "assume[d] that the US/Pueblos' expert, Dr. Cutter, is correct, and . . . resolved all factual questions in favor of Dr. Cutter's opinion." *Id*. (quoting 3 Appendix 298). The Court summarized those legal principles, *id*. at 14-16, as well as federal precedent on aboriginal title, *id*. at 16-21.

In Part V, the Court then analyzed the Certified Order under two headings: "A. Extinguishing Aboriginal Rights Requires an Affirmative Act," *id*. at 21-25;

and "B. Spain's General Administration of Its Water Administration System Was Not Adverse to the Pueblos' Aboriginal Rights," *id*. at 25-27. In Section V.A, the Court concluded, based on precedent from the Supreme Court and court of appeals, that it is not sufficient for a sovereign "merely to *possess* complete dominion," *id*. at 23, but that "a sovereign must affirmatively take an action to exercise complete dominion in a manner adverse to the Indians' right of occupancy," *id*. at 25. In Section V.B, the Court completed the analysis required to affirm or reverse the Certified Order by concluding that the extension of Spanish colonial law over the territory was not properly characterized as an affirmative and adverse exercise of dominion: "Because Spain's water administration system had no impact, let alone a negative impact, on the Pueblos' right to use water, it cannot be said that the system was 'adverse' to the Pueblos." *Id*. at 27.

Chief Judge Tymkovich dissented on the ground that the Court's review of the district court's decision on Issue No. 1 should have awaited decision on the other threshold issues.

REASONS FOR DENYING THE PETITION

A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The State fails to identify any point of law that the Court overlooked or misapprehended. Although the State asserts that the Court "overlooks

evidence in the record," Petition at 4, it is actually disagreeing with the Court's *characterization* of the expert opinions on Spanish law that the Court indisputably did consider. The State thus appears to be arguing that the Court *misapprehended* Spanish law. But the Court did not, as explained in Part II below. Under Circuit Rule 40.1(A), "[r]ehearing will be granted only if a significant issue has been overlooked or misconstrued by the court." The State's Petition fails to show that this Court overlooked or misconstrued any significant issue.

I. The Court did not exceed its jurisdiction under 28 U.S.C. § 1292(b).

The State argues that Section V.B of the Decision "reach[ed] beyond the scope" of the Court's jurisdiction under 28 U.S.C. § 1292(b), Petition at 1, by making "factual findings" about Spanish law that are "unnecessary to resolving the controlling question of law the Court defined," *id.* at 3. That argument is based on two mischaracterizations. First, the State errs in characterizing the discussion of Spanish law in Section V.B as "factual findings." To the contrary, the Court properly characterized the issue of "the extent and impact of Spanish law" as a question of foreign law subject to de novo review, *id*. at 13—not findings of fact reviewed under the clearly erroneous standard.

Second, Section V.B is hardly "unnecessary" to resolving the controlling question of law. A core premise of that question was that Spain took no action that constituted an "affirmative act" adverse to the Pueblos. Indeed, the State's merits

brief in this appeal raised the precise issue to which it now objects: the issue to be decided is whether "the circumstances surrounding Spain's imposition of its legal system to administer the use of public shared waters of the Jemez River plainly and unambiguously indicate Spain's intent to extinguish the Pueblos' aboriginal rights to the unrestricted use of water." State's Response Brief at 2. The Court's analysis in Section V.B directly answered that question.

The State further errs in failing to recognize that the scope of the Court's jurisdiction under 28 U.S.C. § 1292(b) is not limited to the controlling question of law identified by the district court. It ignores this Court's careful assessment of its jurisdiction. *See* Decision at 7. The Court properly relied on *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996), in which the Supreme Court explained that "an appellate court may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Id*. at 205 (internal quotation marks omitted). The Court also relied on its own precedent similarly explaining that "[i]nterlocutory appeals originate from the district court's order itself, not the specific question certified by the district court," such that the "correct test for determining if an issue is appropriate for interlocutory review is (1) whether that issue was raised in the certified order; and (2) whether the issue can control the disposition of the order." Decision at 7 (quoting *Paper, Allied-Industrial, Chemical & Energy Workers v.*

Continental Carbon Co., 428 F.3d 1285, 1291 (10th Cir. 2005)). The Petition's argument against jurisdiction was correctly rejected by both the panel that granted the petitions for permission to appeal and the panel that decided the appeal.[3]

The issue addressed in Section V.B of the Decision—whether the Spanish colonial government took any action to limit the Pueblos' aboriginal right to use water from the Jemez River—was raised in the Certified Order and controlled the disposition of that order. *See* Decision at 9 (order explicitly found that Spain did not affirmatively act to decrease the Pueblos' water use); *id.* at 10 (certification order stated that "whether the Pueblos' aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act was raised in the Court's Order"). Thus, the specific passages in Section V.B to which the State particularly objects fall squarely within this Court's allowable jurisdiction.

