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,

No. 83cv01041 KWR/JHR
JEMEZ RIVER ADJUDICATION

and

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

TOM ABOUSLEMAN, *et al.*,
Defendants.

STATE OF NEW MEXICO'S RESPONSE TO OPENING SUPPLEMENTAL BRIEFS OF THE UNITED STATES AND THE PUEBLO OF SANTA ANA ON ISSUES 1 AND 2

The State of New Mexico ("State") files this Response to the *Opening Supplemental Briefs on Issues 1 and 2* ("Supplemental Briefs") of the United States ("US") (Doc. 4476) and the Pueblo of Santa Ana ("Santa Ana") (Doc. 4475). This Response addresses the arguments in both Supplemental Briefs but should be read in conjunction with the State's *Opening Brief on Issues 1 and 2* (Doc. 4363), *Response Brief on Issues 1 and 2* (Doc. 4366), and *Reply Brief on Issues 1 and 2* (Doc. 4369).

I. INTRODUCTION

The Court granted the US and the Pueblos of Jemez, Zia and Santa Ana (jointly, "US/Pueblos") leave to submit supplemental briefs on Issues 1 and Issue 2 "in light of" the Tenth Circuit Court of Appeals' opinion in *United States v. Abouselman* [sic], 976 F.3d 1146 (10th Cir.

2020) ("Tenth Circuit Opinion").[1] *Scheduling Order* (Doc. 4452) at 3, 5-6. The US and Santa Ana misstate the scope and binding effect of the Tenth Circuit Opinion in their Supplemental Briefs. As demonstrated below, the Tenth Circuit resolved "a discrete purely legal issue" on interlocutory appeal from this Court's *Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* ("2017 Opinion") (Doc. 4397): "Whether, as a matter of law, a sovereign can extinguish aboriginal rights to water by the mere imposition of its authority over such water without any affirmative act." 976 F.3d at 1154. The Tenth Circuit explained that its jurisdiction on interlocutory appeal was limited to resolution of that question, and it did not engage in fact finding. There is evidence in this Court's extensive record of official acts of Spain related to the founding of non-Pueblo land grants above and between the Pueblos. Neither this Court nor the Tenth Circuit made any legal determination on the effects of the land grants on the Pueblos' aboriginal water rights. On remand, the Court should consider this evidence in conjunction with controlling law on aboriginal title to rule with respect to Issue 1 (whether the Pueblos' aboriginal water rights were extinguished or modified by a sovereign act) that the Pueblos' aboriginal water rights were modified by affirmative acts of Spain that ended the Pueblos' exclusive right to use of the waters of the Jemez River Basin, and the right to future uses that would be to the detriment of other water users.

Additionally, as shown below, the Tenth Circuit Opinion has no effect on Issue 2, whether the *Winans* doctrine applies to any of the Pueblos' grant or trust lands. That issue has been fully briefed, and for the reasons set forth in the State's previous briefs and in this Response, the Court should rule that the Pueblos do not possess *Winans* rights.

[1] The correct spelling is "Abousleman."

II. PROCEDURAL HISTORY

This general stream system adjudication to determine all water rights in the Jemez River Basin was filed in 1983. All non-Pueblo water rights have been fully adjudicated and are set forth in separate partial final judgments and decrees entered by the Court in 1998, 2000, and 2008 (Doc. 3948, 3868, 4182). On or about June 10, 2022, the Pueblos of Jemez and Zia entered into a Local Settlement Agreement with the State, the Jemez River Basin Water Users' Coalition ("Coalition"), and the City of Rio Rancho, fully resolving each Pueblo's water rights claims within the basin including claims to aboriginal water rights. As described in the July 15, 2022, *Joint Status Report* (Doc. 4472), the Settlement Agreement must now be approved by Congress to become enforceable.[2] The only non-settling party remaining is Santa Ana which seeks recognition of an expanding right to new uses of water with an aboriginal priority date[3], not currently recognized under existing law, as part of an aboriginal water right.[4]

A. The Origin of Issues 1 and 2

Since the beginning of this case, the US/Pueblos have claimed a first priority water right on the Pueblos' grant and trust lands, under various theories, to a quantity of water much greater than the maximum acreage irrigated by the Pueblos at the time of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848) ("Treaty"). *See*, *e.g.*, *Special Master's Report* (Doc. 1980) at 4-5 (describing the Pueblos' future use claims to appropriate surface and groundwater for non-

[2] The Pueblos of Jemez and Zia filed a *Joinder in the United States Opening Brief on Issues 1 and 2* (Doc. 4477) to preserve their litigation position in the event the pending federal settlement legislation is not enacted.

[3] An aboriginal priority is a first or "time immemorial" priority that is senior to non-Pueblo water rights.

[4] Unlike the Pueblos of Jemez and Zia, Santa Ana's current and historic water uses are primarily within the Middle Rio Grande stream system. In fact, Santa Ana stipulated to just 16.5 acres of historic irrigation within the Jemez River Basin during the 1988 evidentiary proceedings before the Special Master. *Stipulation* (Doc. 1954).

irrigation uses with a time immemorial priority).[5] This round of supplemental briefing follows many years of litigation and briefing on those claims. [6]

In 1988, the State and the Coalition filed motions for partial summary judgment (Doc. 1935, 1938) challenging the US/Pueblos' claims that the Pueblos have a first priority right to expanding future uses of water in excess of what they used on their grant lands as of the Treaty of Guadalupe Hidalgo. The Special Master issued a report in 1988 (Doc. 1980) recommending summary judgment in the State and Coalition's favor on the US/Pueblos' future use claims on Pueblo grant lands based on federal reserved, Indian reserved, aboriginal, or riparian water rights theories. The Special Master also held an evidentiary hearing in 1988 on the Pueblos' historic and existing uses of water from the Jemez River, and issued a second report in 1991 (Doc. 2291) with findings and recommended conclusions regarding the Pueblos' water rights based on past and present uses of water.

On October 4, 2004, Judge Martha Vazquez issued a *Memorandum Opinion and Order* (Doc. 4051) ("2004 Opinion") on the pending motions for partial summary judgment and objections to the Special Master's reports.[7] Considering the various legal theories underlying the US/Pueblos' future use claims, Judge Vazquez found that the doctrine of aboriginal title could form the basis for ownership of a water right, but she granted partial summary judgment in the

[5] The Coalition's Response to both Supplemental Briefs gives a detailed breakdown of the US/Pueblos' future use claims since the beginning of this case.

[6] As set forth in the State's briefing on Issue 3 (quantification of the Pueblos' aboriginal water rights), it is the State's position that the Pueblos possess water rights based on their aboriginal use of the resource prior to 1848, and those vested rights based on actual use are protected by the Treaty of Guadalupe Hidalgo and entitled to an aboriginal priority. After 1848, the Pueblos could, and have, acquired water rights by putting water to beneficial use, and those rights are entitled to a priority of the date of first use.

