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

THE UNITED STATES OF AMERICA,
on its own behalf and on behalf of the
Pueblos of JEMEZ, SANTA ANA, and ZIA
and the STATE OF NEW MEXICO, ex rel.
State Engineer,

Plaintiffs,

and THE PUEBLOS OF JEMEZ, SANTA ANA,
AND ZIA,

Plaintiffs-in-Intervention,

vs.

No. 6:83 cv-1041 KWR/JHR
JEMEZ RIVER ADJUDICATION

TOM ABOUSLEMAN, et al.,

Defendants.

UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS SUPPLEMENTAL BRIEF ON ISSUE NOS. 1 AND 2

The United States submits the following Reply Brief in support of its Opening Supplemental Brief ("US Supp. Br.") on Issue Nos. 1 and 2 (Doc. 4476). This Reply responds to the arguments asserted by the State of New Mexico ("State") in the *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*, ("State Resp."), Doc. 4485, and by the Jemez River Basin Water Users Coalition ("Coalition") in the *Coalition's Response to Opening Supplemental Briefs of the United States and the Pueblo of Santa Ana on Issues 1 and 2* ("Coal. Resp."), Doc. 4484.

The State and Coalition contend that neither this Court nor the Tenth Circuit determined whether the land grants issued to the non-Indian communities of San Ysidro and San Diego de

Canon ("land grants") were affirmative acts by the sovereign that extinguished the Pueblos' aboriginal water rights. Such position is wrong, as evidence of the land grants and arguments by the State and Coalition regarding the land grants were before both this Court and the Tenth Circuit. This Court, aware of the land grants, ruled in its 2017 Order that Spain took no affirmative actions to decrease the Pueblos' water uses. The Tenth Circuit, again aware of the land grants, ruled that the Pueblos' aboriginal rights to use water were not impacted in any way during the Spanish reign. The State and Coalition in effect argue that both this Court and the Tenth Circuit ignored the evidence and arguments before them regarding the land grants. Such position is untenable. The fact that neither this Court nor the Tenth Circuit mentioned the land grants in their rulings does not mean that neither court considered the land grants before issuing their decisions.

Moreover, the fact that neither this Court or the Tenth Circuit mentioned the land grants in their rulings is of no consequence because the fundamental problem with the State and Coalition's Responses is that the essential premise of their argument as to *why* the land grants allegedly extinguished the Pueblos' aboriginal water rights *was rejected by the Tenth Circuit*. The State and Coalition argue that, because the land grants included implied rights to use water in the Rio Jemez, the Rio Jemez became a public water source and that Spanish law principles regarding the uses of public water (that the water was to be shared, that uses could not be to the detriment of other users) applied to the Rio Jemez. The State and Coalition contend that the fact that the Rio Jemez was subject to Spain's laws regarding the use of public waters was enough, in itself, to extinguish the Pueblos' aboriginal water rights. The Tenth Circuit expressly rejected this argument, as the court held that that the imposition of Spanish laws regarding the use of

public waters were general principles only and that the imposition of such principles on the Rio Jemez did *not* extinguish the Pueblos' aboriginal water rights. The State and Coalition do not even attempt to show that their position regarding the effect of the land grants is consistent with the Tenth Circuit's decision. This is not surprising, as their position cannot be squared with the Tenth Circuit's decision. Instead, the State and Coalition argue that the Tenth Circuit's analysis was just dicta. As will be shown below, that is not correct.

I. When this Court issued its 2017 ruling holding that Spain took no affirmative acts to decrease the Pueblos' water uses, evidence of the land grants to non-Indians was before this Court; the State and Coalition provide no support to justify their contention that this Court ignored such evidence.