For these reasons, the State's jurisdictional attack on Section V.B lacks merit.

II. Section V.B is fully supported by the evidentiary record.

The State's second argument for deleting Section V.B of the Decision is that the Court's discussion of Spanish law is "not supported by the evidentiary record" and "conflict[s] with the district court's findings." Petition at 1. The assertion that

[3] Although Chief Judge Tymkovich concluded that appellate review of the district court's decision on Issue No. 1 should have awaited its subsequent rulings on the other threshold legal issues, he did not express agreement with the argument that the State has reasserted in Part I of the Petition.

this Court's interpretation of Spanish law "conflict[s] with the district court's findings" seems misplaced as a criticism; after all, the opinion did *reverse* the district court's decision. And the State fails to show that the Court overlooked or misapprehended any significant aspect of the experts' reports or testimony.

The United States and the Pueblos argued that Spanish law respected aboriginal water rights and that there could be no extinguishment of those rights in the absence of a repartimiento proceeding that actually limited the Pueblos' use of the water in the Jemez River Basin, which never occurred. The State argued that the mere extension of Spanish law over New Mexico was sufficient to extinguish the Pueblos' aboriginal water rights. There was no material dispute as to any relevant underlying fact, e.g., what the Spanish texts said or whether a repartimiento had ever been conducted for the Jemez River Basin.[4] In Section V.B, the Court ruled that Spain did not extinguish the Pueblos' water rights based on the Court's interpretation of Spanish law in light of the federal standard for extinguishment of aboriginal rights. Deleting Section V.B would nullify the Decision.

This Court reviewed the experts' reports and testimony regarding the legal principles in place during the time of Spanish sovereignty; like the district court,

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[4] Magistrate Judge Lynch's proposed findings, which were adopted by the district court, contained extensive discussion of Spain's administration of water in New Mexico, including his finding that "[n]o 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." 3 Appendix 295.

this Court assumed that Dr. Cutter's opinions were correct. Decision at 14 n.6. The district court found the State's view more persuasive, but this Court (fully apprised of that view) agreed with the United States' and the Pueblos' interpretation.

The Court fairly summarized the relevant legal principles, including those discussed in Dr. Cutter's expert report, which stated that

> no repartimientos of water were ever made by Spanish or Mexican authorities regarding the Jemez Valley waters used by Jemez, Zia, and Santa Ana. Thus, the governments of Spain and Mexico took no action to intervene in the uses that these Pueblos made of their water supply; nor did Spain or Mexico act to reduce or modify such use.

Decision at 16 (quoting 3 Appendix 395). The State contends that the Court's no-extinguishment holding is contradicted by the experts' testimony that once the Pueblos' waters became shared with other users, the Pueblos were "no longer able to unilaterally increase their use of water." Petition at 5. But that is not an accurate or complete description of Dr. Cutter's testimony. Although he testified that there was a general principle under Spanish law that "one could not use public waters to the detriment of other users," Decision at 15 (quoting 5 Appendix 632), he further stated that this and other principles were implemented through the "repartimiento de aguas" process, which occurred only when there was a conflict among water users, *see id.* at 15-16 (citing 3 Appendix 392). It is undisputed that no repartimiento ever occurred on the Jemez River. Dr. Cutter testified that, absent a repartimiento, the Pueblos had the unrestricted right to continue using water. 5

Appendix 617 (Transcript 53); *see also* 5 Appendix 618 (Transcript 54) ("I don't think the mere possibility that a repartimiento could take place meant a limitation on the water that could be used.").

Moreover, the only study of repartimientos in the record (cited in Decision at 15) showed that when disputes arose involving Indian communities in central Mexico, the Indians were frequently awarded all of the water from the common source, and non-Indians would be cut off entirely. *See* Dr. William B. Taylor, *Land and Water Rights in the Viceroyalty of New Spain*, 50 N.M. Hist. Rev. 189 (1975).[5] This report supported Dr. Cutter's testimony that there was a "special, sometimes preferential, status for Indians under Spanish rule." Decision at 15 (citing 3 Appendix 388). In any event, in the absence of an actual repartimiento, there is no way to know whether the Spanish crown would have restricted in any fashion the Pueblos' rights to use water.