[7] The State committed its available resources to the adjudication of non-Pueblo water rights during the period between the filing of the Special Master's Reports and reassignment of the case to Judge Vazquez in 2004.

State's favor, holding that the Pueblos do not have *Winters* reserved rights on their grant lands. 2004 Opinion at 19-20, 22. Judge Vazquez found that the US did not impliedly reserve water rights on the Pueblos' grant lands either by agreement with the Pueblos, confirmation of land titles of the Pueblos' grant lands, or by act of Congress; and then held that any reserved rights on Pueblo trust lands have a priority as of the date "those lands were placed in trust."[8] *Id*. at 23-26, 30.

Regarding the applicability of the *Winans* doctrine to the Pueblos' water rights claims, Judge Vazquez explained that *Winans* rights "essentially are governmentally recognized aboriginal rights . . . They preserve existing uses instead of establishing new uses." *Id*. at 26 (citing Robert E. Beck, *Waters and Water Rights* § 37.02(a)(2) (1996)). *See also United States v. Winans*, 198 U.S. 371 (1905). Citing *State v. Adair*, 723 F.3d 1394, 1414 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), Judge Vazquez acknowledged that the *Winans* doctrine may apply to water rights, but she advised that the *Winans* rights must be expressly and explicitly recognized in a treaty with the tribe or other act of the sovereign which specifically identifies the rights reserved by the tribe. *Id.* at 27-28. She therefore concluded that the "[a]pplicability of the *Winans* doctrine to the Pueblos' grant lands will depend on whether these has been governmental recognition of the Pueblos' aboriginal water rights." *Id.* Importantly, Judge Vazquez found that "there is no treaty or agreement between the Pueblos and the United States that fairly specifically recognizes the Pueblos' aboriginal rights." *Id*. at 28. However, because the Treaty of Guadalupe Hidalgo protected the property rights of the citizens of Mexico, including the Pueblos, she denied as premature the State's request for a ruling that Pueblos do not have *Winans* rights on their grant

[8] The 2004 Opinion provides a useful explanation of the difference between Pueblo grant and trust lands. "'Grant lands' refer to those lands granted to the Pueblos by the prior sovereigns and where the Pueblos' title to those lands has not been extinguished. . . . 'Trust lands' refer to those held in trust by the United States for the benefit of and use by the Pueblos." 2004 Opinion at 13-14 (internal citations omitted).

lands because "what the Pueblos' [water] rights were under the previous sovereign have yet to be determined." *Id*. at 28.

Following issuance of the 2004 Opinion, the parties entered into settlement negotiations which were productive until early 2012 when the parties submitted a *Status Report* (Doc. 4234) advising the Court that negotiation had stalled and proposing a plan for resuming litigation. By Order dated July 5, 2012 (Doc. 4253), the Court adopted the parties' proposal and set a briefing schedule on the five threshold legal issues identified by the parties to attempt to resolve the Court's question: what were the Pueblos' water rights under the previous sovereigns that were protected under the Treaty of Guadalupe Hidalgo? As set forth in the State's previous briefs on Issues 1, 2, and 3, and further shown in Section V of this Response, there is now extensive evidence in the record to answer this question.

B. District Court and Appellate Proceedings on Issues 1 and 2

The parties participated in a three-day evidentiary hearing in 2014 before Magistrate Judge Lynch on Issues 1 and 2 and submitted briefs on both issues after the hearing. Judge Lynch issued his *Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* on October 4, 2016 (Doc. 4383). Judge Vazquez issued her 2017 Opinion (Doc.4397), adopting Judge Lynch's recommendations and concluding that Spain's exercise of complete dominion over the determination of the right to use the public waters of the Jemez River stream system extinguished the Pueblos' pre-Spanish aboriginal right to use water. *Id.* at 7. Judge Vazquez made no ruling on any other part of Issues 1 and 2.

The Tenth Circuit Court of Appeals granted the US and Pueblos' petition for interlocutory appeal and on September 29, 2020, issued its opinion reversing Judge Vazquez's 2017 Opinion and remanding the case to this Court for further proceedings consistent with its opinion. 976 F.3d

at 1160. The Tenth Circuit entered an Order on December 18, 2020, (Doc.4438) denying the State's Petition for Rehearing (*United States v. Abouselman*, No. 18-2164, 18-2167, Doc. 010110437893 (10th Cir. November 13, 2020)).

III. ISSUE 1 - THE COURT MUST CONSIDER THE NATURE OF THE CLAIMED ABORIGINAL WATER RIGHT TO DETERMINE WHETHER IT WAS EXTINGUISHED OR MODIFIED BY SOVEREIGN ACT.

Regardless of how this Court construes the scope of remaining issues on remand, it still must decide under Issue 1 whether the Pueblos' aboriginal water rights were extinguished or modified by any affirmative sovereign act. To make that determination, the Court must consider the nature of that claimed water right. Specifically, the Court must determine whether, in addition to historic uses of water with an aboriginal priority date, an aboriginal water right includes an expanding right to make new uses without regard to other water users in the fully appropriated Jemez River Basin. The Tenth Circuit only determined that an affirmative act was necessary to extinguish aboriginal water rights – it did not determine what those rights were. This issue was not before the Tenth Circuit and remains before this Court as an issue of first impression. The US/Pueblos argue for a Pueblo aboriginal right to expanding future use of water that finds no support in the law of aboriginal title or federal Indian water law, and that would have significant implications not only for other water rights that have already been recognized by this Court, *see* Doc. 3948, 3868, 4182, but also for water rights throughout the West. This Court's determination that an aboriginal water right does not include expanding future uses with an aboriginal priority date will not preclude a finding that the Pueblos have first priority aboriginal water rights based on their actual and historical uses of water within the Jemez River Basin, protected as existing property rights by the Treaty of Guadalupe Hidalgo in 1848.

A. A Claimed Aboriginal Right to Expanding Future Use of Water is Legally Incompatible with the Requirement of Actual and Exclusive Use and Occupancy for Proof of Aboriginal Title.