The State and Coalition argue in their Responses that land grants issued by Spain to the non-Indian communities of San Ysidro and San Diego de Canon ("land grants") included implied rights to use water in the Rio Jemez. They argue that "the Rio Jemez thereby became a "public water" source and thus subject to Spanish laws applicable to the use of public waters, and that these facts alone extinguished the Pueblos' aboriginal water rights. State Resp. at 23; Coalition Resp. at 22. Neither the State or Coalition deny that they presented evidence regarding the land grants at the 2014 Hearing before Magistrate Judge Lynch *and* made specific arguments to this Court in briefs that the land grants were affirmative acts that extinguished the Pueblos' aboriginal rights. The State and Coalition nevertheless contend this Court did not consider the land grants before it issued its 2017 Order. State Resp. at 17; Coalition Resp. at 12. Such position is wrong.[1]

[1] The State contends that "the parties appear to agree that this Court made no legal determination in its 2017 Order concerning the effects of the grant lands on the Pueblos' aboriginal water rights." State Resp. at 17. This is not correct. The United States concedes that this Court did

The fact that this Court did not mention the land grants in its 2017 Order does not mean that it ignored the evidence of the land grants and arguments related to the land grants that the State and Coalition submitted. To the contrary, logic dictates that, to the extent this Court believed that the State and Coalition were correct in asserting that the land grants were affirmative acts that extinguished the Pueblos' aboriginal water rights, this Court would have mentioned in its 2017 Order that the land grants were affirmative acts that extinguished the Pueblos' rights. But this Court did no such thing in its 2017 Order. Instead, this Court found that Spain "did not take any affirmative act to decrease the amount of water the Pueblos were using," *Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2*, Doc. 4397 ("2017 Order"), at 7.

II. The Tenth Circuit's holding that the imposition of Spanish laws regarding the use of public waters did not extinguish the Pueblos' aboriginal water rights was not dicta.

The State and Coalition characterize the Tenth Circuit's ruling in *United States, v. Abouselman*, 976 F.3d 1146 (10th Cir. 2020**) ("***Tenth Cir. Dec.*") as being narrow and completely abstract. They contend that it is simply a ruling in general terms only, with no further detail. *See* State Resp. at 16 (the Tenth Circuit held "only that a sovereign must affirmatively act to extinguish aboriginal water rights"); Coalition Resp. at 12. The Tenth Circuit's decision was not so abstract. The court explained exactly what it meant by an "affirmative action" that could extinguish an aboriginal right: "an intent to extinguish can only be found when there is an

---

not expressly mention the land grants in its 2017 Order. However, the United States expressly argued in its Opening Supplemental Brief that this Court had before it evidence of the land grants and arguments related to their alleged effect on the Pueblos' aboriginal rights and this Court, with knowledge of such evidence and arguments, found that Spain took no affirmative acts to decrease the Pueblos' uses of water. US Supp. Br. at 12-15.

affirmative sovereign action focused at a specific right that is held by an Indian tribe that was intended to, and did in fact, have a sufficiently adverse impact on the right at issue." *Tenth Cir. Dec.*, 976 F.3d at 1158. The court also explained what does not constitute an affirmative action extinguishing the Pueblos' aboriginal water rights: "the passive implementation of a generally applicable water administration system does not establish Spain's clear intent to extinguish the water rights of these three Pueblos." *Id.* at 1160. The State and Coalition label as dicta all of the Tenth Circuit's analysis other than that court's statement that an "affirmative sovereign act is required to extinguish an aboriginal right." State Resp. at 20-21; Coalition Resp. at 12-14. This is not correct.

Dicta is limited to "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *Rohrbaugh v. Celotex Corp*, 53 F.3d 1181, 1184 (10th Cir. 1995). The Tenth Circuit's discussion of the Spanish laws regarding the use of public waters and whether those laws were sufficiently adverse to the Pueblos went to the core of the issue before the court of the Tenth Circuit's the analysis and was not dicta.

The State and Coalition recognize that the issue the Tenth Circuit addressed was "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." State Resp. at 16, citing to *Tenth Cir. Dec*., 976 F.3d at 1154; Coalition Resp. at 12, citing *Tenth Cir. Dec*., 976 F.3d at 1158 (emphasis added).[2] The issue before the Tenth Circuit, by the State's and Coalition's own

[2] The Coalition incorrectly asserts that the United States and Pueblos "did not challenge the Court's basic holding . . . that under Spanish and Mexican laws, the Pueblos could not expand their use of water to the detriment of others." Coalition Resp. at 23. This is not accurate. The

admissions, therefore, included the question whether the mere imposition of Spanish laws regarding the use of public water was enough to extinguish aboriginal water rights. To answer that question, the Tenth Circuit properly and logically examined principles of Spanish law, finding that those principles did not extinguish the Pueblos' aboriginal water rights. That analysis went to the heart of the question before the court and, therefore, does not constitute dicta.

