

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA, on its
own behalf and on behalf of the Pueblos of
Jemez, Santa Ana, and ZIA,

Plaintiff - Appellant,

STATE OF NEW MEXICO, ex rel. State
Engineer; JEMEZ RIVER BASIN
WATER USERS COALITION,

Plaintiffs - Appellees,

and

PUEBLO OF SANTA ANA; PUEBLO OF
JEMEZ; PUEBLO OF ZIA,

Plaintiff Intervenors,

v.

No. 18-2164

TOM ABOUSELMAN; DARWIN
HOURIGAN; BOARD OF EDUCATION
OF THE JEMEZ VALLEY PUBLIC
SCHOOL DISTRICT; KING BROTHERS;
NACIMIENTO COMMUNITY DITCH
ASSOCIATION; PUBLIC LANDS
COMMISSIONER,

Defendants.-----

ALL PUEBLO COUNCIL OF
GOVERNORS; PUEBLO OF ACOMA;
PUEBLO OF ISLETA; PUEBLO OF
SANDIA; PUEBLO OF LAGUNA;
PUEBLO OF SAN FELIPE; PUEBLO OF

SANTO DOMINGO; PUEBLO OF ZUNI;
PUEBLO OF SANTA CLARA; PUEBLO
OF OHKAY OWINGEH; ASSOCIATION
OF COMMUNITY DITCHES OF RIO
SAN JOSE; TRI-STATE GENERATION
AND TRANSMISSION ASSOCIATION,
INC; EL RITO DITCH ASSOCIATION;
LA ASOCIACION DE LAS ACQUIAS
DEL RIO VALLECITOS, TUSAS Y OJO
CALIENTE; RIO CHAMA ACQUIA
ASSOCIATION; ASOCIACION DE
ACQUITAS NORTENAS DE RIO
ARRIBA; LA ACEQUIA DE LA
SIERRA; RIO QUEMADO, RIO
FRIJOLES, RIO EN MEDIO AND
SANTA CRUZ STEAM SYSTEMS
COMMUNITY DITCH ASSOCIATION,

Amici Curiae.

STATE OF NEW MEXICO, ex rel. State
Engineer; JEMEZ RIVER BASIN
WATER USERS COALITION,

Plaintiffs - Appellees,

UNITED STATES OF AMERICA, on its
own behalf and on behalf of the Pueblos of
Jemez, Santa Ana, and ZIA,

Plaintiff,

PUEBLO OF JEMEZ; PUEBLO OF
SANTA ANA; PUEBLO OF ZIA,

Plaintiff Intervenors - Appellants,

v.

TOM ABOUSELMAN; DARWIN
HOURIGAN; BOARD OF EDUCATION

No. 18-2167

OF THE JEMEZ VALLEY PUBLIC
SCHOOL DISTRICT; KING BROTHERS;
NACIMIENTO COMMUNITY DITCH
ASSOCIATION; PUBLIC LANDS
COMMISSIONER,

Defendants.

ALL PUEBLO COUNCIL OF
GOVERNORS; PUEBLO OF ACOMA;
PUEBLO OF ISLETA; PUEBLO OF
LAGUNA; PUEBLO OF OHKAY
OWINGEH; PUEBLO OF SAN FELIPE;
PUEBLO OF SANDIA; PUEBLO OF
SANTA CLARA; PUEBLO OF SANTO
DOMINGO; PUEBLO OF ZUNI;
ASSOCIATION OF COMMUNITY
DITCHES OF RIO SAN JOSE; TRI-
STATE GENERATION AND
TRANSMISSION ASSOCIATION, INC.;
EL RITO DITCH ASSOCIATION; LA
ASOCIACION DE LAS ACEQUIAS DEL
RIO VALLECITOS, TUSAS Y OJO
CALIENTE; RIO CHAMA ACEQUIA
ASSOCIATION; ASOCIACION DE
ACQUIAS NORTENAS DE RIO
ARRIBA; LA ACEQUIA DE LA
SIERRA; RIO QUEMADO, RIO
FRIJOLES, RIO EN MEDIO AND
SANTA CRUZ STREAM SYSTEMS'
COMMUNITY DITCH ASSOCIATION,

Amici Curiae.

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 6:83-CV-01041-MV-JHR)**

Mary Gabrielle Sprague, Attorney, Department of Justice (Jeffrey Bossert Clark,
Assistant Attorney General; Eric Grant, Deputy Assistant Attorney General; Elizabeth

Ann Peterson, Attorney; William B. Lazarus, Attorney; James B. Cooney, Attorney, with her on briefs), Washington, D.C., for Plaintiff-Appellant United States of America.