The doctrine of aboriginal title is based on the Indian "right of occupancy" of certain lands prior to arrival of the sovereign. *See Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823). Aboriginal title to land protects existing uses and requires proof "'of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of land.'" *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 784 (1993) (quoting *United States v. Pueblo of Ildefonso*, 206 Ct. Cl. 649, 669 (1975) (internal quotation omitted)); *see State v. Coffee*, 556 P.2d 1185, 1189 (Idaho 1976) ("We hold that, where established by historical use, aboriginal title includes the right to hunt and fish and where those rights have not been passed to the United States, by treaty or otherwise, the rights continue to adhere to the current members of the tribe which held them aboriginally.").[9] In multiple filings the US/Pueblos describe the Pueblos' aboriginal water rights as unextinguished first priority water rights encompassing not only existing and historic uses, but also new future uses on both grant and trust lands to be quantified without regard to existing non-Pueblo water rights in the Jemez River stream system:

> Aboriginal water rights are not limited to the amount of water historically utilized by a tribe or to the traditional methods of water use. . . .
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> ***
>
> The measure of the Pueblos' aboriginal water rights should be the amount they require to satisfy their current and future needs, to sustain their permanent existence as a tribal community on their present homeland. . . .
>
> ***
>
> The Pueblos' aboriginal water rights encompass the right to take as much water as required for its permanent homeland needs.

[9] The State's Response Brief on Issues 1 and 2 (Doc. 4366) and Opening Brief on Issue 3 (Doc. 4287) address the various flaws in the claimed aboriginal right to expanding uses including the US/Pueblos' inability to meet the standard for proof of aboriginal title which requires proof of actual, historic and exclusive use and occupancy. *See United States v. Santa Fe Pac. R. Co*., 314 U.S. 339, 345 (1941).

United States' and Pueblos of Jemez, Santa Ana, and Zia's Opening Brief Regarding Quantification of Pueblos Aboriginal Water Rights (Issue 3) (Doc. 4281) at 9, 11, 12.

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> The most prominent characteristics of aboriginal water rights are their superior priority and the fact that they include water for future needs – that is rights not necessarily being exercised.

Pueblos' Opening Brief to the Tenth Circuit at 33.

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> The United States claims water rights on behalf of the Pueblos…for their past, current and future uses on both their grant and trust lands. . . . 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 its uses. . . .

United States' Opening Brief to the Tenth Circuit at 8-9. It is this unprecedented expansion of the nature of aboriginal water rights, not based on aboriginal use and occupancy but on future homeland needs, that the US/Pueblos claim was never extinguished by any sovereign act, and which therefore can be exercised by the Pueblos from both surface and groundwater to the detriment of all other water users in the Jemez Basin.

Chief Judge Tymkovich, in his dissent to the Tenth Circuit Opinion, expressed skepticism regarding the Pueblos' claim to unextinguished aboriginal water rights incidental to their aboriginal title to land based not only upon historic use of water but also to future use of an undetermined quantity of water which they have never put to use:

> The Pueblos' claim to expanding or future needs seems inconsistent with the doctrine of aboriginal rights. *Even assuming for purposes of argument that the doctrine applies as fully to water as it does to land, it requires the Pueblos to show actual, exclusive and continuous use and occupancy for a long time.*

976 F.3d at 1162 n.2 **(**citing *Pueblo of Jemez v. United States,* 790 F.3d 1143 (10th Cir. 2015)) (emphasis added). The Tenth Circuit's reasoning in *Pueblo of Jemez* merits discussion here as it illustrates why the Pueblos' claimed aboriginal rights to expanding use of the waters of the Jemez

River Basin cannot meet the well-established requirements for proof of aboriginal title.

Pueblo of Jemez addressed the legal sufficiency of Jemez Pueblo's claimed aboriginal title to lands within the Valles Caldera National Preserve under the standard established in *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941) ("*Santa Fe Pacific*"). The court rejected the United States' argument that non-Indian use of the grant lands extinguished the Pueblo's aboriginal title because, it noted, "[s]imultaneous occupancy and use of land pursuant to fee title and aboriginal title could occur because the nature of Indian occupancy differed significantly from the occupancy of settlers." *Id*. at 1165. The court observed, "[I]t is . . . easy to see how a peaceful and private Indian Pueblo might have used portions of this large area of land for its traditional purposes while one agreeable rancher was using portions of it for grazing livestock." *Id.*

By contrast, the Pueblos' future uses of water cannot occur simultaneously with existing uses by non-Pueblos. Hence, as Judge Tymkovich observed in his dissent, the Tenth Circuit's reasoning in *Pueblo of Jemez* is inapplicable to the Pueblos' claim to an aboriginal right of expanding use of water:

> That reasoning [from *Pueblo of Jemez*], however correct it may be with respect to land use, has limited application to water use – particularly where, as here the Jemez River is fully appropriated. Unlike land, the use of water by one user, regardless of its purpose, is necessarily to the exclusion of all others.

976 F.3d at 1163. *Pueblo of Jemez* thus lends no support to the Pueblos' claim to expanding aboriginal water rights based not on actual use or occupancy but upon speculative future needs that would have significant effects on other existing water rights to the Jemez River. If anything, as Judge Tymkovich's dissent demonstrates, *Pueblo of Jemez* casts considerable doubt on the claim because even if such an expanding future use water right could be squared with the requirement of actual and exclusive use and occupancy necessary to establish aboriginal title, the record in this case demonstrates that the Pueblos were required to share water from the Jemez with

non-Pueblo settlers under Spanish and then Mexican sovereignty, water which could not be simultaneously used for the Pueblos' current or future uses. There is no legal or factual basis under the law of aboriginal title for the US/Pueblos' claim for expanded future uses as part of the Pueblos' aboriginal water rights.

B. Federal Doctrines Cited by the Pueblos do not Support a Claimed Aboriginal Right to Expanding Future Use of Water.

None of the federal doctrines relied on by the US/Pueblos support the claim to a first priority aboriginal water right that would allow the Pueblos to increase their use of water into the future without regard to other existing water rights in the Jemez River Basin. As explained in Section 2.A of this Response, this Court already determined that the Pueblos do not have *Winters* reserved rights on their grant lands. The US/Pueblos nevertheless propose *Winters* as a model for recognizing aboriginal water rights on all of their lands – grant and reservation - that are not limited to historic or traditional use:

> As the Court in *Winters* stated, 'the Indians had command of the . . . waters, command of all their beneficial use. . . .' The measure of the Pueblos' aboriginal water rights should be the amount they require to satisfy their current and future needs, to sustain their permanent existence as a tribal community on their present homeland. In that regard aboriginal water rights must be viewed as *practically indistinguishable from federal reserved water right*.

US/Pueblos' Opening Brief on Issue 3 at 11 (emphasis added). *Winters* rights are federal reserved water rights and are immediately distinguishable from the US/Pueblos' claimed aboriginal right in at least three key respects. First, under *Winters* the United States impliedly reserved water that was unappropriated on the date of the reservation. *See* 2004 Opinion at 30 (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). Second, the reserved water right has a priority as of the date of reservation. *See id*. (citing *Arizona v. California*, 376 U.S. 546, 600 (1963)). Third, in *Winters* the United States reserved lands for the tribe for an identified purpose, "to change the

Indians' lifestyle from nomadic to agrarian." *See id*. at 23. "This change in lifestyle established a new use of water for which the United States impliedly reserved water for use on that land . . . reserved from the public domain." *Id*. As this Court confirmed in its 2004 Opinion, the United States and the Pueblos did not enter an agreement impliedly reserving water for "homeland" or other new uses on land reserved from the public domain for the Pueblos' exclusive use. *Id*. The *Winters* doctrine thus provides no support for recognition of a first priority aboriginal right to expanding future use of water in the fully appropriated Jemez River Basin that could be exercised to the detriment of non-Pueblo water rights, many of which were established during the Spanish colonial period before the Treaty of Guadalupe Hidalgo.