The Tenth Circuit recognized that Spain imposed certain principles of law regarding the right to use water on public or common water sources: "there were two main principles guiding Spain's control of water, first, public waters were held in common and shared by everyone. Second, one could not use public waters to the detriment of other users." *Tenth Cir. Dec*., 976 F. 3d at 1155.[3] The Tenth Circuit then stated that these principles of Spanish water law were only general in nature and were not sufficiently specific to extinguish the Pueblos' aboriginal water rights:

> Spain's system for administering water uses were guided by general principles none of which specifically mention any Indian tribes, let alone the Pueblos of

---

United States and Pueblos *directly* challenged the proposition that the imposition of the general principles of Spanish law regarding the uses of public waters was enough to restrict the Pueblos' aboriginal water rights. The United States and Pueblos asserted that imposition of such laws was not enough and that more was required - an affirmative act by the sovereign that actually restricted the Pueblos' uses of water. Whether the United States' and Pueblos' position was correct was the exact issue addressed by the Tenth Circuit.

[3] These are the same general principles of Spanish law that this Court relied upon to conclude that Spanish law extinguished the Pueblos' water rights. This Court held that Spain exercised "complete dominion over the right to use public waters" because, under Spanish law, public waters were to be shared and could not be used to the detriment of others and Spain had the right to allocate waters pursuant to these principles. *Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2* ("2017 Order"), Doc. 4397, at 6-7.

> Jemez, Santa Ana, and Zia. Although Spain had the right to conduct repartimientos, it never exercised that right as to the Pueblos here.

Tenth Cir. Dec., 976 F. 3d at 1160.

The Tenth Circuit emphasized that Spain's right to allocate water pursuant to these principles was only a *right* to exercise complete dominion and that aboriginal rights would be extinguished *only if that dominion were actually exercised*, finding that "*Santa Fe Pacific* requires a sovereign to *exercise* complete dominion, not merely to *possess* complete dominion." *Id*., 976 F. 3d at 1158 (emphasis supplied by court). The Tenth Circuit held that the "the 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." *Id.* at 1160. Thus, as a matter of law, the fact that waters in the Rio Jemez may have become subject to the Spanish law principles regarding public water sources did not in itself extinguish the Pueblos' water rights.[4] This was not dicta, as the Tenth Circuit's discussion addresses exactly what was before it for resolution: whether imposition of Spanish laws regarding public waters was enough, without more, to extinguish the Pueblos' aboriginal water rights.

[4] The Coalition contends that this Court's 2017 Order only focused on whether Spain acted to *decrease* uses and that this Court ruled that Spain restricted the Pueblos' right to *increase* uses. Coalition Resp. at 16. The Coalition contends that this aspect of this Courts' ruling (i.e that Spain restricted the rights of the Pueblos to increase water uses) was the "guts" of this Court's 2017 decision and that "the guts of the 2017 Opinion are still correct and were not reversed." Coalition Resp. at 16. This is patently incorrect. The Tenth Circuit reversed the "guts" of this Court's 2017 Order, as the Tenth Circuit squarely rejected this Court's premise that the imposition of Spanish laws regarding the use of public waters was sufficient to restrict the Pueblos' rights to use water. The Tenth Circuit held that the imposition of such laws "had no impact, let alone a negative impact, on the Pueblos' right to use water" and that imposition of such laws "never actually ended the Pueblos' exclusive use of water or limited their use *in any way*." *Tenth Cir. Dec.*, 976 F.3d at 1160 (emphasis added).

The State and Coalition contend that the Tenth Circuit did not rule on the issue as to whether Spain "modified" the Pueblos' aboriginal water rights, as the court allegedly only focused on whether Spain extinguished such rights. The alleged distinction between "modifying" or extinguishing the Pueblos' aboriginal rights is a false issue, as the Tenth Circuit held that Spain's imposition of the laws regarding the use of public waters "never actually ended the Pueblos' exclusive use of water or limited their use in *any way." Tenth Cir. Dec.* at 1160 (emphasis added).