Thus, the Court's review of the record on Spanish law fully supports the Court's conclusion in Section V.B that there was not "any evidence in the experts'

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[5] Dr. Taylor found that the Indians were "consistently" awarded not only sufficient water for their existing needs, but also amounts for future needs. 6 Appendix 683 (Transcript 316-18). In the only repartimiento that occurred in New Mexico in the entire quarter millennium of Spanish and Mexican rule (which involved Taos Pueblo and three non-Indian communities using water from the Rio Lucero), the Spanish official ruled that while the squatter community of Arroyo Seco could take one "surco" of water when it was abundant, in times of shortage that community would have to cut back its uses "*so that there would be no lack of water to the first users*," referring to the Pueblo. 6 Appendix 717 (Transcript 445; emphasis added).

reports or testimony that Spain's water administration system was adverse to the Pueblos, as it never actually ended the Pueblos' exclusive use of water or limited their use in any way." Decision at 26.

The State contends that the Court "confus[ed] the use of water with the right to use water" and that Dr. Cutter "testified that Spain's sovereignty did impact the Pueblos' water *rights*." Petition at 5. Those contentions are incorrect: the State identifies no record evidence overlooked or misapprehended by the Court. Instead, the State cites a passage from the Certified Order that Spain "insisted on its exclusive right and power to determine the rights to public shared waters." Petition at 5 (quoting 3 Appendix 286). But that is not a quote from Dr. Cutter. Although Dr. Cutter testified that "regalia included the power to determine rights to public shared waters," 5 Appendix 629 (Transcript 105), his report stated that "[w]ith respect to the Pueblos of Jemez, Zia, and Santa Ana, *the crown took no measures that reduced the Pueblos' land or water rights*." 3 Appendix 415 (emphasis added). Accordingly, the Court was correct to hold that "although Spain possessed the right to conduct repartimientos to allocate water, it never exercised that right as to the Pueblos here." Decision at 26.

The Court disagreed with the State's legal argument that the mere imposition of Spanish sovereignty was sufficient to extinguish the Pueblos' aboriginal water rights as a matter of federal law. The petition for rehearing does not come close to

demonstrating that the Court should delete or otherwise amend Section V.B based on supposed overlooking or misapprehension of Spanish law or any error in the Court's analysis of federal law on extinguishment of aboriginal title.

III. The Court should reject the State's alternative request to amend the decision.

The Court carefully delineated the issues that it was *not* addressing in the interlocutory appeal and that remained open for decision in the district court on remand, including the quantification of the Pueblos' aboriginal water rights (Issue No. 3). Decision at 11-12. As best we understand the Petition, the State wants to add to this delineation an assertedly undecided part of Issue No. 1: whether Spain "modified" the Pueblos' aboriginal water rights. Petition at 2, 6-7. That request should be denied.

It is unclear why the parties in 2012 phrased Issue No. 1 to ask whether any established aboriginal water rights had been "modified or extinguished" rather than simply "extinguished," as there is no concept of "modification" of Indian aboriginal rights in the law of aboriginal title. Not surprisingly, then, no party presented any argument in the district court or in this Court suggesting a different standard for, or consequence of, "modification" of aboriginal rights as distinct from extinguishment. At this point then, the word "modified" in Issue No. 1 is effectively a nullity. The parties either came to understand that "modified" was equivalent to "extinguished" or, in failing to argue some distinct concept of modification, they waived the

opportunity to do so. Until its Petition, the State appears to have understood that modification of aboriginal rights by Spain was not a separate sub-issue of Issue No. 1. Notably, in opposing the petitions for permission to appeal, the State acknowledged that the Certified Order addressed whether the Pueblos "held aboriginal water rights, and whether they had been extinguished *or modified* by any actions of Spain or Mexico." State of New Mexico's Response at 20, 10th Cir. Nos. 18-707 and 18-708 (Oct. 11, 2018) (emphasis added). This Court conclusively resolved that Spain had not modified or extinguished the Pueblos' aboriginal water rights, and it should reject the Petition's opportunistic contrary contention that "the issue of whether Spain modified the aboriginal water rights of the pueblos" is "not addressed in the certified order." Petition at 6.

Opening the door for the district court to revisit Spanish law in light of a non-existent modification theory would only cause confusion and delay. All parties agreed that Issue No. 1 would be decided before Issue No. 3 (quantification of any aboriginal water rights), and all agree that Issue No. 3 remains to be decided by the district court on remand. No clarification from this Court is required beyond that provided at Page 11 of the Decision.

Moreover, any concern about the potential effect of Section V.B on the district court's future consideration of the Pueblos' rights under Issue No. 3 does not warrant deletion or amendment of any portion of the Court's discussion of

Spanish law. Section V.B is an integral component of the decision that Spain did not extinguish the Pueblos' aboriginal water rights and is fully consistent with the expert evidence presented to the Court. The parties are free to ask the district court to allow supplemental briefing on Issue No. 3, including to address whether the Spanish land grants are material to the quantification of the Pueblos' water rights. Section V.B should not be deleted or amended based on some theoretical effect on Issue No. 3.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to all case participants except the following unregistered case participants, who will be served by mail or email:

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