The *Winans* doctrine also does not support the claim to aboriginal water rights with expanding future uses of water. While the *Winans* doctrine does apply to water rights, this Court clarified that it "*preserve[s] existing uses instead of establishing new uses*." 2004 Opinion at 26 (emphasis added). Furthermore, *Winans* rights must be expressly and explicitly recognized in a treaty with the tribe or other act of the sovereign which specifically identifies the rights reserved by the tribe. As this Court observed in its 2004 Opinion, "there is no treaty or agreement between the Pueblos and the United States that fairly specifically recognizes the Pueblos' aboriginal rights." *Id.* at 28. The only treaty is the 1848 Treaty of Guadalupe Hidalgo, between the United States and Mexico, not the Pueblos. It makes no mention of any specific rights of the Pueblos. Under the Treaty, the United States agreed to protect the rights of all Mexican citizens generally, which included "not only Indians, but Europeans and Africans. As such, the Pueblos' grant lands *had no different status under the Treaty* than the grant lands owned by the non-Indian Mexicans." *Id.* at 24 (emphasis added). And as Judge Tymkovich observed: "Even the Treaty of Guadalupe Hidalgo recognized that the Pueblos' right to water was limited to that which was actually used," (citing

New Mexico ex rel. Martinez v. City of Las Vegas, 89 P.3d 47, 60 (N.M. 2004) (rejecting the argument that the Treaty of Guadalupe Hidalgo provided an expanding pueblo water right)). *Abouselman*, 976 F.3d at 1162. Using an analogy to land as illustration, he explained, "The Pueblos have no entitlement to expanded reservation lands. Likewise, they are not entitled to expanded water rights not tethered to historical practices." *Id.*

Finally, the US/Pueblos' claims are not supported by *New Mexico v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985) ("*Aamodt II*"). The *Aamodt II* court recognized a Pueblo aboriginal water right based on actual historic use to a date certain – the so called "Mechem" doctrine. *Id*. at 1010. This Court explained in the 2004 Opinion, "The *Aamodt II* ruling was based on the District Court's review of a Special Master's findings of fact and conclusions of law on the rights of the Pueblos of San Ildefonso, Tesuque, Nambe and Pojaque [sic]." 2004 Opinion at 17-18 (citing *Aamodt II*, 618 F. Supp. At 996-1000). In this case, the Special Master properly found in his 1988 Report (Doc. 1980) that the date certain should be the Treaty of Guadalupe Hidalgo; and therefore, whatever property the Pueblos owned at the time of the Treaty, including aboriginal rights to water based on uses as of that date, were preserved. *See* State's Opening Brief on Issue 3 (Doc. 4283) at 3-4. However, because the waters of the Jemez River Basin are a finite resource, recognition of expanding Pueblo water rights with aboriginal priority for future uses would conflict with the terms of the Treaty by potentially diminishing or even nullifying the water rights of non-Indians whose property rights were also protected by the Treaty.

C. An Aboriginal Right to Expanding Future Uses would have Detrimental Effects on Adjudicated Non-Pueblo Water Rights.

Judge Tymkovich called out the US/Pueblos for attempting to obscure the expanding nature of the claimed aboriginal water right, and he highlighted the consequences of recognizing such a right:

> The Pueblos, while disclaiming an intention to seek an *expanding* water right, nonetheless assert that "their aboriginal water rights include *an amount sufficient to satisfy their future needs*." . . . This seems a matter of semantics, but in any case it is problematic to decide whether the Pueblos have aboriginal water rights entitling them to an as-yet-undefined right to expanding use without also considering the implications for the many other water users on the Jemez, some of whose water rights date back to Spanish rule (to say nothing of water users on the Rio Grande, on which other Pueblos may claim a similar aboriginal right to expanding or future uses). . . .

976 F.3d at 1161-62 (internal citation omitted) (emphasis in original).

Judge Tymkovich worried that "[t]he majority's conclusion here may have serious implications for all other users of the Jemez River and, by implication, other river systems in the Southwest[.]" *Id*. at 1162. Accordingly, his dissent offers several considerations intended to guide this Court on remand with the goal of avoiding the potentially unsettling – and unintended – implications of the Opinion's ruling: "On the merits, the majority determines the Pueblos' aboriginal water rights have not been extinguished. But this cannot mean as a practical matter that the Pueblos now have limitlessly expanding water rights." *Abouselman*, 976 F.3d at 1161. The State urges this Court to heed Judge Tymkovich's dissent and consider the following in further proceedings on Issues 1 and 2: whether the Pueblos' rights were modified by Spanish and Mexican law; the limits on the quantification of the rights even under *Arizona v. California*, 373 U.S. 546 (1963); the inapplicability of the law of aboriginal land rights to aboriginal rights to water; the lack of any "law of ancestral Indian water rights;" and the Supreme Court's emphasis in *City of Sherill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 218 (2005) on "longstanding observances and settled expectations" as prime considerations in quantifying the Pueblos' water rights. *See* 976 F.3d at 1161-64.

IV. THE TENTH CIRCUIT DID NOT RESOLVE ISSUE 1 AS TO SPAIN.

The US and Santa Ana misstate the scope of the Tenth Circuit Opinion and its impact on the resolution of Issue 1 (whether the aboriginal water rights of the Pueblos were modified or extinguished by any actions of Spain, Mexico or the United States). The Tenth Circuit's jurisdiction on interlocutory appeal was limited to questions of law "fairly included " within the 2017 Opinion. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); 28 U.S.C. § 1292(b); *United States v. Stanley*, 483 U.S. 669, 677 (1987). Those issues were narrower than the US and Santa Ana contend, and this Court should consider evidence in the record that is relevant to extinguishment or modification of the Pueblos' aboriginal water rights by Spain.

A. The Tenth Circuit Decided a Limited Question of Law Raised by the 2017 Opinion: Whether an Affirmative Act of the Sovereign is Required to Extinguish Aboriginal Water Rights.