The State and Coalition do not deny the fact that, as the United States pointed out in its Opening Supplemental Brief, the State expressly argued to the Tenth Circuit in its Petition for Rehearing that the court's statements in Section V.B of its decision were "unnecessary" and the State requested the court to either delete Section V.B of its decision or to "clarify" that its opinion "does not apply to the question of whether Spain modified the aboriginal rights of the Pueblos in any way." US Supp. Br. at 11, citing to State's Petition for Rehearing before the Tenth Circuit. The Tenth Circuit denied the State's Petition for Rehearing and did not modify or delete Section V.B. of its decision. This Court is bound by the Tenth Circuit's ruling, pursuant to the mandate rule. See US Supp. Br. at 12. The State and Coalition do not present any argument as to why this Court can ignore the Tenth Circuit's deliberate decision to reject the State's contention that Section V.B was unnecessary. This Court cannot second guess the Tenth Circuit.

III. The State and Coalition do not even try to explain how their position regarding the land grants is consistent with the Tenth's Circuit's decision.

As discussed above, the essence of the State's and Coalition's argument regarding the land grants is that the land grants made the Rio Jemez a public water source subject to Spanish laws of public waters and that this fact alone was enough to extinguish the Pueblos' aboriginal water rights. In their discussion of the land grants, neither the State or Coalition even *try* to explain how their position can be squared with the Tenth Circuit's clear holding, discussed at Section II, that the imposition of Spanish laws regarding the use of common or public water sources was *not* sufficient to extinguish the Pueblos' aboriginal rights. The State and Coalition ignore this central holding of the Tenth Circuit, arguing that "the legal effect of the Spanish Crown's official acts in granting land and implied water rights to the same source as the Pueblos has not been decided in this case." Coalition Resp. at 12. This is misleading. Contrary to what the State and Coalition assert, the Tenth Circuit addressed head on the fundamental predicate of the State and Coalition's argument regarding the land grants, holding that the imposition of the general Spanish laws regarding the use of public waters was *not* sufficient to extinguish the Pueblos' aboriginal water rights. 976 F. 3d at 1160. More was required: an affirmative act that "focused at a specific right that is held by an Indian tribe that was intended to, and did in fact, have a sufficiently adverse impact on the right at issue." *Id.* at 1158; see also *Id.* ("in all cases addressing extinguishment courts have pointed to specific sovereign action that was directed to a right held by an Indian tribe. They have then looked at the actual adverse impact of that direct action on the tribal rights at issue").[5]

[5] The United States pointed out in its Opening Supplemental Brief that the Tenth Circuit was aware of the land grants, as both the Coalition and State made specific arguments to the Tenth Circuit that the land grants were acts that extinguished the Pueblos' aboriginal water rights. US Supp. Br. at 16 (citing to pages in briefs filed by the State and Coalition in the Tenth Circuit appeal where the land grant arguments were asserted). Neither the State or Coalition deny this

IV. The land grants did not "encroach" on the Pueblos' water rights

The Coalition contends that the land grants "encroached" on Pueblo land holdings. *See* Coalition Resp. at 19-20. Under the Spanish legal system, water on a common source could be used by multiple users and when disputes among competing users arose, the Spanish sovereign would intervene and allocate rights to use water through a repartimiento or similar proceeding. *Tenth Circuit Dec*, 976 F.3d at 1155. Neither the State nor Coalition claim that such a repartimiento occurred during the Spanish (or Mexican) periods. As a result, the mere issuance of land grants (with implied water rights) did not (and legally could not) impact the Pueblos' water rights because Spain took no specific acts, based on the land grants to the non-Indians, to restrict the amount of water the Pueblos had the right to use. See *Id.* at 1155 (no repartimientos took place during Spanish or Mexican periods and "thus, the governments of Spain and Mexico took no action to intervene in the uses that these Pueblos made of their water supply"); see also *Id.* at 1159 (to extinguish an aboriginal right, the sovereign must take an affirmative act that must have "intended to, and did in fact, have a sufficiently adverse impact on the right at issue"). The Coalition's attempt to denominate the implied water rights of the non-Indian communities of San Ysidro and San Diego de Canon as "encroachments" on the Pueblos' water rights is wrong. The Tenth Circuit held that the Pueblos' aboriginal right to use water remained intact absent a *specific, adverse* act by Spain to restrict the Pueblos' water rights: the mere fact that the non-Indian communities had the right to use water in the Rio Jemez, therefore, did not actually