Richard W. Hughes, Rothstein Donatelli LLP (Reed C. Bienvenu, Rothstein Donatelli LLP; David R. Yepa, VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP, Albuquerque, N.M.; Joseph D. Little, Zia Pueblo, N.M., with him on briefs), Santa Fe, N.M. for Plaintiffs Intervenors-Appellants Pueblo of Jemez, Pueblo of Santa Ana, and Pueblo of Zia.

Arianne Singer, Special Assistant Attorney General, Office of the State Engineer (Gregory C. Ridgley, Special Assistant Attorney General, Office of the State Engineer; Brett J. Olsen, Special Assistant Attorney General, Abramowitz, Frank & Olsen, LLC, Albuquerque, N.M., with her on brief), Santa Fe, N.M., for Plaintiff-Appellee the State of New Mexico.

Larry C. White (John W. Utton, Utton & Kery, PA, with him on brief), Santa Fe, N.M. for Plaintiff-Appellee Jemez River Basin Water Users Coalition.

Reid Peyton Chambers and Vanessa Ray Hodge, Sonosky, Chambers, Sachse, Mielke and Brownell, L.L.P., Albuquerque, N.M.; Ann Berkley Rodgers and Peter C. Chestnut, Chestnut Law Offices, P.A., Albuquerque, N.M.; Susan G. Jordan, Jordan Law Firm L.L.C., Santa Fe, N.M.; Jane Marx, Albuquerque, N.M.; Jessica R. Aberly, Aberly Law Firm, Albuquerque, N.M.; and Scott W. Williams, Curtis G. Berkey, and Aviva L. Simon, Berkey Williams LLP, Berkeley, CA, filed an amicus curiae brief for All Pueblo Council of Governors; Pueblo of Acoma; Pueblo of Isleta; Pueblo of Sandia; Pueblo of Laguna; Pueblo of San Felipe; Pueblo of Santo Domingo; Pueblo of Zuni; Pueblo of Santa Clara; and Pueblo of Ohkay Owingeh on behalf of Plaintiff-Appellant and Plaintiffs Intervenors-Appellants.

Mary E. Humphrey and Connie Odé, Humphrey & Odé, P.C., El Prado, N.M.; Seth Fullerton, Katz, Herdman, MacGillivray & Fullerton, PC, Santa Fe, N.M.; and Adán E. Trujillo, Chimayó, N.M. filed an amicus curiae brief for El Rito Ditch Association; La Asociación de Las Acequias del Rio Vallecitos; Tusas y Ojo Caliente; Rio Chama Acequia Association; Asociación de Acequias Norteñas de Rio Arriba; La Acequia de la Sierra; and Rio Quemado, Rio Frijoles, Rio En Medio and Santa Cruz Steam Systems' Community Ditch Association on behalf of Plaintiffs-Appellees.

Sunny J. Nixon and Shannon M. Sherrell, Rodey, Dickason, Sloan, Akin & Robb, P.A., Santa Fe, N.M., and Rebecca Dempsey, Cuddy & McCarthy, LLP, Santa Fe, N.M., filed an amicus curiae brief for Tri-State Generation and Transmission Association, Inc. and Association of Community Ditches of the Rio San José on behalf of Plaintiffs-Appellees.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **HARTZ**, Circuit Judges.

EBEL, Circuit Judge.

The Pueblos of Jemez, Santa Ana, and Zia have resided along the Jemez River in northern New Mexico since time immemorial; they resided there as their lands passed from Spanish sovereignty, to Mexican sovereignty, and finally to the United States. Almost forty years ago, the United States initiated a water-rights adjudication for the Jemez River Basin, claiming water rights on behalf of the Pueblos. Before us today is an interlocutory appeal addressing a discrete purely legal issue from that ongoing, decades-long litigation: “[W]hether the Pueblos’ aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act.” (App’x 276.)

Exercising our jurisdiction under 28 U.S.C. § 1292(b), we hold that a sovereign must affirmatively act to extinguish aboriginal water rights. Therefore, we REVERSE the district court’s determination below and REMAND the case for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

These are consolidated interlocutory appeals from a district court order determining a single issue within a thirty-seven-year-old case. The appellants are the Pueblos of Jemez, Santa Ana, and Zia (“the Pueblos”), as well as the United States,

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