1. The Tenth Circuit Opinion is limited to the controlling question law.

The US/Pueblos sought interlocutory appellate review of the 2017 Opinion on the grounds that the Court had incorrectly applied the legal standard for extinguishment of aboriginal rights. The Tenth Circuit resolved this narrow issue in their favor, but they now see an opportunity to apply the ruling more broadly to Issue 1 on remand. They point to statements in Section V.B of the Tenth Circuit Opinion ("Spain's General Administration of its Water Administration System was not Adverse to the Pueblos' Aboriginal Rights") regarding the absence of a repartimiento allocating water between the Pueblos and non-Pueblos, or evidence that the Pueblos ever decreased their usage or were unable to increase their usage, as proof that the Tenth Circuit resolved Issue 1 entirely as to Spain. *See* US Supplemental Brief at 8, 17-18; Santa Ana's Supplemental Brief at 5. This argument deliberately ignores the multiple statements by the Tenth Circuit that the scope of its review of the 2017 Opinion was confined to a narrow question of law concerning the imposition of Spanish law over the Jemez River Basin.

In addressing the applicable standard of review on interlocutory appeal, the Tenth Circuit explained:

> The question of whether Spain extinguished the Pueblos' aboriginal water rights is ordinarily a mixed question of fact and law, as it requires application of facts to the legal standard for extinguishment. *Here, however, the district court determined that Spain extinguished the Pueblos' aboriginal water rights by the imposition of Spanish law. Thus, the issue here is the extent and impact of Spanish law.*

976 F.3d at 1154 (footnote omitted) (emphasis added). Later in its opinion, the Tenth Circuit again narrowly and precisely defined the issue and the limits of its jurisdiction:

> In sum, *we have jurisdiction to address only the controlling question of law presented by the order below*: Whether, as a matter of law, a sovereign can extinguish aboriginal rights to water by the mere imposition of its authority over such water without any affirmative act.

Id. The Tenth Circuit answered this question in the negative, holding only that "a sovereign must affirmatively act to extinguish aboriginal water rights." 976 F.3d at 1150. This holding was based almost entirely on the legal standard for extinguishment of aboriginal title articulated by the United States Supreme Court in *Santa Fe Pacific*, 314 U.S. 339:

> [A] sovereign cannot extinguish aboriginal rights without affirmatively acting in a manner adverse to the specific aboriginal rights at issue. . . . *Santa Fe Pacific* requires a sovereign to exercise complete dominion, not merely to possess complete dominion. . . . Thus, to "exercise" complete dominion the sovereign must put its dominion into action, through some sort of affirmative action.

976 F.3d at 1158-59 (internal citations omitted) (emphasis in original). Accordingly, the Tenth Circuit reversed this Court's determination that the Pueblos' aboriginal water rights had been extinguished by imposition of Spanish law, because under the *Santa Fe Pacific* standard, "the passive implementation of a generally applicable water administration system does not establish Spain's clear intent to extinguish aboriginal water rights of these three Pueblos." 976 F.3d at 1160.

This Court should not ignore the Tenth Circuit's clear statement of the limits of its

jurisdiction on interlocutory appeal. It ruled that affirmative acts of the sovereign are necessary to extinguish aboriginal water rights, but it made no determination regarding the legal effect of affirmative acts of Spain that have yet to be considered by this Court under of Issue 1.

2. This Court may consider the founding of the land grants as affirmative acts of Spain adverse the Pueblos' aboriginal water rights.

The US makes much ado about the State's presentation of evidence regarding the San Ysidro and Canon de San Diego land grants at the 2014 hearing before Judge Lynch, and the State's reference to this evidence in its post-hearing briefing to the District Court and briefing to the Tenth Circuit on interlocutory appeal. *See* US Supplemental Brief at 12-15. The State acknowledges that it presented evidence related to the grants, but the State is not "mistat[ing] the record" in submitting that the conclusion of law in the 2017 Opinion from which the US/Pueblos sought interlocutory appeal was not based on findings related to the land grants. *See Id*. at 12. On the contrary, the parties appear to agree that this Court made no legal determination in its 2017 Opinion concerning the effects of the land grants on the Pueblos' aboriginal water rights, and it may now do so on remand.

Referencing the petitions for interlocutory appeal, the Tenth Circuit noted that the US/Pueblos "framed the issue [presented by the 2017 Opinion] as extinguishment of aboriginal water rights without affirmative action." *Abouselman,* 976 F.3d at 1153. Similarly, the US now describes the ruling in the 2017 Opinion from which it sought interlocutory appeal as follows:

> The Court . . . found that Spain extinguished the Pueblos' aboriginal water rights because Spain 'exercised complete dominion over the determination of the right to use public waters adverse to the Pueblo's pre-Spanish right to use water.' . . . The Court relied on the general principles of Spanish law that water from public sources were to be shared and that such waters could not be used to the detriment of others[.]

US Supplemental Brief at 5. Santa Ana avoids any substantive discussion of the 2017 Opinion in its Supplemental Brief, but during oral argument before the Tenth Circuit, Santa Ana's counsel

described the issue for interlocutory appeal as a narrow legal question concerning the imposition of Spanish sovereignty over the Pueblos:

> **Mr. Hughes:** . . . [T]he point I would like to make here is that *the district court decision and the recommended decision of the magistrate below rested their conclusion that the imposition of Spanish sovereignty in the Southwest had totally extinguished all aboriginal rights of the [P]ueblos* on a single phrase in the [S]upreme [C]ourt decision in *Santa Fe Pacific*.
>
> ***
>
> **The Court:** What about the – *what about the [non-Pueblo land] grants to the San Diego and the San Ysidro*?
> **Mr. Hughes:** Your honor –
> **The Court:** Your argument is that that that would be inconsistent with, you know, the [P]ueblos?
> **Mr. Hughes:** And *that argument is totally baseless. It has no merit. First of all, those grants were made almost 200 years after, according to the decision below, the [P]ueblos aboriginal rights had been extinguished, so they really are irrelevant. Secondly, I might mention, of course, that* ***neither of those grants is mentioned in either the recommended decision of the magistrate or the district court decision, so, technically, they're just not even at issue here***. . . .

Transcript of March 11, 2020 Oral Argument ("Oral Arg. Trans."), attached as *Exhibit 1*, at 10, 14:24 – 15:14 (emphasis added).

The State agrees with Santa Ana that the evidence of the founding of the San Ysidro and Canon del Diego land grants upstream of and between the Pueblos was not at issue on interlocutory appeal. The founding of the land grants is not, as the US claims, a "red herring," and this Court's 2017 Opinion did not reject "the argument that the grants were affirmative actions that extinguished the Pueblos' aboriginal water rights." *See* US Supplemental Brief at 18, 26. Rather, this Court determined that imposition of Spanish authority extinguished the Pueblos' aboriginal water rights. 2017 Opinion at 6-7 ("Prior to the arrival of the Spanish, the Pueblos were able to increase their use of public water waters without restriction. After its arrival, the Spanish crown insisted on its exclusive right and power to determine the rights to public shared waters."). This Court's finding that Spain "did not take any affirmative act to decrease the amount of water the

Pueblos were using" was not the basis of its ruling and is not dispositive on the questions of extinguishment or modification when considered against the water right the US/Pueblos are actually claiming – an aboriginal water right based not only on actual use, but on expanding future use. *See id*. at 7 (emphasis added). The US and Santa Ana misuse this finding in an effort to extend the Tenth Circuit Opinion to the determination of issues not fairly presented by the 2017 Opinion.