---

fact. The Tenth Circuit's knowledge of the land grants did not alter that court's holding that the imposition of Spanish laws regarding the use of public waters was not adverse to the Pueblos. The State and Coalition are barred from rearguing that issue before this Court.

restrict or "encroach" upon the Pueblos' rights. The Coalition impermissibly seeks to relitigate this critical aspect of the Tenth Circuit's ruling. And, even if the Coalition could relitigate this issue, it fails to demonstrate that the land grants "encroached" on the Pueblos' aboriginal water rights in a way that extinguished aboriginal rights.

V. The Tenth Circuit's review of the record was not based on "improper factual findings"

The State and Coalition contend that the Tenth Circuit's statements that there was no "evidence in the experts' reports or testimony that Spain's water administration system was adverse to the Pueblos" and that Spain "never actually ended the Pueblos' exclusive use of water or limited their use in any way" were "improper factual findings." State Resp. at 21; Coalition Resp. at 14. The State and Coalition are wrong. As explained above, the Tenth Circuit addressed whether the imposition of Spanish laws was, by itself, sufficient to extinguish the Pueblos' aboriginal water rights. It was in this context that the Tenth Circuit reviewed the record, to determine whether the Spanish laws at issue were adverse to the Pueblos. Examining the record in such context was not an "improper factual finding" but instead a review of the Spanish laws at issue (those relating to the use of public waters) to determine, as a matter of law, whether those laws were sufficient in themselves to extinguish an aboriginal water right. This was completely proper, since whether such laws by themselves extinguished the Pueblos' aboriginal water rights was the heart of the issue before the court. The Tenth Circuit had the authority to review any issue "fairly included within the certified order. "*Tenth Cir. Dec*, 976 F.3d at 1151. The Tenth Circuit's ruling that "Spain never actually ended the Pueblos' exclusive use of water or limited their use in any way" was directly related to the court's examination of the Spanish laws regarding the use of public waters, as the court held that the Spanish laws regarding the use of

public waters were only "general" in nature and did not impose any specific restrictions on the Pueblos of Jemez, Santa Ana, or Zia. *Tenth Cir. Dec*., 976 F. 3 at 1160.

VI. The State and Coalition's focus on the water rights and uses of the non-Indians is misplaced

The State and Coalition emphasize that non-Indians had the right to use water in the Rio Jemez and, in fact, exercised such rights. See, e.g. Coalition Resp. at 12 (referring to lands irrigated by the acequias). This fact, however, does not mean, as the State and Coalition appear to argue, that the Pueblos' aboriginal water rights were, therefore, restricted. The fact that the Rio Jemez was a public water source meant that *if* a dispute arose among competing users of the Rio Jemez and *if* it were necessary for Spanish officials to intervene and allocate the right to use public waters in the Rio Jemez, then the non-Indian users may have received an allocation of water through a repartimiento proceeding, if one had occurred. But the potential for a repartimiento never became reality. The Tenth Circuit squarely held that mere fact that Spain *could have* allocated public waters did not extinguish the Pueblos' water rights, holding that the authority to restrict or allocate water uses is not the same as exercising that authority. *Tenth Cir. Dec*., 976 F.3d at 1160 (Spain had "the right conduct repartimientos to allocate water" but "it never exercised that right"). The Coalition and State ask this Court to overturn the Tenth Circuit's holding based on speculation as to what might have happened if a repartimiento had restricted the Pueblos' right to use water in some hypothetical mannery. There is no need to speculate on this issue, the Tenth Circuit decision held that the mere possibility that public waters could have been allocated by the sovereign was not enough, the sovereign had to have actually allocated the right to use water in the Rio Jemez in a way that directly and intentionally restricted the Pueblos' uses of water. *Id.* at 1160. This never happened. Thus, the water rights

and uses of the non-Indians, upon which the State and Coalition rely, are irrelevant because, notwithstanding such non-Pueblo water rights, Spain declined to allocate the Pueblos' right to use water.