The Coalition's Response to both Supplemental Briefs explains how the arguments of the US and Santa Ana on the binding effect of the Tenth Circuit Opinion are reminiscent of those of the US and the *Aamodt* Pueblos rejected by Judge Mechem in *Aamodt II* under the "law of the case" doctrine following remand by the Tenth Circuit in *State v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976) ("*Aamodt I*"). *See June 10, 1983 Opinion* (unpublished).[10] There, as here, the US contended that the Tenth Circuit's expressions on matters collateral to the issue on appeal were binding on the district court on remand. Citing *Barney v. Winona & St. Peter Ry.* Co., 117 U.S. 228, 231 (1885) ("[the law of the case] rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision"), Judge Mechem rejected the arguments that the Tenth Circuit's expressions in *Aamodt I* "on priority, and its discussion of *Winters* and the Pueblo Lands Act in that context" constituted the holding or law of the case. *Id*. at 10.

Here, the US attempts to push the envelope further than in *Aamodt II*. Quoting *Proctor & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2006), the US warns this Court on one hand that it is "bound to follow the [Tenth Circuit's] mandate" and on the other suggests that the mandate "free[s] [the Court] to pass upon any issue which was expressly or impliedly disposed of

[10] Attached to *Response Brief of Defendant-Appellee Jemez River Basin Water Users Coalition*, Docket No. 18-2164, 18-2167.

on appeal." US Supplemental Brief at 11. Then, despite having framed the issue on interlocutory appeal as a discrete question of law regarding the imposition of Spanish authority, and acknowledged that the Tenth Circuit "did not expressly mention the non-Pueblo land grants," the US claims that the Tenth Circuit impliedly considered evidence of the land grants and therefore "did not agree with the argument that the land grants were adverse to the Pueblos' aboriginal water rights. . . ." US Supplemental Brief at 16-17. Such an expansive application of the Tenth Circuit Opinion to matters not addressed in the opinion – and which the Tenth Circuit was not required to address to resolve the interlocutory appeal – is not law of the case *See Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 705 (10th Cir. 1993), *reh'g on other grounds*, 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1063 (1995) (law of the case may include issue implicitly decided where resolution of the issue is a necessary step in resolving the appeal). Law of the case also does not apply to matters left open by the appellate court's mandate and in this case does not bar the Court from considering evidence related to the founding of the land grants on the question of whether Spain extinguished or modified the Pueblos' aboriginal water rights. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 177 (2nd Cir. 1967).

3. The US and Santa Ana rely on *dicta* in Section V.B of the Tenth Circuit Opinion which does not bind this Court on remand.

The Tenth Circuit clarified multiple times that the scope of its review on interlocutory appeal was limited to a discrete legal question presented by the 2017 Opinion regarding the imposition of Spanish law and which did not involve application of facts to the legal standard for extinguishment of aboriginal title. The US and Santa Ana nevertheless rely on statements in Section V.B of the Tenth Circuit Opinion to argue that the Tenth Circuit held as a matter of law that Spain did not extinguish the Pueblos' aboriginal water rights. It is well established that "[s]tatements in an opinion that are unnecessary for the Court's decision are dicta." *Alpenglow*

Botanicals, LLC v. United States, 894 F.3d 1187, 1202 (10th Cir. 2018). The Tenth Circuit's non-essential statements in Section V.B of its opinion should be seen for what they are – *dicta* that does not constitute law of the case, bind this Court on remand, or resolve Issue 1 as to Spain. *See In re Meridian Reserve, Inc. v. Bonnett Res. Corp.,* 87 F.3d 406, 410 (10th Cir. 1996) (*dicta* is not subject to the law of the case doctrine); *Gonzalez Aguilar v. Wolf*, 448 F. Supp. 3d 1202, 1210 (D.N.M. 2020) (Tenth Circuit *dicta* is not binding); *Dedham Water v. Cumberland Farms Dairy*, 972 F.2d 453, 459 (1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent.").[11]

These statements in Section V.B of the Tenth Circuit Opinion can only be seen as *dicta* for the additional reason that fact finding is the exclusive province of the district court. *See Norelus v. Denny's Inc.*, 628 F.3d 1270, 1293 (11th Cir. 2010 ("[A]s everyone knows, appellate courts may not make factual findings."). The Tenth Circuit was bound by this Court's factual determinations for purposes of interlocutory appeal "and could not make any findings of fact or inference for purposes of any subsequent proceedings." *See DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 611 (6th Cir. 2015). Neither this Court nor Magistrate Lynch found, as the Tenth Circuit stated in Section V.B of its opinion, that "there is no evidence that the Pueblos . . . were unable to increase their usage," that "there is no evidence that Spanish sovereignty had any impact on the Pueblos' use of water from the Jemez River at all," or that Spain "never actually ended the Pueblos' exclusive use of water or limited their use in any way." *Abouselman,* 976 F.3d at 1159. These statements might be true for the Pueblos' actual uses. But the question is not whether Spain took any affirmative

[11] This is the case despite the Tenth Circuit's denial of the State's Petition for Rehearing, the result of which is that the Tenth Circuit Opinion remains as issued.

acts to reduce the Pueblos' actual, then existing uses – it is whether it acted to reduce their right to expand those uses.

The Tenth Circuit's statements in Section V.B are contradicted by evidence in the record that the Pueblos' right to use water, not their existing uses, was not "exclusive" and was in fact limited by affirmative actions of Spain. This includes evidence of the founding of the Spanish land grants to non-Pueblo settlers in the 18th century that necessarily limited the amount of water available for the Pueblos' future uses; as well as the many non-Indian water rights adjudicated by this Court with priority dates dating back to the founding of the land grants. This evidence is directly relevant to the question of whether the Pueblos' aboriginal water rights were modified by any actions of Spain and should be considered by this Court on remand.

B. The Tenth Circuit Opinion does not Prevent this Court from Finding that the Pueblos' Aboriginal Water Rights were Modified by Actions of Spain.

Issue 1 asks whether the Pueblos aboriginal water rights have been "*modified* . . . in any way by any actions of Spain, Mexico or the United States."[12] (Emphasis added). The Tenth Circuit concluded that under the *Santa Fe Pacific* standard, Spain's "passive implementation of a generally applicable water administration system does not establish Spain's clear intent to extinguish the aboriginal water rights of these three Pueblos." 976 F.3d at 1160. The court reached this conclusion without considering the nature of the claimed aboriginal water rights in this case – a claim based not only on actual and historic uses but also to expanding future uses. Neither *Santa Fe Pacific* nor the Tenth Circuit Opinion prevent this Court from considering on remand whether

[12] Because the Court adopted the US/Pueblos' articulation of Issue 1 (*see Joint Proposed Litigation Plan* (Doc. 4237)), Santa Ana cannot credibly claim that there is no theory of "modification" of aboriginal water rights. *See* Santa Ana's Supplemental Brief at 21. The Court should also reject the US' argument that the Tenth Circuit Opinion impliedly resolved the question of modification of the Pueblos' aboriginal water rights because this argument relies on *dicta*. *See* US Supplemental Brief at 11.

Spain modified the Pueblos' aboriginal water rights by affirmative acts to limit expanding uses of water.

Santa Fe Pacific established that a sovereign can extinguish aboriginal title "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. In *United States v. Gemmill*, 535 F.2d 1145, 1147-48 (1976), the Court of Claims found that a series of federal actions demonstrated extinguishment of aboriginal title under the *Santa Fe Pacific* standard: military action against the tribe, establishment of a fort, continuous inconsistent use by others, and no physical possession for over 100 years. The *Gemmil* court clarified that "the relevant question is whether the governmental action was intended to be a revocation of Indian *occupancy* rights. . . ." *Id*. (emphasis added). Here, the Tenth Circuit held that "Spain's general assertion of governing authority does not indicate any intent to extinguish the Pueblos' water rights." 976 F.3d at 1160. But this holding cannot be read in isolation from the law of aboriginal title and the evidence showing that, like the acts of the federal government in *Gemmil*, Spain took a series of affirmative acts intended to restrict the Pueblos' right of occupancy by limiting their right to increase their use of water within the Jemez River Basin.

Indeed, even if this Court can somehow reconcile the contradiction of a claimed aboriginal right without a basis in actual use with the well-established legal requirements restated in *Pueblo of Jemez* for proving the existence of aboriginal title through actual use and occupancy, it must reckon with the undisputed fact that Spain made the Canon de Diego and San Ysidro land grants to Spanish settlers upstream and between the Pueblos. The expert for the US/Pueblos, Professor Charles Cutter, testified that the land grants carried an implied right to use water and transformed the Jemez River into a public, shared water source. March 31, 2014, Hearing Testimony of Charles Cutter ("Cutter") Volume 1 ("V1") at 136:3-19; *see id*. at 113:8-9 (under Spanish law, the Jemez

River was a common resource "for use by everybody"). He also testified that under Spanish law, users on the stream – both Pueblos and non-Pueblos – could increase their use, but not to the detriment of other users. Cutter V1 at 114:17 – 115:3. Importantly, Professor Cutter agreed that Spain's approval of the non-Pueblo settlements ended the Pueblos' exclusive use of the waters of the Jemez River, and as a result the Pueblos were no longer able to unilaterally increase their use of water. Cutter V1 at 138:9 – 140:10. Based on this evidence, Judge Tymkovich specifically recommended that the district court consider on remand whether Spain modified the Pueblos' aboriginal water rights. *See* 976 F.3d at 1162.

The Tenth Circuit pointed in its opinion to the absence of certain affirmative acts by Spain – specifically, the absence of affirmative acts to decrease the amount of water the Pueblos were using, and the absence of a formal *repartimiento*[13] to resolve a conflict between Pueblos and non-Pueblos over the use of water from the Jemez River. *See* 976 F.3d at 1160 Such evidence may be relevant to the question of whether, under the *Santa Fe Pacific* standard, Spain took sufficient acts to extinguish the Pueblos' aboriginal water rights that had been established through actual use. But the US/Pueblos are claiming an aboriginal water right that includes the right to increase the use of water without regard to other users in the Jemez River Basin, and they are claiming that such a right was never extinguished by Spain or the subsequent sovereigns. The requirements of *Santa Fe Pacific* for proving extinguishment of aboriginal title to land thus appear ill suited to this case where the future-use component of the claimed aboriginal water right is not even based on evidence of actual and exclusive use and occupancy of the water resource.

[13] "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)

In any event, as explained in the State's prior briefing on Issue 1 and as demonstrated by evidence in the record including Professor Cutter's testimony, Spain took affirmative acts that transformed the Jemez River into a shared public resource, limiting the amount of water available to the Pueblos and their ability to increase their use of water in the future to the detriment of other users.[14] On remand the Court may consider this evidence to conclude that any right to additional future uses that may have existed under the Pueblos' aboriginal water rights were modified by affirmative actions of Spain. It is undisputed that these actions ended the Pueblos' exclusive right to use of the common water source, the Jemez River, and the right to future uses that would be to the detriment of other users.

V. THE AFFIRMATIVE ACTS OF SPAIN TO MODIFY THE PUEBLOS' ABORIGINAL WATER RIGHTS CONTINUED UNDER MEXICAN RULE.

The US argues that the Tenth Circuit Opinion applies with equal force to the Mexican period and asks the Court to rule as a matter of law that Mexico did not extinguish the aboriginal water rights of the Pueblos. *See* US Supplemental Brief at 22. This argument is founded on a misinterpretation of both the Tenth Circuit Opinion and this Court's 2017 Opinion, neither of which ruled on evidence of affirmative acts of Spain which, as explained above, modified the Pueblos' aboriginal water rights by extinguishing their right to expand their use without regard to other users. Citing the report and testimony of Professor Cutter, Santa Ana contends that "the aboriginal rights to water held by the Pueblos under the 227 years of Spanish rule in New Mexico were completely unaffected by the 25 years of Mexican rule, and there is nothing in the record that suggests anything to the contrary." Santa Ana's Supplemental Brief at 8. Like the US, Santa Ana ignores the evidence of affirmative acts by Spain that modified the Pueblos' aboriginal water

[14] *See*, *e.g.*, the State's Opening Brief on Issues 1 and 2 (Doc. 4363) at 10-11.

rights, the effects of which continued throughout the Mexican period.

Whatever aboriginal water rights the Pueblos may once have possessed were modified by Spain's founding of the Canon de San Diego and San Ysidro land grants above and between the Pueblos with the right to use water from the Jemez River, a shared common resource under Spanish law and then Mexican law. With the founding of these land grants, the Pueblos no longer had exclusive "command of the resources" and the unilateral right to expand or make new uses of water that would be to the detriment to others with a right to use including the non-Pueblo settlers on the land grants. *See* Cutter V1 at 138:20-23. This did not change under Mexican rule. *See id*. at 57:4-17. Under Mexican law, the Jemez River was public water – a common source shared by more than one property owner, including the Pueblos. *See* State's Exhibit 2 (Hall Report) at 2. Thus, on the eve of American sovereignty, all users of the Jemez River, including the Pueblos, were subject to the "requirements of sharing and the principle of "no new or increased uses to the detriment of others." Cutter V1 at 130:4-8, 138:20-25.