VII. The Tenth Circuit's analysis applies with equal force to the Mexican period; the State and Coalition do not show otherwise.

The United States demonstrated in Section V of its Opening Supplemental Brief that the Tenth Circuit's ruling that the imposition of general laws during the Spanish period regarding the use of public water sources was not sufficient by itself to extinguish the Pueblos' aboriginal water rights applies with equal force to the Mexican period. US Supp. Br. at 18-22. Neither the State nor Coalition show otherwise. The State and Coalition merely repeat their earlier arguments, contending that the Rio Jemez was a common source under Mexican law and that, therefore, the Pueblos' water rights were restricted, even though Mexico took no action to do so. State Resp. at 26; Coalition Resp. at 21. The State and Coalition, yet again, ignore the Tenth Circuit's express holding that the mere fact that the Rio Jemez was subject to general laws regarding the use of common, public sources (including, specifically, the principles that public waters were to be shared and that water could not be used to the detriment of others), did not extinguish the Pueblos' aboriginal water law. More was needed – the sovereign had to act to restrict the Pueblos. The logic of the Tenth Circuit's holding applies to the period of Mexican sovereignty as well.

VIII. The State's and Coalition's attempts to distinguish aboriginal rights from so-called "expanding" water rights is not relevant to Issues 1 and 2 ; whether aboriginal rights include a future use component is addressed in briefs addressing Issue 3

The State and Coalition devote numerous pages of their Responses to their legal theory that aboriginal water rights apply only to past or historical uses and do not apply to what they call "expanding" water rights. State Resp. at 8-15; Coalition Resp. at 7-11. By "expanding rights," the State and Coalition refer to the right to increase uses (in essence future uses). State Resp. at 8; Coalition Resp. at 8. The subject matter of the briefs filed by the parties here is Issue 1 and 2. See Doc. 4452 (directing parties to file supplemental briefs on Issue Nos. 1 and 2). Issues 1 and 2 focus on whether the Pueblos' aboriginal water rights were modified or extinguished by any sovereign, and whether *Winans v. United States*, 198 U.S. 371 (1905) applies to any of the Pueblos' grant or trust lands. Doc. 4253 at 2. How those rights are to be quantified, which would include whether such quantification includes a future use component, is expressly reserved for a *different* set of briefs in this case, regarding threshold Issue No. 3. Issue 3 is defined as "if the Pueblos have aboriginal rights or *Winans* reserved water rights, what standards apply to quantify such rights"? *Id.* The State and Coalition both recognize in their Responses that whether an aboriginal right encompasses future uses relates to the quantification of the right. In fact, in their discussion of whether an aboriginal water right includes a future use component, both the State and Coalition cite to assertions made by the parties in briefs filed in connection with *Issue No. 3.* State Resp. at 11-13; Coalition Resp. at 8-11.

The briefs currently before this Court are limited, pursuant to Magistrate Judge Ritter's Order, to Issues 1 and 2. Doc. 4452. The State and Coalition improperly seek to blur the Issues before this Court. The Court should not consider these untimely, procedurally improper, off-topic arguments. To the extent this Court believes supplemental briefs are useful in connection with Issue 3, the Court can so rule and supplemental briefs could then be filed.

It should be noted that, to buttress their view that aboriginal rights do not include future or "expanding" rights, the State and Coalition cite to statements made by Chief Judge Tymkovich in his dissenting opinion in the Tenth Circuit decision. The views of Judge Tymkovich are not the law—they are the views of one dissenting judge. This Court, pursuant to the mandate rule, US Supp. Br. at 10-12, is bound by the majority opinion of the Tenth Circuit. In any event, the primary focus of Judge Tymkovich's assertions are not on whether an aboriginal right, as a matter of law, includes future uses. Instead, Judge Tymkovich focuses on the impact aboriginal rights may have on non-Indian users, based on his view that it would be "problematic" to quantify the Pueblos' aboriginal water rights without "also considering the implication for the many other water users in the Jemez." *Tenth Cir. Dec.*, 976 F. 3d. at 1161-62 (dissenting opinion). The consequences of proper judicial recognition of the Pueblos' aboriginal rights may, in fact, be considerable for the non-Indians. However, the Tenth Circuit held in *State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976) that it was not proper, when quantifying the pueblos' federal water rights, to engage in a balancing of competing interests. *Id.* at 1113, citing to *Cappaert v. United States*, 426 U.S. 128 (1976).