A. The Treaty of Guadalupe Hidalgo did not Protect an Aboriginal Right to Expanding Future Uses of Water with an Aboriginal Priority Date.

The US contends that, in light of the Tenth Circuit Opinion, the Court may rule that the Treaty of Guadalupe Hidalgo did not extinguish the Pueblos' aboriginal water rights, and that the Treaty "protected the Pueblos' rights as they existed at that time (i.e., unextinguished aboriginal rights)." US Supplemental Brief at 23-24. The State agrees that the Treaty of Guadalupe Hidalgo protected the water rights of the Pueblos when they came under American sovereignty in 1848, but disagrees with the US and Santa Ana on what those rights were. As explained above, the Tenth Circuit Opinion did not dispose of Issue 1 as to Spain, and on remand the Court should find that affirmative acts of Spain to limit the Pueblos' right to expand their use of the public water of the Jemez stream system modified the Pueblos' aboriginal water rights. Such was the status of the

Pueblos' water rights under Mexican rule on the eve of American sovereignty. The Treaty of Guadalupe Hidalgo neither extinguished nor expanded these rights, and the US's requested ruling should be denied in so far as the US and Santa Ana claim that the Treaty protected an aboriginal right of expanding future use.

Under the Treaty, the Pueblos came under American sovereignty with no more and no less than the rights they possessed under Mexican rule. As this Court noted in its 2004 Opinion, "[t]he only 'purpose' of the Treaty with respect to Mexican-owned property was to protect existing rights. To protect property is not to grant property nor reserve additional property rights, but to maintain the *status quo*." 2004 Opinion at 24. Mexico had adopted the Plan of Iguala which declared the equality of all Mexican citizens, including the Pueblos, and that the property of all would be protected. *Id*. at 8. The rights held by the Pueblos under Mexican law did not include a right to expand their uses at any time without regard to other water users. *See* Cutter V1 at 145:1-15; State's Exhibit 2 at 51; April 1, 2014 Testimony of G. Emlen Hall ("Hall"), Volume 2 ("V2") at 274:17-23. Their water rights, like those of any other water user, were protected by Mexican law, and thus by the Treaty of Guadalupe Hidalgo. Because the Treaty did not create any new rights, the change to American sovereignty did not have the effect of somehow bestowing on the Pueblos a new right to expand their use of water to the detriment of others. Nor did the Treaty extinguish any rights held by the Pueblos. Those rights were already limited by sovereign act. An aboriginal water right to unfettered and exclusive use of the resource no longer existed.

VI. THE TENTH CIRCUIT OPINION DOES NOT SUPPORT FURTHER BRIEFING ON THE SUB-ISSUES TO ISSUE 1.

Issue 1 has three sub-issues: (1) "Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights and, if so, what effect?;" (2) "Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect?;" and (3) Did the Indian

Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect? " The State agrees with the US that the sub-issues were fully briefed, that the Tenth Circuit Opinion does not address any of the acts of Congress in sub-issues 1 through 3, and supplemental briefing on the sub-issues is unnecessary.[15] *See* US Supplemental Brief at 25. The State directs the Court to the sections of its previous briefs addressing the effects of the acts of Congress in sub-issues 1 through 3 on the Pueblos' water rights. *See* State's Opening Brief on Issues 1 and 2 (Doc. 4363) at 12-18; State's Response Brief on Issues 1 and 2 at 12-15. The State also refers the Court to the Coalition's analysis of the sub-issues in its Reply Brief on Issues 1 and 2 in which the State joined. *See* Doc. 4371 at 18-22.

VII. THE TENTH CIRCUIT OPINION HAS NO EFFECT ON ISSUE 2 BECAUSE THE PUEBLOS DO NOT POSSESS *WINANS* RIGHTS.

Issue 2 is "does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?" The State has demonstrated in its prior briefing on Issues 1, 2 and 3, and in Sections II.A and III.B of this Response that the Pueblos' claim to an aboriginal right to expanding future use of water is wholly incompatible with the *Winans* doctrine for at least two reasons. First, *Winans* rights "preserve existing uses instead of establishing new ones." 2004 Opinion at 26. Second, there has been no governmental recognition of the Pueblos' aboriginal water rights. Neither Spanish nor Mexican law recognized any aboriginal water rights of the Pueblos nor any right to expand their uses to the detriment of others. *See* Cutter V1 at 145:1-15; State's Exhibit 2 at 51; Hall V2 at 274:17-23. Nor did the Treaty of Guadalupe Hidalgo, which was a treaty "between the United States and Mexico in which the United States agreed to protect the property of Mexicans then in the ceded territory," specifically recognize any rights of the Pueblos. 2004 Opinion at 23-24. And

[15] Pages 8 through 18 of Santa Ana's Supplemental Brief largely restate argument regarding sub-issues 1 through 3 in the US/Pueblos' Opening Brief (Doc. 4362) and do not require a response from the State in this brief.

as the Pueblos were not parties to the treaty, there can be no intent by the Pueblos to reserve or retain any specific rights under the treaty, as required for an "Indian Reserved" *Winans* right. Moreover, none of the other federal acts identified in the US/Pueblos' previous briefing, including Section 7 of the 1851 Trade and Non-Intercourse Act and Section 9 of the Pueblo Lands Act, recognize any reservation of aboriginal water rights by the Pueblos necessary for the *Winans* doctrine to apply. *See* State's Response Brief on Issues 1 and 2 at 12-15; *see also* Coalition's Opening Brief on Issues 1 and 2 at 36-62. The State therefore requests a ruling under Issue 2 that the Pueblos do not possess *Winans* rights.

VIII. CONCLUSION

This Court did not reach the issue of the legal effect of affirmative acts of Spain, including the founding of the Non-Pueblo land grants, on the Pueblos' aboriginal water rights. The Tenth Circuit did not address this issue either. The Tenth Circuit decided only a narrow question of law on interlocutory appeal: "Whether, as a matter of law, a sovereign can extinguish aboriginal rights to water by the mere imposition of its authority over such water without any affirmative act." 976 F.3d at 1154. For the reasons set forth above, the Court should rule as to Issue 1 that the Pueblos' aboriginal water rights were modified by affirmative acts of Spain that ended the Pueblos' exclusive right to use of the waters of the Jemez River Basin, and the right to future uses that would be to the detriment of others. For the reasons stated in the State's prior briefing on Issue 2 and further addressed above, the Court should rule that the Pueblos do not possess *Winans* rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, I served the foregoing document electronically through the CM/ECF system which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and to the following person(s) by first classmail:

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