The State and Coalition also cite to Judge Tymkovich's statement that "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." State Resp. at 14, citing to *Tenth Cir. Dec.*, 976 F.3 d at 1161 (dissenting opinion). The United States has never taken the position that the Pueblos have "limitlessly expanding" water rights. The United States acknowledges that the Pueblos' water rights, including their aboriginal water rights, will need to be quantified and included, in specific amounts, in a final decree. The

United States and Pueblos submit that a homeland standard (water needed by a Pueblo to maintain a permanent homeland) is the correct quantification standard. See *United States and Pueblos of Jemez, Santa Ana, and Zia Opening Brief Regarding Quantification of Pueblos' Aboriginal Water Rights* (*Issue No. 3*), Doc. 4281, at 10-14. Regardless of how this Court ultimately addresses the quantification issue, the very purpose of this adjudication is to quantify the water rights of all parties, including the Pueblos' water rights. The notion the Pueblos would have a "limitlessly expanding" right with no quantification is unfounded.

IX. It is not relevant whether the Rio Jemez was fully appropriated.

The States and Coalition contend that the Rio Jemez was fully appropriated and that this meant that water used by the Pueblos necessarily impacted the non-Indians. State Resp. at 10; Coalition Resp. at 24. Neither the State or Coalition provide or refer to any evidence to show that, *during the territorial reign of Spain and then Mexico*, the Rio Jemez was fully appropriated. That arguably constitutes a factual issue on which the lawyers for the Coalition and State failed to submit evidence and on which they are may not testify as lawyers. The River may be fully appropriated now, but that does not mean it was during the Spanish and Mexican periods. Further, the extent to which the Rio Jemez was appropriated is not relevant because the critical factor here, according to the Tenth Circuit's decision, is not who was using water and who was not using water, or how much water was available in the system. The critical (and in fact only issue) is whether the sovereign took action to restrict the water rights of the Pueblos. Moreover, if there had not been enough water for all to use during the Spanish or Mexican periods, a dispute would have arisen and a repartimiento would have taken place, in which a Spanish or

Mexican official would have intervened and would have allocated the right to use the water among the various parties. But we know that such a repartimiento did not occur.

X. The Treaty of Guadalupe Hidalgo does not extinguish the Pueblos' aboriginal water rights

The State concedes that the Treaty of Guadalupe Hidalgo ("Treaty") did not extinguish any rights held by the Pueblo, State Resp. at 27, but then asserts that "those rights were already limited by sovereign act. An aboriginal right to unfettered and exclusive use of the resource no longer existed." *Id.* The Coalition, like the State, contends that at the time of the Treaty the Pueblos' right to use water was restricted. Coalition Resp. at 23. Neither the State nor the Coalition acknowledge that the Tenth Circuit reversed this Court's 2017 Order and held that the "because Spain's water administration system had no impact, let alone a negative impact, on the Pueblos' right to us water, it cannot be said that the system was "adverse" to the Pueblos." *Tenth Cir. Dec.*, 976 F.3d at 1160. As noted in Section VII, such ruling applies with equal force to the Mexican period. Thus, as a matter of law, the State's and Coalition's assertions that, at the time of the Treaty, the Pueblos' right to use water had been restricted is wrong, as such position is directly contrary to the Tenth Circuit's ruling.

The Coalition and State also rely on this Court's 2004 *Memorandum Opinion and Order*, Doc. 4051 ("2004 Opinion"), to claim that the Treaty maintained the status quo, did not create new rights, and protected the rights of all Mexican citizens, thus "this Court may not grant a US/Pueblo claim that would make acequias in the San Ysdiro and Canon de San Diego Grants worse off than they were under Mexican sovereignty." Coalition Resp. at 25; State Resp. at 27. We agree that the Treaty did not provide new water rights for the Pueblos or the predecessors of the Coalition. The State and Coalition, however, make an unwarranted leap of logic that this

Court, by recognizing that the Treaty protected the status quo, thereby ruled that non-Pueblos were therefore not subject to the aboriginal water rights of the Pueblos. This is not correct. The State and Coalition's description of the status quo at the time of the Treaty is not accurate. At the time of the Treaty, the Pueblos' aboriginal water rights were not restricted in any way; thus, the non-Pueblos' rights to use water were subject to the aboriginal water rights of the Pueblos. The non-Indians were not "worse off" than they were before the Treaty, as the Pueblos' aboriginal rights were always extant.

XI. No acts of Congress extinguished the Pueblos' aboriginal water rights

In its Opening Supplemental Brief, the United States explained Issue 1 includes 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?" Doc. 4253 at 2. The United States deferred to the earlier briefs filed by the United States and Pueblos on these sub-issues, as the Tenth Circuit's decision did not address these issues. US Supp. Br. at 25, citing to briefs filed by the United States and Pueblos addressing Issues 1 and 2. The State similarly defers to its earlier briefs. State Resp. at 28. The Coalition includes some discussion of the sub-issues to Issue 1 in its Response, Coalition Resp. at 25-28, but its discussion is a rehash of arguments it asserted in earlier briefs. The United States responded to the Coalition's arguments in the earlier briefs filed on Issues 1 and 2 and stands by those responses.

XII. The Pueblos' grant lands possess *Winans* rights

In its Opening Supplemental Brief, the United States deferred to the earlier briefs filed by the United States on Issue No. 2. US Supp. Br. at 26. In their Response, the State and Coalition assert the same arguments they asserted in their briefs previously filed on Issue No. 2. The United States responded to the Coalition's arguments in the earlier briefs filed on Issue 2 and stands by those responses.

XIII. The Response Brief filed by Charlotte Mitchell is procedurally improper and, in any event, misses the mark, as it does not address any issues regarding extinguishment of aboriginal rights by Spain and Mexico or the United States and its contention that *Winans* is no longer good law is specious.

Counsel for Charlotte Mitchell filed a Response Brief in this matter. *Response Brief on Issues 1 and 2*, Doc. 4481 ("Mitchell Resp."). Such brief is procedurally improper, as this Court directed parties to file *supplemental* briefs on Issues 1 and 2. Doc. 4452 at 3. Charlotte Mitchell did not file any briefs regarding Issues 1 and 2 and thus the brief recently filed is not a supplemental brief. In any event, the brief filed by Charlotte Mitchell misses the mark. There is not a single sentence in the brief that addresses the issues as to whether Spain, Mexico, or the United States extinguished the Pueblos' aboriginal water rights. The only discussion in the brief related to Issues 1 and 2 is the contention that *Winans* was allegedly overruled by *Oklahoma v. Castro-Huerta* , 142 S. Ct. 2486 (2022). See Mitchell Resp. at 24-25. Such position is specious. *Castro-Huerta* addressed a discrete issue relating to criminal jurisdiction on Indian lands and did not in any fashion address issues pertaining to the body of federal law dealing with federal Indian reserved water rights and Indian aboriginal water rights.

CONCLUSION

For the reasons asserted in the United States' Opening Supplemental Brief and for the reasons asserted above, this Court should grant the relief the United States requested in its Opening Supplemental Brief.

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL

Todd Kim

Date: November 21, 2022 _____S_____
James B. Cooney , Trial Attorney
Environment and Natural Resources Division
Indian Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 514-5406

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will cause all CM/ECF participants to be served by electronic means. I hereby also certify that, on this 21st day of September, 2022, I have mailed by United States Postal Service the foregoing document to the following non CM/ECF participants:

Joseph van R. Clarke
Cuddy, Kennedy, Albetta & Ives, LLP
PO Box 4160

Santa Fe, NM 87502-4160

James Curry
PO Box 13073
Albuquerque, NM 87192-3073

Nacimiento Community Ditch Association
c/o Anthony M Jacquez
651 Fairway Loop
Los Ranchos, NM 87124

Gilbert Sandoval
PO Box 61
Jemez Springs, NM 87125

S
James B. Cooney